

Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
1,008		1		430		434,040

Total Estimated Burden Hours:  
434,040.

Status: Reinstatement, without change.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 15, 2000.

**Wayne Eddins,**

*Departmental Reports Management Officer,  
Office of the Chief Information Officer.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[Docket No. 001215356-0356-01 and I.D. 100500A]

RIN 1018-AH42

### Notice of Proposed Interagency Policy on the Prescription of Fishways Under Section 18 of the Federal Power Act

**AGENCIES:** U.S. Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice of proposed policy.

**SUMMARY:** This notice invites public comment on proposed internal policy for the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) regarding the prescription of fishways pursuant to section 18 of the Federal Power Act for non-Federal hydropower projects licensed by the Federal Energy Regulatory Commission (FERC). The proposed policy is intended to set forth the definition of fishways in accordance with the 1992 National Energy Policy Act and the procedures for the prescription of fishways. The policy does not introduce new procedures but standardizes current practices and existing procedures for providing fishway prescriptions.

**DATES:** Written comments must be received on or before February 20, 2001.

**ADDRESSES:** Comments should be sent to, and copies of applicable documents are available from, the Chief, Division of

Federal Program Activities (400 ARLSQ), U.S. Fish and Wildlife Service, 1849 C Street, NW, Washington, DC 20240 or the Director, Office of Habitat Conservation, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3282.

**FOR FURTHER INFORMATION CONTACT:** Dr. Benjamin N. Tuggle, Chief, Division of Federal Program Activities, telephone: 703/358-2161, or Dr. Stephen M. Waste, Office of Habitat Conservation, National Marine Fisheries Service, telephone: 301/713-2325.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department of the Interior, acting through the Fish and Wildlife Service (FWS), and the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), acting through the National Marine Fisheries Service (NMFS), are the Federal Departments primarily responsible for the conservation and management of the Nation's fish and wildlife resources. The FWS has broad responsibilities to conserve, protect, and enhance fish, wildlife, and their habitats under authorities granted by the Fish and Wildlife Act of 1956 (FWA) (16 U.S.C. 742a-742j, not including 742 d-1; 70 Stat.1119); the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 *et seq.*); the Federal Power Act (FPA) (16 U.S.C. 791a *et seq.*); and the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). NMFS has Federal responsibilities for marine, estuarine, and anadromous fish resources pursuant to the FPA, the ESA, and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*), and Reorganization Plan Number 4 of 1970.

Section 18 of the FPA (16 U.S.C. 811) expressly grants to the Departments of Commerce and Interior (Departments) exclusive authority to prescribe fishways. Section 18 states that FERC must require construction, maintenance, and operation by a licensee at its own expense of such fishways as may be prescribed by the Secretary of Commerce or the Secretary of the Interior. Fishways prescribed under section 18 of the FPA by the Departments are mandatory upon FERC for inclusion in license conditions. Within the Department of the Interior, the authority to prescribe fishways is delegated from the Secretary of the

Interior to the FWS Regional Directors. Within the Department of Commerce, the authority to prescribe fishways is delegated to the NMFS Regional Administrators. Therefore, the FWS develops all fishway prescriptions issued by the Department of the Interior under section 18, and NMFS develops all of the Department of Commerce's fishway prescriptions.

#### Discussion

The National Energy Policy Act of 1992, section 1701(b), rescinded FERC's definition of fishways. Through this proposed policy, the Services take this opportunity to define fishways. This proposed policy also sets forth the general agency practice for developing fishway prescriptions, and encourages license participants to anticipate fish passage needs and the Services' procedures. This policy does not introduce new procedures but standardizes current practices to ensure a consistent and effective process. The policy does not expand the authorities of the Departments or the Services beyond those that currently exist and does not place additional requirements on anyone outside the Departments beyond those that already exist in the FPA and FERC's regulations under the FPA at 18 CFR, Chapter I.

Additionally, the courts have recently addressed several section 18 issues that affect the Services' implementation of the fishway prescription process. In following *Escondido Mutual Water Co., et al. v. La Jolla Band of Mission Indians et al.* 466 U.S. 765 (1984), the courts have continued to hold that the exercise by the Secretaries' authority under section 18 is mandatory and requires inclusion of fishway prescriptions in any license issued by FERC. (*Bangor-Hydroelectric Co., Inc. v. FERC*, 78 F.3d 659 (D.C.Cir. 1996); *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2nd Cir. 1997); *American Rivers v. FERC*, 187 F.3d 1007 [9th Cir. 1999]). The Services' fishway prescriptions must be supported by substantial evidence in the administrative record before FERC and be reasonably related to the Services' fish passage goals. (*Bangor-Hydroelectric Co., Inc. v. FERC*, 78 F.3d 659 (D.C.Cir. 1996).)

