In the United States Court of Appeals for the Fourth Circuit

No. 15-2535

CITY OF ROCKINGHAM, NORTH CAROLINA AND AMERICAN RIVERS, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND U.S. SECRETARY OF COMMERCE,
Respondents.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

Br.	Opening brief of Petitioners American Rivers, Inc. and City of Rockingham, North Carolina
cfs	cubic feet per second
Commission or FERC	Federal Energy Regulatory Commission
Duke	Duke Energy Progress, Inc., the licensee
EIS	Environmental Impact Statement
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*.
FPA or the Act	Federal Power Act, 16 U.S.C. §§ 796 *et seq*.
JA	Joint Appendix
License Order	*Duke Energy Progress*, 151 FERC ¶ 62,004, R. 950, JA 2681
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*.
P	Denotes a paragraph number in a Commission order
Petitioners	Joint petitioners American Rivers, Inc. and City of Rockingham, North Carolina
Progress	Carolina Power & Light d/b/a Progress Energy Carolinas, Inc., the former licensee
Project	Yadkin-Pee Dee Hydroelectric Project
R.	Indicates an item in the certified index to the record
Rehearing Order	*Duke Energy Progress*, 153 FERC ¶ 61,056 (2015), R. 1005, JA 3263

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Whether the Federal Energy Regulatory Commission, in issuing a new license for an existing hydroelectric project, satisfied its responsibilities under the Federal Power Act, the National Environmental Policy Act, and the Endangered Species Act, by balancing a comprehensive range of power and non-power values, considering a reasonable range of alternatives, and imposing conditions to ensure that the project, as licensed, provides for the adequate protection, mitigation and enhancement of affected resources.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

This case arises on review of the Federal Energy Regulatory Commission's orders issuing a new license for the continued operation of the108.6 megawatt Yadkin-Pee Dee Hydroelectric Project ("Project"), located on the Yadkin and Pee Dee Rivers in North Carolina. *See Duke Energy Progress*, 151 FERC ¶ 62,004 ("License Order"), R. 950, JA 2681, *on reh'g*, 153 FERC ¶ 61,056 (2015) ("Rehearing Order"), R. 1005, JA 3263. Following a collaborative relicensing process, begun in 2003, the license applicant, previously Progress Energy and now, following a merger, Duke Energy Progress ("Duke"), reached a comprehensive settlement of all resource issues with nearly all stakeholders, including state resource agencies and conservation groups. Petitioners City of Rockingham and American Rivers participated in that process, but ultimately chose not to join the settlement.

After a delay in the relicensing process due to federal and state court litigation concerning authorizations required from other federal and state agencies, the Commission issued a new license in 2015. The new license is conditioned on measures to protect, mitigate and enhance affected resources, derived from recommendations of the Commission's staff, as set forth in its detailed

environmental impact statement, and also from the settlement. Petitioners were unsatisfied with the conditions for flow releases below one of the Project dams to enhance aquatic habitat and recreation. They would have preferred additional flows for aquatic habitat and recreation, and also requested that Duke add a new turbine, which they believe would facilitate their preferred flow regimes. In the Commission's judgment, the conditions required by the new license are supported by substantial evidence and reflect an appropriate balance among competing values, while Petitioners' requests for additional mitigation are not supported by the record or consistent with the public interest.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

A. Federal Power Act

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 authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. 16 U.S.C. § 797(e).

Section 15 of the Act, 16 U.S.C. § 808, sets forth the procedures applicable to relicensing, where the Commission may issue a "new" license to an existing licensee or another entity. Under section 10(a)(1), "the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. § 803(a)(1). Section 4(e), in turn, requires that the Commission balance power and non-power values in arriving at a licensing decision:

> [T]he 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.

16 U.S.C. § 797(e). Finally, in a relicensing proceeding, FPA section 15(a)(2) provides that the project ultimately licensed must be "best adapted to serve the public interest . . . ." 16 U.S.C. § 808(a)(2).

B. Other Relevant Law

Petitioners' arguments in this case touch upon the role of two other federal statutes in the Commission's hydroelectric licensing process: the National

Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA").

In considering an application for a new license for an existing hydroelectric project, the Commission must conduct an environmental review under the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq*. *See Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. FERC*, 143 F.3d 165, 171 (4th Cir. 1998). "NEPA mandates 'a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, . . . and that provide for broad dissemination of relevant environmental information.'" *Defs. of Wildlife v. N. Carolina Dep't of Transp.*, 762 F.3d 374, 393 (4th Cir. 2014) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal citation omitted)); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (same).

Where the action agency determines that a proposed action may be a "major Federal action significantly affecting the quality of the human environment," it must prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). Where an EIS is required, it must contain "a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments

of resources which would be involved in the proposed action should it be implemented." *Id.*

The Endangered Species Act requires federal agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered or threatened species," or result in the destruction or adverse modification of their designated critical habitat. 16 U.S.C. § 1536(a). Where a proposed action may have such a result, the action agency, here the Commission, must consult with the appropriate federal resource agency, here the Department of Commerce's National Marine Fisheries Service. *Id*. If the consulting agency concludes that the proposed action will "jeopardize the continued existence" of any listed species, the consulting agency prepares a biological opinion and an incidental take statement specifying the "impact of such incidental taking on the species" and "reasonable and prudent measures" considered necessary to minimize such impact. 16 U.S.C. § 1536(b)(4).

II. THE COMMISSION'S PROCEEDINGS ON REVIEW

A. The Yadkin-Pee Dee Project

The Yadkin-Pee Dee Hydroelectric Project, in North Carolina, consists of two developments: the Tillery development, located on the Yadkin River; and the downstream Blewett Falls development, located on the Pee Dee River. *See* License Order PP 12-18, JA 2684-85; *see also* Final Environmental Impact

Statement for Projects Nos. 2197, 2206, at 2 (map), 14, R. 461, JA 1221, 1234. Each development includes a dam, reservoir created by the dam, powerhouse, and Project recreation sites. License Order P 14, JA 2685. The issues raised by Petitioners here concern the operation of the Tillery development.

The flow of the Yadkin River is controlled by seven dams operated by the U.S. Army Corps of Engineers (Corps), Alcoa Power, and Duke. *See* License Order P 13, JA 2684. The uppermost dam, W. Kerr Scott Dam, is owned and operated by the Corps. *Id*. The next four, from river mile 253 to 234, are owned and operated by Alcoa Power as the Yadkin Hydroelectric Project, FERC Project No. 2197. *Id*. The final two dams, Tillery, at river mile 218, and Blewett Falls, at river mile 188.2, 15 miles north of the South Carolina border, are licensed to Duke as the Project at issue here. *Id*.

The Tillery hydroelectric generating facilities were placed in operation in 1928. They were first licensed (together with Blewett Falls) by the Commission's predecessor, the Federal Power Commission, in 1958, for a term expiring on April 30, 2008. *Id*. P 4 n.4, JA 2681-82. The Tillery development includes a 16-mile-long, 5,697 acre reservoir, Lake Tillery, with a useable storage capacity of 84,150 acre-feet. *Id*. P 15, JA 2685. The lake is impounded by a 2,752-foot-long dam (Tillery Dam) which includes a 758-foot spillway and a 310-foot-long powerhouse intake. *Id*. The powerhouse houses three 22-megawatt ("MW") turbine-generators

and one 18-MW fixed-blade propeller turbine-generator units, for a total installed capacity of 84 MW. *Id*. P 16, JA 2685. The Blewett Falls development is smaller, with a total installed capacity of 24.6 MW. *Id.* P 19, JA 2686; *see also* Application, Exh. A, R. 36, JA 242-58.

Duke operates the Tillery development in load-following mode on weekdays, meaning that power output is adjusted as demand for power fluctuates throughout the day. License Order P 24 & n.18, JA 2687. As is typical of load-following generation facilities, Tillery either shuts down or greatly curtails electrical output at night and in the early morning, when demand is lowest. *Id*. It also does not generally generate power on the weekends. *Id*.

The Project is operated in coordination with flow releases from Alcoa Power's upstream Yadkin Project. *Id*. P 23, JA 2686. The 1958 license required Duke to release a year-round continuous minimum flow of 40 cubic feet per second ("cfs") from the Tillery development into the Tillery Reach of the Pee Dee River directly downstream from Tillery Dam. *Id*. P 26, JA 2687. Minimum flows are those flows that remain in-stream when the Project is operating, while other flows are diverted to the powerhouse for generation purposes. In addition, under the 1958 license, Duke was responsible for the operation and maintenance of ten Project recreation sites, six of which are located at Tillery. *Id*. P 21, JA 2686.

B. The Relicensing Proceeding

1. Public Engagement And Environmental Review

In April 2003, Duke's predecessor, Carolina Power & Light Co. (known as Progress Energy), initiated the relicensing process by filing a notice of intent to seek a new license with the Commission. Following initial consultations with stakeholders, on April 26, 2006, Progress filed an application to continue the operation of the Project. License Order P 1, JA 2681; *see* Application, Executive Summary, Initial Statement, R. 36, JA 230, 238. Various federal and state agencies, including the U.S. Department of the Interior, Fish and Wildlife Service, intervened in the FERC proceeding. Other intervenors include American Rivers and the Coastal Conservation League, jointly, as well as Richmond County, Anson County, and the City of Rockingham.[1] *See* License Order P 5, JA 2682.

As the Commission began its review, Progress notified the Commission that it had reached an agreement with most stakeholders on the resource issues raised by the relicensing. Shortly thereafter, in July 2007, Progress filed the Comprehensive Settlement Agreement – the "culmination of four years of collaboration by many organizations . . . to study, evaluate, and discuss the various resources issues raised by the relicensing." Settlement, Transmittal Ltr. at 1, R. 246, JA 839. The Settlement resolved all outstanding issues associated with the

[1] Later, American Rivers and Rockingham began participating jointly before the Commission. This brief references the two joint petitioners as Petitioners.

relicensing, as to the signatories, with the exception of fish passage, and included proposed license conditions which the signatories requested the Commission include in any new license. *Id*. at 1-2, JA 839-40; License Order P 7, JA 2683.

The Settlement was signed by Progress, North Carolina Department of Environment and Natural Resources, North Carolina Wildlife Resources Commission, South Carolina Department of Health and Environmental Control, South Carolina Department of Natural Resources, Montgomery County, North Carolina, the Fairway Shores Homeowner's Association, the Pee Dee River Coalition, the Carolina Forest Association, Land Trust for Central North Carolina, The Nature Conservancy, Jordan Timberlands, and the Coastal Conservation League. License Order P 7, JA 2683. Petitioners Rockingham and American Rivers participated in discussions leading to the Settlement, but ultimately chose not to sign it. Instead, they filed comments on the Settlement, stating that they "generally agree that many of the measures proposed in the [Settlement] will improve significantly baseline conditions of beneficial uses of the Pee Dee River," but "with the exception of measures proposed for the Tillery Reach." Comments at 1, R. 262, JA 957.

The Commission's analysis proceeded under the Federal Power Act and the National Environmental Policy Act. On March 13, 2007, the Commission issued a public notice indicating that the application was ready for environmental analysis,

stating its intent to prepare an environmental impact statement, and soliciting comments and recommendations. *See* Notice, R. 190, JA 737. Thereafter, both the National Marine Fisheries Service ("Fisheries Service") and the Department of Interior's Fish & Wildlife Service filed recommendations for the Commission's consideration under Federal Power Act section 10(j), 16 U.S.C. § 803(j)(1). As relevant here, the Fish & Wildlife Service recommended increased minimum flows in order to further enhance aquatic habitat downstream in the Tillery Reach. *See* License Order PP 6, 126, 129, JA 2682, 2716, 2717. American Rivers and Rockingham each filed comments supporting the Fish & Wildlife Service's recommended minimum flows. *See id*. P 131, JA 2718. Taking into consideration comments received during public scoping meetings, as well as the filed recommendations and comments, the Commission issued a draft environmental impact statement for public comment. *See id*. P 8, JA 2683.

Subsequently, in February 2008, Progress reached an agreement on fish passage issues with the relevant federal and state resource agencies, and filed that agreement with the Commission. *See id*. P 9, JA 2683. Under the terms of the Fish Passage Agreement, and reflecting the mandatory fishway prescriptions filed by the Fisheries Service and the Fish and Wildlife Service, the licensee will install, among other things, facilities for upstream and downstream passage of American

shad at Blewett Falls, and, later, upstream American shad passage facilities at Tillery. *See id*. P 101, JA 2707.

