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Part V

Department of Energy

Loans for Small Hydroelectric Power
Project Feasibility Studies and Related
Licensing

DEPARTMENT OF ENERGY

10 CFR Part 797

Loans for Small Hydroelectric Power Project Feasibility Studies and Related Licensing

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: This rule adopts policies and procedures to implement authority given to the Secretary of Energy to make loans for small hydroelectric power project feasibility studies and related licensing under Title IV of the Public Utility Regulatory Policies Act of 1978 (Pub. L. 95-617). Notice of proposed rulemaking and public hearing thereon was issued by the Department of Energy ("DOE") on May 24, 1979.

EFFECTIVE DATE: February 19, 1980.

FOR FURTHER INFORMATION CONTACT:

Department of Energy, Farwell Smith (Office of Resource Applications), 12th and Pennsylvania Avenue, NW., Room 7104, Washington, D.C. 20461, 202-633-8910.

Department of Energy, George Samels (Office of General Counsel), 5E074 Forrestal, 1000 Independence Avenue, SW., Washington, D.C. 20585, 202-252-2924.

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I. Background

Title IV—Small Hydroelectric Power Projects, of the Public Utility Regulatory Policies Act of 1978, Public Law 95-617, (hereinafter, "Title IV" or "PURPA") directs the Secretary of Energy ("Secretary") to establish a program to encourage the development of small hydroelectric power projects at the site of existing dams which are not being used to generate electric power.

Title IV includes authority to the Secretary to provide direct loans for a percentage of the costs of performing feasibility studies and of obtaining the necessary licenses and approvals for small hydroelectric projects. It includes, also, authority for simplified Federal Energy Regulatory Commission ("FERC") licensing¹ and authority for Department of energy loans for construction costs.

This regulation implements the authority of the Secretary of Energy under Title IV only as regards loans for feasibility studies and for acquiring necessary licenses and approvals.

Title IV authorizes the Secretary to make loans to any municipality (as

broadly defined to include a variety of State and local agencies), electric cooperative, industrial development agency, nonprofit organization, or other person (broadly defined to include a variety of entities including, among others, individuals, partnerships, associations and corporations) to assist them in defraying up to 90 percent of the costs of (1) studies to determine the feasibility of undertaking a small hydroelectric power project at an existing dam or dams, (2) preparing any application for a necessary Federal, State and local approval respecting such a project, and (3) participating in any administrative proceeding regarding such application. If the Secretary determines that the small hydroelectric power project would not be technically or economically feasible, he or she may cancel the unpaid balance and any accrued interest on any of the above loans.

The interest rate of loans will be the discount or interest rate used at the time the loan is made for water resources planning projects under Section 80 of the Water Resources Development Act of 1974, 42 U.S.C. § 1962d-17(a). This rate has been established at 7½ percent for the Federal Government's 1980 fiscal year, ending September 30, 1981. The discount rate is presently permitted to change no more than ¼ percent, from one year to next, and will probably increase in the near future years. The term of these loans may not exceed 10 years.

This regulation establishes the procedure to apply for a loan, including matters of eligibility and the content of the application. Further, this regulation establishes criteria for approval of loan applications, specifies the requirements of the completed feasibility study and indicates general loan terms, including monitoring and repayment and, in certain cases, cancellation of the loan. Miscellaneous matters, such as confidentiality of information supplied in connection with a loan, are also covered. This regulation sets out priority to be accorded licensing loan applicants over applicants for feasibility study loans; and certain specified factors which may additionally affect the priority to be given an applicant.

Title IV limits loans to projects that will have installed a maximum capacity of 15,000 kilowatts or less. This regulation further limits loans to projects that will have installed capacity of 100 kilowatts or more.

Title IV further authorizes for each of Fiscal Years 1978, 1979, and 1980 \$10,000,000 in loans for feasibility studies and for licensing applications, such funds to remain available until

expended. Ten million dollars has been appropriated in fiscal years 1979 and 1980 for such loans.

II. Comments on Proposed Regulation

A. General

Numerous written comments were received in response to the notice of proposed rulemaking; and oral presentations were made at public hearings held June 25, 1979, at Seattle and July 2, 1979, at Boston.²

All comments were considered in arriving at this final rule.

The comments were generally favorable and always helpful. Quite often they covered areas of common concern, such as matters of definition or problems in the application requirements. Comments ranged from technical administrative suggestions on environmental concerns to proposals that one section or another of the country be given special consideration.

Among the comments having a common theme, no subject was raised more often than the 100 kilowatt minimum installed capacity requirement. Most comments on that minimum were that it should be lowered at least to 50 kilowatts. PURPA sets a 15,000 kilowatt maximum but leaves the setting of a minimum to this regulation. The 100 kilowatt minimum, which has been retained in this final rule, is based on DOE's experience in this field. In most cases that we have reviewed, projects near or below 100 kilowatts are not economical. Economic feasibility is a key concept in Title IV. We do not

² Comment was made by: American Public Power Association; R. W. Beck and Associates, Seattle, Washington; Boise, Idaho Project Board of Control; California Energy Commission; Connecticut Office of Policy and Management; John A. Dracup, San Francisco, California; Energy Research and Applications, Inc., El Segundo, California; Engineering Consultants, Inc., Englewood, Colorado; Gordon W. Hoyt, Anaheim, California; Susan Kannenberg; John S. Krikorian, Jr., Kingston, Rhode Island; Oscar Larson & Associates, Eureka, California; Maine Office of Energy Resources; Massachusetts Office of Energy Resources; Kenneth Mayo, Nashua, New Hampshire; John McNamara; New England River Basins Commission; Governor's Council on Energy, New Hampshire; New York State Energy Research and Development Authority; Northwestern Wisconsin Electric Company; Oak Ridge National Laboratory, Tennessee; Pennsylvania Department of Environmental Resources; Richard Quinzani, Boston, Massachusetts; Governor's Energy Office, Rhode Island; Rural Alaska Community Action Program, Inc.; Salt River Project Agricultural, etc., District, Phoenix, Arizona; J. Schlaikjer; Hervey C. Scudder; Norman Silberdick, Bellows Falls, Vermont; Guy Stanley; Tlingit-Haida Regional Electrical Authority, Alaska; Tudor Engineering Co., San Francisco; United States Department of the Interior; United States Environmental Protection Agency; Vermont Public Service Board; Warren Wayne; Washington (State) Department of Natural Resources; White Current Corporation, North Hartland, Vermont; Wisconsin Public Service Commission.

¹ See footnote 4 below for FERC implementation of that authority.

want to encourage people to go to the time and expense of preparing an application for a project below 100 kilowatts when chances of getting a loan are so slight.

Projects of this size, furthermore, do not generally require a feasibility study on the scale required in this regulation. Although a study for a small site would certainly require a loan far below the general \$50,000 maximum, the cost of the study per kilowatt-hour of capacity would in most cases be very high. We are concerned, also, that our limited resources are used on projects having some promise of making at least the 100 kilowatt contribution.

Before proceeding to a section-by-section analysis of the comments and the changes, we should make a few general observations. A number of comments reflected ignorance of the restraints imposed on this small hydroelectric loan program by Title IV of PURPA, the authorizing legislation.

It was to avoid that misunderstanding that we reprinted (and here reprint again) the full text of Title IV. The statute specifies the maximum duration of the loans, 10 years for study and licensing loans, and their maximum amount, 90 percent of allowable costs. It requires an "existing dam" that was completed by April 20, 1977. It limits maximum installed capacity to 15,000 kilowatts.

We should emphasize, too, that this regulation deals only with feasibility study loans and licensing loans. It does not have to do with loans for construction of hydroelectric facilities. Section 403 of Title IV authorizes funds for construction loans, but, to date, no request for an appropriation of funds for construction loans has been submitted to Congress.