On September 1, 1994, NMFS and FWS published an "Advanced Notice of Proposed Rulemaking (ANPR) for Prescribing Fishways Under section 18 of the Federal Power Act" in the

**Federal Register** (59 FR 45255).

Comments were received from natural resource and hydroelectric interests. The comments were supportive of a rule and provided suggestions for the proposed rule. Events subsequent to the ANPR, including the *Bangor-Hydroelectric Co.* litigation and court decision, contributed to the delay in further development and issuance of the ANPR and changed our course of action to policy issuance. The Departments have elected to proceed with issuance of a "Notice of Proposed Interagency Policy on the Prescription of Fishways Under Section 18 of the Federal Power Act." This proposed policy meets the same objectives described in the 1994 ANPR.

The proposed policy does not set forth new process or requirements. The fishway prescription process outlined in the proposed policy already occurs during FERC's existing licensing process and is included in FERC's current regulations. The proposed policy is a means to provide guidance to agency staff and ensure a consistent and effective fishway prescription process. The proposed policy will also help facilitate the consultative efforts between the Services, applicant or licensee, and other interested parties in the fishway prescription development process and promote understanding between agencies, license applicants, FERC, and the public of the process used to prescribe fishways.

On May 26, 2000, the Departments issued a **Federal Register** notice (65 FR 34151) requesting public comment on establishing a review process for mandatory conditions including section 18 fishway prescriptions. Such a review process may provide an additional and more formal opportunity for licensees and others to provide input on the Departments' mandatory conditions. When a review process is developed, it will be incorporated into this proposed interagency section 18 policy.

**Applicability**

The proposed policy applies to all the Services' activities related to the prescription of new and/or modification of existing fishways at non-Federal hydroelectric projects licensed by FERC pursuant to the Federal Power Act.

**Record of Compliance**

We have prepared a Record of Compliance documenting that this action complies with the various statutory, Executive Order, and Departments of the Interior and Commerce requirements that are applicable to rulemakings. A copy is available upon request (see **ADDRESSES**).

FERC issues licenses for new, previously unlicensed hydropower projects and issues new licenses for about 1,000 previously licensed non-Federal hydropower projects. Hydropower projects are issued licenses for a period of up to 50 years and then can be re-licensed in order to continue operating. All of the projects receiving licenses are subject to the Services' section 18 mandatory authority to prescribe fishways. The Services determine the need for fishways for hydropower projects on a case-by-case basis. In addition, the Services are required to evaluate fish passage for these hydropower projects based on current environmental laws and regulations. Therefore, it is likely that the Services may prescribe fishways for a fair number of these hydropower projects.

By establishing this proposed policy, the Services set forth existing procedures for providing fishway prescriptions to ensure a consistent and effective process. The policy does not introduce new procedures but standardizes current practices and provides a definition of fishway. Therefore, the numbers of fishways prescribed for hydropower projects will probably not change significantly with this proposed policy. The proposed policy would help to facilitate the consultative efforts among the Services, applicant or licensee, and other interested parties in the fishway prescription development process and promote understanding among agencies, license applicants, FERC, and the public of the process used to prescribe fishways.

The proposed policy was reviewed under Executive Order 12866. As discussed earlier, this proposed policy is a statement of current practice and, therefore, does not contain any additional requirements concerning the government, public, or any other party. Accordingly, this proposed policy will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Similarly, this policy is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this proposed policy does not affect small governments, nor does it require any additional management responsibilities. Therefore, the proposed policy will not result in any significant additional expenditures by entities that participate in the fishway prescription process. This proposed policy will not

produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

In accordance with Executive Order 12630, this proposed policy does not have significant takings' implications. This proposed policy will not result in takings since it generally describes the current procedures used in the fishway prescription process for all involved parties.

In accordance with Executive Order 13132, this proposed policy does not have significant Federalism effects. This proposed policy will not affect other governments since no intrusion on state policy or administration is expected; roles or responsibilities of Federal or state governments will not change; and fiscal capacity will not be substantially directly affected. Therefore, the proposed policy does not have significant effects or implications on Federalism.