On February 11, 2008, North Carolina issued its water quality certification for the Yadkin–Pee Dee Project, as amended on September 12, 2008. *See* License Order PP 87-88, JA 2702 (explaining that certification is required by section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), and must be incorporated into the license, 33 U.S.C. § 1341(d)); *id*., App. A (appending the certification), JA 2782. Petitioners appealed the certification to the North Carolina Superior Court and North Carolina Court of Appeals. Those courts, in proceedings concluding in 2012, upheld the state certification, which requires the same flow regime proposed in the Settlement. *See* Duke Answer at 3-4, R. 850, JA 2345-46.

The Commission issued a final environmental impact statement ("Final EIS") on April 18, 2008. License Order P 10, JA 2684; *see also* Final EIS, R. 461, JA 1194. The Final EIS addressed the full range of resource issues associated with the Project, including aquatic and recreation resources, the primary issues Petitioners raise before this Court. Concerning aquatic resources, the central issue is minimum flows in the Tillery Reach. Staff conducted a detailed analysis focused on two proposals, the Settlement flows and Petitioners' preferred flows. *See* Final EIS at 108-21, JA 1329-42. On the issue of recreation resources, the Settlement and Petitioners again offered, and staff analyzed in detail, differing

proposals, here for periodic flow releases into the Tillery Reach (as a supplement to the minimum flows) intended to enhance recreation opportunities. *See id*. at 91-92, 198-203, JA 1312-13, 1419-24. Based on its analysis of these competing proposals, staff ultimately recommended adoption of the Settlement's proposals for both minimum flows and recreation flows, but also recommended additional recreational boating monitoring and a study. *See id*. at 285, 287-92 (staff recommendations), 298-300 (minimum flow), 313-15 (recreation flow), JA 1496, 1498-1503, 1509-11, 1524-26.

Although Commission staff's analysis was complete, the Commission awaited the completion of proceedings concerning conditions required by federal and state resource agencies. In the interim, Progress notified the Commission that it had changed its name to Duke Energy Progress, Inc., effective April 29, 2013, reflecting the merger of Progress with Duke Energy Corporation. Rehearing Order P 12 & n.10, JA 3266. The Commission's orders and this brief refer to the licensee as Duke.

In compliance with its Endangered Species Act obligations, Commission staff initiated consultation with the National Marine Fisheries Service on January 24, 2008. Studies had documented the endangered shortnose sturgeon in the lower Pee Dee River, about 30 miles downstream from Blewett Falls Dam. While that consultation was pending, the Fisheries Service listed the Atlantic sturgeon as

endangered, and the Commission initiated consultation concerning that species as well. *See* License Order P 109, JA 2710.

On April 29, 2013, the Fisheries Service issued its biological opinion, which concluded that the proposed action is not likely to jeopardize the continued existence of shortnose sturgeon or the local population of Atlantic sturgeon. *Id*. P 110, JA 2710. The biological opinion includes an incidental take statement with reasonable and prudent measures to minimize the take of shortnose and Atlantic sturgeon. Duke sought judicial review of the biological opinion in federal district court in the Western District of North Carolina. *See id*. P 113, JA 2711. A later settlement of that proceeding required the Fisheries Service to revise its biological opinion by February 2015. *Id*. P 114, JA 2712. The Fisheries Service ultimately filed its biological opinion with the Commission on April 18, 2015, just weeks after the Commission issued the license. *See id*.

After the conclusion of the state court litigation concerning the water quality certification, Petitioners returned their attention to the Commission's relicensing proceeding. In 2013 and 2014, Petitioners filed three motions seeking to supplement the record (R. 844, JA 1767 (filed July 24, 2013)), to require a recreational flow study (R. 909, JA 2485 (filed May 23, 2014)), and to supplement the developmental analysis in the Final EIS with additional information concerning their proposal to retrofit a new turbine at Tillery, designed to accommodate their

preferred flows (R. 913, JA 2602 (filed June 23, 2014)). *See* Rehearing Order P 69, JA 3282. Each motion primarily restated arguments made in comments on the draft and final EIS, as refined in the course of Petitioners' challenge to the state water quality certification. The Commission addressed those motions in the License Order. *See* License Order P 10 n.13, JA 2684.

2. The Licensing Orders

On April 1, 2015, the Commission's Office of Energy Projects issued a new 40-year license for the Project. *See* License Order PP 3, 232, JA 2681, 2751. Building on the analysis in the Final EIS, the License Order addressed the issues raised by the relicensing at length, weighing the recommendations and comments of resource agencies and other stakeholders. Ultimately, the Commission found that both the conditions proposed by the Settlement, and those recommended by Commission staff will adequately protect, mitigate and enhance the resources affected by the Project. *See, e.g.*, *id*. P 135, JA 2719. Thus, the Commission concluded that the Project, as licensed with conditions, "is best adapted to a comprehensive plan for improving or developing the Yadkin–Pee Dee River System." *Id*. P 229, JA 2750.

As relevant to the issues raised by Petitioners before this Court, the Commission: (1) approved the minimum flows for the Tillery Reach proposed in the Settlement, and rejected Petitioners' preferred flows, License Order PP 127-35,

153-59, Art. 403, JA 2716-19, 2726-29, 2761; (2) approved the recreation flows proposed in the Settlement and required by the North Carolina water quality certification, and rejected Petitioners' proposed recreation flows, *id*. PP 34, 160-67, Art. 406, JA 2689, 2729-32, 2763; and (3) addressed in detail, and ultimately rejected, Petitioners' proposal to replace or modify an existing turbine, or add a new turbine, to the Tillery development to facilitate their recommended flows, *id*. PP 195-98, JA 2742-43.

Duke sought rehearing and clarification regarding a number of issues, and also requested that the Commission revise the license to incorporate the terms of the final biological opinion. The Commission granted this request and other clarifications, but denied Duke's request to extend the license term to 50 years. *See* Rehearing Order P 41, JA 3275.

Petitioners Rockingham and American Rivers also sought rehearing, continuing to pursue their preferred minimum and recreation flows, and challenging the Commission's compliance with the National Environmental Policy Act and the Endangered Species Act. The Commission denied rehearing, as further described in response to Petitioners' claims addressed below.

SUMMARY OF ARGUMENT

The Federal Power Act endows the Commission alone with the responsibility of balancing the development of the Nation's water resources with the protection of a range of sometimes competing values, including, as particularly relevant here, natural resources and recreational opportunities. Following a collaborative relicensing process, nearly all interested stakeholders – including state and federal resource agencies – joined or supported settlements of the issues raised by the Project, which include extensive conditions to protect, mitigate and enhance the resources affected by the Project. The Commission approved the settlement, with additional conditions developed through its independent evaluation, resulting in a new license that is best adapted to the comprehensive development of the Yadkin-Pee Dee River system for power and other beneficial uses. Only Rockingham and American Rivers protest the Commission's action.

Just as the Commission's responsibilities are broad, Petitioners' interests are narrow. As a result, Petitioners inappropriately invite the Court to "flyspeck" the Commission's comprehensive analysis, and to upset the careful balance of competing interests reflected in the licensing orders. The Court should refuse this invitation – and it is required to by the narrow scope of its review under the Federal Power Act.

The Federal Power Act requires that the Commission develop a complete

record on all aspects of the public interest. The Commission did so, and Petitioners challenge only two areas of the Commission's comprehensive development analysis: aquatic habitat, as impacted by minimum flows from the Tillery Dam; and recreation flows in the Tillery Reach. As to minimum flows, Petitioners primarily challenge the Commission's choice of methodology. From a choice of Weighted Useable Area, Index C, and Dual Flow Analysis, the Commission explained its choice of the first. As the names of these methodologies correctly suggest, this is a technical judgment committed to the Commission's expertise.

Similarly, Petitioners do not demonstrate that the Commission's assessment of recreation needs at the Project is unreasonable or unsupported. The new license requires substantial recreational enhancements, including periodic flow releases to allow additional boating in the Tillery Reach, as well as new boat ramps, among other measures, at the 10 existing recreation sites sponsored by Duke. But, the Commission reasonably found that additional recreation flows were inconsistent with the public interest, based on existing low levels of use and substantial, available recreation capacity in the area. Moreover, North Carolina's water quality certification, the terms of which are mandatory, prohibited the Commission from increasing the recreation flows. Nevertheless, the Commission required Duke to monitor recreational boating and, together with stakeholders, to report on

recommendations for recreation flows.

The Commission also satisfied its obligation to consider a reasonable range of alternatives under the National Environmental Policy Act. Petitioners agree that the Commission did consider their recommendations for flows and a retrofit turbine to accommodate those flows. Nothing in NEPA requires the Commission to consider these recommendations as a discrete action alternative. And, even if it did, Petitioners do not challenge the Commission's finding that it satisfied NEPA by considering their alternatives in the Final Environmental Impact Statement and License Order, but eliminating them from detailed study.

Finally, Petitioners use the Endangered Species Act in an effort to resurrect their challenges to the data used to consider minimum flow regimes. The Commission provided the Fisheries Service with all available data, and reasonably explained its choice, as described above, among the available methodologies for studying aquatic habitat. The Court should respect the Commission's exercise of technical judgment.

ARGUMENT

I. STANDARD OF REVIEW

"This Court may set aside the FERC's order only if . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), "or unsupported by

substantial evidence" under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *Appomattox River Water Authority v. FERC*, 736 F.2d 1000, 1002 (4th Cir. 1984). "The "scope of review under the 'arbitrary and capricious' standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Appomattox*, 736 F.2d at 1002 (same). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. Rather, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal citation omitted)).

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Under this standard, "[i]t is not the function of this court to reweigh the evidence and draw inferences therefrom." *Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342, 1345 (4th Cir. 1984). This Court's "review is particularly deferential when, as is the case here, 'resolution of th[e] dispute involves primarily issues of fact' that implicate 'substantial agency expertise' . . .

and the agency is tasked with balancing often-competing interests." *Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2014) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376–77 (1989)).

Moreover, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378; *see also Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1999). That is, "[i]f the evidence is susceptible to more than one rational interpretation, [the Court] must uphold the agency's determination." *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 94 (3d Cir. 2014) (citing *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) ("The question we must answer . . . is not whether record evidence supports [petitioner]'s version of events, but whether it supports FERC's.")).

Finally, Petitioners challenge the Commission's responsibilities under various provisions of the Federal Power Act. In reviewing Commission decisions interpreting the Federal Power Act, which Congress has entrusted the Commission to administer, reviewing courts apply the familiar *Chevron* framework. *See Oconto Falls, Wis. v. FERC*, 41 F.3d 671, 674 (D.C. Cir. 1994) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). "*Chevron* thus provides a stable background rule against which Congress

can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013).

II. THE LICENSING ORDERS FULLY SATISFY THE COMMISSION'S FEDERAL POWER ACT RESPONSIBILITIES

A. The Commission Considered And Balanced All Aspects Of The Public Interest In Issuing The New License

The Commission's licensing orders on review satisfy its duty to fully consider all resource issues associated with the relicensing of the Project, and its responsibility to balance the competing public interests at stake in reaching a decision to issue a new license for the Project. Petitioners' arguments to the contrary, Br. 10-15, both overstate and misstate the requirements of the Federal Power Act, and understate the scope and nature of the Commission's detailed analysis.

1. The Federal Power Act Requires The Commission To Consider All Aspects Of The Public Interest, Not To Set Particular Resource Goals

Federal Power Act section 10(a)(1) provides:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and

> other purposes referred to in section [4(e) of the Act, 16 U.S.C. § 797(e)] . . . .

16 U.S.C. § 803(a)(1). In practice, this "requires the Commission to develop a record in the proceeding on all aspects of the beneficial public uses relating to the comprehensive development of the waterway." Rehearing Order P 78, JA 3286; *see Udall v. FPC*, 387 U.S. 428, 450 (1967) (holding that under FPA section 10(a)(1), "[t]he test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest' . . . .").

In this case, the Commission fully considered all aspects of the public interest, as required by FPA section 10(a)(1). The extensive record reflects that the Commission addressed archaeological and historic resources, erosion, sedimentation, recreation, socioeconomics, native and exotic aquatic vegetation, fishery resources (including fish spawning and rearing, as well as fish entrainment), instream flows, drought and flood management, non-project water withdrawals, and water quality, among other matters. Rehearing Order P 78, JA 3286. For each of these issues and resources, the Commission solicited information from the license applicant and the public, considered those submissions, conducted its own independent evaluation, and, where necessary, addressed and resolved conflicting views. Moreover, the record reflects that the Commission gave "equal consideration" to the protection, mitigation of damage to,

and enhancement of all aspects of environmental quality, as well as recreation and developmental interests, as required by FPA section 4(e), 16 U.S.C. § 797(e).