Finally, although this regulation attempts to set forth what a loan application should state and what a feasibility study should contain, there is no "ideal" study or application. Any study or application should provide enough information for the DOE to make the necessary evaluation of the project.

Beyond that, we leave it to the individual to determine how detailed and persuasive the document should be—and we recognize that, in the nature of things, this will be determined to some extent by the mere size of the given project.³ Every unsuccessful applicant may request an explanation.

³ One comment stated that, although the originally proposed version of § 791.21 ("Application Requirements") might profitably be redrafted along present lines, nevertheless, "It may be of greater benefit to leave section 797.21 as is, because it forces the proposer to apply his own organizational skills to sensing an order." We chose to redraft this section.

Section 797.41 has been added to establish a delegation of program functions from the Secretary to the Assistant Secretary for Resource Applications.

B. Purpose

Section 797.01, "General Purpose", has been changed to make clear that a licensing loan may defray a percentage of all the appropriate costs involved in pursuing the whole application process for project licensing and approval, not merely the cost of preparing an application. For example, engineer consultant services necessary to evaluate various agency comments on a license application would ordinarily be an allowable cost, as would the cost of legal counsel in intervention proceedings. Here, as throughout this revised regulation, reference has been inserted to "regional" approval considerations, in addition to Federal, State and local licensing and approval.

C. Priority

In section 797.02, "priority considerations" have been changed rather extensively as a result of comment on the proposed revisions. The holding of a FERC preliminary permit has been deleted as a basis for priority. We have concluded that a considerable percentage, possibly a majority, of applicants will have no need to establish the priority of application for FERC licensing purposes which is the sole purpose of a FERC preliminary permit. Under subchapter I of the Federal Power Act, 16 U.S.C. §§ 797(f) and 800, States and municipalities (as very broadly defined and constituting a major prospective source of small hydro applications) enjoy such preference in the issuance of FERC permits and licenses that there is scant incentive to them to obtain a preliminary permit in the absence of actual competition from a non-government applicant for a permit or license.

Deleted, too, is the priority originally proposed for non-FERC projects thought likely to win quick State and local approval. There seems little point to keeping this ground of priority if, as we anticipate, the great majority of loan applicants will come under FERC jurisdiction and will have the benefit of the simplified regulations now being developed by FERC for small hydro.⁴

⁴ For example, Order No. 11, issued September 5, 1978, styled "Short-Form License (Minor)", covering projects of 1,500 kilowatts or less. Other regulations, either proposed by FERC or adopted, as of this writing, include Order No. 54, issued October 22, 1979: "Regulations Prescribing General Provisions for Preliminary Permit and License Applications . . ."; and, Docket No. RM 79-36, April

We have deleted from priority consideration an applicant's need/ability to consume the planned power output. Comment received left us in doubt that this essentially economic consideration should be a ground for priority on a par with the other five basic program considerations specified at subsection 797.02(b).

Gone, too, is the proposed 35 percent allocation to licensing loans. We agree that this allocation is unnecessary in view of the Secretary's inherent authority to make appropriate adjustments responsive to program developments.

Finally, previously redundant references to review of incoming applications have been combined to indicate clearly that all applications will receive initial consideration in the order received, before being classified as to possible priority, understanding that, priority or not, some applications will prove harder and more time consuming than others to process.

D. Definitions

In section 797.03, the definition of "existing dam" has been reworded, in response to comment, to make clear that a project is not disqualified for being situated at an aqueduct outlet or canal drop, so long as the barrier to the watercourse creating the hydraulic head was constructed prior to April 20, 1977. The concept of this definition is that, in appropriate cases, such a site may itself be a small dammed impoundment within the sense of PURPA, although remote from a "mother dam", and that, as such, it may be a damsite better suited than the principal dam for small hydroelectric power development. The definition still avoids the risk that a loan may ultimately promote activities which result in drying a natural stream. As noted in footnote 3, FERC has proposed to exempt certain sites of this kind from regulation under subchapter I of the Federal Power Act. The definition should also tie in well with the PURPA Conference Committee's desire that several qualifying projects along the same waterway be treated as one for study purposes.⁵

⁵ 19, 1979: "Regulations Governing Applications for Licenses for Major Projects—Existing Dams", covering projects in excess of 1,500 kilowatts. And see Docket No. RM 79-35, April 20, 1979: "Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act", covering facilities of 15 megawatt or less capacity which utilize only a man-made conduit operated primarily for water distribution, if located on non-Federal lands.

⁶ H.R. Rep. No. 95-1750, pages 104, 106, October 10, 1978. The several projects/same waterway approach is implemented at § 797.40(b)(2) of this rule.

As reworded, the definition also makes clear that the "repairs or reconstruction" permitted under the definition of "existing dam" extend to reconstruction of a breached dam—even a badly breached one—and include renovation of abandoned hydroelectric machinery.

In line with comment which we received, the definition of "licensing loan" has been expanded to show that the loan is to defray a percentage of costs, not merely of preparing a license application but of pursuing the application process with its attendant legal, consultant, documentary, etc., expenses, as appropriate; and that license amendment is covered, as well as the obtaining of FERC or other license exemption.

Several suggestions had to be rejected in light of PURPA's express definitions of "small hydroelectric power project" (section 408(1)) and "existing dam" (section 408(6)). It was variously urged that the loan program should extend to feasibility/licensing of projects regardless of proximity to a dam and should extend to projects involving construction of a new dam. But the PURPA definitions are explicit that an existent, proximate damming structure is a basic requirement for a loan. Therefore, these suggestions cannot be accommodated within the statutory frame.

And, it was proposed that we raise the installed capacity maximum to 25,000 kilowatts in the definition of "small hydroelectric power project", so that the higher capacity will qualify for a loan. We lack authority to do so—Congress has made 15,000 kilowatts the limit under PURPA.

A related comment proposed that loans should extend to projects at dams which already generate electric power. This suggestion was based on the absence of the phrase, "existing dams which are not being used to generate electric power" (emphasis added) from the definition of "small hydroelectric power project" in section 406(1) of PURPA, although it appears in initial section 401 of that Act. The proponent urged, in a well-expressed comment, that this omission appears to have been legislative oversight and that in this regulation we should be no more restrictive in defining "small hydroelectric power project" than was Congress.

We have rejected the proposal to amend the definition of "small hydroelectric power project" to include dams which already generate electric power. Congress seems to have said what it intended. The establishment-of-program section, section 401, expressly

restricts the program to "existing dams which are not being used to generate electric power." No provision of Title IV expressly authorizes the loaning of federal moneys for projects related to dams which already generate electric power. The House bill is described at pages 64 and 65 of the PURPA Conference Report as seeking to "develop the hydroelectric potential of existing dams which are not being used to generate electric power" and "to develop the hydroelectric potential of existing dams at which no such potential is currently in use". PURPA's definition of "existing dams" in section 408(6) speaks in terms of "installation of any small hydroelectric power project," not "increase in the installed capacity of" a small hydroelectric project. In short, the most reasonable interpretation of Title IV is that the loans are to assist study and licensing at dams that do not yet generate electric power.

E. Eligibility Requirements

Section 797.20 of the regulation, on eligibility requirements, has been expanded to remove doubt, expressed in comment, as to what entities are eligible as "municipalities". PURPA section 408(7) carries over the Federal Power Act definition of "municipality" (16 U.S.C. 796(7)) and this regulation does the same at 797.03(f); 797.20 simply carries this over again by the reference to the broad range of state and local agencies eligible to apply as municipalities".

The citizenship requirement in this section has been reworded to avoid a misunderstanding that we regard all sites as coming under FERC licensing jurisdiction.

F. Application Requirements

Section 797.21, on application requirements, has been revised, in response to repeated suggestions, to allow applicants to submit photocopies of materials previously provided to FERC. We should note that this liberality may be of fleeting advantage, as FERC reduces its submittal requirements in compliance with Congressional mandate. We are not in a position to dispense with relatively detailed submittals; they are necessary for our prudent evaluation of the fiscal risk entailed in a direct loan program, as is the need for updating of information to reflect changes pending approval, also newly provided for in this final regulation.

