ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 14-1271

HOOPA VALLEY TRIBE, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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November 24, 2015

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in the brief of Petitioner Hoopa Valley Tribe and the brief of supporting intervenor Yurok Tribe.

B. Ruling Under Review:

1. *PacifiCorp*, Order Denying Petition for Declaratory Order, Project No. 2082-058, 147 FERC ¶ 61,216 (Jun. 19, 2014) (Initial Order), JA 798; and

2. *PacifiCorp*, Order Denying Rehearing, Project No. 2082-058, 147 FERC ¶ 61,216 (Oct. 16, 2014) (Rehearing Order), JA 850.

C. Related Cases:

The issues under review in this proceeding have not previously been before this Court or any other court. This Court has twice reviewed Federal Energy Regulatory Commission orders relating to the pending relicensing of the Klamath Hydroelectric Project: *Hoopa Valley Tribe v. FERC*, 629 F.3d 209 (D.C. Cir. 2010); and *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008).

/s/ *Ross R. Fulton*
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November 24, 2015

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GLOSSARY

California	Governor of California or the California Water Board
Commission or FERC	Federal Energy Regulatory Commission
Initial Order	*PacifiCorp*, Order Denying Petition for Declaratory Order, Project No. 2082-058, 147 FERC ¶ 61,216 (Jun. 19, 2014), JA 798
Klamath Dam or Project	The Klamath Hydroelectric Project
Oregon	Governor of Oregon or Oregon Department of Environmental Quality
Rehearing Order	*PacifiCorp*, Order Denying Rehearing, Project No. 2082-058, 147 FERC ¶ 61,216 (Oct. 16, 2014), JA 850
Section 401 or 401(a)(1)	33 U.S.C. § 1341(a)(1) (Clean Water Act).
States	California and Oregon
Tribe	Hoopa Valley Tribe

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STATEMENT OF THE ISSUES

PacifiCorp operates the Klamath Hydroelectric Project (Klamath Dam or Project) under a federal license issued by the Federal Energy Regulatory Commission (FERC or Commission). PacifiCorp's original license expired in 2006; it has applied for a new license. Regrettably, that relicense proceeding has been ongoing for over a decade while the Commission awaits the necessary Clean Water Act water quality certification from California and Oregon (collectively, States).

In 2012, Petitioner Hoopa Valley Tribe (Tribe) brought a declaratory request to the Commission. The Tribe asked that the Commission dismiss PacifiCorp's relicense application, or declare that Oregon and California have waived their authority to issue Clean Water Act water quality certification for the Project. The issues presented for review are:

1. Whether the Commission reasonably found that California and Oregon did not waive Clean Water Act Section 401 water quality certification, *see* 33 U.S.C. § 1341(a)(1), by failing to act on a PacifiCorp request for certification within one year.

2. Whether the Commission acted within its discretion to reject dismissal of PacifiCorp's relicensing application, when the Commission found that dismissal and decommissioning would still require water quality certification and would not result in a positive outcome because it was contrary to a 48-party Settlement Agreement to decommission the Klamath Dams by 2020.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF JURISDICTION

The Commission agrees with the Tribe that this Court has jurisdiction. The Commission does not concur with the motion to dismiss filed on January 26, 2015, by Intervenors American Rivers, California Trout, Trout Unlimited, and Upper

Klamath Water Users Association. That motion asserts that the Court lacks jurisdiction over whether California and Oregon waived water quality certification because the Tribe failed to join California and Oregon as indispensable parties – even though the States may not be joined absent their consent. (On May 4, 2015, the Court ordered Intervenors' motion to dismiss be referred to the merits panel and that the parties address in their briefs the issues presented in that motion).

Because a State's compliance with Clean Water Act Section 401 is a federal question for the Commission, a challenge to a Commission order regarding state compliance is a proper question for a federal appeals court. *See Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("A water quality certification is reviewable in federal court."); *Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991) (the application of section 401 involves a federal question that must be resolved by the Commission "and the federal courts"). The Tribe does not challenge Oregon or California's certification decisions – or the States' application of state law. Instead, "the order on review [is] undeniably that of the Commission." *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 768 F.3d 1, 4 n.3 (D.C. Cir. 2014), amended op. reissued, No. 13-1074 (D.C. Cir. Jan. 30, 2015).