In accordance with Executive Order 12988, the proposed policy does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This proposed policy does not require any information collection for which the Office of Management and Budget approval is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). We have analyzed this proposed policy in accordance with the criteria of the National Environmental Policy Act (NEPA) and the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)). This proposed policy does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement or assessment is not required. We have determined that the issuance of the proposed policy is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10. NOAA has determined that the issuance of this proposed policy qualifies for a categorical exclusion as defined by NOAA 216-6 Administrative Order, Environmental Review Procedure.

We have analyzed this proposed policy in accordance with section 7 consultation of the ESA. We have determined that issuance of this proposed policy will not affect species listed as threatened or endangered under the ESA, and, therefore, a section 7 consultation on this proposed policy is not required.

We have analyzed this proposed policy in accordance with section 305(b) of the Magnuson-Stevens Act. We have

determined that issuance of this proposed policy may not adversely affect the essential fish habitat (EFH) of federally managed species, and, therefore, an essential fish habitat consultation on this proposed policy is not required. If individual fishway prescriptions for specific projects may adversely affect EFH, then FERC would be required to conduct an EFH consultation with NMFS.

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and with the Department of the Interior Manual (512 DM 2), this proposed policy does not directly affect Tribal resources. We have evaluated effects on federally recognized Indian tribes and have determined that there are no potential effects. The proposed policy does not introduce new procedures but standardizes existing procedures for consultation concerning the fishway prescription process. The proposed policy will further facilitate consultative efforts between the Services and the Tribes and promote understanding of the process used to prescribe fishways.

## **PROPOSED INTERAGENCY POLICY FOR THE PRESCRIPTION OF FISHWAYS**

### **I. Introduction**

The purpose of this policy is to publish the Services' definition of fishway and procedures for the prescription of fishways by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services), pursuant to section 18 of the Federal Power Act (FPA) for non-Federal hydropower projects licensed by the Federal Energy Regulatory Commission (FERC).

Hydropower projects including their associated dams divide a river system into isolated segments, impede or block fish movement, and kill or injure fish. The viability and mobility of fish species that would otherwise move to and between different habitats within the river basin may diminish substantially, if not completely, due to the dams. Fishways help mitigate the impact of hydropower dams on aquatic ecosystems by providing fish passage. Fishways on dams serve a variety of public purposes and resource goals including, but not limited to, the safe and timely physical passage of fish past the project; the improvement/ augmentation of existing populations within a basin; the reunification of fragmented populations; and the reintroduction/ reestablishment of

viable fish runs in a basin or watershed. In addition, providing fish passage may be necessary to protect tribal resources 61 FR 58211 (1996) and the exercise of American Indian tribal rights.

Fishways are prescribed by the Services to ensure the safe, timely, and effective passage of fish at non-Federal hydropower projects. Fishways facilitate the effective movement of fish past a hydropower project and provide one or more ways for fish to move, upstream or downstream, for such purposes as spawning, rearing, feeding, dispersing, and the seasonal use of habitat.

The Services will determine whether or not fishways are required for specific hydropower projects. Fishway prescriptions are designed to support implementation of fisheries management and resource protection objectives. Often the objectives will ensure that hydropower projects meet the goals of restoring, maintaining, and enhancing fish populations. Fishway prescriptions address fish passage goals identified in national, regional, or watershed level planning documents or those provided by the Services on a site-specific basis. In determining the need for fishways, the Services should coordinate with the states, other Federal agencies, Tribes, and other interested parties in the development of basin-wide fish restoration plans and goals.

Accomplishing effective fish passage is in the public interest and is an appropriate project purpose. As such, this purpose should be an integral component of project design and operation, whenever possible and practical, for both existing and new projects. This purpose is best met when fishway plans are integrated into early project planning and design and continuously achieved through the term of the license. Accomplishing this purpose requires that both or either Services with statutory fishway responsibilities are involved in both pre- and post-licensing related activities. This involvement is traditionally through consultation with the applicant or licensee and communication with FERC.

After licensing, the Services work with the licensee on fishway-related planning, modeling, and design prior to construction, operation, and maintenance. After passage facilities are complete and operational, facility evaluation, monitoring, and inspection should be initiated by the applicant or licensee to the satisfaction of the Services to ensure that the fish passage facility is performing as intended. Each of these activities is important and can influence whether or not effective fish

passage is being, or will be, accomplished.

### **II. Definition of Fishway**

In order to ensure the consistent implementation of the Services' fishway prescriptions, it is necessary to understand the elements of a fishway. Congress provided guidance as to what constitutes a fishway in the National Energy Policy Act (NEPA) of 1992 (Pub.L. 102-486). Section 1701(b) of the Act states:

... the items which may constitute a "fishway" under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, and devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.

