

171 FERC ¶ 62,098

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Douglas Leen

Project No. 14862-001

ORDER GRANTING EXEMPTION FROM LICENSING
(10 MW OR LESS)

(May 21, 2020)

1. On November 28, 2018, as supplemented on June 10, September 24, September 26, and October 1, 2019, Douglas Leen filed an application¹ to exempt his proposed 1.5-kilowatt (kW) Kupreanof Microhydro Project (Kupreanof Project or project) from the requirements of Part I of the Federal Power Act (FPA).² The project is located on an unnamed stream, in Petersburg Borough, Alaska. The project will occupy property owned by the applicant and 0.651 acre of federal land in the Tongass National Forest (Tongass), managed by the U.S. Department of Agriculture's Forest Service (Forest Service).³ As discussed below, this order issues an exemption from licensing for the project.

¹ On September 26, 2019, the applicant informed the Commission of his intent to convert his application for a minor license filed on November 28, 2018, to an application for an exemption from licensing and included the additional information necessary to augment the license application and convert it to an application for exemption from licensing.

² The Commission is authorized to exempt from the licensing requirements of Part I of the FPA, small hydroelectric projects with an installed capacity of 10 megawatts or less that use for the generation of electricity either an existing dam (*i.e.*, one in existence on or before July 22, 2005) or a "natural water feature" without the need for any dam or impoundment. *See* sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2018), *amended by* the Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, 127 Stat. 493 (2013) (amending, *inter alia*, section 405 to define "small hydroelectric power projects" as having an installed capacity that does not exceed 10 megawatts).

³ Because the project will be located on national forest land and involves post-1935 construction, it is required to be licensed (or exempted from licensing) by the Commission pursuant to section 23(b)(1) of the FPA. *See* 16 U.S.C. § 817 (2018).

BACKGROUND

2. The Commission issued a public notice of the application filing, which was published in the *Federal Register* on December 18, 2018.⁴

3. On October 23, 2019, the Commission issued a public notice accepting the application, indicating the application was ready for environmental analysis, and setting December 22, 2019, as the deadline for filing motions to intervene, comments, recommendations, and terms and conditions.⁵ The Alaska Department of Fish and Game (Alaska DFG) filed comments on December 19, 2019. No motions to intervene were filed.

4. An Environmental Assessment (EA), prepared by Commission staff, was issued on March 30, 2020.⁶ The EA analyzes the effects of the proposed project and alternatives to it. The EA contains background information, an analysis of project impacts, and support for the requirements of this exemption from licensing. On April 29, 2020, the Forest Service stated it supported the analysis and conclusions of the EA. Based on the record of the proceeding, including the EA, granting an exemption from licensing for the Kupreanof Project would not constitute a major federal action significantly affecting the quality of the human environment. All comments have been fully considered in determining whether, and under what conditions, to issue this exemption.

PROJECT DESCRIPTION

5. The project will divert water from natural pools within the east and west branches of an unnamed stream. A 3-foot-long, 1.5-foot-wide, 1.5-foot-deep steel intake box will be installed in the east branch and a 2.5-foot-long, 1-foot-wide, 1.25-foot-deep steel intake box will be installed in the west branch. The intake boxes will have top openings, screened with an angled steel plate with 0.125-inch diameter holes, and will be elevated above the streambed to allow flow to pass around the intakes to ensure a continuous flow in the unnamed stream below the diversions. Water collected through the east branch intake will be conveyed to the powerhouse through a 6-inch diameter, 458-foot-long partially buried plastic penstock. A 3-inch-diameter, 30-foot-long, partially buried plastic penstock will connect the west branch intake with the east branch penstock. The powerhouse will contain a 1.5-kilowatt (kw) turbine/generator unit. Water will be discharged from the powerhouse through a 3-foot-long, 3-foot-wide tailrace that

⁴ 83 Fed. Reg. 64,822 (2018).

⁵ 84 Fed. Reg. 57,865 (2019).