We noted earlier, our extensive reworking of the general scheme of section 797.21. Additionally we have eliminated the need to state a "proposed method of repaying the loan" because

we were advised that we would invariably find this answered by the words, "by check." We also eliminated the requirement of a preliminary statement of proposed construction-stage possessory and access rights. It would be premature to request this information, which would more appropriately be provided in the feasibility study. A note following subsection 797.21(a)(9) indicates those limited instances when a FERC preliminary permit will be a prerequisite to a loan.

A preliminary estimate of value of power (as contrasted with sale price) was added to section 797.21(b)(1)(v). This was done in response to comments that it would allow economic comparison with the cost of alternative generation in situations where sale price may be too difficult to estimate.

In subsection 797.21(b)(2), we have revised the map and picture requirements of a study loan application to indicate a preference for maps and pictures of standard quality and detail.

We have added a request, at section 797.21(b)(1)(ii), for information on reservoir use, if any. Here we are particularly concerned to learn of recreational or residential uses that may have developed at a moribund impoundment. In response, again, to comment, we have broadened section 797.21(b)(3) to garner all "reasonably available" reports on safety of the existing dam, rather than limit reference to Corps of Engineers reports.

We have inserted a reference to the criminal sanction under 18 U.S.C. section 1001 for intentional misrepresentation or fraud in an application.

At section 797.21(b)(6) we have added a reference to need for advance work by a diligent applicant. A feasibility study loan applicant is required by the Office of Management and Budget⁶ to notify appropriate areawide and State clearinghouses about the intended project sufficiently in advance of DOE's action on the application for concerned governmental agencies to react to protect their own interests. We anticipate that 30 day advance notice will be required. Project notification may be initiated by an applicant by use of Standard Form 424, available from DOE offices listed later in this preface.

Finally, subsection 797.21(b)(4), requiring submission of information known by the applicant to raise substantial environmental implications, has been broadened, as a result of several comments, to include

⁶ OMB Circular No. A-85, Revised (41 Federal Register 2052, January 23, 1976).

information on the presence of Federally- or State-listed endangered or threatened species of animal or plant life, and to include known involvement of critical habitat at the site.

G. Purpose of Loans

Section 797.30, on the purpose of the loans, has been rather fully reworked. The point of the section is to aid DOE's and the applicant's mutual perception of what a feasibility study should achieve. The purpose-of-loans section should give something of an overview of the whole thrust of this small hydro loan program. Although no comment was directed to need for a reworking of the section, we became concerned that, as originally drafted, it tended to obscure those objectives with a list of study subjects approaching random order. We believe that, as redrafted, it meets those objectives now.

In response to comment, subsection 797.30(a)(1)(iii) clarifies the concept of "engineering acceptability" of the proposed site for hydroelectric power development. That concept is limited for feasibility study purposes. As revised, the subsection indicates that exhaustive engineering considerations, which may be entailed in FERC licensing, are not required of the feasibility study.

Pursuant to comment on the dam safety issue, subsection 797.30(a)(1)(iv) has been broadened to require initial assessment of the condition of the dam as it stands, in addition to initial assessment of hazards likely to be introduced by the project.

A new subsection, 797.30(a)(2), has been included to meet several requests for better definition of the kind of environmental and social information that the study should contain, and to indicate acceptability of certain secondary sources of such information.

In subsection 797.30(a)(3), we now limit the requirement for benefit/cost analysis to projects that do not involve project financing, but we continue to recommend inclusion of benefit/cost analysis in all studies. Where project financing is involved, the subsection, as revised, requests that the financing plan include information on contractual commitments proposed for purchase of the power output.

One comment urged that we expressly offer loans to "improve" feasibility studies. Express provision appears neither advisable nor necessary. We foresee instances when an applicant will have already assembled materials which are basic to a feasibility study but which fall short of making a case for (or against) technical and economic feasibility and environmental acceptability. It is a fine point whether

an applicant in that situation would be seeking a loan to make a feasibility study or to "improve" one, but the assembling of such materials certainly would not disqualify the applicant under the provisions of this regulation.

Subsection 797.30(b) on the purpose of a licensing loan has been rephrased to correspond with preceding sections 797.01 and 797.03(k).

H. Approval Procedure

In section 797.40, on approval procedure and requirements, we have continued the shift in emphasis away from FERC preliminary permit considerations. As indicated earlier, in connection with present 797.02 and 797.21(a)(9), we anticipate that consultation with FERC, as to an applicant's need for a preliminary permit, will be selective, limited ordinarily to applicants vulnerable to the preference generally accorded States and municipalities under the Federal Power Act.

As revised, section 797.40 no longer prescribes specific Secretarial findings as to an applicant's access rights and prospects of acquiring possessory rights at the site. A requirement for specific findings as to acquisition prospects would too often involve an exercise in estimating the unpredictable. PURPA itself, in section 408(4), rather plainly envisions postponement of hard and fast decisions on acquisition until the construction loan stage. So, on reflection, the matter seems to us inappropriate for specific findings and better left for such initial consideration as may be necessary under 797.40(b)(1).

I. Loan Terms

In section 797.50, loan terms, we have corrected our error in stating that no repayment is required for the first 3 years after disbursement; none is required for the first 4 years.

Additionally, in response to comment, we have provided for loans to be evidenced by two documents, a loan agreement and a separate promissory note, and for loans in excess of the original amount of loan and/or in excess of \$50,000, on certain specified conditions including the providing of collateral security, when such security is deemed necessary.⁷ We would emphasize that we anticipate restricting loan increases to licensing loans primarily, if not exclusively, in situations where the difficulty in predicting such expenses as consultant and attorney fees incidental to the

⁷ We have eliminated, as probably counterproductive, the requirement that collateral be provided for every loan. The regulation now provides for milestones and monitoring.

licensing/approval process has resulted in a justifiable underestimate of necessary expenses.

Subsection 797.50(a)(6) has been worded to indicate that a licensing loan covers the broad application process, including regional approvals.

We rejected proposals that contents and frequency of reports be specified in this rule. In a program as relatively modest as this, we would rather the loan agreement tailor those requirements to the individual account.

We rejected a proposal that 797.50(a)(4)(ii) not require liquidation of a study/licensing loan from the proceeds of construction financing. The proponent urged that significantly increased interest cost will result over the life of the construction loan, thus thwarting Congress' intention that low interest Federal financing be available to study loan and licensing loan borrowers. The proponent appeared to concede that little interest cost would be added over the former full lifetime of the typical study/licensing loan, if liquidation is required. In our view it is precisely that period that was the focus of Congressional concern in setting up this loan program.

Likewise, we rejected a request that a loan bear "simple interest", only, during its first 4 deferred years. Apart from being a reasonable condition of deferral, one wholly in keeping with standard business practice, it appears to us to be required under section 404(a) of PURPA that interest be accrued on unpaid interest during the first 4 years after execution of the loan agreement, as provided in paragraph 797.50(a)(3)(ii).

J. Assignment or Transfer

In section 797.70 we have added a prohibition on unauthorized "transfer" of the loan and its obligations, to the existing prohibition against unauthorized assignment.

K. Cancellation

Section 797.80, on cancellation of the loan obligation, has been revised in response to several suggestions. We have added, as a condition of the cancellation, the requirement at subsection (e)(3) that the borrower withdraw any pending license application for the project. We have also included, as subsection (e)(4), the provision for reinstatement of the debt which was at subsection 797.90(f) of the proposed regulation, with the additional qualification that it is for the Secretary to determine whether the forgiven borrower's interest is a substantial one in an entity that starts construction of the project to which a cancelled loan

pertained, so as to reinstate the loan obligation.