The Commission alone is tasked with this comprehensive inquiry; after all, FPA section 10(a)(1) requires that the Project be best adapted "as in the judgment of the Commission." 16 U.S.C. § 803(a)(1). To be sure, Petitioners would have preferred that the Commission balance these competing aspects of the public interest differently, but that ultimate decision is left to the Commission's informed judgment. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (explaining that the agency's role under section 10(a)(1) "is emphasized" by the statutory language referencing "the judgment of the Commission"); *see also U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (holding that agency need only establish a record to support its decisions and need not definitively resolve all environmental concerns). The breadth of the Commission's role contrasts with the narrowness of Petitioners' interests: Of the catalog of resource issues and impacts the Commission addressed, Petitioners challenge the Commission's assessment of only two: aquatic habitat and recreation. The Commission addresses these issues in detail below, *infra* pp. 31, 39.

Petitioners dispute the Commission's understanding of FPA section 10(a)(1), but their arguments reflect a deeply flawed interpretation of the statutory language. They first rely, Br. 12-13, on *Scenic Hudson Preservation Conference v.*

FPC, 354 F.2d 608 (2d Cir. 1965), as conferring on the Commission "a specific planning responsibility." *Id*. at 613. While Petitioners construe these words to require FERC to set goals or objectives, the *Scenic Hudson* court's own understanding of the Commission's "planning function," under FPA section 10(a)(1), is consistent with the Commission's view and action here: "The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." *Id*. at 620.

Likewise, Petitioners misstate the meaning of "comprehensive plan" in FPA section 10(a)(1). That provision "does not require the Commission to prepare a single comprehensive plan that sets goals for achieving desired future conditions against which an application is measured." Rehearing Order P 77, JA 3286. To be clear, as the Ninth Circuit has found, no document entitled "Comprehensive Plan" need be prepared or filed. *Id*. P 77 n.60, JA 3286 (citing *LaFlamme v. FERC*, 945 F.2d 1124, 1128 (9th Cir. 1991)). In *LaFlamme*, the court affirmed the Commission's interpretation of section 10(a)(1) – the same interpretation it relies on here – as requiring the Commission to "consider all facts relevant to the public interest." 945 F.2d at 1128 (citing, e.g., *Udall*, 387 U.S. at 450). The dictionary definition of "plan," Br. 13, does not trump the Commission's reasonable interpretation of the statutory text. *See Piedmont Envtl. Council v. FERC*, 558

F.3d 304, 312 (4th Cir. 2009) (holding that FERC's permissible construction of ambiguous statutory language will be upheld).

Indeed, in arguing that the Commission must set goals or objectives for resources managed by other federal and state agencies, Petitioners offer little more than a misreading of *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). *See* Br. 12-13. The language from *Escondido* on which Petitioners rely addresses section 4(e) of the Federal Power Act, which (in addition to requiring equal consideration of power and non-power values, as discussed above) requires that licenses issued for projects located on federal lands or reservations include "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 reservations." 16 U.S.C. § 797(e). Addressing the nature of section 4(e) conditions, the Court in *Escondido* explained:

> If the Secretary concludes that the conditions are necessary to protect the reservation, the Commission is required to adopt them as its own, and the court is obligated to sustain them *if they are reasonably related to that goal*, otherwise consistent with the FPA, and supported by substantial evidence.

466 U.S. at 778 (emphasis added to language quoted by Petitioners, Br. 12). This language does not address the Commission's section 10(a)(1) responsibility to inquire into and balance all aspects of the public interest, at all, let alone require it to "relate any license condition to a stated goal." Br. 12. The responsibility to set

resource goals lies not with the Commission, but with the federal and state resource agencies responsible for managing the resources in question. Rehearing Order P 79, JA 3287; *see also* License Order PP 151, 155, JA 2725, 2727.

2. The Commission Adequately Considered Resource Agencies' Comprehensive Plans

Reflecting the role of the Commission in relation to federal and state resource agencies, the Federal Power Act and the Commission's regulations call for those resource agencies to submit, for the Commission's consideration, potentially relevant comprehensive plans prepared by those federal and state agencies. 16 U.S.C. § 803(a)(2); 18 C.F.R. § 2.19. Under FPA section 10(a)(2), the Commission must consider whether the Project, as conditioned, would be consistent with the comprehensive plans submitted by those agencies. 16 U.S.C. § 803(a)(2). The Commission is not required to ensure consistency with section 10(a)(2) plans. Rehearing Order P 79, JA 3287; *see Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554 (2d Cir. 1992) (same). On rehearing before the Commission, Petitioners endorsed this longstanding interpretation of section 10(a)(2). *See* Rehearing Request at 31, R. 961, JA 3177 (quoting *FPL Energy Maine Hydro, LLC*, 95 FERC ¶ 61,016, at p. 61,032 (2001) (internal citations omitted) ("Moreover, the Commission is not required to ensure that licensing a project is consistent with Section 10(a)(2)(A) plans as long as it has given due consideration to all recommendations from relevant agencies, reconciled

inconsistencies between those agencies' recommendations and the Commission's plans to the extent possible, and explained its reasons for departing from the agencies' recommendations.")).

In this case, Commission staff identified 19 comprehensive plans relevant to the Project, including four plans concerning the restoration of anadromous fishery resources and two on recreation in the Project area. Rehearing Order P 79, JA 3287. Petitioners claim there are "potential conflicts" between the Project as licensed and those plans, Br. 15, but offer nothing more than this assertion and a few citations to its filings before the Commission. This mere assertion does not satisfy this Court's rules. *See* Fed. R. App. P. 28(a)(8)(A) (requiring argument section of brief to contain "appellant's contentions and the reasons for them"). This Court typically does not consider arguments incorporated by reference, and a "conclusory remark [like, 'potential conflicts'] is insufficient to raise on appeal any merits-based" claim. *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 n.7 (4th Cir. 2006) (citing Fed. R. App. P. 28). And even if it were, Petitioners may present to this Court only those objections they preserved in their request for agency rehearing.[2] On rehearing before the Commission, Petitioners claimed potential

[2] This Court's "review of FERC's order[s] is limited by 16 U.S.C. § 825*l*(b), which provides, '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

conflicts with only two comprehensive plans. *See* Rehearing Request at 31-34, JA 3177-80 (*cited in* Br. 15).

If the Court determines that Petitioners have adequately raised these issues, review of the record demonstrates that the Commission has satisfied FPA section 10(a)(2). On rehearing, Petitioners claimed that the Commission did not fully consider the 2005 North Carolina Wildlife Action Plan. *See* Rehearing Request at 31-34, JA 3177-80. Petitioners argued that the new license does not prioritize conservation of native species over non-native species, as required by that Plan. *Id*. But the Commission's analysis addressed the Plan, specifically finding that Duke's proposed donations of riparian lands to North Carolina would contribute to the conservation goals of the plan.[3] Final EIS at 230, JA 1451; *see* License Order PP 58-60, JA 2695-96 (discussing land transfers).

Moreover, the Commission fully addressed the resource issues and goals identified in the Wildlife Action Plan. The Final EIS contains extensive discussion of fish species in the Project area, and identifies and considers six federal aquatic species of concern as well as non-native mollusks. Final EIS at 102-106, JA 1323-

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application for rehearing unless there is reasonable ground for failure to do so.'" *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n*, 143 F.3d at 173.

[3] The donation of lands is a voluntary commitment by Duke, also included as a term of North Carolina's water quality certification. *See* License Order P 92, JA 2704. The Commission did not find the donation to be necessary for Project purposes. *See id*. P 93, JA 2705.

27; *id*. at 123, JA 1344 (noting that invasive, exotic, clam and snail populations are common throughout the Southeast and their introduction is unrelated to Project operations). Staff specifically identified a 2006 diadromous fish restoration plan developed jointly by the same federal and state agencies that signed the Fish Passage Agreement. *Id*. at 104, JA 1325. The signatories to the Fish Passage Agreement specifically agreed that the Agreement fully supports the 2006 plan, which identifies target species and population goals for those species. *Id*., Table 32, at 125, JA 1346; *see also id*. at 104, JA 1325. Likewise, Commission staff's analysis of the proposed minimum flows demonstrates that those flows are, consistent with the Wildlife Action Plan, intended to improve habitat for native species. *Id*. at 111-18, JA 1332-39 (discussing habitat availability for American shad, among other native species of concern); *see also infra* pp. 31-34 (discussing mitigation value of minimum flows). Thus, the Commission reasonably concluded that the new license is consistent with the Wildlife Action Plan and its objectives. *See* Rehearing Order P 79, JA 3287; Final EIS at 326, JA 1537.

On rehearing, Petitioners also specifically questioned whether the new license is consistent with the North Carolina State Comprehensive Outdoor Recreation Plan's objective of improving outdoor recreational opportunities. *See* Rehearing Request at 33, JA 3179. The Final EIS references this plan and found no inconsistency. Final EIS at 326-37, JA 1537-38; Rehearing Order P 79,

JA 3287. As further discussed below, *infra* p. 45, the new license considered and requires significant recreation enhancements, including many, though not all, of those sought by Petitioners. *See* License Order PP 164, 166-67, JA 2731, 2732 (requiring enhanced recreation flows in the Tillery Reach); *see also id*. PP 169-79, JA 2733-37 (requiring new and improved recreation facilities and recreation monitoring); *see also* Final EIS at 314, JA 1525 (noting projection of increased recreational use and recommending post-licensing monitoring).

B. The Minimum Flow Requirements Fully Satisfy The Federal Power Act

1. The Minimum Flows Are Best Adapted To The Comprehensive Development Of The River System

Petitioners specifically challenge the Commission's approval of Duke's proposed minimum flow releases from Tillery Dam as inconsistent with the comprehensive development standard of section 10(a)(1) of the Federal Power Act, 16 U.S.C. § 803(a)(1). *See* Br. 10-14. Under the 1958 license, Duke was required to release a year-round continuous minimum flow of 40 cubic feet per second from the Tillery development, typically through leakage through the spillway radial gates and/or the trash gate. License Order P 26, JA 2687. In the Settlement, the signing parties, including Duke, proposed to increase this to a year-round continuous minimum flow of 330 cfs – more than an eight-fold increase. *Id*. P 33, JA 2688; *see also* Settlement § 2.1.4.2, JA 880. Also, following the first passage

of American shad at the Blewett Falls Dam (scheduled for five spawning seasons after license issuance), the Settlement requires Duke to provide a continuous minimum flow of 725 cfs for an eight-week period in the spring, to support spawning habitat for shad. License Order P 33, JA 2689.

During the relicensing proceeding, the Fish and Wildlife Service submitted a recommendation for enhanced minimum flows. Rehearing Order P 85, JA 3288; *see also* Fish and Wildlife Service Section 10(j) Recommendations, R. 201, JA 741. The Service proposed minimum flows for the Tillery Reach of 800 to 1,000 cfs from May 16 to January 31, and 1,500 to 1,800 cfs from February 1 through May 15, to improve American shad spawning. Rehearing Order P 85, JA 3288. Petitioners supported those recommended flows. *Id.*

The Commission approved the proposed minimum flows set forth in the Settlement, and rejected Petitioners' preferred flows. *See* License Order P 33, JA 2689. The Commission relied on its staff's analysis of impacts to fish habitat. Rehearing Order PP 88-92, JA 3289-90; *see also* Final EIS at 109-19, JA 1330-40. Staff's analysis showed that "Duke's proposed year-round flow of 330 cfs would substantially improve the availability of fish and aquatic invertebrate habitat over existing conditions," while Petitioners' preferred flows "would not result in significantly more habitat than Duke's proposed flows." Rehearing Order P 98, JA 3292; Final EIS at 119, JA 1340. In light of this finding, the Commission

examined the annual costs of each proposal, ultimately finding that the incremental increase in habitat provided by Petitioners' preferred flows "did not justify the costs, and [the] recommendation was thus inconsistent with the equal consideration and comprehensive development standards of FPA sections 4(e) and 10(a)(1)." Rehearing Order P 99, JA 3293.

As required by the Commission, as well as North Carolina's water quality certification, Duke must conduct post-licensing monitoring of aquatic life downstream of Tillery Dam. License Order PP 89-90, JA 2703-04. That plan will require Duke to identify criteria for the successful recovery of macroinvertebrates and fish. *Id*. P 90, Art. 401(a), JA 2704, 2758. And, as required by the Commission, acting on its own conditioning authority, the plan will outline corrective actions to be implemented if the success criteria are not met. *Id.* As always, the Commission specifically retains the authority to reopen the license to require modifications to Project facilities or operations, should monitoring indicate the need for such action. *See id*., Art. 15 & 17, JA 2779; *see also* Rehearing Order P 61, JA 3280; *Dep't of Interior*, 952 F.2d at 547 (finding that FERC reasonably rejected requests for additional studies and accounted for uncertainty through post-licensing monitoring and conditions, where "any party, including petitioners here, may petition FERC to enforce the license conditions or exercise its retained authority under the reopener clause").

