ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 17-1003

MAINE COUNCIL OF THE ATLANTIC SALMON FEDERATION, *ET AL.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

Robert H. Solomon
Solicitor

Lona T. Perry
Deputy Solicitor

For Respondent Federal
Energy Regulatory Commission
Washington, D.C. 20426

MARCH 15, 2018

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Merimil Limited Partnership*, 155 FERC ¶ 61,185 (May 19, 2016); and

2. *Merimil Limited Partnership*, 157 FERC ¶ 61,089 (Nov. 7, 2016).

C. Related Cases

This case is related to *Maine Council of the Atlantic Salmon Federation v. NMFS*, 858 F.3d 690 (1st Cir. 2017). In that appeal, the court reviewed a district court decision dismissing a case by petitioners here, seeking to directly challenge a biological opinion issued by the National Marine Fisheries Service. The First Circuit affirmed the district court dismissal, finding that review of the biological opinion was subject to the exclusive jurisdiction of the court of appeals to review these FERC orders.

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

March 15, 2018

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES 1

STATEMENT REGARDING JURISDICTION 3

STATUTORY AND REGULATORY PROVISIONS…. 4

STATEMENT OF THE FACTS 5

I. STATUTORY AND REGULATORY BACKGROUND 5

II. THE 1998 KENNEBEC AGREEMENT 6

III. THE 2009 EXPANSION OF SALMON CRITICAL HABITAT TO INCLUDE PROJECT LOCATIONS 9

A. The Interim Plan 9

B. The Fisheries Service Biological Opinion 12

IV. THE CHALLENGED ORDERS 15

A. The License Order 15

B. The Rehearing Order 18

SUMMARY OF ARGUMENT 19

ARGUMENT……. 21

I. STANDARD OF REVIEW 21

II. THIS COURT LACKS JURISDICTION TO CONSIDER CONSERVATION GROUPS' ALLEGED DEFECTS IN THE BIOLOGICAL OPINION 23

TABLE OF CONTENTS

III. THE COMMISSION REASONABLY REJECTED THE TWO ARGUMENTS MADE IN CONSERVATION GROUPS' BRIEF THAT WERE PRESERVED FOR REVIEW 30

A. The Commission Reasonably Relied On The Biological Opinion 30

B. The Commission Reasonably Determined That The Interim Plan Did Not Conflict With The Kennebec Agreement 34

CONCLUSION….. 37

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Allegheny Power v. FERC,
437 F.3d 1215 (D.C. Cir. 2006).. 23, 27

Bennett v. Spear,
520 U.S. 169 (1997)... 31

**California Sportfishing Protection Alliance v. FERC*,
193 Fed. Appx. 655 (9th Cir. 2006) 25, 26

Central Maine Power Co. v. FERC,
252 F.3d 34 (1st Cir. 2001)... 37

**City of Tacoma v. FERC*,
460 F.3d 53 (D.C. Cir. 2006)......................... 4, 5, 6, 22, 23, 26, 31, 32, 33

City of Tacoma v. Taxpayers of Tacoma,
357 U.S. 320 (1958)... 23, 24

Duncan's Point Lot Owners Ass'n v. FERC,
522 F.3d 371 (D.C. Cir. 2008)... 21

FERC v. Elec. Power Supply Ass'n,
136 S. Ct. 760 (2016)... 21

First Iowa Hydro-Elec. Coop. v. FPC,
328 U.S. 152 (1946).. 5

Hoopa Valley Tribe v. FERC,
629 F.3d 209 (D.C. Cir. 2010)... 29

**Ind. Util. Reg. Comm'n v. FERC*,
668 F.3d 735 (D.C. Cir. 2012)... 4, 23, 27

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Keating v. FERC,
569 F.3d 427 (D.C. Cir. 2009).. 24

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989)... 22

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983)... 22

Myersville Citizens for a Rural Cmty., Inc. v. FERC,
783 F.3d 1301 (D.C. Cir. 2015)... 22

**Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*,
962 F.2d 27 (D.C. Cir. 1992)... 4, 23

Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy,
898 F.2d 1410 (9th Cir. 1990) 32

San Luis & Delta-Mendota Water Auth. v. Locke,
776 F.3d 971 (9th Cir. 2014) 5

Save Our Sebasticook v. FERC,
431 F.3d 379 (D.C. Cir. 2005).. 25

S.C. Pub. Serv. Auth. v. FERC,
762 F.3d 41 (D.C. Cir. 2014).. 22

Stop H-3 Ass'n v. Dole,
740 F.2d 1442 (9th Cir. 1984) 32

Wabash Valley Power Ass'n, Inc. v. FERC,
268 F.3d 1105 (D.C. Cir. 2001)... 24, 25

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

City of Tacoma, Washington,
110 FERC ¶ 61,140 (2005) 26

Edwards Manufacturing Co., Inc., et al.,
84 FERC ¶ 61,227 (1998) 7, 8, 29

Merimil Ltd. Partnership,
110 FERC ¶ 61,240 (2005) 29

Merimil Limited Partnership,
155 FERC ¶ 61,185 (2016) 2, 6-10, 12-16, 18, 27, 28,
29, 31, 33, 34, 35, 36

Merimil Limited Partnership,
157 FERC ¶ 61,098 (2016) 2, 10, 18, 24, 28, 30, 31, 33, 34, 36

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A) 21

Endangered Species Act

Section 3(19), 16 U.S.C. § 1532(19) 13

Section 7(a)(2)-(4), 16 U.S.C. § 1536(a)(2)-(4) 5

Section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A).. 6

Section 9, 16 U.S.C. § 1538 13

TABLE OF AUTHORITIES

STATUTES: **PAGE**

Federal Power Act

Section 4(e), 16 U.S.C. § 797(e) 5

Section 313(a), 16 U.S.C. § 825*l*(a) 23

Section 313(b), 16 U.S.C. § 825*l*(b) 4, 20, 22, 23, 26

National Environmental Policy Act

42 U.S.C. § 4332(2)(C) 28

REGULATIONS:

18 C.F.R. § 385.713(c)(2)... 24

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Conservation Groups	Petitioners Maine Council of the Atlantic Salmon Federation, Natural Resources Council of Maine, Kennebec Valley Chapter of Trout Unlimited, and Maine Rivers
Fisheries Service	The National Marine Fisheries Service
Interim Plan	Interim species protection plan for listed salmon for the years 2013 to 2019
Kennebec Agreement	May 28, 1998 Lower Kennebec River Comprehensive Settlement Accord
Licensees	Brookfield White Pine Hydro, LLC and Merimil Limited Partnership
License Order	*Merimil Limited Partnership*, 155 FERC ¶ 61,185 (May 19, 2016)
Rehearing Order	*Merimil Limited Partnership*, 157 FERC ¶ 61,089 (Nov. 7, 2016)

In the United States Court of Appeals for the District of Columbia Circuit

No. 17-1003

MAINE COUNCIL OF THE ATLANTIC SALMON FEDERATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In 2009, the critical habitat of an endangered salmon subspecies was expanded to include the area around three hydropower projects on the Kennebec River in Maine licensed by the Federal Energy Regulatory Commission (FERC or Commission). In response, the project licensees (Licensees), in consultation with federal and state resource agencies, developed an interim species protection plan (Interim Plan) that would last for seven years. The Interim Plan is designed to

simultaneously improve critical habitat for the salmon in the interim period while conducting studies and employing adaptive management strategies to develop a superior permanent species protection plan to be implemented at the end of the interim period.

In the orders challenged in this appeal, the Commission amended the licenses of the three hydropower projects to include the Interim Plan. *Merimil Limited Partnership*, 155 FERC ¶ 61,185 (May 19, 2016) (License Order), *on reh'g*, 157 FERC ¶ 61,089 (Nov. 7, 2016) (Rehearing Order). The Commission relied both on its own Biological Assessment and a Biological Opinion issued by the National Marine Fisheries Service (Fisheries Service) to find that the Interim Plan would improve the salmons' migratory habitat and was unlikely to jeopardize the salmons' continued existence.

On appeal, petitioners Maine Council of the Atlantic Salmon Federation, Natural Resources Council of Maine, Kennebec Valley Chapter of Trout Unlimited, and Maine Rivers (collectively Conservation Groups) argue that the Commission relied on a flawed Biological Opinion. They base this argument on alleged defects in the Biological Opinion that the Conservation Groups did not raise to the Commission on rehearing. The first question presented on appeal is:

(1) Whether the Court lacks jurisdiction to consider these arguments as they were not preserved on rehearing as required by the Federal Power Act.[1]

Conservation Groups also argue on appeal that the Commission improperly deferred to the Biological Opinion in adopting the Interim Plan and that the Interim Plan conflicts with a 1998 settlement agreement regarding fishery resources in the Kennebec River basin. This appeal therefore also presents the additional following questions:

(2) Whether the Commission reasonably relied on the Biological Opinion, given the Fisheries Service's expertise and the Commission's independent analysis; and

(3) Whether the Commission reasonably concluded that the Interim Plan did not conflict with the 1998 settlement agreement, and was in any event necessary given the subsequent 2009 expansion of critical habitat for listed salmon to include project locations.

STATEMENT REGARDING JURISDICTION

When a Biological Opinion is prepared in the course of a FERC licensing proceeding, "the only means of challenging the substantive validity of the

---

[1] To the extent that the Court reaches the merits of these challenges to the Biological Opinion, these challenges will be addressed in the brief of Intervenor-Respondent Department of Commerce.