L. Default

In section 797.90, dealing with default, we have followed the suggestion that we add insubstantiality of the default (as determined by the Secretary) as a ground for waiver of default and that we provide for the Secretarial option to restructure the loan on a mutually acceptable basis. This changes the former, more restrictive, provision that restructuring was an alternative, not an addition, to waiver.

We have declined to give a defaulter 90 days rather than 30, to pay off, as one proposal suggested. Evidently the proposal was based on concern that an unsuspecting borrower will suddenly face a deadline too short to arrange payment of the debt. We believe, on the contrary that a borrower will, typically, be aware of having lapsed into default well before the Secretary's demand for payment in full. Moreover, the Secretary has discretion when to start the deadline period running and, indeed, whether to make the demand at all. It is not to be presumed that the Secretary will seize on inadvertent, correctible defaults as ground for calling a loan.

M. Appeals

Section 797.500 is new. It provides for appeals after the loan agreement is entered into, in cases of disputes over factual determinations made by the DOE official who executed the agreement.

III. Additional Information

This rule sets out requirements for the filing and processing of applications for direct loans for small hydroelectric power project feasibility studies and related licensing and kindred matters.

The notice of proposed making of this regulation (44 Federal Register 30278, May 24, 1979) announced that requests for loans will be considered after publication of this final rule; that such requests would be acceptable prior to this publication; and that such requests must be updated to meet additional requirements of this final rule. Several such requests were received between May 24, 1979, and publication of this final rule. These applicants will be advised individually as to any necessary updating.

DOE has prepared a guide for applying for loans, the use of which we recommend to those who have not yet applied for loans. The guide is obtainable from, and requests for loans should be directed to, the DOE Regional Representative in the applicant's region, listed below.

Region I: Harold J. Keohane, Analex Bldg., Room 700, 150 Causeway St., Boston, MA 02114 (617) 223-3701.

Region II: Robert A. Low, 26 Federal Plaza, Room 3206, New York, NY 10007 (212) 264-1021.

Region III: Obra S. Kernodle III, 1421 Cherry Street, 10th Floor, Philadelphia, PA 19102 (215) 597-3890.

Region IV: Lewis Centofanti, 1655 Peachtree St., N.E., Atlanta, GA 30309 (404) 861-2838.

Region V: Robert H. Bauer, 175 West Jackson Blvd., Room A-333, Chicago, IL 60604 (312) 353-0540.

Region VI: Dan Rambo, P.O. Box 35228, 2628 West Mockingbird Lane, Dallas, TX 75235 (214) 749-7345.

Region VII: Mary O'Halloran, 324 East 11th Street, Kansas City, MO 64108 (816) 374-2061.

Region VIII: Charles F. Metzger, P.O. Box 26247 Belmar Br., 1075 South Yukon Street, Lakewood, CO 80226 (303) 234-2420.

Region IX: William C. Arntz, 111 Pine Street, Third Floor, San Francisco, CA 94111 (415) 566-7216.

Region X: Jack B. Robertson, 1992 Federal Building, 915 Second Avenue, Seattle, WA 98174 (206) 442-7289.

In accordance with section 102(2)(c) of the National Environmental Policy Act of 1969, ("NEPA"), 42 U.S.C. 4332(2)(c), DOE has determined that this final rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment, because the activities included under this rule encompass only financial assistance for feasibility studies and licensing/approval endeavors. In addition, small hydroelectric power projects covered by this final rule will themselves be subject to NEPA requirements. FERC is the lead agency for licensing such projects and will have the responsibility for assuring site specific environmental review as to each such project.

In accordance with DOE Order 2030.1 implementing Executive Order 12044, "Improving Government Regulations," the Assistant Secretary for Resource Applications has determined that this regulation is significant because it is related to the National Energy Act, but will not have major economic consequences nor a substantial effect on existing energy objectives or statutes, nor adversely affect competition. Therefore, no regulatory analysis of this regulation, for major impacts, is required.

Issued in Washington, D.C. January 10, 1980.

Charles W. Duncan, Jr.,
Secretary, Department of Energy.

Text of the Authorizing Legislation

For convenience, the text of Title IV, Small Hydroelectric Power Projects, under the Public Utility Regulatory

Policies Act of 1978, is printed below. Title IV includes both *Loans For Feasibility Studies*, which, with licensing loans, is the subject of this rulemaking, and *Loan For Project Costs*, for which no rulemaking has as yet been initiated.

Sec. 401. Establishment of Program

The Secretary shall establish a program in accordance with this title to encourage municipalities, electric cooperatives, industrial development agencies, nonprofit organizations, and other persons to undertake the development of small hydroelectric power projects in connection with existing dams which are not being used to generate electric power.

Sec. 402. Loans for Feasibility Studies

(a) Loan Authority.—The Secretary, after consultation with the [Federal Energy Regulatory] Commission, is authorized to make a loan to any municipality, electric cooperative, industrial development agency, nonprofit organization, or other person to assist such person in defraying up to 90 percent of the costs of—

(1) studies to determine the feasibility of undertaking a small hydroelectric power project at an existing dam or dams and

(2) preparing any application for a necessary license or other Federal, State, and local approval respecting such a project at an existing dam or dams and of participating in any administrative proceeding regarding any such application.

(b) Cancellation.—The Secretary may cancel the unpaid balance and any accrued interest on any loan granted pursuant to this section if he determines on the basis of the study that the small hydroelectric power project would not be technically or economically feasible.

Sec. 403. Loans for Project Costs

(a) Authority.—The Secretary is authorized to make loans to any municipality, electric cooperative, industrial development agency, nonprofit organization, or other person up to 75 percent of the project costs of a small hydroelectric power project. No such loan may be made unless the Secretary finds that—

(1) the project will be constructed in connection with an existing dam or dams,

(2) all licenses and other required Federal, State, and local approvals necessary for construction of the project have been issued,

(3) the project will have no significant adverse environmental effects, including significant adverse effects on fish and wildlife, on recreational use of water, and on stream flow, and

(4) the project will not have a significant adverse effect on any other use of the water used by such project.

The Secretary may make a commitment to make a loan under this sub-section to an applicant who has not met the requirements of paragraph (2), pending compliance by such applicant with such requirements. Such commitment shall be for period of not to exceed 3 years unless the Secretary, in consultation with the Commission, extends such period for good cause shown.

Notwithstanding any such commitment, no such loan shall be made before such person has complied with such requirements.

(b) Preference.—The Secretary shall give preference to applicants under this section who do not have available alternative financing which the Secretary deems appropriate to carry out the project and whose projects will provide useful information as to the technical and economic feasibility of—

- (1) the generation of electric energy by such projects, and
- (2) the use of energy produced by such projects.

(c) Information.—Every applicant for a license for a small hydroelectric power project receiving loans pursuant to this section shall furnish the Secretary with such information as the Secretary may require regarding equipment and services proposed to be used in the design, construction, and operation of such project. The Secretary shall have the right to forbid the use in such project of any equipment or services he finds inappropriate for such project by reason of cost, performance, or failure to carry out the purposes of this section. The Secretary shall make information which he obtains under this subsection available to the public, other than information described as entitled to confidentiality under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974, [Public Law 93-319; 88 Stat. 246].

(d) Joint Participation.—In making loans for small hydroelectric power projects under this section, the Secretary shall encourage joint participation, to the extent permitted by law, by applicants eligible to receive loans under this section with respect to the same project.

Sec. 404. Loan Rates and Repayment

(a) Interest.—Each loan made pursuant to this title shall bear interest at the discount or interest rate used at the time the loan is made for water resources planning projects under section 80 of the Water Resources Development Act 1974 (42 U.S.C. 1962 [d] 17(a)). Each such loan shall be for such term, as the Secretary deems appropriate, but not in excess of—

- (1) 10 years (in the case of a loan under section 402) or
- (2) 30 years (in the case of a loan under section 403).