The Commission's analysis of the impacts on aquatic habitat associated with minimum flows is comprehensive, and reflects thoughtful balancing of the two key factors at stake: habitat needs and development interests. This analysis fully satisfied the Federal Power Act's comprehensive development standard. *See Conservation Law Found. v. FERC*, 216 F.3d 41, 49 (D.C. Cir. 2000) (affirming FERC's decision not to require minimum flows, where it adequately considered and weighed competing power and non-power values); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("The disputed question here involves both technical understanding and policy judgment. The Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced.").

2. The Commission Adequately Assessed The Impact Of Flow Changes On Aquatic Habitat

Petitioners challenge the Commission's choice of methodology in assessing the impacts of flow changes on aquatic habitat in the Tillery Reach. Specifically, Petitioners claim that the Commission relied on "inferior scientific methods that are not reliable" for assessing aquatic habitat impacts for this Project. Br. 36. The Commission met its burden to show substantial evidence in support of the minimum flow conditions, and adequately addressed Petitioners' preferred flows. While other record evidence might support Petitioners' proposal, that does not invalidate the adopted conditions. Petitioners may "disagree," Br. 22, with this

standard of review, but courts have confirmed that this is all that is required. *See, e.g.*, *California v. FERC*, 966 F.2d 1541, 1551 (9th Cir. 1992) ("While [petitioner] might be able to argue that its methodology is 'better,' it has not demonstrated, nor does a review of the lengthy FERC analysis of flow regimes reveal, that FERC used an invalid methodology, or that FERC's decision was not based on substantial evidence.").

In studying aquatic habitat needs, Duke used the Physical Habitat Simulation System to quantify habitat over a given range of flows. Rehearing Order P 87, JA 3289. There are several possible outputs of the System, and the three at issue here are: Weighted Useable Area, Index C, and Dual Flow Analysis. *Id*. P 88, JA 3289. Weighted Useable Area is an "estimate of the area of suitable habitat that is available to a species and/or life stage per unit length of a stream at a given flow." *Id*. Index C is a "summary statistic from a large amount of weighted usable area data." *Id*. In a Dual Flow Analysis, "the availability of suitable physical habitat (weighted usable area) is estimated for the minimum and maximum flows over a time series." *Id*.

Duke reported the results using the Index C methodology, and also performed a limited Dual Flow Analysis. License Order PP 157-58, JA 2728; *see also* Final EIS at 109, JA 1330; *see* Application, App. B, Pee Dee River Instream Flow Final Study Report at 8-11, 9-7, R. 56, JA 645, 658. Duke conducted the

flow studies following a collaborative study design and review process. *See* Application, Exh. E1 at E1-9–E1-10, JA 277-78 (discussing stakeholder participation).

As detailed in the Final EIS, the Commission relied on its own staff's selection of Weighted Useable Area as a methodology to assess the impact of various flow regimes on aquatic habitat. Rehearing Order PP 91-92, JA 3290. The selection of Weighted Usable Area allowed Commission staff to study a wide-range of species across a large number of river reaches, under all known possible flow conditions (70 cfs (average flow under the 1958 license) to 17,000 cfs (the maximum flow during periods of non-generation)). *Id*. P 92, JA 3290.

The Final EIS presents the results of this analysis for the 1958 license, the Settlement flow regime, and Petitioners' preferred flows. *See* Final EIS at 111-18, JA 1332-39. Staff's analysis found that the Settlement flow regime would "substantially improve" aquatic habitat over existing conditions, increasing the maximum habitat area possible by 17 percent. Rehearing Order P 98, JA 3292; License Order P 132, JA 2718. Petitioners' preferred flows, in turn, would provide an additional 15 percent increase on top of the Settlement flow regime. Rehearing Order P 98, JA 3292. For the high spring flows, targeted to improving spawning habitat for shad, the Settlement flow of 725 cfs provides a 34 percent increase in maximum spawning habitat area, while Petitioners' preferred flow of 1,500 to

1,800 cfs would provide an additional increase of 26 percent more spawning habitat area. Rehearing Order P 98, JA 3292-93; License Order P 133, JA 2718.

Petitioners start their challenge to the Commission's methodology for assessing instream flows by challenging a methodology that the Commission did not use. Petitioners claim that the Commission erred in relying on Index C. Br. 36-37. But, the Commission explained that it did not, in fact, rely on Index C. Rehearing Order P 91, JA 3290 (explaining that the Final EIS (at 109-11, JA 1330-32) recited Duke's Index C analysis).

In response to Petitioners' concerns regarding Weighted Useable Area, the Commission acknowledged that the Weighted Usable Area methodology does not directly address flow fluctuations based on peaking operations. License Order P 158, JA 2728; Final EIS at 111, JA 1332. The Dual Flow Analysis, by contrast, takes peaking operations into account by identifying suitable habitat for both minimum *and maximum* flows, over a time series. Rehearing Order P 88, JA 3289. Thus, while the Commission noted that the Dual Flow Analysis is typically used to assess peaking operation, the Commission found that it is best used to assess habitat availability "where there is a potential tradeoff between the high- and low-flow limiting factors." *Id*. P 93, JA 3290. Here, Petitioners do not dispute that no party proposed such a tradeoff. In other words, as the Commission explained, "the high (i.e., peaking) flow is established." *Id*. Because the stakeholders were

focused on identifying *minimum* flows to enhance aquatic conditions, there was insufficient reason to assess results for maximum flows by using a Dual Flow Analysis. *Id*.; *see Dep't of Interior*, 952 F.2d at 547 (affirming decision not to require additional studies where "FERC specifically considered the additional studies proposed and found that they were unlikely to provide additional, useful information").

Notably, Petitioners' preferred flow regime, as developed by the Fish and Wildlife Service, was not based on the Dual Flow Analysis. License Order P 158, JA 2728 ("no entity made recommendations for flows based specifically on the dual flow analysis"); Rehearing Order P 93, JA 3290; *see also* Fish and Wildlife Service 10(j) Recommendations at 4-7, R. 201, JA 744-47. This is the case even though Duke actually performed a limited Dual Flow Analysis. *See* Application, App. B, Pee Dee River Instream Flow Final Study Report at 8-11, 9-7, R. 56, JA 645, 658. Moreover, even though Duke filed its Instream Flow Report in the record on April 26, 2006, including the Dual Flow Analysis, Petitioners did not request that the Commission perform a full Dual Flow Analysis until July 2013, over five years after issuance of the Final EIS. *See* License Order P 153, JA 2726 (citing Motion at 32-44, R. 844, JA 1801-13).

Finally, the Commission does not claim that Petitioners were *required* to obtain the Physical Habitat Simulation System in order to conduct any modeling

they felt would support their recommendations. Br. 25. Rather the Commission reasonably declined to compel Duke to disclose its model, where the Commission was able to reach a determination, based on existing information in the record, that Petitioners' recommendations were not consistent with the public interest. More to the point, however, Petitioners could have challenged the input data and results of the Dual Flow Analysis – or the other methodologies – which were readily available in the record. Rehearing Order P 94, JA 3291. They did not. In any event, the Commission reasonably explained its reliance on Weighted Useable Area, and its decision, steeped in technical expertise, to favor that methodology warrants deference from the Court. *See Hughes River Watershed Conservancy*, 165 F.3d at 289-90 (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 100-01 (1983)); *see also Webb v. Gorsuch*, 699 F.2d 157, 160 (4th Cir. 1983) (holding that "where there is conflicting expert opinion" the agencies "and not the courts . . . resolve the conflict").

C. The Required Recreation Flows Fully Satisfy The Federal Power Act

Petitioners also challenge the level of recreation flows – periodic flows released during recreation season designed to enhance boating opportunities – required under the new license. Under the 1958 license, Duke was not required to release flows for recreational purposes. As part of the Settlement, Duke and the signatory parties proposed to release 1,750 acre-feet of water per year from Lake

Tillery for recreational purposes during the recreation season (May 15 through September 15), in addition to the other required minimum instream flows. License Order P 34, JA 2689; Rehearing Order P 104, JA 3295. Recreation flows can be increased to 1,950 acre-feet, under certain circumstances. License Order P 34, JA 2689. Both the minimum and maximum recreation flows are set forth in section 2.1.4.3 of the Settlement, which, importantly, is included as condition 9 of the North Carolina water quality certification. Rehearing Order P 104, JA 3295.

In the EIS, Commission staff recommended the Settlement's proposed recreation flows, subject to the development of a Recreation Flow Release Plan to determine how to allocate the required flows. Final EIS at 314, JA 1525. In addition to detailing the recreation use types and the proposed recreation flow rates, dates, and duration, staff recommended that Duke notify the public of the flow releases, monitor recreational use, and, at the end of the initial 3-year evaluation period, file a report with recommendations for modifying the flow release schedule consistent with the requirements of the North Carolina water quality certification. License Order P 166, JA 2732; *see also id*. Art. 406, JA 2763.

In the License Order, the Commission adopted the Settlement's proposed recreation flows, and required the Recreation Flow Release Plan as recommended by Commission staff. License Order P 167, Art. 406, JA 2732, 2763. Before the Commission, as before this Court, Petitioners recommended recreation flow

releases of 1,200 cfs, or 33,560 acre-feet per year (Final EIS at 314, JA 1525), every weekend and holiday from May to September. License Order P 163, JA 2730; Rehearing Order P 106, JA 3296. The Commission addressed Petitioners' concerns in detail, ultimately finding that the Settlement recreation flows are supported by substantial evidence and consistent with the Federal Power Act and Commission policy, while Petitioners' favored flows were barred by the mandatory conditions of the North Carolina water quality certification and, in any event, were not consistent with the public interest.

1. The Recreation Flows Are Supported By Substantial Evidence

As part of the collaborative relicensing process, Duke, the resource agencies and other stakeholders designed and implemented a study of recreation flows to identify the flow levels that would protect and, if appropriate, enhance recreation opportunities at the Project. *See* Application, Exh. E7 at E7-35, JA 318; *see also* 18 C.F.R. § 4.51(f)(5) (requiring, as part of a license application, a report on recreation resources, prepared in consultation with state and federal recreation agencies). The Tillery Reach is a relatively flat river reach that generally supports canoes and kayaks. License Order P 161, JA 2729. The Pee Dee River Instream Flow Study results indicate that recreational users are able to canoe and kayak the Tillery Reach at Duke's proposed minimum instream flow of 330 cubic feet per

second. *Id*. Thus, the study assessed the navigability of the reach based on the use of a 14-foot motorized jon boat. *Id*.

In the Final EIS, using the data collected in the recreation report, Commission staff concluded that 330 cfs would improve boating conditions over the existing conditions of 40 cfs; however, 330 cfs would not be sufficient to allow downstream navigation of jon boats in the Tillery Reach. *Id*. P 164, JA 2731. Instead, staff found that 671 cfs would be needed for the downstream navigation. *Id.* Staff further found that the Settlement flows would meet this need, when the 1,750 acre-feet to 1,950 acre-feet (884 to 985 cfs) of water dedicated to recreational boating flows under the Settlement is allocated in combination with intervening flows from the tributaries to the river below Tillery Dam. *Id*.; *see also* Final EIS at 201-02, 313, JA 1422-23, 1524; Rehearing Order P 110, JA 3297. Commission staff did not, however, recommend flows beyond those proposed in the Settlement, explaining that current and projected recreational use does not "warrant[] boatable flows every weekend and holiday during the entire recreation season, given the relatively low use of this reach and the additional annual cost of $129,000 to implement the 1,200 cfs alternative . . . ." Final EIS at 314, JA 1525.

Petitioners, reviewing the same study data Commission staff reviewed in the Final EIS, claim that 671 cfs is inadequate to support the use of jon boats in the Tillery Reach. Br. 44-45. They assert that further study is necessary to verify the

results of Duke's study, *id*. at 44, that Duke should have studied additional types of flow-dependent recreation, *id*. at 45-46, and that the Commission should have estimated the potential recreation demand in the Tillery Reach, *id*. at 48-52, as well as the economic benefits of increased recreation. *Id*. at 52-54.

Importantly, Commission staff agreed with Petitioners that an additional recreational boating flow study is appropriate. But, while Petitioners wanted the study conducted prior to license issuance, the Commission found the existing record sufficient to support the Settlement recreation flows, as conditioned by the requirement for monitoring and a report on recommended changes to the flow schedule. Rehearing Order P 115, JA 3299; License Order, Article 406, JA 2763-64 (including Rockingham as a consulting party in development of the plan and report). "It is common Commission practice to include a license condition that requires a licensee to monitor future recreational demand, so long as such license articles are not used as a substitute for reasoned pre-licensing decision-making." Rehearing Order P 115, JA 3299 (citing *PP&L Montana*, 97 FERC ¶ 61,060 at 61,323 (2001) (discussing *Dep't of the Interior*, 952 F.2d at 546 (holding that FERC need not have "perfect information" before acting and that such a requirement would violate the substantial evidence standard)).