[Biological Opinion] is on review of FERC's decision in the court of appeals." *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006). Under the appellate review provision of the Federal Power Act, section 313(b), 16 U.S.C. § 825*l*(b), parties seeking review of Commission orders must first petition the Commission for rehearing and must raise with specificity in that petition all objections urged on appeal. *Ind. Util. Reg. Comm'n v. FERC*, 668 F.3d 735, 738-39 (D.C. Cir. 2012); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). *See* 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.").

On appeal, Conservation Groups raise evidentiary and analytical challenges to the Biological Opinion that they failed to raise before the Commission on rehearing. Accordingly, as discussed more fully in Argument Section II, *infra*, this Court lacks jurisdiction to consider these arguments, and therefore Conservation Groups have presented no justiciable basis on which to challenge the Biological Opinion.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum to this Brief.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The licensing of hydroelectric projects within the Commission's jurisdiction falls under Part I of the Federal Power Act, which constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). Section 4(e) of the Act, 16 U.S.C. § 797(e), authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects in jurisdictional waters.

The Endangered Species Act imposes an obligation on all federal agencies to protect listed species. *Tacoma*, 460 F.3d at 75. Under section 7 of the Act, "[i]f a federal agency concludes that an anticipated action is likely to jeopardize the existence of a listed species or adversely modify its critical habitat, the agency must consult with the appropriate expert agency," here the Fisheries Service. *Id.* (citing 16 U.S.C. §§ 1536(a)(2), (4)). As part of this consultation, the action agency (here FERC) prepares an initial assessment of the project, a Biological Assessment, in which it evaluates the project's impact on listed or endangered species. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2014). The consulting agency reviews the action agency's Biological Assessment and uses it to prepare a Biological Opinion in which it determines

whether the proposed action is likely to adversely impact endangered or listed species, or negatively modify their critical habitat. *Id*. at 988. If the consulting agency concludes that the proposed action will jeopardize species or critical habitats, the Biological Opinion must set out any "reasonable and prudent alternatives" that would protect the listed species and its habitat. *Tacoma*, 460 F.3d at 75 (quoting 16 U.S.C. § 1536(b)(3)(A)). The consulting agency may also issue with the Biological Opinion an incidental take statement that permits the action agency to harm listed species when implementing the reasonable and prudent alternatives without violating the Endangered Species Act. *Id*.

II. THE 1998 KENNEBEC AGREEMENT

This appeal concerns the Lockwood, Shawmut and Weston hydroelectric projects on the Kennebec River in Maine. License Order P 1, JA 569. The Commission originally licensed these projects in the 1960s, and has subsequently relicensed them. *Id*. P 2, JA 570. The current Shawmut license expires in 2021 and the current Lockwood and Weston licenses expire in 2036. *Id*. P 2 nn.3-5, JA 570.

The Kennebec River supports a varied fish population, including both resident and migratory species. License Order P 3, JA 571. In 1998, licensees of a number of projects on the Kennebec and Sebasticook rivers (including Lockwood, Shawmut, and Weston), together with state and federal resource agencies and

environmental groups, filed an offer of settlement, known as the Lower Kennebec River Comprehensive Settlement Accord (Kennebec Agreement), to facilitate the restoration of a number of species in the Kennebec River Basin. License Order P 3-4, JA 571-72. The Commission amended the licenses for the Licensees' projects to incorporate the terms of the Agreement. *Id.* (citing *Edwards Manufacturing Co., Inc., et al.*, 84 FERC ¶ 61,227 (1998) (incorporating relevant parts of the 1998 Kennebec Agreement in the licenses for the Lockwood, Shawmut, and Weston Projects, among others)).

The Kennebec Agreement provides a process and schedule for installing interim and permanent upstream and downstream fish passage facilities for American shad, alewife, blueback herring, Atlantic salmon, and American eel at participating projects, including the Lockwood, Shawmut, and Weston Projects. License Order P 31, JA 580. For interim upstream passage, in accordance with the Agreement, Licensees in 2006 installed a fish lift, as well as a trap, sort and transport system at the Lockwood project that traps fish and trucks them to spawning areas upstream of the Lockwood, Shawmut and Weston projects. *Id.* P 35, JA 581. Interim downstream passage is accomplished through a combination of controlled spills, turbine shutdown, and sluicing which does not require new structures. License Order P 32, JA 580.

Based upon an Environmental Assessment that found that permanent fish passage facilities should be required only when fish are present at the projects, the Agreement required the installation of permanent fish passage facilities only upon occurrence of a biological trigger based on fish population. *See Edwards Manufacturing Co.*, 84 FERC ¶ 61,277 at 62,095-96. At Lockwood, the Agreement provided that permanent fish passage must be installed within two years after 8,000 American shad are captured at the interim Lockwood fish trap in a single season or when Licensees and resources agencies select an alternative biologically-based trigger (e.g., one based on salmon or river herring populations rather than shad). *Id*. at 62,094; License Order P 33 & n.31, JA 580-81. The requisite number of shad were never collected in the Lockwood trap, and the Licensees and resource agencies never adopted an alternative trigger. License Order P 33 & n.31, JA 580-81.

Under the Kennebec Agreement, if the biological trigger had not been met by December 2014 (which it was not), the parties agreed to meet to assess the progress in restoring the species covered by the Agreement and to attempt to reach consensus on future fish passage measures. License Order P 34, JA 581. The parties have initiated discussions under this provision but have not reached consensus. *Id*.

III. THE 2009 EXPANSION OF SALMON CRITICAL HABITAT TO INCLUDE PROJECT LOCATIONS

The Gulf of Maine Distinct Population Segment of Atlantic salmon was listed as endangered on November 17, 2000.[2] At that time, the geographic boundaries for the listed population did not include the areas where the Lockwood, Shawmut and Weston projects are located. License Order P 8, JA 573 (citing 65 Fed. Reg. 69,459 (2000)). In 2009, the Fisheries Service expanded the geographic boundaries of this fish population to include the Kennebec River basin in the population's designated critical habitat, including the location of these three projects. *Id*. (citing 74 Fed. Reg. 29,344 (2009) and 74 Fed. Reg. 29,300 (2009)).

A. The Interim Plan

Following the 2009 expansion of critical salmon habitat to include project locations, Licensees initiated consultation with the Fisheries Service about the potential effect of project operation on the listed salmon. *See* License Order P 9, JA 573 (citing Biological Opinion at 5-6, JA 222-23 (providing consultation history)). Through informal consultation, the Fisheries Service preliminarily

---

[2] A Distinct Population Segment is the smallest division of a species permitted to be protected under the Endangered Species Act. It is a population or group of populations that is discrete from other populations of the species and is significant in relation to the entire species. The Endangered Species Act provides for listing species, subspecies, or distinct population segments of vertebrate species. *See* License Order n.11, JA 572.

determined that the continued operation of the projects was likely to have adverse effects on the listed Atlantic salmon and its designated critical habitat. *See* License Order PP 8-10, JA 573-74 (describing consultation). To address these effects, Licensees developed an interim species protection plan in cooperation with the Fisheries Service, the Fish and Wildlife Service, and the Maine Department of Marine Resources. *Id.*

On February 21, 2013, Licensees filed the proposed Interim Plan and a draft Biological Assessment with the Commission. License Order P 10, JA 574. Licensees requested that the Commission initiate formal consultation with the Fisheries Service on the Interim Plan and incorporate the proposed measures in the project licenses. *Id.* Commission staff independently reviewed and adopted the Biological Assessment and, on March 14, 2013, initiated formal consultation with the Fisheries Service on the listed Atlantic salmon. *Id.* P 11, JA 574; Rehearing Order P 8, JA 618. Commission staff advised the Fisheries Service that the Commission "believe[d] that the measures contained in the Interim [species protection plan] would enable the licensees to best enhance protection of [listed Atlantic salmon] and designated critical habitat" at the projects. *See* March 14, 2013 Letter, R. 991 at 3, JA 151.

The Interim Plan, covering the 7-year period from 2013 to 2019, provides for installing new upstream fishways at the Lockwood, Shawmut and Weston

projects and conducting upstream and downstream passage and survival studies for Atlantic salmon. License Order P 40, JA 583. These studies are to be conducted as part of an adaptive management strategy designed to achieve high passage and survival rates for Atlantic salmon through the projects. *Id.* The Interim Plan contemplates that a final protection plan will be developed and filed for Commission approval in 2019 to cover the remaining period from 2020 to expiration of the Lockwood and Weston project licenses in 2036. *Id.* Because the Shawmut project license expires in 2021, the final plan would be considered in that project's relicensing proceeding. *Id.* P 40 n.34, JA 583.

Under the Interim Plan, for upstream passage, Licensees will continue to use the existing Lockwood fish lift and trap and truck system to provide interim upstream passage for Atlantic salmon past the three projects. Licensees will, however, modify the existing Lockwood fishway to include a volitional component.[3] *Id.* P 42, JA 583 (citing Biological Opinion at 19, JA 236). Once the volitional component has been installed, Licensees will conduct Atlantic salmon adult upstream passage effectiveness studies for up to three years. *Id.* Licensees also will design new upstream passage facilities for the Shawmut and Weston projects in consultation with fisheries agencies. *Id.* P 43, JA 584.

[3] A volitional component of a fish passage system is a structure, like a fish ladder, that allows but does not force, the fish to use it.