(b) Repayments.—Amounts repaid on loans made pursuant to this title shall be deposited into the United States Treasury as miscellaneous receipts.

Sec. 405. Simplified and Expeditious Licensing Procedures

(a) Establishment of Program.—The Commission shall establish, in such manner as the Commission deems appropriate, consistent with the applicable provisions of law, a program to use simple and expeditious licensing procedures under the Federal Power Act for small hydroelectric power projects in connection with existing dams.

(b) Prerequisites.—Before issuing any license under the Federal Power Act for the construction or operation of any small hydroelectric power project the Commission—

(1) shall assess the safety of existing structures in any proposed project (including possible consequences associated with failure of such structures), and

(2) shall provide an opportunity for consultation with the Council on Environmental Quality and the Environmental Protection Agency with respect to the environmental effects of such project.

Nothing in this subsection exempts any such project from any requirement applicable to any such project under the National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the Endangered Species Act, or any other provision of Federal law.

(c) Fish and Wildlife Facilities.—The Commission shall encourage applicants for licenses for small hydroelectric power projects to make use of public funds and other assistance for the design and construction of fish and wildlife facilities which may be required in connection with any development of such project.

Sec. 406. New Impoundments

Nothing in this title authorizes (1) the loan of funds for construction of any new dam or other impoundment, or (2) the simple and expeditious licensing of any such new dam or other impoundment.

Sec. 407. Authorizations

There are hereby authorized to be appropriated for each of the fiscal years ending September 30, 1978, September 30, 1979, and September 30, 1980, not to exceed \$10,000,000 for loans to be made pursuant to section 402, such funds to remain available until expended. There are hereby authorized to be appropriated for each of the fiscal years ending September 30, 1978, September 30, 1979, September 30, 1980, not to exceed \$100,000,000 for loans to be made pursuant to section 403, such funds to remain available until expended.

Sec. 408. Definitions

For purposes of this title, the term—

(1) "small hydroelectric power project" means any hydroelectric power project which is located at the site of any existing dam, which uses the water power potential of such dam, and which has not more than 15,000 kilowatts of installed capacity;

(2) "electric cooperative" means any cooperative association eligible to receive loans under section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904);

(3) "industrial development agency" means any agency which is permitted to issue obligations the interest on which is excludable from gross income under section 103 of the Internal Revenue Code of 1954;

(4) "project costs" means the cost of acquisition or construction of all facilities and services and the cost of acquisition of all land and interests in land used in the design and construction and operation of a small hydroelectric power project;

(5) "nonprofit organization" means any organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under section 501(a) of such Code (but only with respect to a trade or business carried on by such organization

which is not an unrelated trade or business, determined by applying section 513(a) to such organization);

(6) "existing dam" means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project;

(7) "municipality" has the meaning provided in section 3 of the Federal Power Act; and

(8) "person" has the meaning provided in section 3 of the Federal Power Act. [End of text of Title IV.]

Accordingly, new Part 797 to Title 10, Code of Federal Regulations is added as follows:

PART 797—LOANS FOR SMALL HYDROELECTRIC POWER PROJECT FEASIBILITY STUDIES AND RELATED LICENSING

Sec.

- 797.1 General purpose.
- 797.2 Priority considerations.
- 797.3 Definitions.
- 797.20 Eligibility requirements.
- 797.21 Application requirements.
- 797.30 Purpose of loans.
- 797.40 Approval procedure and requirements.
- 797.41 Delegation of authority.
- 797.50 Loan agreement and terms.
- 797.60 Project monitoring and audit.
- 797.70 Assignment or transfer of loan.
- 797.80 Cancellation.
- 797.90 Default.
- 797.100 Disclosure.
- 797.200 Noninterference with Federal, State, regional and local requirements.
- 797.300 Overall program considerations.
- 797.400 Nondiscrimination in federally assisted programs.
- 797.500 Appeals.

Authority: Sec. 401 Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (16 U.S.C. 2701) and Sec. 644, Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.).

§ 797.1 General purpose.

The purpose of this regulation is to establish the procedure for two kinds of loans. One is a loan to defray a percentage of the costs of studying the feasibility of developing a small hydroelectric power project in connection with an existing dam that is not being used to generate electric power. The other is a loan to defray a percentage of the costs of applying for a necessary license or other Federal, State, regional, or local approval respecting such a project and of participating in any administrative proceeding regarding such application. This regulation will also specify a) the requirements of the feasibility study, b)

the borrower's obligations under a loan, c) when the Secretary may cancel the obligation to repay the loan, and d) priorities to be accorded kinds of applications.

§ 797.2 Priority considerations.

(a) The Secretary will give applications for licensing loans priority over applications for feasibility study loans, because licensing loan applications must be based on completed feasibility studies (see § 797.40(c)(1)) and thus typically will be closer to putting power from qualified projects on line. Initial consideration will be given in the order applications are received, but the time required to process an application may vary from case to case.

(b) In determining the priority to be accorded a particular licensing or feasibility study loan application, the Secretary may take into account factors including, but not limited to, the following:

(1) The potential of the hydroelectric power project to save oil or gas.

(2) The likelihood that the project will be carried through to completion relative quickly.

(3) The need for substantial revision of the application in order to achieve compliance with this regulation.

(4) The disparity, if any, between the size of the loan sought and the size of the contemplated project.

(5) Any evident, substantial environmental implications.

§ 797.3 Definitions.

For purposes of this part.

(a) "Small hydroelectric power project" means a hydroelectric power project that is proposed to be located at the site of an existing dam or dams in the United States, its territories or possessions, at a dam(s) not being used to generate electric power, that will use the water power potential of such dam(s), and that, when completed, will have an installed capacity of not more than 15,000 kilowatts, nor less than 100 kilowatts.

(b) "Existing dam" means any dam or barrier built across a watercourse that was completed on or before April 20, 1977, which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of the small hydroelectric power project. "Repairs or reconstruction" as used in this subsection includes reconstruction of breached structures and renovation of machinery left in place.

(c) "Electric cooperative" means any cooperative association eligible to

receive loans under section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904).

(d) "Industrial development agency" means any agency which is permitted to issue obligations the interest on which is excludable from gross income under section 103 of the Internal Revenue Code of 1954.

(e) "Nonprofit organization" means any organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under section 501(a) of such Code (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

(f) "Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power.

(g) "Person" includes an individual, corporation, joint stock company, partnership, association, business trust, organized group of persons (whether incorporated or not), or receiver, or trustee of any of the foregoing.

(h) "Secretary" means Secretary of Energy or his designated representative.

(i) "Statutory interest rate" means the discount or interest rate, used at the time the loan is made, for water resources planning projects under section 80 of the Water Resources Development Act of 1974, 42 U.S.C. 1962 d-17(a).

(j) "Feasibility study loan" means a loan to assist in defraying a percentage of the costs of a study to determine the technical and economic feasibility and environmental acceptability of undertaking a small hydroelectric power project at an existing dam or dams.

(k) "Licensing loan" means a loan to assist in defraying a percentage of the costs of applying for a necessary license or license amendment or other Federal, State, regional, and local approval or exemption concerning a small hydroelectric power project and the costs of participating in any administrative proceeding regarding any such application.

(l) "Loan agreement" means a contractual instrument executed between the United States as lender and a borrower, which sets forth the terms and conditions for provision of funds by the United States to the borrower incidental to a feasibility study loan or a licensing loan and for repayment of the loan by the borrower.

(m) "Commission" means the Federal Energy Regulatory Commission ("FERC").

§ 797.20 Eligibility requirements.

(a) Eligible applicants for any loan under this part may be a municipality (*i.e.*, city, county, irrigation district, drainage district or other political subdivision or agency of a State, competent as defined in § 797.3(f)), electric cooperative, industrial development agency, nonprofit organization, individual, corporation, joint stock company, partnership, association, business trust, organized group of persons (whether incorporated or not), the receiver(s) or trustee(s) of any of the foregoing, or any combination of the foregoing. Applicants may not be Federal agencies.