The Commission adequately addressed and reasonably rejected each of Petitioners' remaining arguments. Nothing in FPA section 10(a)(1) or its

regulations requires a study of all possible recreational uses. Rehearing Order P 112, JA 3297. Here, where water-contact activities, including boating and swimming, have the lowest participation rates for all recreation types at the Tillery Reach, and increased recreation flows required by the license will enhance the opportunities for both, the Commission reasonably declined to direct more resources toward studying other water-contact activities. *Id*. (noting that swimming makes up 20 out of the estimated 3,413 user-days of recreation at the Tillery Reach, while canoeing accounts for just 2 user-days); *see also id*. P 116, JA 3299 (same). Duke's recreation study methodology, which focused on jon boats (where all parties agreed that the minimum instream flows were suitable for canoes and kayaks), was a reasonable choice in light of the relatively low recreation use. *See Hughes River Watershed Conservancy*, 165 F.3d at 289 ("Agencies are entitled to select their own methodology as long as that methodology is reasonable.").

Likewise, the Commission is not required to study all potential recreation demand, nor did it see the value in doing so here. Rehearing Order P 112, JA 3297. The record contains significant data on existing and projected recreation uses. *See* Application, Exh. E7, R. 38, 39, 40, JA 281, 333, 502; *see also* Final EIS § 3.3.7, p. 290, JA 1400, 1501. The Commission relied on that data, examining three Project recreation sites along the Tillery Reach, to show that,

under pre-relicensing conditions, the greatest capacity reached was 65 percent at a canoe portage on Memorial Day weekend and 53 percent during April weekends at an access point just below the Tillery Dam. Rehearing Order P 112, JA 3298. Otherwise, capacity remained at about 30 to 37 percent. *Id*. (citing Application, Exh. E7, App. E7-1 at 1-57–1-58, JA 396-97); *see also* License Order P 165 n.161, JA 2731 (additional capacity figures). And, this excess recreation capacity in the Tillery Reach does not take into account the eight other Project-sponsored recreation opportunities (outside the Tillery Reach). Rehearing Order P 112, JA 3297; *see also* License Order PP 169-175, JA 2733-35. Notably, Duke is required, under the new license, to develop a Recreation Plan in consultation with Rockingham, and other stakeholders, which requires substantial improvements to existing recreation facilities, including new (or improved) boat ramps and parking facilities, and a number of other enhancements sought by Rockingham. *See* License Order PP 169-172, JA 2733-34. With this analysis, the Commission adequately considered recreation demand, in satisfaction of its regulations and requirements of reasoned decision-making.

Further, where the Commission determined that Petitioners' preferred recreational flows are not supported due to low recreational use and the cost of lost power generation, it found no need to estimate potential economic benefits of increased recreation. *See* Rehearing Order P 113, JA 3298 (citing *Conservation*

Law Found., 216 F.3d at 47). In *Conservation Law Foundation*, the D.C. Circuit held that "nothing in the statute requires the Commission to place a dollar value on nonpower benefits. Nor does the fact that the Commission assigned dollar figures to . . . economic costs [of lost power generation] require that the Commission do the same for nonpower benefits." *Id*. at 47. The same principles apply here. The required recreation flows provide substantial enhancement of boating opportunities on the Tillery Reach; the Commission reasonably found that additional information concerning non-power values would not be useful in balancing these recreation enhancements with competing developmental values. Rehearing Order P 113, JA 3298 ("[M]onetary worth is only one measure of [a resource's] value and should not be the singular determinant in balancing competing uses in the public interest.").

Substantial record evidence, as required by Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b), supports the recreation flows required in the licensing orders. *See N. Carolina Utils. Comm'n v. FERC*, 741 F.3d 439, 452 (4th Cir. 2014) (declining opportunity to "reweigh the evidence" where petitioner "clearly disagrees with" FERC's findings). Petitioners repeatedly reference *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (cited Br. 32, 36, 37, 39, 44, 58), but cite nothing to support their contention that the Federal Rules of Evidence, or any verification requirement found in *Daubert* or elsewhere, are

applicable to the Commission's relicensing proceeding. That case does not replace the FPA's controlling statutory standard. *See Nantahala*, 727 F.2d at 1345 ("the role of this court is to ensure that the findings of the Commission are supported by substantial evidence").

2. The Recreation Flows Are Consistent With FPA Section 10(a)(1) And Commission Recreation Policy

Petitioners have an understandable interest in promoting local recreation and tourism. The Commission respects this interest, and considered it as part of its broad responsibility to balance competing developmental and non-developmental values in a manner consistent with the public interest. To this end, the Federal Power Act requires "equal consideration" of competing power and non-power values; it does not require equal treatment. *See Conservation Law Found.*, 216 F.3d at 47 (citing *California*, 966 F.2d at 1550).

The Commission's recreation policy, set forth in 18 C.F.R. § 2.7, states that the "Commission will . . . seek, within its authority, the ultimate development of [recreation] resources . . . ." 18 C.F.R. § 2.7 (*quoted in* Rehearing Order P 108, JA 3296). It further requires licensees to "develop suitable public recreational facilities upon project lands and waters . . . ." 18 C.F.R. § 2.7(b). Petitioners assert that this requires the "best or most extreme" recreation development, and that all possible demand be satisfied. Br. 55. The Commission, on the other hand, has consistently interpreted this policy to require recreation development to the

extent "reasonable in light of the facts in that case," looking at recreation at the project as a whole, as well as recreation available outside the project boundary. Rehearing Order P 109, JA 3296 (citing *Georgia Power Co.*, 31 FERC ¶ 61,014, at 61,027 (1985); *New York State Elec. & Gas Corp.*, 128 FERC ¶ 61,256, at P 22 (2009)).

Petitioners essentially take the position that the Commission should place its thumb on the scale in favor of recreational development, or a particular type of recreational development, when balancing competing public interests under sections 10(a)(1) and 4(e) of the Federal Power Act. But such action would be plainly inconsistent with the text of 18 C.F.R. § 2.7, which limits Commission action to that "within its authority." Just as the equal consideration standard does not give environmental factors "preemptive force," *Dep't of Interior*, 952 F.2d at 545, neither can recreation factors carry disproportionate weight.

Here, as described in the section above, the Commission fully evaluated existing recreation at the Project and in the area and considered demand for recreation going forward. Rehearing Order P 114, JA 3298. On balance, the Commission determined that significant recreation enhancements were, in fact, reasonable and consistent with the public interest. *See* License Order PP 164-65, JA 2731. But in light of the limited existing use and increased power expenses,

further additional recreation flows, as recommended by Petitioners, were not in the overall public interest. *Id*.; *see also* Rehearing Order P 114, JA 3298.

3. Petitioners' Preferred Recreation Flows Are Inconsistent With North Carolina's Water Quality Certification

As described above, the Settlement provides a maximum recreation flow releases of 1,950 acre-feet of water per year. *See* Rehearing Order P 107, JA 3296; Settlement § 2.1.4.3, JA 880. North Carolina's water quality certification, issued by the Division of Water Quality of the North Carolina Department of Environment and Natural Resources, provides that the Settlement is incorporated by reference into the certification, with limited exceptions not applicable here. License Order, App. A, Condition 9, JA 2786; *see also id*. P 160, JA 2729. The certification does not otherwise address recreation flows, only the minimum instream flows imposed for aquatic habitat improvement.

Petitioners are correct that the Commission generally may impose additional water quality conditions that do not conflict with terms of the water quality certification. Br. 47. But here, the Settlement recreation flows *are* a term of the water quality certification, as incorporated by reference. Petitioners' preferred recreation flows of 1,200 cfs on every weekend and holiday in season, which would require 33,560 acre-feet of water per year, Final EIS at 314, JA 1525, are in direct conflict with the water quality certification. *See* Rehearing Order P 107, JA 3296; *see also Dep't of Interior*, 952 F.2d at 548 ("FERC may not alter or reject

conditions imposed by the states through [Clean Water Act] section 401 certificates.") (citing *Keating v. FERC*, 927 F.2d 616, 622–23 (D.C. Cir. 1991)).

To clarify a point raised by Petitioners, Br. 47, the North Carolina Department of Environment and Natural Resources (renamed the Department of Environmental Quality in 2015) is indeed a signatory to the Settlement. *See* Settlement, Explanatory Statement at 1 n.1, JA 844; *see* North Carolina Dep't of Envtl. Quality, History of DEQ, http://deq.nc.gov/about/history-of-deq. The Division of Water Resources now houses the responsibilities, including water quality standards and permitting, previously handled by the Division of Water Quality. *See* North Carolina Dep't of Envtl. Quality, Water Quality Permitting, http://deq.nc.gov/about/divisions/water-resources/water-resources-permits.

D. The Commission Did Not Abuse Its Discretion In Carrying Petitioners' Motions To The License Order

Petitioners claim that the Commission violated the Administrative Procedure Act and Commission regulations by deferring consideration of three motions, filed between 5 and 7 years after the Final EIS, to the License Order. Br. 26-29. Petitioners argue that the Commission "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), action on the motions. That standard, allowing the Court to "compel agency action," *id*., so delayed does not apply here, where the Commission has now acted.

But, in any event, the Commission's action was reasonable and well within the discretion committed to the agency to manage its own proceedings. Rehearing Order P 71, JA 3283 (citing cases); *see also Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities. . . ."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances . . . administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (internal quotation marks and citations omitted). Further, despite Petitioners' statement to the contrary, nothing in the Commission's regulations requires the Commission to act on a motion "in advance of a final order." Br. 28 (discussing 18 C.F.R. § 385.212(c) (specifying required contents of motion)).

The motions "predominantly reiterate the comments [Petitioners] made in previous filings," and the Commission fully addressed those comments, as well as any new information in the motions, in the Final EIS and, later, in the orders. License Order PP 10 n.13, 163, 192-193, 195-197, 218, JA 2684, 2730, 2741, 2742-43, 2747 (addressing motions); Rehearing Order PP 69-71, 120, JA 3282-83, 3301 (addressing motions). For example, Petitioners' July 24, 2013 motion to

supplement the record claimed that Duke should have amended its license application to reflect asserted changes in its ability to operate the project to provide efficient and reliable electric service, and Duke's need for power to serve its customers, factors the Commission considers under Federal Power Act sections 15(a)(2)(C) and (D), 16 U.S.C. §§ 808(a)(2)(C)-(D). *See* Br. 29-30. The Commission reviewed this information, and ultimately found that it was not relevant to and would not affect its section 15 analysis. Rehearing Order PP 72-74, JA 3284-85; *see also* License Order P 192, JA 2741.

Moreover, Petitioners do not explain how they are prejudiced. Petitioners do not dispute that an interlocutory appeal from an earlier order denying their motions would likely not have been immediately reviewable under the applicable finality standard. Rehearing Order P 71, JA 3283; *see also Cities of Anaheim & Riverside, California v. FERC*, 692 F.2d 773, 777 (D.C. Cir. 1982) ("The Supreme Court in *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938), held that 'The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding . . . .'"). They are still able to challenge the Commission's rulings, and have done so. Petitioners may disagree with the Commission's merits decisions, *e.g.*, to issue a new license without requiring further studies, but this does not make the Commission's procedural handling of the motions improper.

III. THE COMMISSION FULLY SATISFIED ITS NATIONAL ENVIRONMENTAL POLICY ACT OBLIGATION TO CONSIDER ALTERNATIVES

Petitioners assert that the Commission failed to satisfy its National Environmental Policy Act obligation to consider reasonable alternatives in assessing approaches to minimum instream flows. Their claim is narrow: Petitioners acknowledge that "Commission staff considered and rejected Petitioners' proposal,"[4] but complain that the Commission did not consider their proposal as a "separate action alternative." Br. 16; *see also id*. at 20. This Court should deny Petitioners' invitation to improperly "flyspeck" the Commission's Final EIS, particularly where Petitioners concede that their proposals were considered. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005) ("[A] court reviewing an EIS for NEPA compliance must take a holistic view of what the agency has done to assess environmental impact. Courts may not "flyspeck" an agency's environmental analysis, looking for any deficiency, no matter how minor.") (citing, *e.g*., *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (describing the inquiry as "deciding whether claimed deficiencies in a [final EIS] are merely flyspecks, or are significant enough to

[4] The Commission assumes, for the sake of briefing, that Petitioners' references to their "proposal" includes their recommended minimum flow regime, recreation flows and the retrofit turbine which Petitioners believe would facilitate their recommended flows. *See* Br. 16-22.

defeat the goals of informed decision making and informed public comment") (quotation marks omitted)).