For downstream passage, Licensees will expand operation of the downstream passage facilities at the Lockwood, Shawmut, and Weston Projects from April 1 to December 31 each year for use by adult and juvenile Atlantic salmon. License Order P 44, JA 584. Licensees will also study downstream passage of smolts and kelts in consultation with resource agencies.[4] *Id.* P 46, JA 585.

Adaptive management -- that is, provisions to adapt a plan to changing conditions -- is an integral part of the Interim Plan. License Order P 47, JA 586. Measures included in the plan would be subject to revision after agency consultation and, if necessary, Commission approval. *Id.* To that end, Licensees will prepare annual reports to be shared with resources agencies for further consultation. *Id.*

B. The Fisheries Service Biological Opinion

On July 22, 2013, the Fisheries Service filed a Biological Opinion addressing the Interim Plan. License Order P 16, JA 575. *See* Biological Opinion, R. 1014, JA 218. The Fisheries Service concluded that operation of the Lockwood, Shawmut, and Weston Projects under the Interim Plan may adversely affect, but is

---

[4] A smolt is a young salmon when it first migrates from fresh water to the sea. Kelts are adult salmon that have spawned. Kelts require downstream passage because Atlantic salmon can spawn more than once.

not likely to jeopardize, the continued existence of listed Atlantic salmon. License Order P 16, JA 575. Although these projects would continue to adversely affect essential features of the species' designated critical habitat, the proposed action would improve the functioning of migratory habitat by constructing upstream fishways and by implementing an adaptive management strategy to improve downstream survival. *Id*. The Fisheries Service therefore concluded that the proposed action would not lead to adverse modification or destruction of critical habitat. *Id*.

The Biological Opinion included an incidental take statement, which specified the amount of incidental take of Atlantic salmon that can occur through 2019 as a result of project operations and the activities that will take place under the Interim Plan. License Order P 53, JA 587. The incidental take statement includes three "reasonable and prudent" measures to avoid or minimize incidental take of the species, as well as terms and conditions to implement those measures. *Id*. P 54, JA 587. These terms and conditions are non-discretionary actions that the Commission must require in order to comply with the take prohibitions of section 9 of the Endangered Species Act.[5]

---

[5] Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, prohibits any taking of listed species unless the take is authorized in an incidental take statement. As defined in section 3(19) of the Endangered Species Act, 16 U.S.C. § 1532(19),

The first reasonable and prudent measure requires the Commission to ensure in the license that Licensees conduct all in-water and near-water construction activities in a manner that minimizes incidental take of Endangered Species Act-listed species or of those proposed for listing and conserves the aquatic resources on which Endangered Species Act-listed species depend. License Order P 55, JA 588. To implement this measure, the Biological Opinion lists 17 terms and conditions related to: (a) contractor education; (b) timing of construction; (c) erosion control and protection of water quality; (d) storage and staging of materials and construction equipment; and (e) riparian vegetation management.

Under the second reasonable and prudent measure, the Commission must ensure that Licensees measure and monitor the provisions contained in the Interim Plan in a way that adequately protects listed Atlantic salmon. License Order P 56, JA 588. To implement this measure, the Biological Opinion includes 10 terms and conditions for the Lockwood, Shawmut, and Weston Projects, requiring study plans, fishway maintenance and inspection, and specific adaptive management plans to address any downstream passage deficiencies. *Id.*

Under the third reasonable and prudent measure, the Commission must ensure that Licensees complete an annual monitoring and reporting program to

---

"take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

confirm that they are minimizing incidental take and are reporting to the Fisheries Service all project-related observations of dead or injured salmon. License Order P 57, JA 588. To implement this measure, the Commission required Licensees to: (a) notify the Fisheries Service of any changes in operation, maintenance activities, and debris management; (b) contact the Fisheries Service within 24 hours of any interactions with Atlantic salmon, including any non-lethal and lethal takes; and (c) in the event of lethal take, to photograph and preserve any dead salmon or body parts until after discussing disposal with the Fisheries Service. *Id.*

IV. THE CHALLENGED ORDERS

A. The License Order

Following issuance of the Biological Opinion, the Commission amended the project licenses to include the Interim Plan. License Order P 1, JA 569. Licensees developed the Interim Plan in consultation with the Fisheries Service to provide interim measures to protect Atlantic salmon and to avoid or minimize incidental take as a result of project operations. *Id.* P 65, JA 592. The Fisheries Service determined in its Biological Opinion that, if the plan is implemented, the projects may adversely affect, but are not likely to jeopardize the continued existence of the listed salmon. *Id.* The Fisheries Service further concluded that the projects will continue to adversely affect essential features of the designated critical habitat for the species over the interim period. *Id.* However, the plan will improve the

functioning of migratory habitat by constructing three volitional upstream fishways and by implementing an adaptive management strategy to improve fish survival. With these protective measures, the Fisheries Service concluded that the proposed action will not lead to adverse modification or destruction of critical habitat. *Id.*

The Commission found that the Fisheries Service, as the expert agency charged with implementing the Endangered Species Act for these fish, is in the best position to make discretionary factual determinations about the measures needed to protect them. *Id.* P 70, JA 593. Although the Commission is ultimately responsible for ensuring, in consultation with the Fisheries Service, that its actions are in compliance with the Endangered Species Act, the Commission found it is entitled to defer to the expertise of the Fisheries Service, and need not undertake a separate independent analysis of the issues addressed in the Biological Opinion. *Id.* In any event, the Commission independently reviewed and adopted the Biological Assessment in this case, and based on that review found no basis for concluding that the Interim Plan was inadequate to protect listed salmon. *Id.*

With regard to arguments that the Interim Plan measures are inadequately supported or lack sufficient performance standards, *see* License Order P 64, JA 591 (describing comments), the Commission found that the Interim Plan was put into place specifically to develop studies designed to address many of the Conservation Groups' concerns, such as passage efficiency and effectiveness. *Id.*

P 69, JA 593. Through the knowledge gained by these studies, Licensees, after consulting with the Fisheries Service and other resource agencies, should be able to design, construct and operate efficient and effective passage for salmon that can be included in the final species protection plan for these projects, and to establish informed performance standards to be incorporated in the final protection plan. *Id*. PP 66, 69, JA 592, 593 (citing Biological Opinion at 13, JA 230). During the interim period, passage and survival studies, together with adaptive management techniques, will be used to make any needed changes to study design, project structures, or project operation. *Id*. P 66, JA 592.

The Commission further found no conflict between the Interim Plan and the Kennebec Agreement. *Id*. P 74, JA 594. The Kennebec Agreement provides that, if by December 2014 the biological trigger for permanent upstream passage facilities has not been met (i.e., the earlier of either 8,000 shad captured in a single season at the Lockwood interim fish trap or the development of a different biological assessment trigger based on a different fish population), parties to the agreement will attempt to reach consensus upon future fish passage measures. *Id*. P 73, JA 594. Neither trigger was met by December 2014, and the parties have begun consulting as contemplated in the Agreement. *Id*. This effort is separate from the Interim Plan, which deals exclusively with endangered Atlantic salmon as a result of the expanded geographic range for the listed salmon subspecies. *Id*.

Thus, the Commission found that the Interim Plan did not cause the lack of fish passage improvements at the projects and it does not preclude the parties from seeking fish passage improvements under the Agreement at the projects for all the species addressed in the Agreement. *Id*. P 74, JA 594. More important, as Atlantic salmon are listed as endangered, the Commission must give priority to the protection of the salmon in the event of a conflict, whether actual or perceived, with the Kennebec Agreement. *Id*.

B. The Rehearing Order

In their June 17, 2016 Application for Rehearing of the License Order, in their "Reasons for Rehearing," R. 1256 at 3-5, JA 608-10, as relevant here, Conservation Groups challenged the Commission's finding that it properly deferred to the Fisheries Service's conclusions in the Biological Opinion, *see id*. P 14, JA 609, and the finding that adoption of the Interim Plan did not conflict with the Kennebec Agreement. *Id*. PP 11-13, JA 608-09.

In the Rehearing Order, the Commission rejected these arguments. The Commission found that the Interim Plan identifies measures necessary to avoid and minimize the effects of the projects on listed salmon, and does not preclude parties from seeking other fish passage improvements at the projects or from consulting and developing additional measures for other fish species addressed in the Kennebec Agreement. Rehearing Order P 5, JA 617. Moreover, the Commission

must give priority to the protection of endangered species like the Atlantic salmon, and must prioritize developing protection measures in a timely manner regardless of any perceived conflict with the Kennebec Agreement. *Id*. "It would be imprudent for the Commission to indefinitely delay implementation of the Interim Plan to minimize adverse project impacts until there is a consensus by the parties to the Kennebec Agreement on permanent mitigation measures." *Id*.

The Commission also found that it reasonably relied on the Fisheries Service, the expert agency charged with implementing the Endangered Species Act for Atlantic salmon. *Id*. P 8, JA 618. Further, the Commission independently reviewed and adopted Licensees' Biological Assessment and consulted with the Fisheries Service on the Interim Plan. *Id*. Based on that assessment, the Commission found no basis to second-guess the expert agency's determination. *Id*.

SUMMARY OF ARGUMENT

In 2009, the designated critical habitat for an endangered salmon subspecies was expanded to include, as relevant here, the area of three hydropower projects on the Kennebec River in Maine. In response to that expansion, the licensees of those projects, in consultation with the Fisheries Service, developed an interim species protection plan for the listed salmon. The purpose of adopting interim measures was to mitigate adverse effects on the salmon from project operations, while studies and adaptive management practices were undertaken to craft a more

effective permanent species protection plan. In the challenged orders, the Commission amended Licensees' project licenses to include the Interim Plan.