⁶ Environmental Assessment for Small Hydroelectric Project Exemption, Kupreanof Microhydro Project, Project No. 14862-001 (Mar. 30, 2020).

discharges into the mainstem of the stream about 525 feet below the confluence of the east and west branches. Power will be transmitted over a 420-foot long transmission line that will be attached to the underside of an existing boardwalk and trees to connect to a battery bank located in a shed adjacent to Mr. Leen's residence. The proposed project boundary encloses all of the project facilities described above. The power will serve Mr. Leen's residence. The average annual generation will be about 2.5 MWh.

6. Mr. Leen proposes to use diverted water for hydropower generation and to return all diverted flows to the unnamed stream after it passes through the powerhouse.⁷ Mr. Leen proposes to maintain a year-round minimum flow of 50 gallons per minute (gpm), or inflow, whichever is less, in the 525-foot-long mainstem bypassed reach. The minimum flow will be measured immediately below the confluence of the east and west branch.

7. The maximum hydraulic capacity of the project will be 300 gpm. At flows of 50 gpm or less in the mainstem, the project will not operate, and all flow will pass downstream of the intakes. At flows greater than 50 gpm and up to 350 gpm (the maximum hydraulic capacity plus the minimum flow), the project will operate, and 50 gpm will be passed into the bypassed reach. At flows greater than 350 gpm, the project will operate at its maximum capacity, and all remaining flow will pass downstream of the intakes into the bypassed reach.

8. In addition to the measures described above, Mr. Leen proposes to: (1) install boulders in the project's tailrace to prevent the powerhouse discharge from eroding the streambank; (2) restore stream contours, stream banks, and trenched areas to a pre-construction condition; and (3) rinse footwear prior to entering project land during construction to prevent the spread of invasive plants.

FPA SECTION 30(c) CONDITIONS

9. Pursuant to section 405 of Public Utility Regulatory Policies Act (PURPA),⁸ 10-megawatt exemptions are subject to the requirements of section 30(c) of the FPA,⁹ which provides, among other things, that the Commission "shall include in any such exemption ... such terms and conditions as the Fish and Wildlife Service, National Marine Fisheries Service, and the State [fish and wildlife] agency each determine are appropriate to prevent loss of, or damage to, [fish and wildlife] resources" Article 2 of all

⁷ The applicant refers to this mode of operation as "run-of-river."

⁸ 16 U.S.C. § 2705(b) (2018).

⁹ *Id.* § 823a(c).

exemptions requires compliance with the terms and conditions filed by federal and state fish and wildlife agencies to protect fish and wildlife resources (section 30(c) conditions).¹⁰

10. No terms and conditions were filed for the project by federal or state fish and wildlife agencies.

THREATENED AND ENDANGERED SPECIES

11. Section 7(a)(2) of the Endangered Species Act of 1973¹¹ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species or result in the destruction or adverse modification of their designated critical habitat.

12. No federally listed or proposed species, or critical habitats, are known to occur in the project area; therefore, issuing an exemption from licensing would have no effect on federally listed threatened and endangered species.¹² No further action under the Endangered Species Act is required.

NATIONAL HISTORIC PRESERVATION ACT

13. Under section 106 of the National Historic Preservation Act¹³ and its implementing regulations,¹⁴ federal agencies must take into account the effect of any proposed undertaking on properties listed, or eligible for listing, in the National Register (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Office (SHPO) to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

14. By letter filed May 1, 2020, the Alaska SHPO concurred with staff's determination that the project would have no effect on any cultural resources listed on or eligible for the National Register of Historic Places. However, certain project

¹⁰ 18 C.F.R. § 4.106 (2019).

¹¹ 16 U.S.C. § 1536(a) (2018).

¹² EA at 8.

¹³ Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108 (2018).

¹⁴ 36 C.F.R. Part 800 (2019).

modifications not specifically authorized by this exemption could adversely affect cultural resources, such as maintenance activities, land-clearing or land-disturbing activities not contemplated by the exemption, or changes to project operation or facilities. Therefore, Article 29 requires the exemptee to consult with the Alaska SHPO and potentially affected tribes prior to conducting any such project modifications to determine the effects of the activities and the need for protective measures.