The fundamental purpose of a fishway is to provide for the movement of fish past a barrier. Fishways are intended to provide safe, timely, and effective access to and from habitat for such purposes as spawning, rearing, feeding, growth to maturity, dispersion, migration, seasonal use of habitat and connectivity within the aquatic ecosystem, but not for habitat protection. To be successful, fishways must be constructed, operated, and maintained considering the biological requirements of fish moving upstream and downstream and the manner in which these movements are influenced by the structural and nonstructural elements of a hydropower project. A variety or combination of facilities, structures, devices, measures, and operations are often necessary in order for a fishway to provide effective fish passage.

The fishway definition in this policy provides clarification of Congress' guidance on the elements of a fishway. The Services define fishway as:

Any facility, structure, device, measure, or project operation, or any combination thereof, necessary for safe, timely, and effective movement of fish, regardless of life stage, whether upstream or downstream, through, over, or around a reach affected by a hydropower project, including, but not limited to: (1) fish ladders, locks, lifts, bypasses, barriers, and screens; (2) breaches, notches, spillways, gates, tunnels, flumes, pipes, or other conveyances, and channel modifications; and (3) water spill, flow, temperature, and level; (4) operating schedules; and (5) any other facilities, structures, devices, measures, or project operations necessary to attract, guide, pass, repel, exclude, transport, or trap fish, or provide information—by monitoring, modeling, evaluating, and studying, to ensure safe, timely and effective passage of fish.

Facility, structure, device, operation, and measure are not the same (see III.

Other Definitions Used in the Policy). By way of example, and not limitation, a fishway may include: (1) facilities that are often used for conveying, bypassing, collecting (as in a gallery), counting, trapping, and transporting fish; (2) structures, such as fish ladders, screens, barriers, and spillways used for conveying, guiding, or excluding fish, or the super structure in a fish-lift that provides for physical support; and (3) devices, mechanical or electronic, such as pumps or valves of an attraction flow system, the gate and hoist and pulley of a fish-lift, or a vehicle for transporting fish, that are often necessary to run the system, and thus, part of a fishway.

Project operations and measures are often necessary to ensure the effectiveness of the facilities, structures, devices, and other operations. They may include the timing of when a power generation unit may be on or off (first unit on, last off) during the migration period to affect the routing of migrating fish. Also, as a measure to ensure that the structures, facilities, and devices will be designed and located to pass fish effectively, conditions requiring planning (including operations and maintenance), modeling, designing, and consultation can be included. In particular, hydraulic modeling of project operations can be effective in designing and locating structures, facilities, and devices and in adjusting the effect of project operations on fish routing and movement. The Services may include measures to ensure that flows for attraction and conveyance are adequate for fish passage.

To ensure that the structures, facilities, and devices will operate in synchrony with fish movement, the Services may include schedules for initial and/or seasonal fish-passage operations. The Services may also include mechanisms for scheduling any necessary seasonal changes, subject to an express requirement for the notification to, and approval by, the Services. In regard to these operations, a prescription may specify a maximum and minimum river flow at which upstream and downstream passage should be provided by the applicant or licensee. Evaluations of fish passage effectiveness and inspection may be included to ensure that passage measures perform in a manner consistent with the intent and specific criteria stipulated by the Services in their prescriptions.

### III. Other Definitions Used in the Policy

For the purpose of this policy:

*Departments* means the Department of the Interior and the Department of

Commerce. *FERC* means the Federal Energy Regulatory Commission.

*Devicemeans* a piece of equipment or a mechanism designed to serve a particular purpose or perform a particular function.

*Facility* means a specific combination of structures, devices, operations, and/or measures designed to work together to perform a function.

*Fish* means fishes, mollusks, crustaceans, and all other forms of freshwater, estuarine, and marine animal life other than mammals and birds.

*Hydropower project* means a complete unit of development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) that are part of a said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit - as defined in the FPA.

*Measure* means an amount, allotment, capacity, evaluation, intensity, measurement, quality, schedule, size, study, and action calculated to achieve an end.

*Migratory* means demonstrating any mass movement from one habitat to another with characteristic regularity in time or according to stages of life history.

*Operation* means a method or manner of functioning or performing.

*Reach* means a section or portion of a stream length.

*Riverine fish* means fish that live in freshwater systems, such as rivers and streams, that do not spend time at sea.