In this appeal, Conservation Groups argue that the Commission relied on a flawed Fisheries Service Biological Opinion. Conservation Groups, however, failed to raise the alleged defects in the Biological Opinion to the Commission on rehearing, and therefore under section 313(b) of the Federal Power Act this Court lacks jurisdiction to consider those arguments. The Commission reasonably relied on both the expert agency's Biological Opinion and on its own independent analysis to conclude that the Interim Plan satisfied the Commission's obligation under the Endangered Species Act to protect listed salmon.

Conservation Groups also argue that the Interim Plan conflicts with the 1998 Kennebec Agreement concerning fish passage measures for several species of fish on the Kennebec River. The Commission reasonably found no conflict. The interim fish passage measures required by the Kennebec Agreement would continue to operate and would be enhanced under the Interim Plan. The Kennebec Agreement required no installation of permanent fish passage measures unless a biological trigger (8,000 American shad collected at the Lockwood interim fish lift facilities in a single season) was reached prior to December 2014, which did not occur. The Agreement instead provided for further consultation among the parties, which is ongoing.

In any event, the Commission must give priority to the protection of the endangered salmon, and must prioritize developing protective measures in a timely manner, regardless of any perceived conflict between the Kennebec Agreement and the Interim Plan. It would be imprudent for the Commission to indefinitely delay implementation of the Interim Plan to minimize adverse project impacts until there is consensus by the parties to the Kennebec Agreement on permanent mitigation measures.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of the Commission's hydroelectric licensing decisions is deferential, and limited to determining whether they are arbitrary and capricious. *See Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 375 (D.C. Cir. 2008); 5 U.S.C. § 706(2)(A) (reviewing court shall set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice

made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court). In the context of the Endangered Species Act, where the Court is reviewing the Commission's reliance on a consulting agency's Biological Opinion, "the critical question" is whether FERC's decision to rely on the Biological Opinion was arbitrary and capricious. *Tacoma*, 460 F.3d at 75.

"The Commission's factual findings are conclusive if supported by substantial evidence." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (citing 16 U.S.C. § 825*l*(b)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence." *Id.* (internal quotation marks and citations omitted). When considering an agency's "evaluation of scientific data within its technical expertise," the Court affords "an extreme degree of deference." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (internal quotation marks omitted); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.") (internal quotation marks omitted).

II. THIS COURT LACKS JURISDICTION TO CONSIDER CONSERVATION GROUPS' ALLEGED DEFECTS IN THE BIOLOGICAL OPINION.

When a Biological Opinion is prepared in the course of a FERC licensing proceeding, "the only means of challenging the substantive validity of the [Biological Opinion] is on review of FERC's decision in the court of appeals." *Tacoma*, 460 F.3d at 76. Under the appellate review provision of the Federal Power Act, section 313(b), 16 U.S.C. § 825*l*(b), parties seeking review of Commission orders must first petition the Commission for rehearing and must raise in that petition all of the objections urged on appeal. *Platte River*, 962 F.2d at 34. *See* 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.").

Further, "because an application for rehearing must 'set forth specifically the ground or grounds upon which such application is based,' 16 U.S.C. § 825*l*(a), [the court's] jurisdiction is limited by the extent to which a petitioner objected 'with specificity.'" *Ind. Util. Reg. Comm'n*, 668 F.3d at 738-39 (quoting *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006)). *See* Federal Power Act section 313(a), 16 U.S.C. § 825*l*(a) ("The application for rehearing shall set forth specifically the ground or grounds upon which such application is based."); *City of*

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958) (section 313 provides that aggrieved party may have judicial review in the court of appeals "upon all issues raised before the Commission in the motion for rehearing").

On brief before the Court, Conservation Groups raise evidentiary and analytical challenges to the Biological Opinion that they failed to raise before the Commission on rehearing. Specifically, Conservation Groups argue that the Biological Opinion has: (1) insufficient evidentiary support for the efficacy of "multi-dam" fish passage, Brief at 31-44; (2) insufficient consideration of the hazards from impoundment, *id*. at 45-46; and (3) no performance standards for downstream fish passage during the interim period. *Id*. at 47-49. Conservation Groups also argue that the Interim Plan will distort the project baseline that will apply once the interim period is over. *Id*. at 52-54. None of these arguments appears in Conservation Groups' request for rehearing before the Commission. *See* Conservation Groups' June 17, 2016 Application for Rehearing, R. 1256, JA 606-10. Accordingly, this Court lacks jurisdiction to consider these arguments.[6] *See, e.g., Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105,

---

[6] In the Rehearing Order, the Commission dismissed Conservation Groups' request for rehearing in its entirety because the request failed to comply with the Commission's regulation requiring that a request for rehearing set forth with specificity the grounds on which the rehearing application is based, including the basis, in fact and law, for each alleged error, including Commission and court precedent. Rehearing Order P 3, JA 616 (citing 18 C.F.R. § 385.713(c)(2)). In *Keating v. FERC*, 569 F.3d 427, 432 (D.C. Cir. 2009), this Court held that,

1114 (D.C. Cir. 2001) (the court lacks authority to waive the statutory rehearing requirement).

The fact that the challenges concern the Biological Opinion does not, moreover, constitute "good cause" under the statute for failing to raise these arguments on rehearing to the Commission. *See generally, e.g., Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) (good cause exception to rehearing requirement is reserved for extraordinary situations). Rather, where Conservation Groups seek to overturn Commission orders based on the Commission's allegedly arbitrary and capricious reliance on a flawed Biological Opinion, it is incumbent on Conservation Groups to raise those alleged flaws for the Commission's consideration on rehearing.

The Ninth Circuit, in *California Sportfishing Protection Alliance v. FERC*, 193 Fed. Appx. 655 (9th Cir. 2006), addressed the situation presented here. In that case, environmental groups challenged Commission orders amending a hydroelectric license on the ground, *inter alia*, of alleged defects in the Biological Opinion on which the Commission relied. *See id*. at 658. While the court

---

notwithstanding such a dismissal, the Court retains jurisdiction over issues that were actually raised on rehearing by the petitioner to which the Commission responded on the merits. In light of that decision, here, the Commission is arguing only that, under the Federal Power Act and relevant caselaw, jurisdiction is precluded over issues that were not raised by the petitioners on rehearing and that consequently were not addressed on the merits by the Commission.

considered the groups' challenges to the Biological Opinion that were raised to the Commission on rehearing, the court held that it lacked jurisdiction under section 313(b) to consider a challenge to the Biological Opinion (the validity of the applied definition of "adverse modification") that was not raised to the Commission. *Id.* This Court in its 2006 *Tacoma* decision was not required to address this jurisdictional issue because the substantive challenges to the Biological Opinion were raised to the Commission on rehearing. *See, e.g., City of Tacoma, Washington*, 110 FERC ¶ 61,140 PP 14-29 (2005) (order on rehearing under review in this Court's *Tacoma* decision, addressing petitioner challenges to the Biological Opinion).

Here, as in *California Sportfishing*, this Court should find that it lacks jurisdiction to hear Conservation Groups' evidentiary and analytical challenges to the Biological Opinion. In any event, Intervenor-Respondent Department of Commerce, on behalf of the Fisheries Service, in its brief will address the merits of Conservation Groups' challenges to the Biological Opinion. *See, e.g., Tacoma*, 460 F.3d at 76 (participation of consulting agency that prepared the Biological Opinion ensures that the validity of the Biological Opinion is adequately presented).

Conservation Groups noted in their rehearing request to the Commission that they had previously submitted comments to the Commission on the Biological

Opinion. *See* R. 1256 at 1, JA 606. Even if those prior comments raised some of the points now asserted on brief to this Court, that would not change the jurisdictional bar. This Court has found arguments jurisdictionally barred even where petitioners reference earlier filings in their rehearing requests. *See Ind. Util. Reg. Comm'n*, 668 F.3d at 739 (petitioner's reference on rehearing to argument made in earlier filings was insufficient to preserve issue for review); *Allegheny Power*, 437 F.3d at 1220 (attempt to incorporate by reference in rehearing request previously-filed brief was insufficient to preserve issue for review). Thus, it is not sufficient that the Commission has notice of an argument; rather, the argument must be raised on rehearing to preserve the argument on appeal. *See Ind. Util. Reg. Comm'n*, 668 F.3d at 739 (jurisdictional limitation based on specificity of rehearing request applies regardless of whether or not the Commission was aware or should have been aware of the argument at the time).

Further, as the Commission found, the very purpose of the Interim Plan is to develop studies designed to address many of the concerns expressed by the Conservation Groups, such as passage efficiency and effectiveness. License Order P 69, JA 593. The Interim Plan passage and survival studies, together with adaptive management techniques, will be used to make any needed changes to the study design, project structures, or project operation during the interim period, and to establish performance standards and efficient and effective fish passage design

that will be incorporated in the final species protection plan for these projects. License Order PP 66, 69, JA 592, 593 (citing Biological Opinion at 13, JA 230). Accordingly, the Commission reasonably concluded that Licensees' Interim Plan will help improve conditions for Atlantic salmon and will avoid or minimize incidental take of Atlantic salmon at the Lockwood, Shawmut, and Weston Projects. License Order P 78, JA 596.