15. While the project will have no adverse effects on known historic properties, cultural resources could be discovered during constructing or operating the project. Therefore, Article 30 requires the exemptee to stop work and consult with the Alaska SHPO and potentially affected tribes, if previously unidentified cultural resources are discovered during project construction or operation.

RECOMMENDATIONS AND OTHER MEASURES

A. Flow Diversion and Return

16. In the EA, Commission staff concluded that the applicant's proposal to only use diverted water for hydropower generation and to return all diverted flows to the unnamed stream after it passes through the powerhouse would maintain stable conditions for aquatic resources downstream of the project and recommended that this mode of project operation be required as a condition of any exemption issued for the project.¹⁵ Article 24 requires this measure.

B. Minimum Flow

17. In the EA, Commission staff concluded that maintaining the proposed minimum flow of 50 gpm, or inflow, whichever is less, in the mainstem bypassed reach would maintain habitat and stream connectivity, for both resident and anadromous fish during project operation.¹⁶ Therefore, Article 25 of this exemption requires the exemptee to maintain a minimum flow of 50 gpm, or inflow, whichever is less, in the bypassed reach and to report deviations from the minimum flow requirement.

¹⁵ EA at 14 - 15.

¹⁶ EA at 16.

C. Operation Compliance Monitoring

18. In the EA, Commission staff recommended developing an operation compliance monitoring plan, to monitor and document compliance with the required minimum flow.¹⁷ Article 26 requires the plan.

D. Erosion and Sediment Control

19. To minimize erosion, Mr. Leen proposes to restore all disturbed stream contours and streambank areas to a pre-construction condition and refill trenched areas with excavated soils. However, Mr. Leen's proposal lacks detail regarding erosion controls during construction. In the EA, Commission staff recommended developing an erosion and sediment control plan that includes a detailed description of the site-specific best management practices to be implemented to control erosion and sedimentation in construction areas.¹⁸ Article 20 requires the plan.

E. Intake Screens

20. When the project is operating, fish and debris could become entrained into the project intake, penstock, and turbine. To prevent entrainment, Mr. Leen proposes to install an angled perforated plate with 0.125-inch diameter holes on each of the intakes. In the EA, Commission staff concluded that this covering would prevent entrainment of juvenile and adult salmonid species, including rearing coho salmon that may occur in the vicinity of the submerged intakes.¹⁹ Staff also concluded that an angled screen design would help guide fish and debris over and away from the intake screen face and into the bypassed reach. Article 27 of the exemption requires these intake screens to be installed during operation of the project.

F. Invasive Plants Management

21. Japanese knotweed and other invasive plant species were documented in the project area. To prevent the introduction and spread of invasive species, Mr. Leen proposes to rinse footwear prior to entering project land during construction. Because of the difficulty in controlling Japanese knotweed and other invasive plants, Commission staff concluded additional measures, such as also cleaning equipment, would be helpful in preventing the spread of invasive plants during project construction and operation. Therefore, in the EA, Commission staff recommended developing an invasive plants

¹⁷ EA at 29.

¹⁸ EA at 28 – 29.

¹⁹ EA at 17.

management plan that includes cleaning equipment and footwear prior to entering the project lands during construction, operation, and maintenance of the project.²⁰ Article 28 of this exemption requires the plan.

ADMINISTRATIVE PROVISIONS

22. All projects exempted from licensing under Part I of the FPA are subject to standard terms and conditions. These terms and conditions are included as standard Articles 1 through 9. Special Articles 10 through 30 which provide for administration of the exemption from licensing and dam safety, are also included in this exemption.

A. Annual Charges

23. The Commission collects annual charges from exemptees for the administration of its hydropower program.²¹ However, as explained in Article 10, under the regulations currently in effect, projects with an authorized installed capacity of 1,500 kW or less, like this project, are not currently assessed an annual charge.