"Under NEPA, federal agencies must 'study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.'" *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n*, 143 F.3d at 172 (quoting 42 U.S.C. § 4332(2)(E)). The Court "review[s] FERC's decision as to the appropriate range of alternatives for abuse of discretion." *Id*. (citing *Friends of the Ompompanoosuc*, 968 F.2d at 1558); *see also Vt. Yankee*, 435 U.S. at 551-52 (same).

Petitioners are correct that the Final EIS considered three discrete action alternatives: (1) no action; (2) Duke's proposed measures, as modified by the Settlement; and (3) FERC staff's recommended alternative. *See* Final EIS at 13, JA 1233. Other than their preferred flows and retrofit turbine, Petitioners offer no other proposed alternative for the Commission's consideration.

As noted above, Petitioners do not dispute that the Commission in fact considered their flow and retrofit proposals. The Final EIS discussed the benefits and cost of lost generation associated with Petitioners' preferred flow regime, and explained the reasons for not adopting it. *See* License Order P 193, JA 2741 (citing Final EIS at 298-300, JA 1509-11). Further, the final EIS considered the Tillery development retrofit and then, when Petitioners provided additional

information subsequent to the issuance of the Final EIS, the Commission included supplemental analysis of the retrofit proposal in the License Order. *See* Final EIS at 120, JA 1341 (discussing retrofit); *see also* Rehearing Order P 124, JA 3302; License Order PP 195-98, JA 2742-43. Where, as here, the Commission reasonably found that the proposed alternative did not offer significant advantages warranting substantial additional costs, the Commission reasonably chose not to consider Petitioners' proposals as an action alternative. *See* Rehearing Order PP 120-21, JA 3301; *see also Webster v. U.S. Dep't of Agric*., 685 F.3d 411, 427 (4th Cir. 2012) ("[T]he agency is not required 'to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.'") (quoting *Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1244 (10th Cir. 2011) (internal citations omitted)).

NEPA does not require that the Commission treat every possible permutation of a proposed action as a discrete alternative. License Order P 193, JA 2741 (citing *Idaho Power Co*., 110 FERC ¶ 61,242 at PP 80-85 (2005)); Rehearing Order P 123, JA 3302. Petitioners "do not explain how [the EIS] would be materially improved" by considering their proposals as discrete alternatives, rather than recommendations. *Idaho Power*, 110 FERC ¶ 61,242 at P 85. Nor is it inherently unreasonable for the Commission to consider two or three action alternatives, as Petitioners argue, Br. 18, while eliminating other possible

alternatives and recommendations from detailed study. *See Webster*, 685 F.3d at 424 (finding NEPA satisfied where agency, presented with alternatives, "offered appropriate reasons for eliminating all but two from detailed study, including, among other considerations, reasons related to technical feasibility, pecuniary costs, and effectiveness in achieving the purposes of the action"). The discussion of Petitioners' proposals in the Final EIS and the orders fully satisfied the overarching purpose of NEPA – to ensure informed agency decision-making. *See id*. at 425 (noting twin goals of NEPA: informed agency decision-making and informed public comment); *see also Scenic Hudson Preservation Conference v. FPC*, 453 F.2d at 81 (finding that supplemental analysis in orders, subsequent to issuance of the final EIS, meets NEPA goals).

Moreover, even if the Commission had treated Petitioners' proposal as a discrete alternative, the result would be the same. Rehearing Order P 125, JA 3302. The Council on Environmental Quality's NEPA regulations "permit[] agencies to eliminate alternatives from detailed analysis so long as they 'briefly discuss the reasons for their having been eliminated.'" *Id*. (citing 40 C.F.R. § 1502.14(a)); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1201 (9th Cir. 1999) (holding that FERC's analysis "comfortably meets the 'discuss briefly' standard"). As described above, the Final EIS and licensing orders fully satisfied this standard. *See* Rehearing Order P 125, JA 3302. Importantly, Petitioners do not challenge the

Commission's alternative finding, and have now waived the opportunity to do so. *See Cavallo v. Star Enter*., 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) ("Under the decisions of this and the majority of circuits, an issue first argued in a reply brief is not properly before a court of appeals.")

Petitioners endeavor to transform NEPA from a procedural statute, requiring a hard look at environmental impacts, to a substantive requirement to minimize all environmental impacts. *See* Br. 21. "In fact, an agency decision is acceptable even if there will be negative environmental impacts resulting from it, so long as the agency considered these costs and still decided that other benefits outweighed them." *Nat'l Audubon Soc'y*, 422 F.3d at 184 (citing *Robertson*, 490 U.S. at 350); *see also Webster*, 685 F.3d at 429 (noting that agency "candidly acknowledged" that the approved new dam would be a barrier to fish passage). Consistent with this standard, the Commission acknowledged that not every environmental impact of the continued Project operation will be fully mitigated. *See, e.g.*, Final EIS at 143, 172, JA 1364, 1393. Rather, the Commission found that "the measures required by the license will adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources affected by this project," as required by the Federal Power Act. Rehearing Order P 103, JA 3294. That is all that is required.

Finally, in addition to their NEPA claim, Petitioners argue that the Commission was required to determine whether their proposal for a new turbine at

the Tillery development "would be economical" under Commission policy or "cost-effective," Br. 33, under FPA section 15(a)(2)(F), 16 U.S.C. § 808(a)(2)(F). FPA section 15(a)(2)(F) requires the Commission to determine "[w]hether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner." 16 U.S.C. § 808(a)(2)(F). As the Commission explained, section 15(a)(2) requires a *comparative* analysis of cost-effectiveness (among other factors) only where there are competing applications for a new license. Rehearing Order P 130, JA 3303. Again, Petitioners do not challenge the Commission's interpretation of FPA section 15(a)(2), and have now waived the opportunity to do so. *See supra* pp. 56-57. All that is required by statute is an assessment that Duke is likely to carry out its plans for the Project in a cost-effective manner. The Commission satisfied that requirement. *See* License Order P 220, JA 2748.

Further, Petitioners, Br. 20-21, 32-33, misconstrue the purpose and nature of the Commission's economic analysis under its *Mead Corporation* policy. *See* Rehearing Order P 101, JA 3294 (citing *Mead Corp.*, 72 FERC ¶ 61,027 (1995)). The Commission did, in fact, consider the estimated cost of Petitioners' preferred flow regime and their proposed retrofit turbine. *See* Final EIS at 243, 261, JA 1465, 1471 (*Mead* analysis, showing cost information for competing minimum flow proposals), 298-300 (costs of recreation flows), JA 1509-11; Rehearing Order P 99, JA 3293; License Order PP 195-96, JA 2742 (Petitioners estimated that the

turbine would cost $19 million, while Duke estimated that it would cost $28 million.). For each of Petitioners' proposals, the Commission found that the added incremental cost was not justified in light of minor benefits. *See, e.g.*, Rehearing Order PP 99 (minimum flows), 113 (recreation flows), 120-21 (turbine), JA 3293, 3298, 3301. The Commission's analysis balances costs and benefits, consistent with precedent and policy providing that project economics are "by no means" determinative of the public interest. Rehearing Order P 102, JA 3294 (quoting *Mead Corp.*, 72 FERC at 61,068).

In any event, nothing in the Federal Power Act requires the Commission to conduct a full *Mead* analysis for recommended measures, and the Commission consistently conducts such an analysis only for complete action alternatives. *See* Rehearing Order P 101, JA 3294 (explaining purpose of *Mead* analysis); *id*. P 122, JA 3301; *see also* Final EIS at 284, JA 1494 (economic comparison of three alternatives). Petitioners make no effort to counter the Commission's understanding of its own precedent. *See Aburto-Rocha v. Mukasey*, 535 F.3d 500, 503 (6th Cir. 2008) ("An agency's interpretation of its own precedents receives considerable deference . . . .") (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007), and *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

IV. THE COMMISSION FULLY SATISFIED ITS ENDANGERED SPECIES ACT OBLIGATIONS

Finally, Petitioners challenge both the Commission's and the National Marine Fisheries Service's compliance with the Endangered Species Act. Br. 56-59. As to the Commission, Petitioners claim that the Commission violated its responsibility, in initiating consultation with the Fisheries Service, to "provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat." 50 C.F.R. § 402.14(d). Petitioners renew their claim that only the Dual Flow Analysis satisfies this requirement.

As the Commission explained, the Fisheries Service received Duke's instream flow study, which Petitioners acknowledge includes Duke's limited Dual Flow Analysis, as well as the Commission's analysis, using Weighted Useable Area. Rehearing Order P 144, JA 3308. As described above, the Commission reasonably explained its choice of Weighted Useable Area as the methodology for assessing suitable fish habitat under a range of flow regimes. *See supra* pp. 34-39. Moreover, the Commission not only provided the best available data – it provided all available data. *See Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 61 (D.C. Cir. 2000) (holding agency was not obligated to develop "better data"). The Commission's decision to provide the Fisheries Service with all available data falls

well within the discretion afforded such judgments. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) ("[W]hat constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference.").

Beyond the provision of data to the National Marine Fisheries Service, the Commission acknowledges that the Fisheries Service "is the recognized expert with regard to matters of listed species and their habitat." Rehearing Order P 143, JA 3308 (citing *City of Tacoma, Washington v.* FERC, 460 F.3d 53, 75 (D.C. Cir. 2006)). The Commission understands that the Fisheries Service, filing a separate brief, will be addressing Petitioners' remaining contentions raised under the Endangered Species Act, concerning the Fisheries Service's duties as the consulting agency. *See* Br. 56-59.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be affirmed in all respects.

REQUEST FOR ORAL ARGUMENT

Because this case raises questions implicating both technical matters within the Commission's expertise and the Commission's statutory role in balancing competing public interests, the Commission requests that oral argument be held.

Respectfully submitted,

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Final Brief: August 24, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 a proportionally spaced typeface using Times New Roman in Microsoft Office Word 2010 14-point and Normal.

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August 24, 2016

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AND
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Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.

''(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

''(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

''(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

''(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

''SEC. 1005. FUNDING SOURCES.

''Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, § 317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the

requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal

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

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-

chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and

[1] So in original. Probably should be followed by ''; and''.

enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14–06–100–6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14–06–100–6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14–06–100–6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to—

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which—

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be deter-

mined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

(June 10, 1920, ch. 285, pt. I, §10, 41 Stat. 1068; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§206, 212, 49 Stat. 842, 847; Pub. L. 87–647, Sept. 7, 1962, 76 Stat. 447; Pub. L. 90–451, §4, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, §§3(b), (c), 9(a), 13, Oct. 16, 1986, 100 Stat. 1243, 1244, 1252, 1257; Pub. L. 99–546, title IV, §401, Oct. 27, 1986, 100 Stat. 3056; Pub. L. 102–486, title XVII, §1701(a), Oct. 24, 1992, 106 Stat. 3008.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (j)(1), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

1992—Subsec. (e)(1). Pub. L. 102–486, in introductory provisions, substituted ''administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter;'' for ''administration of this subchapter;'' and inserted ''*Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agen-

cies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended:'' after ''as conditions may require:''.

1986—Subsec. (a). Pub. L. 99–495, § 3(b), designated existing provisions as par. (1), inserted ''for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),'' after ''water-power development'', inserted ''irrigation, flood control, water supply, and'' after ''including'', which words were inserted after ''public uses, including'' as the probable intent of Congress, substituted ''and other purposes referred to in section 797(e) of this title'' for ''purposes; and'', and added pars. (2) and (3).

Subsec. (e). Pub. L. 99–546 inserted proviso that no charge be assessed for use of Government dam or structure by licensee if, before Jan. 1, 1985, licensee and Secretary entered into contract which met requirements of date of license, powerplant construction, ownership, and revenue, etc.

Pub. L. 99–495, § 9(a), designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (h). Pub. L. 99–495, § 13, designated existing provisions as par. (1) and added par. (2).

Subsec. (j). Pub. L. 99–495, § 3(c), added subsec. (j).

1968—Subsec. (d). Pub. L. 90–451 provided for maintenance of amortization reserves on and after effective date of new licenses.

1962—Subsecs. (b), (e), (i). Pub. L. 87–647 substituted ''two thousand horsepower'' for ''one hundred horsepower''.

1935—Subsec. (a). Act Aug. 26, 1935, § 206, substituted ''plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes'' for ''scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses,'' and ''such plan'' for ''such scheme''.

Subsec. (b). Act Aug. 26, 1935, § 206, inserted ''installed'' before ''capacity''.