In their Application for Rehearing, Conservation Groups argued that the Fisheries Service's Biological Opinion violated the National Environmental Policy Act by failing to consider alternatives such as dam removal. *See* Application for Rehearing, R. 1256 P 16, JA 610. As the Commission found in the Rehearing Order, neither the Fisheries Service nor the Commission were required to undertake an analysis under the National Environmental Policy Act in this case, which only concerned the nature and timing of fish passage measures that were already required by the terms of the project licenses. Rehearing Order P 9, JA 619. *See* 42 U.S.C. § 4332(2)(C) (Environmental Impact Statement, including evaluation of alternatives, must be prepared for "major Federal actions significantly affecting the quality of the Human environment"). The requisite environmental assessments and consideration of alternatives were prepared when the Commission first included fish passage measures in the project licenses in 1998 and again when the Commission relicensed the Lockwood project in 2005. *See*

Rehearing Order P 9 & n.26, JA 619 (citing *Edwards Manufacturing Co*., 84 FERC ¶ 61,227 at 62,095-96 (amending project licenses in 1998 to include Kennebec Agreement fish passage measures); *Merimil Ltd. Partnership*, 110 FERC ¶ 61,240 at PP 12-13 (2005) (2005 Lockwood relicensing)).

Now, on brief, Conservation Groups argue that the Endangered Species Act required that the Fisheries Service consider the alternative of dam removal in the Biological Opinion. Brief at 54. Because this is not the argument that Conservation Groups presented to the Commission on rehearing, the Court lacks jurisdiction to consider this argument as well. In any event, in response to a comment by another party, the Commission reasonably declined to initiate a proceeding to reopen and amend the Lockwood project license to consider possible removal. License Order P 76, JA 595. While the Commission can reopen and amend a license if a project has unanticipated, serious impacts on fishery resources, *see, e.g., Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 211 (D.C. Cir. 2010), the Lockwood Project's effects on fishery resources were both anticipated and addressed in the Kennebec Agreement, which provided a mechanism for parties to consult on future fish passage measures and consider any additional studies or fish passage measures that may be needed. *Id*.

III. THE COMMISSION REASONABLY REJECTED THE TWO ARGUMENTS MADE IN CONSERVATION GROUPS' BRIEF THAT WERE PRESERVED FOR REVIEW.

Only two issues raised on brief by Conservation Groups were preserved in their request for rehearing before the Commission: (1) the argument that the Commission improperly deferred to the Fisheries Service Biological Opinion without undertaking any independent review, *see* Brief at 55, Application for Rehearing, R. 1256 at P 14, JA 609; and (2) the argument that adoption of the Interim Plan conflicts with the Kennebec Agreement. Brief at 49-51, Application for Rehearing, R. 1256 at PP 11-13, JA 608-09. The Commission reasonably rejected both arguments in the Rehearing Order.

A. The Commission Reasonably Relied On The Biological Opinion.

As just discussed in Argument Section II *supra*, Conservation Groups failed to preserve for appellate review their arguments challenging the validity of the Biological Opinion. Accordingly, Conservation Groups have presented no justiciable basis for their argument that the Commission erred in relying on a "flawed" or "legally invalid" Biological Opinion. *See* Brief at 55-56.

In any event, the Commission reasonably determined that it was entitled to rely on the Fisheries Service Biological Opinion. Rehearing Order P 8, JA 618. The Fisheries Service is the expert agency charged with implementing the Endangered Species Act for these fish, and is therefore in the best position to make

discretionary factual determinations about what measures might be needed to protect them. *Id.*; License Order P 70, JA 593. As this Court has held, the interagency consultation process mandated in the Endangered Species Act "reflects Congress's awareness that expert agencies (such as the Fisheries Service and the Fish and Wildlife Service) are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species." *Tacoma*, 460 F.3d at 75. Accordingly, "those expert agencies are in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species." *Id.* "Congress's recognition of this expertise suggests Congress intended the action agency to defer, at least to some extent, to the determinations of the consultant agency." *Id.* (citing *Bennett v. Spear*, 520 U.S. 169-70 (1997) (finding that an action agency disregards a jeopardy finding in a Biological Opinion "at its own peril")).

Thus, although the Commission possesses significant expertise in fishery matters and is ultimately responsible for ensuring, in consultation with the Fisheries Service, that its actions are in compliance with the Endangered Species Act, the Commission is entitled to defer to that agency's expertise, and need not undertake a separate, independent analysis of the issues addressed in a Biological Opinion. License Order P 70, JA 593; Rehearing Order P 8, JA 618. *See Tacoma*,

460 F.3d at 75. "In fact, if the law required the action agency to undertake an independent analysis, then the expertise of the consultant agency would be seriously undermined." *Tacoma*, 460 F.3d at 76. The Commission is entitled to rely on a Biological Opinion based on even "admittedly weak" evidence, if the challenging party does not provide the Commission with new evidence not considered by the consulting agency. *Id*. at 76 (following *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990)). *See also, e.g., Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984) (reliance on Biological Opinion not arbitrary and capricious, even though evidence "admittedly was weak," where challengers offered "no information that had not already been evaluated by the expert agency").

Here, Conservation Groups point to no information they provided the Commission to undermine the Biological Opinion conclusions that was not considered by the Fisheries Service. While Conservation Groups point to the October 25, 2017 Declaration of John Waldman as evidence of failed fish passage schemes elsewhere in the eastern United States, *see* Brief at 42, 43, 51, this declaration was attached to Conservation Groups' brief to this Court, and was not previously provided either to the Commission or the Fisheries Service.

Conservation Groups argue that, under this Court's decision in *Tacoma*, the substantive review on the merits of the Biological Opinion renders irrelevant the

question of the Commission's reasonable reliance on the Biological Opinion. Brief at 55 (citing *Tacoma*, 460 F.3d at 76). However, in *Tacoma*, this Court did not view the issue of the substantive validity of the Biological Opinion to be dispositive of the issue of the Commission's reasonable reliance. Rather, this Court examined both issues, finding first that the Commission reasonably relied upon the Biological Opinion, 460 F.3d at 75-76, and then rejecting (properly preserved) challenges to the Biological Opinion's validity. *Id*. at 76-78.

Further, the Commission did not solely rely on the Fisheries Service Biological Opinion in this case. The Commission independently reviewed and adopted Licensees' Biological Assessment. Rehearing Order P 8, JA 618; License Order P 70, JA 593. Based upon that review, Commission staff concluded that "the measures contained in the Interim [Plan] would enable the licensees to best enhance protection of [listed] salmon and designated critical habitat at the five projects in the short term." *See* March 14, 2013 Letter, R. 991 at 3, JA 151. The Commission further engaged in formal consultation with the Fisheries Service on the Interim Plan, and the Fisheries Service concurred with Commission staff's determination that the Interim Plan would not lead to adverse modification or destruction of critical habitat. Rehearing Order P 8, JA 618; License Order P 65, JA 592. Contrary to Conservation Groups' assertions, therefore, based on its own review and analysis, the Commission found no basis to conclude that the Interim

Plan was inadequate to protect Atlantic salmon. License Order P 70, JA 593; Rehearing Order P 8, JA 618.

B. The Commission Reasonably Determined That The Interim Plan Did Not Conflict With The Kennebec Agreement.

Conservation Groups also contend that the Interim Plan, by approving fish passage construction, undermined Conservation Groups' ability to effectively assert their rights to consultation under the Kennebec Agreement. Brief at 49-51. The Commission reasonably determined that there was no conflict between the Interim Plan and the Kennebec Agreement. License Order P 74, JA 594; Rehearing Order P 5, JA 617.

The 1998 Kennebec Agreement, negotiated among Licensees, resource agencies and conservation groups, provided a process and schedule for installing interim and permanent upstream and downstream fish passage facilities for American shad, alewife, blueback herring, Atlantic salmon and American eel at hydroelectric projects on the Sebasticook and Kennebec Rivers, including the Lockwood, Shawmut and Weston Projects. License Order P 31, JA 580. The interim upstream passage facilities required by the Agreement (a fish lift and an interim trap, sort and transport system) were installed at Lockwood in 2006. *Id.* Interim downstream passage under the Agreement was accomplished through a combination of controlled spills, turbine shutdown, and sluicing, which did not require new structures. *Id.*

The Agreement did not specify a date upon which permanent fish passage facilities would be installed, but rather provided that such facilities must be installed within two years after 8,000 American shad are captured at the interim Lockwood fish trap in a single season, or when the Licensees and resource agencies select an alternate biological trigger, such as the growth in population of Atlantic salmon or river herring. License Order P 33 & n.31, JA 581. Under the Agreement, if neither of these biological triggers was met by December 2014, the parties agreed to meet to assess the progress in restoring the species covered by the agreement and to attempt to reach consensus on future fish passage measures. *Id.* P 34, JA 581.

Neither biological trigger was met prior to December 2014; very few shad have been captured at Lockwood each year, and an alternative biological trigger has not been developed. *Id.* P 73, JA 594. Therefore, Licensees and the other parties began consulting as contemplated in the agreement. *Id.* For example, beginning in February 2014, Licensees have been consulting with Maine Marine Resources, the Fisheries Service, the Fish and Wildlife Service and conservation groups to identify studies and operational measures to improve shad passage at the project. *Id.* P 72, JA 593 (discussing measures).