B. Start of Construction

24. Standard Article 3 provides that the Commission may revoke the exemption if actual construction of the project's generating facilities has not begun within two years or has not been completed within four years from the date this exemption is granted. Additionally, Article 11 is included in this exemption and states that the exemptee must commence construction of the project works within two years from the issuance date of the exemption and complete construction of the project within four years from the issuance date of the exemption.²²

C. Exhibit F and G Drawings

25. The Commission requires exemptees to file sets of project drawings for Commission approval. Because the Exhibit F drawings, filed on September 24, 2019 and October 1, 2019, do not include a profile view showing the major project features, the Exhibit F drawings cannot be approved. The Exhibit G drawing filed on October 1, 2019, is also not approved. The Exhibit G drawing shows the west branch intake but

²⁰ EA at 29.

²¹ 18 C.F.R. § 11.1(b)(2) (2019).

²² The deadlines in Standard Article 3 (contained in the attached Form E-2) refer to the project's generating facilities. The deadlines in special Article 11 apply to on-the-ground construction of other project facilities.

does not show the west branch penstock. Article 12 requires the exemptee to file revised Exhibit F drawings that include profile drawings of major project features, and G drawings showing the west branch penstock. The drawings must comply with the requirements specified in sections 4.39 and 4.41 of the Commission's regulations.²³

26. Where new construction or modifications to the project are involved, the Commission requires exemptees to file revised drawings of project features as-built. Article 13 provides for the filing of these drawings.

D. Project Safety

27. In the interest of ensuring the safety of this project, Article 14 is included in this exemption and requires the exemptee to comply with Part 12 (Safety of Water Power Projects and Project Works) of the Commission's regulations, which governs the safety of water power projects and project works.²⁴

E. Operation and Maintenance

28. Ensuring that the exempted project is operated and maintained as required by this exemption is an important public interest function of the Commission. Therefore, Article 15 is included in this exemption and states that if the exemptee causes or allows essential project property to be removed or destroyed, or to become unfit for use, without adequate replacement, the Commission will deem it the exemptee's intent to surrender the exemption.

F. Exemptee Liability

29. Section 10(c) of the FPA provides that licensees, and not the United States, are liable for "damages occasioned to the property of others by the construction, maintenance, or operation of the project works...."²⁵ To clarify that exemptees are similarly liable, Article 16 is included in this exemption and states that the exemptee is liable for damages to the property of others.

G. Project Financing

30. To ensure that there are sufficient funds available for project construction, operation, and maintenance, Article 17 requires the exemptee to file, for Commission

²³ 18 C.F.R. §§ 4.39 and 4.41(g)-(h) (2019).

²⁴ 18 C.F.R. Part 12 (2019). Article 14 is broader than Standard Article 8 (contained in the attached Form E-2), which essentially is subsumed in Article 14.

²⁵ 16 U.S.C. § 803(c) (2018).

approval, documentation of project financing for the construction, operation, and maintenance of the project at least 90 days before starting project construction.

H. Property Rights

31. Pursuant to 18 C.F.R. § 4.31(c)(2)(ii), an applicant for an exemption is required to demonstrate that, at the time it files its exemption application, it has sufficient rights to any non-federal land and facilities required for the construction and operation of the project. Mr. Leen's application, as supplemented, contains documentation that he has the necessary property rights to develop and operate the project. However, because an exemption is issued in perpetuity, Article 18 is included in this exemption and reserves the Commission's authority to terminate the exemption if, in the future, the exemptee fails to maintain sufficient rights to comply with the terms and conditions of the exemption.

32. The Forest Service requires an exemptee to obtain a special use authorization prior to commencing ground disturbing activities on National Forest System land.²⁶ Under standard Article 5 of this exemption, the Mr. Leen has one year from issuance of this exemption to obtain the right to occupy the federal lands included in this exemption. Article 19 requires Mr. Leen to document that he has obtained these rights.

I. Review of Final Plans and Specifications

33. To ensure the exemptee is constructing and operating a safe and adequate project, Articles 20 through 23 require the exemptee to provide the Commission's Division of Dam Safety and Inspections (D2SI) – Portland Regional Office, for its review and approval: contract plans and specifications; cofferdam and deep excavation construction drawings, as appropriate; a public safety plan; and project modifications resulting from environmental requirements.