*Services* means the U.S. Fish and Wildlife Service within the Department of the Interior, and the National Marine Fisheries Service within the Department of Commerce.

*Structure* means a constructed physical feature.

## IV. The Fishway Prescription Process

### A. Scoping, Consultation, and Studies

The policy states in general terms the Services' fishway prescription process, which may occur concurrently with FERC's licensing or during the license term. The fishway prescription process

described in this document is generally applicable to both the traditional and the alternative licensing processes at 18 CFR, Chapter I. Because the FERC record is developed differently in these processes, the prescription process may be adjusted to reflect those differences. The fishway prescription process is a consultative, iterative effort among the Services, applicant or licensee, and other interested parties to adequately address resource management, biological, engineering, and design factors related to accomplishing effective fish passage at the project.

The Services typically begin the fishway prescription process by scoping the issues related to fish passage for the individual license proceeding. While each project is unique, some initial considerations for the Services include (1) the types of fish occurring currently or historically in the vicinity of the project or proposed project; (2) the biological status of the species under consideration; (3) the effect of the project, or proposed project, on fish and their habitat; (4) the status of the habitat upstream of the project; (5) the possibility for restoration of fish runs; (6) the need for fishways; and (7) what types of fishways are needed. As part of the scoping process, the Services evaluate the information available to answer these questions.

A critical component of the Services' fishway prescription process is the information available to the Services and existing in the FERC record. The information utilized by the Services comes from a variety of sources, including historical accounts, records, surveys, and other information; Federal, state, and tribal management plans; information obtained from scoping, consultation and coordination, project-specific surveys and studies, and the license application, as well as information already in the Services' possession. One of the Services' important objectives, as a participant in the licensing or amendment process, is to identify whether fish passage may be impacted by the project, to identify project features and operations that may impact fish passage, and to identify the means and measures to mitigate these impacts. Based upon the information available, the Services will identify resource management goals and fish passage concerns as early in the consultation process as the information gathering process allows. Where gaps in information are identified in the consultation process, the Services will work with the applicant or licensee, Indian tribes, affected Federal and state agencies, and other participants to

identify necessary information and needed studies, as appropriate.

Information requested by the Services should assist in identifying the necessary design or modification of the hydroelectric project (including potential fishways) to avoid and minimize project impacts on fish passage and protection and to allow for safe, timely, and effective fish passage. The Services may request studies to acquire information needed to ensure fish passage and expressly identify those studies necessary for the Services to exercise the FPA section 18 authority. The cost of studies is borne by the license applicant or licensee. The Services will consider the least costly study alternatives that will provide the needed information to accomplish their goals when the cost information is provided for review.

Studies are to be conducted over the period of time necessary to provide information needed to identify the fish that may be affected by the project, how they are affected, and the elements necessary for effective passage of these fish. The Services provide technical assistance in the form of review and comment on the applicant's or licensee's informational studies and proposed designs related to fish passage. When possible, the Services and applicant or licensee will work closely in all aspects of the study process. When information has been requested by the Services and that information is not provided by the applicant or licensee, fishway prescriptions may be based on the best information available and on the Services' best professional judgment.

#### *B. Need for Fishways*

The Services' determinations regarding the need for fishways will be made on a case-by-case basis and may be based on a number of factors. The Services may consider whether the proposed project is, or would be: (1) located on a water body that is presently used by or that provides habitat for migratory fish or has the potential to provide use or habitat through run restoration or fish passage improvements; (2) located on a water body that is presently used by or provides habitat for riverine fish or that has the potential to provide use or habitat through fish passage improvement; (3) located on a water body where fish passage is necessary to restore or otherwise protect the resources and the exercise of reserved rights of affected American Indian Tribes; (4) located in a river basin where the need for fish passage is articulated in natural resource plans; (5) located in

a river basin where the biological impact of the project without fish passage would affect, or has affected, fish distribution, production, and diversity within the river basin or surrounding river basins; (6) located in a river basin where a decision to prescribe fishways may conflict with state, regional, tribal, or Federal resource management priorities or affect other fish and wildlife resources through the introduction of non-native or exotic species, exposure to environmental contaminants, or other similar factors; (7) located on a water body where fish passage is necessary to conserve, recover, or continue the existence of species protected under the Endangered Species Act (ESA), or may adversely affect essential fish habitat as determined pursuant to the Magnuson-Stevens Act; (8) located in a river basin where the designated use, existing use, anti-degradation provisions, basin plans, or water quality criteria in applicable state, Federal, or tribal water quality standards developed pursuant to section 303 of the Clean Water Act include or are applicable to migratory fish or their habitat; and, (9) located in a river basin that is presently used by, or provides habitat for use by declining, depleted fish or interjurisdictional fish or that has the potential to provide use or habitat for declining, depleted, or interjurisdictional fish through restoration or fish passage improvements. Other factors may be considered based upon the specifics of the project and resources at issue.