(b) If the proposed project site is subject to FERC licensing jurisdiction, applicants must meet any citizenship requirement of the FERC. Applicants must also meet any citizenship requirement applicable under State or local law.

§ 797.21 Application requirements.

(a) Application requirements common to feasibility study loans and licensing loans shall include financial, scheduling, and other background information in support of the application. This information will be used as a basis for the Secretary's determination whether the applicant is capable of successfully completing the feasibility study or undertaking the applicable licensing and permitting requirements and subsequently constructing and operating the proposed small hydroelectric power project. Information previously provided by a feasibility study loan applicant need not be repeated at the time of applying for a licensing loan if it is unchanged. If an applicant has already submitted an application to FERC that contains information requested in this section, applicant may attach a photocopy of what was submitted to FERC.

The information required includes the following: (1) The amount of the loan being requested and whether it is for a feasibility study or for licensing.

(2) A description of the major tasks required to perform the study or to obtain the license; a proposed schedule for completing each major task; estimates of the cost of each major task and of total costs; and the share of costs to be borne by applicant(s).

(3) A brief description of the applicant(s) that indicates its history, the kind and size of its business, or, in the case of a municipality (see definition at § 797.3(f)), the experience if any, that

the municipality has had with projects of this nature.

(4) A current financial statement that includes source of revenue and (except in the case of individual applicants) a balance sheet. The Secretary may require a licensing loan applicant to provide certification of the financial statement by a certified public accountant or equivalent certification acceptable to the Secretary.

(5) A description of any other Federal financial assistance (e.g., direct loans, guaranteed loans, grants) expected to be applied for or already applied for or obtained by the applicant(s) in connection with the project.

(6) A list of all key persons who will be involved in the feasibility study or licensing effort (including any permitting effort) with their responsibilities and qualifications. This list should include any contractor and consultant whose services are proposed to be used. Information should be provided to show that they are capable of meeting the schedule within cost constraints of the loan.

(7) Affidavit(s) of United States citizenship as applicable (see § 797.20(b)).

(8) Documentation as to each applicant's authority to undertake the activities contemplated by the application. Such documentation should take substantially the following form:

(i) If an applicant is a municipality (see definition § 797.3(f)), a copy of its charter or other organization papers, duly certified by the Secretary of State, or other proper certifying officer, of the State in which it is located, with a copy of the State law(s) authorizing the proposed activities and an attested copy of the authorization to file the application.

(ii) If an applicant is a corporation, a copy of the charter or certificate and articles of incorporation, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. If the small hydroelectric power project would be located in a State other than that in which the corporation is organized, a certificate shall be included from the Secretary of State of the State in which the project would be located showing compliance with the laws relating to foreign corporations. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application.

(iii) If an applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing

board, if any, authorizing the filing of the application.

(iv) If an applicant is a nonprofit organization, verification of that fact.

(v) If an applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made.

(vi) If an applicant is a joint stock company, a verified copy of the articles of association.

(vii) For purposes of this subsection, verification may be by affidavit of an authorized representative of an applicant; attestation shall be by the authorized officer of an applicant.

(9) The status of any application by the applicant to FERC for a preliminary permit, license or exemption for the project at the proposed site (or a statement that such application has not been made) and the status of any other application by the applicant for Federal, State, regional, or local approval of the project.

Note.—A FERC preliminary permit establishes priority of application for FERC licensing purposes. Holding such a permit is not a blanket requirement for a feasibility study loan or licensing loan under this regulation.

It is an appropriate requirement for a loan applicant (typically an applicant that is not a municipality as broadly defined, see § 797.3(f) above) whose failure to establish priority of application may result, under FERC regulation, in the ultimate award of a permit or license to another developer of the proposed site.

(10) Information provided in a *pending* application for a feasibility study loan or licensing loan under this regulation shall be updated by the applicant to show changes.

(b) Applications for *feasibility study loans* shall also include the following:

(1) A narrative description of the proposed site to be studied that should address, but not necessarily be limited to, the following, to the extent that such information is reasonably available:

(i) the number, physical composition, dimension (including height of head), general configuration, age and condition, of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, to be included as part of the project;

(ii) the number, surface area, storage capacity and normal maximum surface elevation of any reservoirs to be included as part of the project and their present use;

(iii) the number, length, voltage, interconnection, age and condition of any transmission lines to be included as part of the project;

(iv) a preliminary indication of capacity potential, average annual energy generation, and the most likely customers for the power which would be produced;

(v) a preliminary estimate as to sale price or value of power;

(vi) stream characteristics (yearly flow patterns, downstream dependence on streamflows, etc.); and,

(vii) any other information that would aid the Secretary in understanding the setting in which the facility will be built, particularly those factors which may make the setting important or unique, including listing on the National Register of Historic Places of any structures or sites in the vicinity of the proposed project.

(2) Maps and pictures describing the site.

(i) U.S. Geological Survey topographical quadrangle sheets, or similar topographic maps of a State agency, if available, are preferred.

(ii) The map, as supplemented by the pictures, should indicate:

(A) The location of the proposed project with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects that can be noted on the map and recognized in the field.

(B) The approximate relative locations of the principal project features.

(C) The approximate proposed project boundary. This should also indicate both non-Federal lands necessary for the project and lands of the United States (including reservations).

(3) Any report on the safety of the dam or dams at the project site reasonably available to the applicant.

(4) A description of substantial environmental implications known to the applicant, including information regarding the presence of any Federally or State-listed endangered or threatened species of animal or plant in the area of the project, critical habitat involved, if any, and the possible need to accommodate migratory fish by installation of fish ladders.

(5) Information on how the applicant will have access to the proposed project site to perform the study.

(6) A copy of the project notification sent by applicant for review by areawide and State clearinghouses, as required by Office of Management and Budget Circular No. A-95, Revised (41 FR 2052, January 13, 1976).

(c) Applications for a *licensing loan* shall include in addition to the information specified in paragraph (a) of this section, a copy of a completed feasibility study acceptable to the

Secretary and conforming to the requirements indicated in § 797.30.

(d) In addition to the above required information the loan applicant shall supply such other information as the Secretary may deem necessary to consider the request for a loan.

(e) The application shall be signed by the applicant(s) or on behalf of an applicant by an authorized representative. (Note: Title 18 United States Code, section 1001 provides criminal penalties for fraud and intentional false statements in information submitted in such an application.)

(f) Every applicant whose application has been rejected will be informed, upon request, of the reason for rejection. The rejection is not a bar to submission of an appropriately revised application.

§ 797.30 Purpose of loans.

(a) Feasibility Study Loans.

(1) The purpose of a feasibility study loan is to help to defray expenses to be incurred in preparing a study of the small hydroelectric power project proposed by an applicant. Broadly stated, the goal of that study is to determine, through engineering and economic analysis and consideration of environmental and institutional requirements, whether the project is technically and economically feasible and environmentally sound as a supplier to an existing power grid or as an independent contributor of power for local applications or a combination of both. Accordingly, each study should address, but is not limited to, the following:

(i) Site description not previously supplied under § 797.21(b)(1)(i)-(iii) and 797.21(b)(2).

(ii) Estimated performance characteristics of the facility, including potential peak power production, and estimated average annual energy production.

(iii) Engineering acceptability of the site for hydroelectric power development.

Note.—For an existing dam, this should not ordinarily require extensive detailed field investigation (e.g., subsurface geotechnical investigation) nor preparation of detailed working drawings and specifications of the kind that may be required in connection with a FERC license application.

(iv) Initial assessment of the condition of the dam and of the safety hazards, if any, likely to be introduced by the installation or rehabilitation of the power plant and appurtenances.

(v) Availability of a suitable turbine(s), generator(s) and accessories required for the facility.