34. The exemptee may not begin any construction until the D2SI – Portland Regional Engineer has reviewed and commented on the plans and specifications, determined that all preconstruction requirements have been satisfied, and authorized, in writing, the start of construction.

The Director orders:

(A) Effective the date this order is issued, the Kupreanof Project is exempted from Part I of the Federal Power Act (FPA), subject to the conditions and the articles specified below.

²⁶ See Letter filed on April 29, 2020 from David Schmid, Regional Forester, U.S. Department of Agriculture, Forest Service.

(B) The project consists of:

- (1) All lands, to the extent of the exemptee's interests in these lands, described in the project description and the project boundary discussion of this order.
- (2) The following project works: (1) two intake boxes screened with inclined plates perforated with 0.125-inch diameter holes: (a) a 3-foot-long, 1.5-foot-wide, 1.5-foot-deep steel intake box located in the east branch of the unnamed stream; and, (b) a 2.5-foot-long, 1-foot-wide, 1.25-foot-deep steel intake box located in the west branch of the unnamed stream; (2) a 6-inch diameter, 458-foot-long partially buried plastic penstock connecting the east branch intake to a powerhouse; (3) a 3-inch-diameter, 30-foot-long, partially buried plastic penstock connecting the west branch intake to the penstock leading from the east branch intake; (4) a powerhouse containing a 1.5-kilowatt (kW) turbine/generator unit; (5) a 3-foot-long, 3-foot-wide tailrace that discharges into the mainstem unnamed stream; (6) a 420-foot-long above-ground transmission line that will bring power to an existing structure that contains a battery bank & inverter.

The project works generally described above are more specifically shown and described by Exhibit A below:

Exhibit A: Pages 4 through 7 filed on October 1, 2019.

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project, all portable property that may be employed in connection with the project, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibit A, as described above, is approved and made part of the exemption. The Exhibit F and Exhibit G drawings filed as part of the application for exemption do not conform to the Commission's regulations and are not approved.

(D) This exemption is also subject to the articles set forth in Form E-2 entitled, "Standard Terms and Conditions of Exemption from Licensing," as reproduced at the end of this order, and the following additional articles:

Article 10. Administrative Annual Charges. The exemptee must pay the United States annual charges, effective as of the start of project construction, as determined in accordance with the provisions of the Commission's regulations in effect from time to time, for the purpose of reimbursing the United States for the cost of administration of the Commission's hydropower program. The authorized installed capacity for that purpose is

1.5 kilowatts. Under the regulations currently in effect, projects with authorized installed capacities of less than or equal to 1,500 kilowatts will not be assessed an annual charge.

Article 11. *Start of Construction.* The Commission may terminate this exemption if the actual construction of any project works has not begun within two years or has not been completed within four years from the issuance date of this exemption. If an exemption is terminated under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing for the same project within two years of the termination.

Article 12. *Exhibit F and G Drawings.* Within 90 days of the issuance date of the exemption, the exemptee must file, for Commission approval, revised Exhibit F and G drawings showing the project boundary and all principal project works necessary for operation and maintenance of the project. The revised Exhibit F drawing must include a profile view showing major project features. The revised Exhibit G drawing must include the west branch penstock. The revised Exhibit F and G drawings must comply with sections 4.39 and 4.41 of the Commission's regulations.

Article 13. *As-built Exhibits.* Within 90 days of completion of construction of the facilities authorized by this exemption, the exemptee must file, for Commission approval, revised Exhibits A, F, and G, as applicable, to describe and show those project facilities as built.

Article 14. *Part 12 Requirements.* This project is subject to Part 12 of the Commission's regulations, 18 C.F.R. Part 12 (as they may be amended from time to time). For the purposes of applying these provisions of Part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

Article 15. *Operation and Maintenance.* The Commission may determine that the exemptee has impliedly surrendered this exemption if essential project property is removed or destroyed or becomes unfit for use, without adequate replacement; or if the project is abandoned or good faith project operation or maintenance is discontinued; or if the exemptee refuses or neglects to comply with the terms of the exemption and the orders of the Commission.