Subsec. (d). Act Aug. 26, 1935, § 206, substituted ''net investment'' for ''actual, legitimate investment''.

Subsec. (e). Act Aug. 26, 1935, § 206, amended subsec. (e) generally.

Subsec. (f). Act Aug. 26, 1935, § 206, inserted last sentence to first par., and inserted last par.

Subsec. (i). Act Aug. 26, 1935, § 206, inserted ''installed'' before ''capacity'', and ''annual charges for use of'' before ''lands'' in proviso.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

SAVINGS PROVISION

Pub. L. 99–495, § 9(b), Oct. 16, 1986, 100 Stat. 1252, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect any annual charge to be paid pursuant to section 10(e) of the Federal Power Act [16 U.S.C. 803(e)] to Indian tribes for the use of their lands within Indian reservations.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relating to reporting recommendations to Congress every 5 years, 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.

§ 804. Project works affecting navigable waters; requirements insertable in license

If the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

(June 10, 1920, ch. 285, pt. I, § 11, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

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.

§ 805. Participation by Government in costs of locks, etc.

Whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in subsection (a) of section 804 of this title, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495 struck out first sentence which read as follows: ''No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title.''

1968—Pub. L. 90–451 designated existing provisions as subsec. (a) and added subsec. (b).

1935—Act Aug. 26, 1935, § 207, amended section generally.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 808. New licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this subchapter.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

(b) Notification of intention regarding renewal; public availability of documents; notice to public and Federal agencies; identification of Federal or Indian lands included; additional information required

(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation

of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after October 16, 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this subchapter for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

(c) Time of filing application; consultation and participation in studies with fish and wildlife agencies; notice to applicants; adjustment of time periods

(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d) Adequacy of transmission facilities; provision of services to successor by existing licensee; tariff; final order; modification, extension or termination of order

(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this chapter has been executed, the Commission shall order the existing licensee to file (pursuant to section 824d of this title) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 824d of this title and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this subchapter, except that in issuing such order the Commission—

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;

(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and

(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

(e) License term on relicensing

Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines

to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.

(f) Nonpower use licenses; recordkeeping

In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

(June 10, 1920, ch. 285, pt. I, § 15, 41 Stat. 1072; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 90–451, § 3, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, §§ 4(a), (b)(1), 5, Oct. 16, 1986, 100 Stat. 1245, 1248.)

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–495, § 4(a), (b)(1), designated existing provisions as par. (1), substituted ''existing'' for ''original'' wherever appearing, and added pars. (2) and (3).

Subsecs. (b) to (f). Pub. L. 99–495, §§ 4(a), 5, added subsecs. (b) to (e) and redesignated former subsec. (b) as (f).

1968—Pub. L. 90–451 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 809. Temporary use by Government of project works for national safety; compensation for use

When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license under this chapter, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

(June 10, 1920, ch. 285, pt. I, § 16, 41 Stat. 1072; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

TERMINATION OF WAR AND EMERGENCIES

Joint Res. July 25, 1947, ch. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

§ 810. Disposition of charges arising from licenses

(a) Receipts from charges

All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this subchapter, shall be paid into the Treasury of the United States, subject to the following distribution: 12½ per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to ''Miscellaneous receipts''; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 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 section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 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 amended (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 Procedure.

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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. 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, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

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

in section 3(11) of the Act are not within the licensing authority of the Commission, and directed that future applications filed with it for such licenses be referred for appropriate action to the Federal department having supervision over the lands or waterways involved.

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948]

§ 2.4 Suspension of rate schedules.

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

(a) The Commission cannot suspend a rate schedule after its effective date.

(b) The Commission can suspend any new schedule making any change in an existing filed rate schedule, including any rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, contained in the filed schedule.

(c) Included in such changes which may be suspended are:

(1) Increases.

(2) Reductions.

(3) Discriminatory changes.

(4) Cancellation or notice of termination.

(5) Changes in classification, service, rule, regulation or contract.

(d) Immaterial, unimportant or routine changes will not be suspended.

(e) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(f) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(g) Suspension of a rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

(Natural Gas Act, 15 U.S.C. 717–717w (1976 & Supp. IV 1980); Federal Power Act, 16 U.S.C. 791a–828c (1976 & Supp. IV 1980); Dept. of Energy Organization Act, 42 U.S.C. 7101–7352 (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948, and amended by Order 303, 48 FR 24361, June 1, 1983; Order 575, 60 FR 4852, Jan. 25, 1995]

§ 2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities. The Commission expects the licensee to assume the following responsibilities:

(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

(b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of persons with disabilities in the design and construction of such project facilities and access.

(c) To encourage and cooperate with appropriate local, State, and Federal agencies and other interested entities in the determination of public recreation needs and to cooperate in the preparation of plans to meet these needs, including those for sport fishing and hunting.

(d) To encourage governmental agencies and private interests, such as operators of user-fee facilities, to assist in

carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.

(e) To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

(f)(1) To comply with Federal, State and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional necessary regulations for such purposes.

(2) To provide either by itself or through arrangement with others for facilities to process adequately sewage, litter, and other wastes from recreation facilities including wastes from watercraft, at recreation facilities maintained and operated by the licensee or its concessionaires.

(g) To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.

(h) To inform the public of the opportunities for recreation at licensed projects, as well as of rules governing the accessibility and use of recreational facilities.

[Order 313, 30 FR 16198, Dec. 29, 1965, as amended by Order 375–B, 35 FR 6315, Apr. 18, 1970; Order 508, 39 FR 16338, May 8, 1974; Order 2002, 68 FR 51115, Aug. 25, 2003]

§ 2.8 [Reserved]

§ 2.9 Conditions in preliminary permits and licenses—list of and citations to "P—" and "L—" forms.

(a) The Commission has approved several sets of standard conditions for normal inclusion in preliminary permits or licenses for hydroelectric developments. In a special situation, of course, the Commission in issuing a permit or license for a project will modify or eliminate a particular article (condition). For reference purposes the sets of conditions are designated as ''Forms''—those for preliminary permits are published in Form P–1, and those for licenses are published in Form L's. There are different Form L's for different types of licenses, and the forms have been revised from time to time. Thus at any given time there will be several series of standard forms applicable to the various vintages of different types of licenses. The forms and their revisions are published on the Commission's Web site (*www.ferc.gov/industries/hydropower/gen-info/comp-admin/l-forms.asp*).

(b) Forms currently in use may be obtained on the Commission's Web site or from Federal Energy Regulatory Commission, Washington, DC 20426.

(Secs. 3, 4, 15, 16, 301, 304, 308, and 309 (41 Stat. 1063–1066, 1068, 1072, 1075; 49 Stat. 838, 839, 840, 841, 854–856, 858–859; 82 Stat. 617; 16 U.S.C. 796, 797, 803, 808, 809, 816, 825, 825b, 825c, 825g, 825h, 826i), as amended, secs. 8, 10, and 16 (52 Stat. 825–826, 830; 15 U.S.C. 717g, 717i, 717o))

[Order 348, 32 FR 8521, June 14, 1967, as amended by Order 540, 40 FR 51998, Nov. 7, 1975; Order 567, 42 FR 30612, June 16, 1977; Order 699, 72 FR 45323, Aug. 14, 2007; Order 737, 75 FR 43402, July 26, 2010; Order 756, 77 FR 4893, Feb. 1, 2012]

§ 2.12 Calculation of taxes for property of public utilities and licensees constructed or acquired after January 1, 1970.

Pursuant to the provisions of section 441(a)(4)(A) of the Tax Reform Act of 1969, 83 Stat. 487, 625, public utilities and licensees regulated by the Commission under the Federal Power Act which have exercised the option provided by that section to change from flow through accounting will be permitted by the Commission, with respect to liberalized depreciation, to employ a normalization method for computing federal income taxes in their accounts and annual reports with respect to property constructed or acquired after January 1, 1970, to the extent with which such property increases the productive or operational capacity of the utility and is not a replacement of existing capacity. Such normalization will also be permitted for ratemaking purposes to the extent such rates are subject to the Commission's ratemaking authority. As to balances in Account 282 of the Uniform System of Accounts, ''Accumulated deferred income taxes—Other property,'' it will remain the Commission's policy

(2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;

(3) A showing that the retail rates are lower than the proposed wholesale rates for comparable service;

(4) The wholesale customer's prospective rate for comparable retail service, i.e. the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs;

(5) An indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged.

(b) Where price squeeze is alleged, the Commission shall, in the order granting intervention, direct the Administrative Law Judge to convene a prehearing conference within 15 days from the date of the order for the purpose of hearing intervenors' request for data required to present their case, including prima facie showing, on price squeeze issues.

(c) Within 30 days from the date of the conference the filing utility shall respond to the data requests authorized by the Administrative Law Judge.

(d) Within 30 days from the filing utility's response, the intervenors shall file their case-in-chief on price squeeze issues, which shall include their prima facie case, unless filed previously.

(e) The burden of proof (i.e. the risk of nonpersuasion) to rebut the allegations of price squeeze and to justify the proposed rates are on the utility proposing the rates under section 205(e) of the Federal Power Act.

(f) In proceedings where price squeeze is an issue, the Secretary shall include the state commission, agency or body which is responsible for regulation of retail rates in the state affected in the service list maintained under § 385.2010(c) of this chapter.

[Order 563, 42 FR 16132, Mar. 25, 1977, as amended by Order 225, 47 FR 19054, May 3, 1982]

§ 2.18 Phased electric rate increase filings.

(a) In general, when a public utility files a phased rate increase, the Commission will determine the appropriate suspension period based on the total increase requested in all phases. If a utility files a rate increase within sixty days after filing another rate increase, the Commission will consider the filings together to be a phased rate increase request.

(b) This policy will not be applied if the increase is phased:

(1) To coordinate with new facilities coming on line;

(2) To implement a rate moderation plan;

(3) To avoid price squeeze;

(4) To comply with a settlement approved by the Commission; or

(5) If the utility makes a convincing showing that application of the policy would be harsh and inequitable and that, therefore, good cause has been shown not to apply the policy in the case.

[52 FR 11, Jan. 11, 1987]

§ 2.19 State and Federal comprehensive plans.

(a) In determining whether the proposed hydroelectric project is best adapted to a comprehensive plan under section (10)(a)(1) of the Federal Power Act for improving or developing a waterway, the Commission will consider the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by:

(1) An agency established pursuant to Federal law that has the authority to prepare such a plan, or

(2) A state agency, of the state in which the facility is or will be located, authorized to conduct such planning pursuant to state law.

(b) The Commission will treat as a state or Federal comprehensive plan a plan that:

(1) Is a comprehensive study of one or more of the beneficial uses of a waterway or waterways;

(2) Includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and

(3) Is filed with the Secretary of the Commission.

[Order 481–A, 53 FR 15804, May 4, 1988]

§ 4.51 Contents of application.

An application for license under this subpart must contain the following information in the form specified. As provided in paragraph (f) of this section, the appropriate Federal, state, and local resource agencies must be given the opportunity to comment on the proposed project, prior to filing of the application for license for major project—existing dam. Information from the consultation process must be included in this Exhibit E, as appropriate.

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for License for Major Project—Existing Dam

(1) (Name of applicant) applies to the Federal Energy Regulatory Commission for a (license or new license, as appropriate) for the (name of project) water power project, as described in the attached exhibits. (Specify any previous FERC project number designation.)

(2) The location of the project is:

State or territory: _____
County: _____
Township or nearby town: _____
Stream or other body of water: _____

(3) The exact name and business address of the applicant are:

_____

_____

_____

The exact name and business address of each person authorized to act as agent for the applicant in this application are:

_____

_____

_____

(4) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed, with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [Provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state and local laws or a municipal charter, or, if such laws or documents are not clear, other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: (provide brief description for each law).

(6) The applicant must provide the name and address of the owner of any existing project facilities. If the dam is federally owned or operated, provide the name of the agency.

(b) *Exhibit A* is a description of the project. This exhibit need not include information on project works maintained and operated by the U.S. Army Corps of Engineers, the Bureau of Reclamation, or any other department or agency of the United States, except for any project works that are proposed to be altered or modified. If the project includes more than one dam with associated facilities, each dam and the associated component parts must be described together as a discrete development. The description for each development must contain:

(1) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, whether existing or proposed, to be included as part of the project;

(2) The normal maximum surface area and normal maximum surface elevation (mean sea level), gross storage capacity, and usable storage capacity of any impoundments to be included as part of the project;

(3) The number, type, and rated capacity of any turbines or generators, whether existing or proposed, to be included as part of the project;

(4) The number, length, voltage, and interconnections of any primary transmission lines, whether existing or proposed, to be included as part of the project (see 16 U.S.C. 796(11));

(5) The specifications of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(6) All lands of the United States that are enclosed within the project

boundary described under paragraph (h) of this section (Exhibit G), identified and tabulated by legal subdivisions of a public land survey of the affected area or, in the absence of a public land survey, by the best available legal description. The tabulation must show the total acreage of the lands of the United States within the project boundary.