#### *C. Fishway Prescription Formulation*

Fishway prescriptions may take the form of general directives, specific standards, or design criteria or plans. They may include site access, facilities, structures, devices, operations, and measures, including monitoring, evaluation, compliance, and modification, necessary to ensure fishways pass fish in a safe, timely, and effective manner. The Services will formulate fishway prescriptions based upon all relevant information available, including fishway studies; FERC's consultation and environmental review processes; fish management, restoration or natural resource plans; historical records; scientific and technical literature; scientific expertise available to and within the Services; and any other related information available to the Services.

Fishway prescriptions may address those elements of fishway construction, operation, and maintenance necessary to ensure effective fish passage and to maintain and restore all life stages over the term of the license. These elements

include location, flow amounts, gas saturation, water temperature, construction materials, fishway design, operation and construction schedules, performance standards, and operational studies, and post-licensing effectiveness measures and may include scaled drawings showing plan views, elevation views, water surface profile, and cross-section views as appropriate. If Services fishway designs exist for a specific species, they will be provided to the applicant or licensee early in the prescription process. Where appropriate, the Services may provide fish passage measures for hydropower projects during abandonment, decommissioning, or otherwise curtailing operation. The Services will endeavor to prescribe fishways to achieve identified fish passage goals using the best available technology in a practical and effective manner. When the Services determine that equally effective alternative means of meeting and achieving identified fish passage goals exist, they will use the alternative with the minimum cost.

When sufficient information is available, the Services will submit preliminary fishway prescriptions in response to FERC's notice that the project is "ready for environmental analysis" (REA). However, the Services are required by law to base prescriptions on substantial evidence in the FERC record. If information is insufficient at the time of the REA notice, the Services may exercise the FPA section 18 authority by reserving the authority to prescribe. If a prescription is likely, the Services may submit information on fish passage for FERC to include in its analysis. When the Services are not able to prescribe at the time of the REA notice, but anticipate submitting a prescription, the Services will notify FERC and other participants of their target date for submittal of their fishway prescription. Preliminary prescriptions will be provided as soon as sufficient information becomes available, or the Services may exercise section 18 authority through a reservation of authority. If the Services determine that uncertainty continues regarding the impacts of a hydropower project on fish passage, fishway prescriptions will be conservative and resolve the uncertainty in favor of assuring the safe, timely, and effective passage and protection of fish. Fishway prescriptions may include post-licensing evaluation and monitoring requirements to reduce uncertainty regarding effectiveness of fish passage.

At any time during the process when the evidence supports the conclusion that fish passage is not currently needed

or is not currently feasible, the Services will inform the applicant or licensee and FERC and may exercise section 18 by reserving authority to prescribe fishways in the future.

Once a preliminary fishway prescription is submitted to FERC, in a continuation of the consultation and coordination roles of the participants, any interested party may choose to provide new information related to the preliminary prescription to the Services. FERC's publication of its draft NEPA analysis provides a means for additional environmental information to be entered into FERC's record, which must be evaluated by the Services in the context of any preliminary prescriptions submitted. The Services will consider any new information, including new information provided in the draft NEPA document, and may review and modify their preliminary prescriptions as appropriate. Prior to FERC's release of the final NEPA analysis, the Services should either reaffirm the preliminary prescriptions for fishways or submit modified prescriptions for fishways for inclusion in any license or amendment issued by FERC. Furthermore, during the term of the license, the Services may modify a prescription in response to changes in circumstances and/or to new information.

Fishway prescriptions must be related to stated fish passage goals identified or adopted by the Services and could include goals identified by other interested parties in the context of national, regional, and watershed level planning. When watershed, river, or project-specific goals have not been identified, they may be inferred from related documents (i.e., regional goals from national goals). Goals may also be developed by the Services based on available information and on scientific expertise. Thus, relevant goals may be extrapolated from existing documents or be developed within the licensing context. Goals related to fish passage should be included in the administrative record.

Measures may be prescribed so that the Services can obtain information necessary to ensure the effectiveness of fish passage under the new license. These measures may be implemented either before or after construction and may include, but not be limited to, physical, hydraulic, biological, or other modeling; tests; monitoring evaluations; and inspections. These effectiveness measures are considered part of the fishway prescription.