Article 16. *Liability.* This exemption is subject to the provisions of section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c) (2018). That section provides that the exemptee must be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under this exemption; and in no event shall the United States be liable therefore.

Article 17. Documentation of Project Financing. At least 90 days before starting construction, the exemptee must file with the Commission, for approval, the exemptee's documentation for the project financing. The documentation must show that the exemptee has acquired the funds, or commitment for funds, necessary to construct the project in accordance with this order. The documentation must include, at a minimum, financial statements, including a balance sheet, income statement, and a statement of actual or estimated cash flows which provide evidence that the exemptee has sufficient assets, credit, and projected revenues to cover project construction, operation, and maintenance expenses, and any other estimated project liabilities and expenses.

The financial statements must be prepared in accordance with generally accepted accounting principles and signed by an independent certified public accountant. The exemptee must not commence project construction until the filing is approved.

Article 18. Property Rights. The Commission reserves the right to require the exemptee to obtain additional property rights, if such rights become necessary to develop, operate, or maintain the project or to achieve compliance with the terms and conditions of the exemption. The Commission may terminate this exemption if, at any time, the exemptee does not hold sufficient property rights in the land or project works necessary to develop, maintain, and operate the project.

Article 19. Right to Occupy Federal Lands. Within one year of the issuance date of this exemption, the exemptee shall file documentation with the Commission showing it has obtained the right to occupy any federal lands necessary for the construction, operation, and maintenance of the project.

Article 20. Contract Plans and Specifications. At least 60 days prior to the start of any construction, the exemptee must file final design documents with the Secretary of the Commission, preferably through eFiling. The exemptee must also submit two hard copies of the documents to the Division of Dam Safety and Inspections (D2SI)-Portland Regional Engineer. The design documents must include: final plans and specifications, supporting design report, Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, and Soil Erosion and Sediment Control Plan. The exemptee may not begin construction until the D2SI-Portland Regional Engineer has reviewed and commented on the documents, determined that all preconstruction requirements have been satisfied, and authorized start of construction.

The Soil Erosion and Sediment Control Plan must include: a detailed description of the site-specific best management practices to be implemented to control erosion and sedimentation in construction areas; an implementation schedule; and any monitoring or maintenance programs.

Article 21. Cofferdam and Deep Excavation Construction Drawings. Should construction require cofferdams or deep excavations, the exemptee must: (1) have a

Professional Engineer who is independent from the construction contractor, review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction; and (2) ensure that construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of any cofferdams or deep excavations, the exemptee must file the approved cofferdam and deep excavation construction drawings and specifications, and the letters of approval with the Secretary of the Commission, preferably through eFiling. The exemptee must also submit two hard copies of the documents to the Commission's Division of Dam Safety and Inspections-Portland Regional Engineer.

Article 22. Public Safety Plan. Within 60 days from the issuance of this order, the exemptee must file a Public Safety Plan with the Secretary of the Commission, preferable through eFiling. The exemptee must also submit two hard copies of the document to the Commission's Division of Dam Safety and Inspections-Portland Regional Engineer. The plan must include a description of all safety devices and signage needed to warn the public of fluctuations in flow from the project or otherwise protect the public in the use of project lands and waters. The plan must also include a map showing the location of all public safety measures. For guidance on preparing public safety plans the exemptee can review the *Guidelines for Public Safety at Hydropower Projects* on the FERC website.

Article 23. Project Modification Resulting from Environmental Requirements. If environmental requirements under this exemption require modification that may affect the project works or operations, the exemptee must consult with the Commission's Division of Dam Safety and Inspections-Portland Regional Engineer. Consultation must allow sufficient review time for the Commission to ensure that the proposed work does not adversely affect the project works, dam safety, or project operation.