The consultations occurring under the Kennebec Agreement are separate from Licensees' development of the Interim Plan, which deals exclusively with

endangered Atlantic salmon as a result of the Fisheries Service expansion of the salmons' geographic range. *Id*. P 73, JA 594. The Interim Plan did not cause the lack of fish passage improvements at the projects, and it does not preclude any party to the Kennebec Agreement from seeking fish passage improvements at any hydro projects on the Kennebec River, including those which are part of the Interim Plan. Rehearing Order P 5, JA 617; License Order P 74, JA 594. Therefore, the Commission found that the Interim Plan and the Kennebec Agreement are not in conflict. License Order P 74, JA 594.

More important, the Interim Plan identifies measures necessary to avoid and minimize the effects of the Lockwood, Shawmut and Weston Projects on the federally-listed Atlantic salmon. Rehearing Order P 5, JA 617; License Order P 40, JA 583. The Commission must give priority to the protection of endangered species like the Atlantic salmon, and must prioritize developing protection measures in a timely manner regardless of any actual or perceived conflict with the Kennebec Agreement. Rehearing Order P 5, JA 617; License Order P 74, JA 594. It would be imprudent for the Commission to indefinitely delay implementation of the Interim Plan to minimize adverse project impacts until there is a consensus by the parties to the Kennebec Agreement on permanent mitigation measures. Rehearing Order P 5, JA 617. "[I]f prompt action is necessary and delay would be harmful, agencies sometimes do need to take interim action, deferring to further

proceedings other facets of the problem or alternative solutions that may take more time to develop." *Central Maine Power Co. v. FERC*, 252 F.3d 34, 44 (1st Cir. 2001).

CONCLUSION

For the foregoing reasons, the petition for review, to the extent not dismissed for lack of jurisdiction, should be denied.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8334
Fax: 202-273-0901
E-mail: Lona.perry@ferc.gov

March 15, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
 Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8334
Fax: 202-273-0901
E-mail: Lona.perry@ferc.gov

March 15, 2018

ADDENDUM

STATUTES
AND
REGULATIONS

TABLE OF CONTENTS

STATUTES: **PAGE**

Endangered Species Act

Section 3, 16 U.S.C. § 1532 .... A-1

Section 7, 16 U.S.C. § 1536 .... A-3

Section 9, 16 U.S.C. § 1538 .... A-6

Federal Power Act

Section 4, 16 U.S.C. § 797 .... A-10

Section 313, 16 U.S.C. § 825*l* A-15

REGULATIONS:

18 C.F.R. § 385.713 .... A-16

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the ''Act''), may apply to the Advisory Council, any functions of the President under the Act, except for that of reporting to the Congress, shall be performed by the Secretary in accordance with the guidelines issued by the Administrator of General Services.

(e) The Department of the Interior shall provide funding and administrative support for the Task Force and Advisory Council to the extent permitted by law and consistent with existing appropriations.

BARACK OBAMA.

[Reference to the National Security Staff to be understood to refer to the staff of the National Security Council, see Ex. Ord. No. 13657, set out as a note under section 3021 of Title 50, War and National Defense.]

EXTENSION OF TERM OF ADVISORY COUNCIL ON WILDLIFE TRAFFICKING

Term of Advisory Council on Wildlife Trafficking extended until Sept. 30, 2017, by Ex. Ord. No. 13708, Sept. 30, 2015, 80 F.R. 60271, set out as a note under section 14 of the Federal Advisory Committee Act in the Appendix to Title 5, Government Organization and Employees.

§ 1532. Definitions

For the purposes of this chapter—

(1) The term ''alternative courses of action'' means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term ''commercial activity'' means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms ''conserve'', ''conserving'', and ''conservation'' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term ''Convention'' means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term ''critical habitat'' for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term ''endangered species'' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term ''Federal agency'' means any department, agency, or instrumentality of the United States.

(8) The term ''fish or wildlife'' means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term ''foreign commerce'' includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term ''import'' means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub. L. 97–304, §4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term ''permit or license applicant'' means, when used with respect to an action of a Federal agency for which exemption is

sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term ''person'' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term ''plant'' means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term ''Secretary'' means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term ''species'' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term ''State agency'' means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term ''threatened species'' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term ''United States'', when used in a geographical context, includes all States.

(Pub. L. 93–205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub. L. 94–359, § 5, July 12, 1976, 90 Stat. 913; Pub. L. 95–632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96–159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub. L. 100–478, title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

Reorganization Plan Numbered 4 of 1970, referred to in par. (15), is Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1988—Par. (13). Pub. L. 100–478, § 1001(a), amended par. (13) generally. Prior to amendment, par. (13) read as follows: ''The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.''

Par. (15). Pub. L. 100–478, § 1001(b), inserted ''also'' before ''means the Secretary of Agriculture''.

1982—Par. (11). Pub. L. 97–304 struck out par. (11) which defined ''irresolvable conflict'' as, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 1536(a) of this title, completion of such action would violate section 1536(a)(2) of this title.

1979—Par. (11). Pub. L. 96–159 substituted ''action would violate section 1536(a)(2) of this title'' for ''action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat''.

1978—Pars. (1) to (4). Pub. L. 95–632, § 2(1), (7), added par. (1) and redesignated former pars. (1) to (3) as (2) to (4), respectively. Former par. (4) redesignated (6).

Par. (5). Pub. L. 95–632, § 2(2), (7), added par. (5). Former par. (5) redesignated (8).

Par. (6). Pub. L. 95–632, § 2(7), redesignated former par. (4) as (6). Former par. (6) redesignated (9).

Par. (7). Pub. L. 95–632, § 2(3), (7), added par. (7). Former par. (7) redesignated (10).

Pars. (8) to (10). Pub. L. 95–632, § 2(7), redesignated former pars. (5) to (7) as (8) to (10), respectively. Former pars. (8) to (10) redesignated (13) to (15), respectively.

Pars. (11), (12). Pub. L. 95–632, § 2(4), (7), added pars. (11) and (12). Former pars. (11) and (12) redesignated (16) and (17), respectively.

Pars. (13) to (15). Pub. L. 95–632, § 2(7), redesignated former pars. (8) to (10) as (13) to (15), respectively. Former pars. (13) to (15) redesignated as (18) to (20), respectively.

Par. (16). Pub. L. 95–632, § 2(5), (7), redesignated former par. (11) as (16) and substituted ''and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' for ''and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature''. Former par. (16) redesignated (21).

Par. (17). Pub. L. 95–632, § 2(7), redesignated former par. (12) as (17).

Par. (18). Pub. L. 95–632, § 2(6), (7), redesignated former par. (13) as (18) and substituted ''fish, plant, or wildlife'' for ''fish or wildlife''.

Pars. (19) to (21). Pub. L. 95–632, § 2(7), redesignated pars. (14) to (16) as (19) to (21), respectively.

1976—Par. (1). Pub. L. 94–359 inserted '': *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.'' after ''facilitating such buying and selling''.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) deter-

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

of section 553 of title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) Appropriations

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 669b of this title, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

(Pub. L. 93–205, § 6, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95–212, Dec. 19, 1977, 91 Stat. 1493; Pub. L. 95–632, § 10, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96–246, May 23, 1980, 94 Stat. 348; Pub. L. 97–304, §§ 3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426; Pub. L. 100–478, title I, § 1005, Oct. 7, 1988, 102 Stat. 2307.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'' or ''This Act'', meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Sport Fishing Restoration Account established under section 1016 of the Act of July 18, 1984, referred to in subsec. (i)(1), probably means the Sport Fish Restoration Account established by section 9504(a)(2)(A) of Title 26, Internal Revenue Code, which section was enacted by section 1016(a) of Pub. L. 98–369, div. A, title X, July 18, 1984, 98 Stat. 1019.

AMENDMENTS

1988—Subsec. (d)(1). Pub. L. 100–478, § 1005(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species. The Secretary shall make an allocation of appropriated funds to such States based on consideration of—

''(A) the international commitments of the United States to protect endangered species or threatened species;

''(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

''(C) the number of endangered species and threatened species within a State;

''(D) the potential for restoring endangered species and threatened species within a State; and

''(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species.

So much of any appropriated funds allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.''

Subsec. (i). Pub. L. 100–478, § 1005(b), added subsec. (i).

1982—Subsec. (d)(2)(i). Pub. L. 97–304, § 3(1), substituted ''75 percent'' for ''66⅔ per centum''.

Subsec. (d)(2)(ii). Pub. L. 97–304, § 3(2), substituted ''90 percent'' for ''75 per centum''.

Subsec. (i). Pub. L. 97–304, § 8(b), struck out subsec. (i) which authorized appropriations to carry out this section of $10,000,000 through the period ending Sept. 30, 1977, $12,000,000 for the period Oct. 1, 1977, through Sept. 30, 1980, and $12,000,000 for the period Oct. 1, 1980, through Sept. 30, 1982. See section 1542(b) of this title.

1980—Subsec. (i). Pub. L. 96–246 in par. (2) substituted ''$12,000,000'' for ''$16,000,000'' and ''1980'' for ''1981'', and added par. (3).