(c) *Exhibit B* is a statement of project operation and resource utilization. If the project includes more than one dam with associated facilities, the information must be provided separately for each such discrete development. The exhibit must contain:

(1) A statement whether operation of the powerplant will be manual or automatic, an estimate of the annual plant factor, and a statement of how the project will be operated during adverse, mean, and high water years;

(2) An estimate of the dependable capacity and average annual energy production in kilowatt-hours (or a mechanical equivalent), supported by the following data:

(i) The minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, with a specification of any adjustments made for evaporation, leakage, minimum flow releases (including duration of releases), or other reductions in available flow; monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the period of critical streamflow used to determine the dependable capacity;

(ii) An area-capacity curve showing the gross storage capacity and usable storage capacity of the impoundment, with a rule curve showing the proposed operation of the impoundment and how the usable storage capacity is to be utilized;

(iii) The estimated hydraulic capacity of the powerplant (minimum and maximum flow through the powerplant) in cubic feet per second;

(iv) A tailwater rating curve; and

(v) A curve showing powerplant capability versus head and specifying maximum, normal, and minimum heads;

(3) A statement, with load curves and tabular data, if necessary, of the manner in which the power generated at the project is to be utilized, including the amount of power to be used on-site, if any, the amount of power to be sold, and the identity of any proposed purchasers; and

(4) A statement of the applicant's plans, if any, for future development of the project or of any other existing or proposed water power project on the stream or other body of water, indicating the approximate location and estimated installed capacity of the proposed developments.

(d) *Exhibit C* is a construction history and proposed construction schedule for the project. The construction history and schedules must contain:

(1) If the application is for an initial license, a tabulated chronology of construction for the existing projects structures and facilities described under paragraph (b) of this section (Exhibit A), specifying for each structure or facility, to the extent possible, the actual or approximate dates (approximate dates must be identified as such) of:

(i) Commencement and completion of construction or installation;

(ii) Commencement of commercial operation; and

(iii) Any additions or modifications other than routine maintenance; and

(2) If any new development is proposed, a proposed schedule describing the necessary work and specifying the intervals following issuance of a license when the work would be commenced and completed.

(e) *Exhibit D* is a statement of costs and financing. The statement must contain:

(1) If the application is for an initial license, a tabulated statement providing the actual or approximate original cost (approximate costs must be identified as such) of:

(i) Any land or water right necessary to the existing project; and

(ii) Each existing structure and facility described under paragraph (b) of this section (Exhibit A).

(2) If the applicant is a licensee applying for a new license, and is not a municipality or a state, an estimate of the amount which would be payable if

the project were to be taken over pursuant to section 14 of the Federal Power Act upon expiration of the license in effect [*see* 16 U.S.C. 807], including:

(i) Fair value;

(ii) Net investment; and

(iii) Severance damages.

(3) If the application includes proposals for any new development, a statement of estimated costs, including:

(i) The cost of any land or water rights necessary to the new development; and

(ii) The cost of the new development work, with a specification of:

(A) Total cost of each major item;

(B) Indirect construction costs such as costs of construction equipment, camps, and commissaries;

(C) Interest during construction; and

(D) Overhead, construction, legal expenses, taxes, administrative and general expenses, and contingencies.

(4) A statement of the estimated average annual cost of the total project as proposed specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

(i) Cost of capital (equity and debt);

(ii) Local, state, and Federal taxes;

(iii) Depreciation and amortization;

(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies; and

(v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure.

(5) A statement of the estimated annual value of project power, based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source, specifying any projected changes in the cost of power from that source over the estimated financing or licensing period if the applicant takes such changes into account.

(6) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e) (3) and (4) of this section.

(7) An estimate of the cost to develop the license application;

(8) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river; and

(9) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power, due to a change in project operations (*i.e.*, minimum bypass flows; limits on reservoir fluctuations).

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. *See* § 4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the proposed project:*

(1) *General description of the locale.* The applicant must provide a general description of the environment of the project and its immediate vicinity. The description must include general information concerning climate, topography, wetlands, vegetative cover, land development, population size and density, the presence of any floodplain and the occurrence of flood events in the vicinity of the project, and any other factors important to an understanding of the setting.

(2) *Report on water use and quality.* The report must discuss the consumptive use of project waters and the impact of the project on water quality. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality in the affected stream or other body of water. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must include:

(i) A description (including specified volume over time) of existing and proposed uses of project waters for irrigation, domestic water supply, steam-

electric plant, industrial, and other consumptive purposes;

(ii) A description of existing water quality in the project impoundment and downstream water affected by the project and the applicable water quality standards and stream segment classifications;

(iii) A description of any minimum flow releases specifying the rate of flow in cubic feet per second (cfs) and duration, changes in the design of project works or in project operation, or other measures recommended by the agencies consulted for the purposes of protecting or improving water quality, including measures to minimize the short-term impacts on water quality of any proposed new development of project works (for any dredging or filling, refer to 40 CFR part 230 and 33 CFR 320.3(f) and 323.3(e))[1];

(iv) A statement of the existing measures to be continued and new measures proposed by the applicant for the purpose of protecting or improving water quality, including an explanation of why the applicant has rejected any measures recommended by an agency and described under paragraph (f)(2)(iii) of this section.

(v) A description of the continuing impact on water quality of continued operation of the project and the incremental impact of proposed new development of project works or changes in project operation; and

(3) *Report on fish, wildlife, and botanical resources.* The report must discuss fish, wildlife, and botanical resources in the vicinity of the project and the impact of the project on those resources. The report must be prepared in consultation with any state agency with responsibility for fish, wildlife, and botanical resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the project may affect anadromous fish resources subject to that agency's jurisdiction), and any other state or Federal agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must include:

(i) A description of the fish, wildlife, and botanical resources of the project and its vicinity, and of downstream areas affected by the project, including identification of any species listed as threatened or endangered by the U.S. Fish and Wildlife Service (*See* 50 CFR 17.11 and 17.12);

(ii) A description of any measures or facilities recommended by the agencies consulted for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or improvement of those resources;

(iii) A statement of any existing measures or facilities to be continued or maintained and any measures or facilities proposed by the applicant for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or improvement of such resources, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency and described under paragraph (f)(3)(ii) of this section.

(iv) A description of any anticipated continuing impact on fish, wildlife, and botanical resources of continued operation of the project, and the incremental impact of proposed new development of project works or changes in project operation; and

(v) The following materials and information regarding the measures and facilities identified under paragraph (f)(3)(iii) of this section:

(A) Functional design drawings of any fish passage and collection facilities, indicating whether the facilities depicted are existing or proposed (these drawings must conform to the specifications of §4.39 regarding dimensions of full-sized prints, scale, and legibility);

(B) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(C) An implementation or construction schedule for any proposed measures or facilities, showing the intervals following issuance of a license when implementation of the measures or construction of the facilities would be commenced and completed;

(D) An estimate of the costs of construction, operation, and maintenance,

[1] 33 CFR part 323 was revised at 47 FR 31810, July 22, 1982, and §323.3(e) no longer exists.

of any proposed facilities, and of implementation of any proposed measures, including a statement of the sources and extent of financing; and

(E) A map or drawing that conforms to the size, scale, and legibility requirements of § 4.39 showing by the use of shading, cross-hatching, or other symbols the identity and location of any measures or facilities, and indicating whether each measure or facility is existing or proposed (the map or drawings in this exhibit may be consolidated).

(4) *Report on historical and archeological resources.* The report must discuss the historical and archeological resources in the project area and the impact of the project on those resources. The report must be prepared in consultation with the State Historic Preservation Officer and the National Park Service. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must contain:

(i) Identification of any sites either listed or determined to be eligible for inclusion in the National Register of Historic Places that are located in the project area, or that would be affected by operation of the project or by new development of project facilities (including facilities proposed in this exhibit);

(ii) A description of any measures recommended by the agencies consulted for the purpose of locating, identifying, and salvaging historical or archaeological resources that would be affected by operation of the project, or by new development of project facilities (including facilities proposed in this exhibit), together with a statement of what measures the applicant proposes to implement and an explanation of why the applicant rejects any measures recommended by an agency.

(iii) The following materials and information regarding the survey and salvage activities described under paragraph (f)(4)(ii) of this section:

(A) A schedule for the activities, showing the intervals following issuance of a license when the activities would be commenced and completed; and

(B) An estimate of the costs of the activities, including a statement of the sources and extent of financing.

(5) *Report on recreational resources.* The report must discuss existing and proposed recreational facilities and opportunities at the project. The report must be prepared in consultation with local, state, and regional recreation agencies and planning commissions, the National Park Service, and any other state or Federal agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted indicating the nature, extent, and results of the consultation. The report must contain:

(i) A description of any existing recreational facilities at the project, indicating whether the facilities are available for public use;

(ii) An estimate of existing and potential recreational use of the project area, in daytime and overnight visits;

(iii) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the project and in its vicinity (including opportunities for the handicapped), and for the purpose of ensuring the safety of the public in its use of project lands and waters;

(iv) A statement of the existing measures or facilities to be continued or maintained and the new measures or facilities proposed by the applicant for the purpose of creating, preserving, or enhancing recreational opportunities at the project and in its vicinity, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency and described under paragraph (f)(5)(iii) of this section; and

(v) The following materials and information regarding the measures and facilities identified under paragraphs (f)(5) (i) and (iv) of this section:

(A) Identification of the entities responsible for implementing, constructing, operating, or maintaining any existing or proposed measures or facilities;

(B) A schedule showing the intervals following issuance of a license at which implementation of the measures or construction of the facilities would be commenced and completed;

(C) An estimate of the costs of construction, operation, and maintenance of any proposed facilities, including a statement of the sources and extent of financing;

(D) A map or drawing that conforms to the size, scale, and legibility requirements of §4.39 showing by the use of shading, cross-hatching, or other symbols the identity and location of any facilities, and indicating whether each facility is existing or proposed (the maps or drawings in this exhibit may be consolidated); and

(vi) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System, or that have been designated as wilderness area, recommended for such designation, or designated as a wilderness study area under the Wilderness Act.

(6) *Report on land management and aesthetics.* The report must discuss the management of land within the proposed project boundary, including wetlands and floodplains, and the protection of the recreational and scenic values of the project. The report must be prepared following consultation with local and state zoning and land management authorities and any Federal or state agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted indicating the nature, extent, and results of the consultation. The report must contain:

(i) A description of existing development and use of project lands and all other lands abutting the project impoundment;

(ii) A description of the measures proposed by the applicant to ensure that any proposed project works, rights-of-way, access roads, and other topographic alterations blend, to the extent possible, with the surrounding environment; (*see, e.g.*, 44 F.P.C. 1496, *et seq.*);

(iii) A description of wetlands or floodplains within, or adjacent to, the project boundary, any short-term or long-term impacts of the project on those wetlands or floodplains, and any mitigative measures in the construction or operation of the project that minimize any adverse impacts on the wetlands or floodplains;

(iv) A statement, including an analysis of costs and other constraints, of the applicant's ability to provide a buffer zone around all or any part of the impoundment, for the purpose of ensuring public access to project lands and waters and protecting the recreational and aesthetic values of the impoundment and its shoreline;

(v) A description of the applicant's policy, if any, with regard to permitting development of piers, docks, boat landings, bulkheads, and other shoreline facilities on project lands and waters; and

(vi) Maps or drawings that conform to the size, scale and legibility requirements of §4.39, or photographs, sufficient to show the location and nature of the measures proposed under paragraph (f)(6)(ii) of this section (maps or drawings in this exhibit may be consolidated).

(7) *List of literature.* The report must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) Exhibit F. *See* §4.41(g) of this chapter.

(h) Exhibit G. *See* §4.41(h) of this chapter.

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 123, 46 FR 9029, Jan. 28, 1981; Order 183, 46 FR 55251, Nov. 9, 1981; Order 184, 46 FR 55942, Nov. 13, 1981; Order 413, 50 FR 11684, Mar. 25, 1985; Order 464, 52 FR 5449, Feb. 23, 1987; Order 540, 57 FR 21737, May 22, 1992; Order 2002, 68 FR 51120, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

[74 FR 20423, May 4, 2009]

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service

with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

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

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although

the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director 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 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the

incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015]

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service,

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CERTIFICATE OF SERVICE

I certify that on August 24, 2016, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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