(vi) Plan for using or marketing the power including description of present and prospective power user groups and estimated revenues or value to be derived from power produced.

(vii) Plan for transmitting power from the project to intended user.

(viii) Anticipated annual operation and maintenance costs.

(ix) Anticipated project life.

(x) Need, if any, to acquire land or any interest in land or in project structures, or other land rights or water rights, to construct and operate the facility, and their availability and estimated cost.

(xi) Environmental and related considerations as indicated in paragraph (a)(2) of this section.

(xii) Estimates of costs of obtaining Federal, State, regional and local license and/or approval necessary for construction and operation of the facility, including legal and consultant expenses incidental to administrative proceedings. Note the importance of early identification of all such agencies and of advance contact with them to determine turn-around time.

(xiii) Financial analysis as indicated in paragraph (a)(3) of this section.

(xiv) Total estimated cost of the project and cost per kilowatt-hour produced.

(xv) Schedule for putting power on line.

(2) The study should identify probable environmental and social impacts of the project. In particular, the study should analyze the likely effect of construction and of proposed mode(s) of operation of the facility on water resources of the project area (including water quality and effects on the current uses of the reservoir, and on major downstream uses); on recreation; and on plant and local or migratory animal wildlife, listing the presence of any Federally- or State-listed endangered or threatened species. The study should also indicate the involvement of any critical habitat and the involvement of any site included on, or eligible for, the National Register of Historic Places. Note: Applicants should consult with the Department of Energy early in the feasibility study to obtain further guidance on the scope and level of detail required for a specific project. In general, this aspect of the feasibility study will be based on available information supplemented by reconnaissance level site specific information as necessary to identify probable environmental impacts. Further, this aspect does not involve the preparation of an environmental impact statement or an environmental assessment pursuant to the requirements of the National Environmental Policy Act of 1969

("NEPA") (42 U.S.C. 4321 *et seq.*) and the regulations (40 CFR Parts 1500-1508) of the Council on Environmental Quality for implementing the procedural provisions of NEPA. Applicants should be aware that the licensing of small hydroelectric power projects will require a site specific NEPA review that will be under the jurisdiction of the Federal Energy Regulatory Commission.

(3) In those cases where construction of the facility will require project financing, the study should include a cash flow statement covering the first ten operating years and a financing plan. The plan should use realistic assumptions regarding interest rates and debt amortization, and should detail contractual commitments proposed to be obtained for purchase of power output of the project. For projects not requiring project financing, an economic benefit/cost analysis should be provided. Note: Although a benefit/cost analysis is not required for a project which uses project financing, such an analysis is often of assistance in evaluating such a project, and its inclusion is encouraged.

(b) Licensing Loans.

The purpose of a licensing loan is to assist in defraying a percentage of the costs of applying for a necessary license or license amendment or other Federal, State, regional, and local approval or exemption respecting a small hydroelectric power project and the cost of participating in any administrative proceeding regarding any such application.

§ 797.40 Approval procedure and requirements.

(a) Consultation with FERC. Before making a feasibility study loan or a licensing loan, the Secretary will consult with FERC to the extent the Secretary deems necessary to determine whether the loan would be inadvisable unless the applicant holds a preliminary permit from FERC under Subchapter I of the Federal Power Act (16 U.S.C. § 791a, and following) for the proposed project. The Secretary will not make the loan if the Secretary believes it to be inadvisable for lack of that permit. See note to § 797.21(a)(9).

(b) Feasibility Study Loans.

(1) Before issuing a feasibility study loan, the Secretary must make the following findings, which will be based upon the Secretary's evaluation of the information provided in the loan application or otherwise available:

(i) That there exists a reasonable likelihood that the applicant or other person who will undertake the study is capable of performing it.

(ii) That the applicant will repay the loan.

(iii) That the project may be found to be both technically and economically feasible and environmentally acceptable. The determination of economic feasibility will include consideration of costs associated with environmental and safety factors.

(iv) That all requirements of this regulation, and of Title IV of the Public Utility Regulatory Policies Act of 1978, pertaining to the issuance of the feasibility study loan, have been found to be satisfied.

(2) In cases where there are two or more proposed projects located upon the same waterway, the Secretary may approve one loan for a single feasibility study dealing with all such projects (in which the persons proposing the projects will jointly participate with rights and obligations hereunder exactly the same as if their participation were on a separate basis) even though the projects are proposed by different persons, if the Secretary finds that to do so would avoid unnecessary duplication of effort and costs and would provide adequate information to make a determination concerning the feasibility of all such projects.

(c) Licensing Loans.

Prior to the issuance of a licensing loan, the Secretary must make the following findings, which will be based upon the Secretary's evaluation of the information provided in the loan application and accompanying feasibility study, or otherwise available:

(1) That the applicant has submitted a feasibility study which substantially conforms to the requirements and purpose indicated in section 797.30 and tends to establish that the proposed small hydroelectric power project is technically and economically feasible and environmentally acceptable. The determination of economic feasibility will include consideration of costs associated with environmental and safety factors.

(2) That there exists a reasonable likelihood that the applicant will repay the loan.

(3) That all requirements of this regulation, and of Title IV of the Public Utility Regulatory Policies Act of 1978, pertaining to the issuance of the licensing loan, have been satisfied.

(d) Additional Considerations as to Feasibility Study Loans and Licensing Loans.

In determining whether or not to make a feasibility study loan or licensing loan, as well as in determining the percentage of costs such loan will defray, the Secretary may take into consideration the cost of the work as it relates to the size and output of the proposed hydroelectric power facility, and such

other matters as in the Secretary's judgment bear on the ultimate success or failure of the proposed small hydroelectric power project. See, also, § 797.50(c), regarding loan limits.

(e) Site Visits. In making the determinations referred to in this section, the Secretary may consider information provided by a visit to the proposed site by the Secretary or his or her representative.

§ 797.41 Delegation of authority.

(a) Pursuant to the authority vested in the Secretary of Energy ("Secretary") and by Section 642 of the Department of Energy Organization Act (Pub. L. 95-91), there is hereby delegated to the Assistant Secretary for Resource Applications the authority to:

(1) Make feasibility study loans and licensing loans, and cancel the unpaid balance and any accrued interest on such loans, pursuant to the Small Hydroelectric Power Projects Program authorized in Title IV of the Public Utility Regulatory Policies Act of 1978 (Pub. L. 95-617) ("PURPA") and otherwise administer such Program;

(2) Promulgate such rules and regulations as necessary and appropriate for the Assistant Secretary to perform his or her functions under Title IV of PURPA;

(3) Sign documents, for publication in the Federal Register, that are necessary for the Assistant Secretary to perform his or her functions under Title IV of PURPA;

(4) Take such other action as the Secretary or the Secretary's authorized delegates may, from time to time, direct or authorize.

(b) The authority delegated to the Assistant Secretary for Resource Applications may be further delegated, in whole or in part.

(c) In exercising the authority hereby delegated or as redelegated pursuant to this section, the delegate(s) shall be governed by the rules and regulations of the Department of Energy and the policies and procedures prescribed by the Secretary's delegate.

(d) Nothing in this delegation by the Secretary shall preclude the Secretary from exercising any of the authority so delegated whenever, in the Secretary's judgment, the Secretary's exercise of such authority is necessary or appropriate to administer the functions vested in the Secretary.

§ 797.50 Loan agreement and terms.

(a) A loan agreement, and a promissory note securing performance of that agreement, shall be executed in writing between the borrower and the Secretary. In addition to other

provisions the Secretary may deem appropriate, the loan agreement and the promissory note shall provide as follows, either at full length or by incorporation by reference to terms of the other of the two documents.

(1) The borrower agrees to repay the loan of funds provided by the Secretary, unless the Secretary forgives repayment as provided in paragraph (a)(4)(i) of this section.

(2) The interest rate on the loan will be the statutory interest rate.