1978—Subsec. (c). Pub. L. 95–632 designated existing provision as par. (1), and in par. (1) as so designated, redesignated pars. (1) to (5) as subpars. (A) to (E), respectively, and subpars. (A) and (B) of subpar. (E), as so redesignated, as cls. (i) and (ii), respectively, substituted ''paragraph'' for ''subsection'' in provision preceding subpar. (A), as so redesignated, ''endangered or threatened species of fish or wildlife'' for ''endangered species or threatened species'' in subpar. (D), as so redesignated, ''subparagraphs (C), (D), and (E) of this paragraph'' for ''paragraphs (3), (4), and (5) of this subsection'' in cl. (i) of subpar. (E), as so redesignated, ''clause (i) and this clause'' for ''subparagraph (A) and this subparagraph'' in cl. (ii) of subpar. (E), as so redesignated, and added par. (2).

1977—Subsec. (c). Pub. L. 95–212, § 1(1), inserted provisions that States in which the State fish and wildlife agencies do not possess the broad authority to conserve all resident species of fish and wildlife which the Secretary determines to be threatened or endangered may nevertheless qualify for cooperative agreement funds if they satisfy all other requirements and have plans to devote immediate attention to those species most urgently in need of conservation programs.

Subsec. (i). Pub. L. 95–212, § 1(2), substituted provisions authorizing appropriations of $10,000,000 to cover the period ending Sept. 30, 1977, and $16,000,000 to cover the period beginning Oct. 1, 1977, and ending Sept. 30, 1981, for provisions authorizing appropriations of not to exceed $10,000,000 through the fiscal year ending June 30, 1977.

COOPERATIVE AGREEMENTS WITH STATES UNAFFECTED BY 1981 AMENDMENT OF MARINE MAMMAL PROTECTION ACT

Nothing in the amendment of section 1379 of this title by section 4(a) of Pub. L. 97–58 to be construed as affecting in any manner any cooperative agreement entered into by a State under subsec. (c) of this section before, on, or after Oct. 9, 1981, see section 4(b) of Pub. L. 97–58, set out as a note under section 1379 of this title.

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out pro-

grams for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ''agency action'') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93–205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95–632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96–159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97–304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub. L. 99–659, title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3741, 3742; Pub. L. 100–707, title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

References in Text

This chapter, referred to in subsecs. (a)(1), (i), and (j), was in the original ''this Act'', meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Privacy Act, referred to in subsec. (e)(7)(C), is probably a reference to section 552a of Title 5, Government Organization and Employees. See Short Title note set out under section 552a of Title 5.

The National Environmental Policy Act of 1969, referred to in subsec. (k), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Disaster Relief and Emergency Assistance Act, referred to in subsec. (p), is Pub. L. 93–288, May 22, 1974, 88 Stat. 143, as amended, known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which is classified principally to chapter 68 (§ 5121 et seq.) of Title 42. For complete classification of this Act

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention

If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife preservation in Western Hemisphere

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the ''Secretary''), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the ''Western Convention''). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

(Pub. L. 93–205, § 8A, as added Pub. L. 96–159, § 6(a)(1), Dec. 28, 1979, 93 Stat. 1228; amended Pub. L. 97–304, § 5[(a)], Oct. 13, 1983, 96 Stat. 1421.)

AMENDMENTS

1982—Subsec. (c). Pub. L. 97–304, § 5[(a)](1), designated existing provisions as par. (1) and added par. (2).

Subsec. (d). Pub. L. 97–304, § 5[(a)](2), substituted provisions relating to reservations by the United States under the Convention for provisions which had established an International Convention Advisory Commission and had provided for its membership, staffing, and operation.

Subsec. (e). Pub. L. 97–304, § 5[(a)](3), substituted provisions implementing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere for provisions which had provided that the President shall designate those agencies of the Federal Government that shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.

EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97–304, § 5(b), Oct. 13, 1982, 96 Stat. 1422, provided that: ''The amendment made by paragraph (1) of subsection (a) [amending this section] shall take effect January 1, 1981.''

ABOLITION OF HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

Committee on Merchant Marine and Fisheries of House of Representatives abolished and its jurisdiction transferred by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995. Committee on Merchant Marine and Fisheries of House of Representatives treated as referring to Committee on Resources of House of Representatives in case of provisions relating to fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management) except for measures relating to oil and other pollution of navigable waters, or oceanography by section 1(b)(3) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Resources of House of Representatives changed to Committee on Natural Resources of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY; INTERIM PERFORMANCE OF FUNCTIONS OF COMMISSION

Pub. L. 96–159, § 6(b), Dec. 28, 1979, 93 Stat. 1230, provided that until such time as the Chairman, Members, and Executive Secretary of the International Convention Advisory Commission are appointed, but not later than 90 days after Dec. 28, 1979, the functions of the Commission be carried out by the Endangered Species Scientific Authority as established by Ex. Ord. No. 11911, formerly set out as a note under section 1537 of this title, with staff and administrative support being provided by the Secretary of the Interior as set forth in that Executive Order.

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to sec-

tion 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) In general

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements

Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons, if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc–4(d)[1] of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

(Pub. L. 93–205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub. L. 95–632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 97–304, § 9(b), Oct. 13, 1982, 96 Stat. 1426; Pub. L. 100–478, title I, § 1006, title II, § 2301, Oct. 7, 1988, 102 Stat. 2308, 2321; Pub. L. 100–653, title IX, § 905, Nov. 14, 1988, 102 Stat. 3835.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1)(G), (2)(E), (c)(2), (e), and (f)(1), was in the original "this Act", meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

Section 668cc–4 of this title, referred to in subsec. (f)(2), was repealed by Pub. L. 93–205, § 14, Dec. 28, 1973, 87 Stat. 903.

AMENDMENTS

1988—Subsec. (a)(2)(B). Pub. L. 100–478, § 1006, amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "remove and reduce to possession any such species from areas under Federal jurisdiction;".

Subsec. (d). Pub. L. 100–478, § 2301, amended subsec. (d) generally, revising and restating as pars. (1) to (4) provisions of former pars. (1) to (3).

Subsec. (d)(1)(A). Pub. L. 100–653 inserted "or plants" after "purposes)".

1982—Subsec. (a)(2)(B) to (E). Pub. L. 97–304, § 9(b)(1), added subpar. (B) and redesignated former subpars. (B), (C), and (D) as (C), (D), and (E), respectively.

Subsec. (b)(1). Pub. L. 97–304, § 9(b)(2), substituted "The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection" for "The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, if the purposes of such holding are not

[1] See References in Text note below.

contrary to the purposes of this chapter; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from December 28, 1973, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on December 28, 1973''.

Subsec. (b)(2)(A). Pub. L. 97–304, §9(b)(3), substituted ''The provisions of subsection (a)(1) shall not apply to'' for ''This section shall not apply to'' in provisions preceding cl. (i).

1978—Subsec. (b). Pub. L. 95–632 designated existing provision as par. (1) and added par. (2).

HUMAN ACTIVITIES WITHIN PROXIMITY OF WHALES

Pub. L. 103–238, §17, Apr. 30, 1994, 108 Stat. 559, provided that:

''(a) LAWFUL APPROACHES.—In waters of the United States surrounding the State of Hawaii, it is lawful for a person subject to the jurisdiction of the United States to approach, by any means other than an aircraft, no closer than 100 yards to a humpback whale, regardless of whether the approach is made in waters designated under section 222.31 of title 50, Code of Federal Regulations, as cow/calf waters.

''(b) TERMINATION OF LEGAL EFFECT OF CERTAIN REGULATIONS.—Subsection (b) of section 222.31 of title 50, Code of Federal Regulations, shall cease to be in force and effect.''

TERRITORIAL SEA OF UNITED STATES

For extension of territorial sea of United States, see Proc. No. 5928, set out as a note under section 1331 of Title 43, Public Lands.

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc–3[1] of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term ''undue economic hardship'' shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this chapter to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consid-

[1] See References in Text note below.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

ing minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, §4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amended by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sections 824*l*, 824m, and 825*o*–1 of this title and former sections 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to

furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may

[1] So in original. The colon probably should be a period.

[2] So in original. The period probably should be a colon.

find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, §4, 41 Stat. 1065; June 23, 1930, ch. 572, §2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; Pub. L. 97–375, title II, §212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, §3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, §241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109–58, which directed amendment of subsec. (e) by inserting after ''adequate protection and utilization of such reservation.'' at end of first proviso ''The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.'', was executed by making the insertion after ''adequate protection and utilization of such reservation:'' at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99–495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of environmental quality.

1982—Subsec. (d). Pub. L. 97–375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, §202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, §202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, §202, redesignated subsec. (c) as (d) and substituted ''3d day of January'' for ''first Monday in December'' in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, §202, redesignated subsec. (d) as (e) and substituted ''streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States'' for ''navigable waters of the United States'' and ''subsection (f)'' for ''subsection (e)''. Former subsec. (e) redesignated (f).

Subsec. (f). Act Aug. 26, 1935, §202, redesignated subsec. (e) as (f) and substituted ''once each week for four weeks'' for ''for eight weeks''. Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was struck out by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935, §202, added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was struck out.

Subsec. (h). Act Aug. 26, 1935, §202, struck out subsec. (h) which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, inserted sentence respecting contents of report.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–495, §18, Oct. 16, 1986, 100 Stat. 1259, provided that: ''Except as otherwise provided in this Act, the amendments made by this Act [enacting section 823b of this title and amending this section and sections 800, 802, 803, 807, 808, 817, 823a, 824a–3, and 824j of this title] shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act [Oct. 16, 1986]. The amendments made by sections 6 and 12 of this Act [enacting section 823b of this title and amending section 817 of this title] shall apply to licenses, permits, and exemptions without regard to when issued.''