It is not the goal of the Services to engineer the final design of the hydropower project. Accordingly, the Services may, leave the final

engineering details to the applicant or licensee and approve the engineering design proposed by the applicant or licensee to ensure that it adequately addresses the passage requirements of fish affected by the project. The Services will consider passage alternatives proposed by the applicant or licensee so long as passage requirements can be met to the satisfaction of the Services.

#### *D. Documentation*

The Services will file with FERC documentation of substantial evidence that supports the need for fishways, provides the basis for the fishway prescription, and demonstrates that the fishway prescribed is reasonably related to goals identified by the Services. This documentation will be in addition to the information already contained in FERC's administrative record. Such documentation may include, as appropriate, primary and original sources of information, including documents, reports, studies, evaluations, assessments, and other related information relied upon by the Services to develop fishway prescriptions; reasons for decisions regarding the need for fishways; alternatives considered; and any other information relied upon by the Services to develop fishway prescriptions. The Services will exercise best professional judgment in developing fishway conditions based on documentation in the record.

#### **V. Reservation of Authority to Prescribe Fishways**

Future fish passage needs, project design modifications, and management objectives, over the life of a license, cannot always be discerned or predicted when a hydropower project is licensed. Further, it is within the Services' discretion, as affirmed in *Wisconsin Public Service v. FERC*, 32 F. 3d 1165 (7th Cir. 1994), to either issue prescriptions during the licensing or amendment process or to reserve their authority. The Services will generally exercise section 18 of the FPA by reserving that authority for the purpose of maintaining the flexibility necessary to respond to new information prior to licensing and during the license term; e.g., fish passage needs, project modifications, management goals, environmental conditions, and technological innovations. When appropriate, the Services will exercise section 18 by reserving authority to prescribe fishways whether submitting a prescription or not. Because an exercise of section 18, through a reservation of authority to prescribe fishways, can be exercised at any time, such reservation

does not preclude the prescription of fishways prior to license issuance or throughout the term of the license when, and if, a fishway may become necessary. The reservation provides notice to the applicant or licensee of the need to be prepared to construct a fishway during the term of the license. A reservation may be activated when environmental conditions change or new information becomes available. When activated, a reservation to prescribe fishways may result in the formulation of a post-licensing prescription. For example, section 18 authority may be exercised by a reservation where there are no fish at present, but where fish will become present after passage is provided at downstream sites.

#### **VI. Post-Licensing Modification of Fishway Prescriptions**

The post-licensing modification of fishway prescriptions is a necessary mechanism to ensure effective fish passage after the license is issued. Fishway prescriptions may be modified by the Services, after license issuance, to address a number of factors, such as conditions of settlement or licensing; a change in local or regional conditions, technology, management emphasis, or ecological status; availability of new information; amendments to project design or operation; or a need for new or improved fishways at the project. Additionally, new fishways may be prescribed based on the above factors and on the license amended through the use of a license reopener provision.

Post-licensing modification of fishway prescriptions is also appropriate during the initial stages of fishway operation when the results of fishway evaluations indicate that additional prescriptive measures beyond those provided in the license are necessary to make the fishway more effective. Performance evaluations are a measure necessary to ensure the effectiveness of the facility, structure, device, or operation for passing fish. Once the fishway is operating effectively, future modifications will be based on an established need that is supported by substantial evidence, as determined by the Services.

Environmental changes may occur that require a modification of a prescription to maintain or restore the ability of a fishway to pass fish in a safe, timely, and effective manner. The development and implementation of comprehensive natural resource plans, including applicable state, regional, tribal, or Federal fishery management plans, may also warrant fishway prescription modification to meet new

or revised management goals. In such cases, the Services will work with the licensee to the extent possible to develop measures necessary to adapt the existing fishway to meet the passage needs of the plan's target resources before prescribing new facilities, structures, devices, operations, or measures. For all of these and other similar circumstances, the Services will meet with the licensee and other interested parties to identify the need for and specific type of modification required. The fishway prescription process is initiated post-licensing (i.e., when new information is available or when there is a license amendment), by the Services' filing a motion with FERC, with copies to the licensee and interested entities. The motion may be made pursuant to a reservation of authority, standard reopener, or license amendment proceeding. In all other respects, the prescription process is the same during both the pre- and the post-licensing periods.