(3) The loan shall be repaid over a maximum period of 10 years as follows:

(i) No payments of principal or interest are required for the first 4 years from the date of execution of the loan agreement.

(ii) Beginning on the 4th anniversary date, the accrued interest, which will include interest charged on unpaid interest, shall be added to the outstanding principal balance and 1/4 of that total shall be due at such time.

(iii) Each anniversary date thereafter, 1/2 of the total computed in subparagraph (ii) above shall be due plus all interest accrued in the previous year on the unpaid balance of the loan.

(iv) Prepayments may be made at any time without penalty.

(4) The provisions of this subsection above shall be altered by the following circumstances:

(i) The Secretary forgives repayment of interest and principal as permitted in § 797.80.

(ii) Construction is undertaken on the proposed hydroelectric power project, in which event the outstanding balance of the feasibility study and/or licensing loan should be part of the financing for such project and the loan repaid out of the proceeds of any construction loan. To insure compliance with this provision, the Secretary shall have the option of accelerating the repayment of any loan made under this regulation and demanding payment in full any time after the expiration of 60 days from the date construction has begun on the project.

(5) Payments required by the loan agreement, if not made when due, shall accrue interest at a specified rate, which shall be not less than 10 percent per annum.

(6) The loan may be used by the borrower to defray up to 90 percent of the costs of a feasibility study or of the costs of applying for a necessary license or license amendment, other Federal, State, regional, and local approval or exemption respecting the project, and of participating in any administrative proceeding regarding such application. No part of the loan shall be used to defray any fee charged by any Federal,

State, regional or local agency as a condition of receiving a license, amendment, or other approval or exemption, or any cost associated with a finder's fee. The loan may defray reasonable and customary costs directly related to the project and entailed in the engineering, financial, legal, environmental, social and institutional considerations necessary to the study on to the licensing or approval endeavors of the borrower.

(7) The borrower will make periodic reports, as required, regarding the progress of the feasibility study or licensing or approval activities.

(8) Requests for disbursements at closing and thereafter shall be supported by such documents and by such indications of progress as the secretary may require.

(9) Costs allowable under paragraph (a)(6) of this section and incurred by a borrower prior to signing the loan agreement may be credited toward the borrower's share of costs. In no case will such costs be reimbursable from proceeds of the loan.

(b) The documents shall also provide, either at full length or by incorporation by reference, for monitoring and audit (see § 797.60), assignment or transfer (see § 797.70), default (see § 797.90), and appeals (see § 797.500).

(c) The Secretary will not increase the amount of a feasibility study loan or licensing loan, nor make a feasibility study loan or licensing loan in excess of \$50,000, unless in the Secretary's judgment good cause is shown. In that event, the Secretary may require of the borrower such additional supporting covenants, collateral security arrangements, and contribution to the project as the Secretary deems necessary to protect the interests of the United States.

§ 797.60 Project monitoring and audit.

The borrower shall keep such records concerning the small hydroelectric power project as are required by generally accepted accounting principles, and such other records as the Secretary may deem necessary. The Secretary may have access, for the purpose of audit and examination, to any pertinent records or other documents of the borrower during the regular business day, and may require that copies of such documents be provided to the Department of Energy by the borrower.

§ 797.70 Assignment or transfer of loan.

Assignment or transfer of the loan and obligations contained thereunder may be made only with the written consent of the Secretary.

§ 797.80 Cancellation.

(a) The Secretary may cancel the unpaid balance and any accrued interest on any feasibility study loan or licensing loan if the Secretary determines on the basis of the study, or on the basis of any other information available to the Secretary, that the small hydroelectric power project would not be technically or economically feasible or environmentally acceptable. The Secretary's determination to cancel the loan may be made prior to the completion of the study or afterwards.

(b) In determining economic feasibility, the Secretary shall be guided by the Secretary's determination of the ability of the proposed project to support financing appropriate to carry out the project and available to the applicant for the project under reasonable terms and conditions.

(c) The Secretary may cancel the unpaid balance and any accrued interest on a loan to a borrower who, in the Secretary's judgment, has been or will be unable to obtain a necessary license respecting the project, or any right necessary to construct and operate the project, for a reason beyond the borrower's control and despite borrower's good faith effort to do so.

(d) The Secretary will not cancel the unpaid balance and accrued interest on any feasibility study or licensing loan if the Secretary finds that the borrower, in applying for the loan, (1) failed to provide information reasonably available to such borrower that would have indicated that there was not a reasonable likelihood the project would be found to be technically and economically feasible and environmentally acceptable, or (2) withheld information indicating that the borrower would be unable to obtain a license, approval or right necessary to the project.

(e) It shall be a condition of cancellation of unpaid balance or accrued interest under this section that:

(1) The Secretary's obligation to disburse funds under the loan agreement shall terminate.

(2) A feasibility study produced under a feasibility study loan made to the borrower pursuant to this regulation shall become property of the United States.

(3) The borrower shall withdraw any pending license application for the project.

(4) If during the term of a cancelled loan the borrower, or an entity in which the borrower has a substantial interest, as determined by the Secretary, starts construction of the small hydroelectric power project to which the loan

pertained, unpaid principal and interest to date shall become due and payable.

§ 797.90 Default.

(a) If the borrower fails to perform the terms and conditions of the loan agreement or any related document, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all amounts outstanding, both principal and interest, under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of demand to make payment in full because of default.

(d) If the failure on the part of the borrower to perform the terms and conditions of the loan agreement, or related document, does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, or is deemed by the Secretary to be insubstantial, the Secretary may elect, at the Secretary's option, to waive the default and restructure the repayment required by the loan agreement in any mutually acceptable manner.

(e) Should the borrower fail to pay after demand as provided in paragraph (c) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

§ 797.100 Disclosure.

Subject to the requirements of law and in accordance with Department of Energy ("DOE") regulations concerning public disclosure, trade secrets, commercial and financial information, and other information or data concerning the project that the applicant submits to DOE in writing on a privileged or confidential basis before or during the project will not be disclosed by DOE without prior notification to the applicant. Any applicant asserting that the information is privileged or confidential shall appropriately identify and mark such information.

§ 797.200 Noninterference with Federal, State, regional, and local requirements.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower by Federal, State, regional, and local government agencies in connection with permits, licenses, or other authorizations to construct or finance small hydroelectric power projects.

§ 797.300 Overall program considerations.

Nothing in this regulation shall be interpreted to restrict the Secretary, in making the various determinations provided for in this regulation, from taking into account considerations relating to the small hydroelectric power project loan program as a whole.

§ 797.400 Nondiscrimination in federally assisted programs.

(a) Applicants and recipients of Federal assistance from DOE are obligated to comply with civil rights requirements of the following public laws: Title VI of the Civil Rights Act of 1964; Title IX of the higher Education Amendments of 1972; Section 16 of the Federal Energy Administration Act of 1974; Section 401 of the Energy Reorganization Act of 1974; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975.

(b) To be in compliance with civil rights requirements, an applicant/recipient, among other obligations, must—

(1) Submit a written assurance that the program or activity will be operated in a manner that does not exclude from participation in or deny the benefits or services to individuals on the basis of race, color, national origin, sex, age, or handicap;

(2) Designate the person responsible for coordination of activities to carry out its civil rights compliance responsibilities; and

(3) Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees that it does not discriminate on the basis of race, color, national origin, sex, age, or handicap.

§ 797.500 Appeals.

Any dispute about a question or fact arising under the loan agreement shall be decided in writing by the DOE official who executed the agreement, or his successor. The borrower may, within 14 calendar days after receipt of the decision, make a written request to that official to reconsider the decision. The decision on the request for reconsideration, which also shall be in writing, may be appealed in writing by the borrower, within 30 calendar days after receipt, to the Chairman, Board of Contract Appeals, Department of Energy, Washington, D.C. 20545. That Board, when functioning to resolve the dispute, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board on the dispute shall be the final decision of the Secretary.

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