SAVINGS PROVISION

Pub. L. 99–495, §17(a), Oct. 16, 1986, 100 Stat. 1259, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

''(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;

''(2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States;

''(3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right;

''(4) affect, expand, or create rights to use transmission facilities owned by the Federal Government;

''(5) alter, amend, repeal, interpret, modify, or be in conflict with, the Treaty rights or other rights of any Indian tribe;

''(6) permit the filing of any competing application in any relicensing proceeding where the time for filing a competing application expired before the enactment of this Act [Oct. 16, 1986]; or

''(7) modify, supersede, or affect the Pacific Northwest Electric Power Planning and Conservation Act [16 U.S.C. 839 et seq.].''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (d) of this section relating to submitting a classified annual report to Congress showing permits and licenses issued under this subchapter, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103–7.

PROMOTING HYDROPOWER DEVELOPMENT AT NONPOWERED DAMS AND CLOSED LOOP PUMPED STORAGE PROJECTS

Pub. L. 113–23, §6, Aug. 9, 2013, 127 Stat. 495, provided that:

''(a) IN GENERAL.—To improve the regulatory process and reduce delays and costs for hydropower development at nonpowered dams and closed loop pumped stor-

age projects, the Federal Energy Regulatory Commission (referred to in this section as the 'Commission') shall investigate the feasibility of the issuance of a license for hydropower development at nonpowered dams and closed loop pumped storage projects in a 2-year period (referred to in this section as a '2-year process'). Such a 2-year process shall include any prefiling licensing process of the Commission.

''(b) WORKSHOPS AND PILOTS.—The Commission shall—

''(1) not later than 60 days after the date of enactment of this Act [Aug. 9, 2013], hold an initial workshop to solicit public comment and recommendations on how to implement a 2-year process;

''(2) develop criteria for identifying projects featuring hydropower development at nonpowered dams and closed loop pumped storage projects that may be appropriate for licensing within a 2-year process;

''(3) not later than 180 days after the date of enactment of this Act, develop and implement pilot projects to test a 2-year process, if practicable; and

''(4) not later than 3 years after the date of implementation of the final pilot project testing a 2-year process, hold a final workshop to solicit public comment on the effectiveness of each tested 2-year process.

''(c) MEMORANDUM OF UNDERSTANDING.—The Commission shall, to the extent practicable, enter into a memorandum of understanding with any applicable Federal or State agency to implement a pilot project described in subsection (b).

''(d) REPORTS.—

''(1) PILOT PROJECTS NOT IMPLEMENTED.—If the Commission determines that no pilot project described in subsection (b) is practicable because no 2-year process is practicable, not later than 240 days after the date of enactment of this Act [Aug. 9, 2013], the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the public comments received as part of the initial workshop held under subsection (b)(1); and

''(B) identifies the process, legal, environmental, economic, and other issues that justify the determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.

''(2) PILOT PROJECTS IMPLEMENTED.—If the Commission develops and implements pilot projects involving a 2-year process, not later than 60 days after the date of completion of the final workshop held under subsection (b)(4), the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the outcomes of the pilot projects;

''(B) describes the public comments from the final workshop on the effectiveness of each tested 2-year process; and

''(C)(i) outlines how the Commission will adopt policies under existing law (including regulations) that result in a 2-year process for appropriate projects;

''(ii) outlines how the Commission will issue new regulations to adopt a 2-year process for appropriate projects; or

''(iii) identifies the process, legal, environmental, economic, and other issues that justify a determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.''

IMPROVEMENT AT EXISTING FEDERAL FACILITIES

Pub. L. 102–486, title XXIV, §2404, Oct. 24, 1992, 106 Stat. 3097, as amended by Pub. L. 103–437, §6(d)(37), Nov. 2, 1994, 108 Stat. 4585; Pub. L. 104–66, title I, §1052(h), Dec. 21, 1995, 109 Stat. 718, directed Secretary of the Interior and Secretary of the Army, in consultation with Secretary of Energy, to perform reconnaissance level studies, for each of the Nation's principal river basins, of cost effective opportunities to increase hydropower production at existing federally-owned or operated water regulation, storage, and conveyance facilities, with such studies to be completed within 2 years after Oct. 24, 1992, and transmitted to Congress, further provided that in cases where such studies had been prepared by any agency of the United States and published within ten years prior to Oct. 24, 1992, Secretary of the Interior, or Secretary of the Army, could choose to rely on information developed by prior studies rather than conduct new studies, and further provided for appropriations for fiscal years 1993 to 1995.

WATER CONSERVATION AND ENERGY PRODUCTION

Pub. L. 102–486, title XXIV, §2405, Oct. 24, 1992, 106 Stat. 3098, provided that:

''(a) STUDIES.—The Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388) [see Short Title note under section 371 of Title 43, Public Lands], and Acts supplementary thereto and amendatory thereof, is authorized and directed to conduct feasibility investigations of opportunities to increase the amount of hydroelectric energy available for marketing by the Secretary from Federal hydroelectric power generation facilities resulting from a reduction in the consumptive use of such power for Federal reclamation project purposes or as a result of an increase in the amount of water available for such generation because of water conservation efforts on Federal reclamation projects or a combination thereof. The Secretary of the Interior is further authorized and directed to conduct feasibility investigations of opportunities to mitigate damages to or enhance fish and wildlife as a result of increasing the amount of water available for such purposes because of water conservation efforts on Federal reclamation projects. Such feasibility investigations shall include, but not be limited to—

''(1) an analysis of the technical, environmental, and economic feasibility of reducing the amount of water diverted upstream of such Federal hydroelectric power generation facilities by Federal reclamation projects;

''(2) an estimate of the reduction, if any, of project power consumed as a result of the decreased amount of diversion;

''(3) an estimate of the increase in the amount of electrical energy and related revenues which would result from the marketing of such power by the Secretary;

''(4) an estimate of the fish and wildlife benefits which would result from the decreased or modified diversions;

''(5) a finding by the Secretary of the Interior that the activities proposed in the feasibility study can be carried out in accordance with applicable Federal and State law, interstate compacts and the contractual obligations of the Secretary; and

''(6) a finding by the affected Federal Power Marketing Administrator that the hydroelectric component of the proposed water conservation feature is cost-effective and that the affected Administrator is able to market the hydro-electric power expected to be generated.

''(b) CONSULTATION.—In preparing feasibility studies pursuant to this section, the Secretary of the Interior shall consult with, and seek the recommendations of, affected State, local and Indian tribal interests, and shall provide for appropriate public comment.

''(c) AUTHORIZATION.—There is hereby authorized to be appropriated to the Secretary of the Interior such sums as may be necessary to carry out this section.''

PROJECTS ON FRESH WATERS IN STATE OF HAWAII

Pub. L. 102–486, title XXIV, §2408, Oct. 24, 1992, 106 Stat. 3100, directed Federal Energy Regulatory Commission, in consultation with State of Hawaii, to carry

out study of hydroelectric licensing in State of Hawaii for purposes of considering whether such licensing should be transferred to State, and directed Commission to complete study and submit report containing results of study to Congress within 18 months after Oct. 24, 1992.

§ 797a. Congressional authorization for permits, licenses, leases, or authorizations for dams, conduits, reservoirs, etc., within national parks or monuments

On and after March 3, 1921, no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as constituted, March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

(Mar. 3, 1921, ch. 129, 41 Stat. 1353.)

CODIFICATION

Provisions repealing so much of this chapter ''as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission'' have been omitted.

Section was not enacted as part of the Federal Power Act which generally comprises this chapter.

Section 212 of act Aug. 26, 1935, ch. 687, title II, 49 Stat. 847, provided that nothing in this chapter, as amended should be construed to repeal or amend the provisions of the act approved Mar. 3, 1921 (41 Stat. 1353) [16 U.S.C. 797a] or the provisions of any other Act relating to national parks and national monuments.

§ 797b. Duty to keep Congress fully and currently informed

The Federal Energy Regulatory Commission shall keep the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate fully and currently informed regarding actions of the Commission with respect to the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.].

(Pub. L. 99–495, § 16, Oct. 16, 1986, 100 Stat. 1259.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Federal Power Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Electric Consumers Protection Act of 1986, and not as part of the Federal Power Act which generally comprises this chapter.

CHANGE OF NAME

Committee on Energy and Commerce of House of Representatives treated as referring to Committee on Commerce of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

§ 797c. Dams in National Park System units

After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] (nor an exemption from such Part) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be construed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project.

(Pub. L. 102–486, title XXIV, § 2402, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

Where the Federal Energy Regulatory Commission is required to prepare a draft or final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit, at the election of the applicant, a contractor, consultant or other person funded by the applicant and chosen by the Commission from among a list of such individuals or companies determined by the Commission to be qualified to do such work, to prepare such statement for the Commission. The contractor shall execute a disclosure statement prepared by the Commission specifying that it has no financial or other interest in the outcome of the project. The Commission shall establish the scope of work and procedures to assure that the contractor, consultant or other person has no financial or other potential conflict of interest in the outcome of the proceeding. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared envi-

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first sec-tion of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-ed (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Proce-dure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

Maine Council of the Atlantic Salmon Federation, et al. v. FERC **Docket No. P-2574, *et al.***
D.C. Cir. No. 17-1003

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 15th day of March 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Telephone: (202) 502-8334
Fax: (202) 273-0901
Email: lona.perry@ferc.gov