Article 24. Flow Diversion and Return. The exemptee must immediately return all diverted flows to the unnamed stream after the flows are used to generate power in order to protect aquatic habitat downstream of the powerhouse discharge.

Article 25. Minimum Flow in the Bypassed Reach. The exemptee must operate the project to maintain a minimum flow of 50 gallons per minute or inflow, whichever is less, in the bypassed reach of the unnamed stream as measured immediately below the confluence of the west branch and east branch of the unnamed stream.

Planned Deviations:

Minimum flow requirements may be temporarily modified if required by operating emergencies beyond the control of the exemptee, or for short periods, up to 3 weeks, after mutual agreement among the exemptee and the Alaska Department of Fish and Game and U.S. Forest Service. After concurrence from the agencies, the exemptee must file a

report with the Secretary of the Commission as soon as possible, but no later than 14 calendar days after the onset of the planned deviation. Each report must include: (1) the reasons for the deviation and whether operations were modified; (2) the duration and magnitude of the deviation; (3) any observed or reported environmental effects; and (4) documentation of consultation with the agencies. For planned deviations exceeding 3 weeks, the exemptee must file an application for a temporary amendment of minimum flow releases, and receive Commission approval prior to implementation.

Unplanned Deviations, More Than 3 Hours or Resulting in Environmental Effects:

If the exemptee deviates from minimum flow requirement, the exemptee must report each incident to the Secretary of the Commission. For any deviation that lasts longer than 3 hours or results in environmental effects, the exemptee must file a report as soon as possible, but no later than 14 calendar days after each such incident. The report must include: (1) the cause of the event; (2) the duration and magnitude of the deviation; (3) any pertinent operational and/or monitoring data; (4) a timeline of the incident and the exemptee's response; (5) any comments or correspondence received from the resource agencies, or confirmation that no comments were received from the resource agencies; (6) documentation of any observed or reported environmental effects; and (7) a description of measures implemented to prevent similar deviations in the future.

Unplanned Deviations Lasting 3 Hours or Less and with No Environmental Effects:

For deviations lasting 3 hours or less that do not result in environment effects, the exemptee must file an annual report, by January 31, describing each incident up to 1 month prior to the reporting date, including: (1) the cause of the event; (2) the duration and magnitude of the deviation; (3) any pertinent operational and/or monitoring data; (4) a timeline of the incident and the exemptee's response; (5) any comments or correspondence received from the resource agencies, or confirmation that no comments were received from the resource agencies; and (6) a description of measures implemented to prevent similar deviations in the future. Any deviations that occur within the month prior to the reporting date should be included in the following year's report.

Article 26. Operation Compliance Monitoring. Within one year of issuance of the exemption, the exemptee must file with the Commission for approval, an operation compliance monitoring plan that describes how the exemptee will monitor and report compliance with the operational requirements of the exemption. The plan, at a minimum, must include a detailed description of how the exemptee will monitor and document compliance with the minimum flow requirements, a provision to maintain a log of project operation, and an implementation schedule.

The Commission reserves the right to require changes to the plan. Implementation

of the plan and operation of the project must not begin until the plan is approved by the Commission. Upon Commission approval, the exemptee must implement the plan and schedule, including any changes required by the Commission.

Article 27. Intake Screens. To protect aquatic resources in the unnamed stream during project operation, the exemptee must cover the intake openings with inclined plates perforated with holes not to exceed 0.125-inch in diameter.

Article 28. Invasive Plants Management. At least 90 days prior to the start of any ground-disturbing activity, the exemptee must file with the Commission, for approval, an invasive plants management plan developed in consultation with the Forest Service. The purpose of this plan is to minimize the risk of establishing or propagating non-native invasive species on project lands during project construction and operation. The plan, at a minimum, must include a detailed description of methods the exemptee will employ for cleaning equipment and footwear prior to entering the project lands during construction, operation, and maintenance of the project.