#### VII. Intervention in the FERC Process

FERC's regulations allow any participant with a demonstrable interest in a licensing, post-licensing, or amendment proceeding to file a motion to intervene, and to seek status as a party to the licensing proceeding. In order to preserve their ability to fully participate in the process and to appeal any adverse final licensing decision, the Services should file a timely intervention in all proceedings in which they have an interest, in accordance with FERC's regulations and applicable Departmental procedures. However, party status is not required for the Services to provide fish passage prescriptions.

#### VIII. Relationship to the Endangered Species Act

This policy is intended to guide the Services in the exercise of their authorities under section 18 of the FPA. The requirements for conserving threatened and endangered species are separately set forth in the ESA and implementing regulations at 50 CFR part 402. Where fish passage for both listed and nonlisted species is involved, Services' personnel will fully coordinate fish passage efforts with endangered species efforts to provide consistent and unified fishway prescriptions for the safe, timely, and effective passage of fish. Fishway prescription formulation should be fully integrated with the ESA section 7 consultation process in FERC's licensing or during the license term.

#### IX. National Environmental Policy Act Compliance

The Services provide preliminary prescriptions to FERC for inclusion in FERC's NEPA analysis of the proposed project. This allows the prescriptions to be analyzed in the context of the entire project. After FERC completes the NEPA analysis, the Services then modify the prescriptions if necessary, based on the NEPA analysis, and provide them to FERC for inclusion in the final NEPA document and in the license.

#### X. Scope of the Policy

This policy applies to all activities of the Services related to the prescription of fishways at non-Federal hydroelectric projects licensed by FERC pursuant to the FPA. It does not expand the authorities of the Departments or the Services beyond those that currently exist and does not place additional requirements on anyone outside the Departments beyond those that already exist in the FPA and FERC's regulations at 18 CFR, Chapter I. This policy provides guidance for Services' personnel, but allows variations appropriate to individual circumstances.

#### XI. Authority for This Policy

The authority for this policy is section 18 of the Federal Power Act, (16 U.S.C. 811).

Dated: November 20, 2000.

**Jamie Rappaport Clark,**  
*Director, U.S. Fish and Wildlife Service,  
Department of the Interior.*

Dated: December 18, 2000.

**Penelope Dalton,**  
*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*  
[FR Doc. 00-32723 Filed 12-21-00; 8:45 am]  
BILLING CODES 3510-22-S; 4310-55-S

#### DEPARTMENT OF THE INTERIOR

##### Fish and Wildlife Service

#### Availability of Comprehensive Conservation Plan and Summary for Flint Hills National Wildlife Refuge, Hartford, KS

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of Availability.

**SUMMARY:** Pursuant to the Refuge Improvement Act of 1997, the U.S. Fish and Wildlife Service has published the Flint Hills National Wildlife Refuge Comprehensive Conservation Plan and Summary. This Plan describes how the

FWS intends to manage the Flint Hills NWR for the next 10-15 years.

**ADDRESSES:** A copy of the Plan or Summary may be obtained by writing to U.S. Fish and Wildlife Service, Flint Hills NWR, P.O. Box 128, Hartford, KS 66854 or download from <http://www.r6.fws.gov/larp/>.

**FOR FURTHER INFORMATION CONTACT:** Jerre Gamble, U.S. Fish and Wildlife Service, Flint Hills NWR, P.O. Box 128, Hartford, KS 66854; 316/392-5553.

**SUPPLEMENTARY INFORMATION:** Flint Hills National Wildlife Refuge straddles the Neosho River in eastern Kansas. The area is dominated by complex resource management issues revolving around the flood control function of John Redmond Reservoir. Activities associated with agriculture, flood control, and public recreation have placed increasing demands on the landscape and identified the need for more responsible utilization of land and water resources that support the remaining native ecosystem components.

Flint Hills National Wildlife Refuge will continue to conserve habitat for the diverse array of native plants and animals that rely upon the resources of the Refuge for survival. This Plan describes the conservation activities that the Fish and Wildlife Service intends to carry out on Flint Hills NWR.

Dated: December 18, 2000.

**Ralph O. Morgenweck,**  
*Regional Director, Denver, Colorado.*  
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#### DEPARTMENT OF THE INTERIOR

##### Bureau of Land Management

[WO-09310-091310-09PB-0901-0924 1A]

#### Extension of Approved Information Collection, OMB Approval Number 1004-090160

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) announces its intention to request extension of an existing approval to collect certain information from lessees who submit a Geothermal Leasing Report. BLM uses the information to determine if a lessee qualifies for a lease extension. The implementing regulations are found at (43 CFR 3208).