The exemptee must include with the plan documentation of consultation, copies of recommendations on the plan after it has been prepared and provided to the Forest Service, and specific descriptions of how the Service's comments are accommodated in the plan. The exemptee must allow a minimum of 30 days for the Forest Service to comment and to make recommendations prior to filing the plan with the Commission. If the exemptee does not adopt a recommendation, the filing must include the exemptee's reasons based on project-specific reasons.

The Commission reserves the right to require changes to the plan. Implementation of the plan and construction of the project must not begin until the plan is approved by the Commission. Upon Commission approval, the exemptee must implement the plan, including any changes required by the Commission.

Article 29. Protection of Cultural Resources. Prior to implementing any project modifications not specifically authorized by this exemption, including but not limited to maintenance activities, land-clearing or land-disturbing activities, or changes to project operation or facilities, the exemptee must consult with the Alaska State Historic Preservation Office (Alaska SHPO) and potentially affected tribes to determine the effects of the activities and the need for any cultural resource studies or measures. If no studies or measures are needed, the exemptee must file with the Commission documentation of its consultation with the Alaska SHPO and tribes.

If a project modification is determined to affect a historic property, the exemptee must file, for Commission approval, a historic properties management plan (HPMP) prepared by a qualified cultural resource specialist after consultation with the Alaska SHPO. In developing the HPMP, the exemptee must use the Advisory Council on

Historic Preservation and the Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002. The HPMP must include the following items: (1) a description of each historic property; (2) a description of the potential effect on each historic property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of the nature and extent of consultation; and (5) a schedule for implementing mitigation and conducting additional studies. The Commission reserves the right to require changes to the HPMP.

The exemptee must not implement any project modifications, other than those specifically authorized in this exemption, until informed by the Commission that the requirements of this article have been fulfilled.

Article 30. Protection of Undiscovered Cultural Resources. If the exemptee discovers previously unidentified cultural resources during the course of constructing, maintaining, or operating project works or other facilities at the project, the exemptee must stop all land-clearing and land-disturbing activities in the vicinity of the resource and consult with the Alaska State Historic Preservation Office (Alaska SHPO) and potentially affected tribes to determine the need for any cultural resource studies or measures. If no studies or measures are needed, the exemptee must file with the Commission documentation of its consultation with the Alaska SHPO and tribes.

If a discovered cultural resource is determined to be eligible for the National Register of Historic Places (National Register), the exemptee must file, for Commission approval, a historic properties management plan (HPMP) prepared by a qualified cultural resource specialist after consultation with the Alaska SHPO. In developing the HPMP, the exemptee must use the Advisory Council on Historic Preservation and the Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002. The HPMP must include the following items: (1) a description of each discovered property that is eligible to be listed in the National Register; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of the nature and extent of consultation; and (5) a schedule for implementing mitigation and conducting additional studies. The Commission reserves the right to require changes to the HPMP.

The exemptee must not resume land-clearing or land-disturbing activities in the vicinity of a cultural resource discovered during construction until informed by the Commission that the requirements of this article have been fulfilled.

(E) The exemptee must serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

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(F) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 8251 (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019). The filing of a request for rehearing does not operate as a stay of the effective date of this exemption or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

for
Terry L. Turpin
Director
Office of Energy Projects

FEDERAL ENERGY REGULATORY COMMISSION

Section 4.106 - Standard Terms and Conditions of Exemption from Licensing

Any exemption from licensing granted under this subpart for a small hydroelectric power project is subject to the following standard terms and conditions:

Article 1. The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

Article 2. The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service, the National Marine Fisheries Service, and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or to otherwise carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

Article 3. The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the date on which this exemption was granted. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

Article 4. This exemption is subject to the navigation servitude of the United States if the project is located on navigable waters of the United States.

Article 5. This exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal agencies. The Commission may accept a license application by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

Article 6. In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

Article 7. The Commission may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant.

Article 8. Any exempted small hydroelectric power project that utilizes a dam that is more than 33 feet in height above streambed, as defined in 18 C.F.R. 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 C.F.R. part 222, is subject to part 12 of the Commission's regulations, part 12 of this title (as they may be amended from time to time).

Article 9. Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

Document Content(s)

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