And although it is not binding in favor of jurisdiction merely because the Court has previously reviewed an issue without jurisdiction being raised, *see*

Midland Power Coop. v. FERC, 774 F.3d 1, 6 (D.C. Cir. 2014), this Court has considered challenges to Commission orders regarding a State's compliance with Clean Water Act Section 401 where the State was not a party. *See, e.g.*, *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (whether Washington Department of Ecology waived certification); *City of Fredericksburg v. FERC*, 876 F.2d 1109 (D.C. Cir. 1989) (whether Virginia State Water Control Board waived certification).

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

Under the Federal Power Act, the Commission may issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. *See* 16 U.S.C. § 797. In deciding whether to issue a license – whether in an initial or relicensing proceeding – the Commission is required, "in addition to the power and development purposes for which licenses are issued," to "give equal consideration to" energy conservation, fish and wildlife protection, recreational opportunities, and other aspects of environmental quality. *Id.*; *see California v. FERC*, 495 U.S. 490, 499 (1990) (Federal Power Act requires FERC to "consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions.").

The Commission may issue hydroelectric licenses for up to 50 years. *See* 16 U.S.C. § 808. If a new license is not granted prior to the expiration of the existing license, the Commission may issue to the licensee an annual license to operate the project from year to year, "under the terms and conditions of the existing license until . . . a new license is issued." *Id.*; *see Klamath Water Users Assn. v. FERC*, 534 F.3d 735, 737 (D.C. Cir. 2008) (finding PacifiCorp entitled to annual licenses under the Federal Power Act while its license application is pending).

If a proposed hydroelectric license "may result in any discharge into navigable waters" of the United States, Section 401 of the Clean Water Act mandates that an applicant "shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . . ." 33 U.S.C. § 1341(a)(1). "'No license or permit shall be granted until the certification *required by this section* has been obtained or has been waived.'" *City of Tacoma*, 460 F.3d at 67-68 (quoting 33 U.S.C. § 1341(a)(1)) (emphasis in original); *see also Keating*, 927 F.2d at 622 ("Although federal licenses are required for most activities that will affect water quality, an applicant for such a license must first obtain state approval of the proposed project.").

The Commission's role is "limited to awaiting, and then deferring to, the final decision of the state." *City of Tacoma*, 46 F.3d at 67-68. In enacting the Clean Water Act, Congress "sought to expand federal oversight of projects

affecting water quality while also reinforcing the role of States as the prime bulwark in the effort to abate water pollution." *Alcoa Power*, 643 F.3d at 972 (internal citation omitted); *see also Keating*, 927 F.2d at 622 (Congress "plainly intended an integration of both state and federal authority"). The water quality certification authority granted to States is "one of the primary mechanisms" through which States may exercise their authority. *Keating*, 927 F.2d at 622.

But if a State "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." 33 U.S.C. § 1341(a)(1). The Commission determines whether a State waives water quality certification. *See Alcoa Power*, 643 F.3d at 972 (because the validity of a certification under Section 401 "is a question of federal law, the issue was properly put to the Commission, and is now properly before this court"); *City of Tacoma*, 46 F.3d at 67-68 (FERC must address a State's compliance with Section 401).

B. The Klamath Hydroelectric Dam Project

The Klamath Hydroelectric Project is located primarily on the Klamath River in Klamath County, Oregon and Siskiyou County, California. *PacifiCorp*, Order Denying Rehearing, 149 FERC ¶ 61,038 at P 2 (Oct. 16, 2014) (Rehearing Order), R. 43, JA 850; *PacifiCorp*, Order Denying Petition for Declaratory Order,

147 FERC ¶ 61,216 at P 2 (Jun. 19, 2014) (Initial Order), R. 39, JA 798. The Project includes seven hydroelectric developments and one non-generating dam. Initial Order at P 2, JA 798. The original license – authorized by the Commission's predecessor, the Federal Power Commission – was issued in 1954 and expired in 2006. *Id.*

Since the expiration of PacifiCorp's license in 2006, the Commission has issued PacifiCorp annual licenses to operate the Project. *See* Rehearing Order at P 2, JA 850; *see also Klamath Water Users Ass'n*, 534 F.3d at 740 (dismissing, for lack of redressability, challenge to Commission order refusing to include power contract for irrigation customers in PacifiCorp's annual license because retail rates are controlled by the States – not the contract – and no evidence that inclusion would alter the States' retail rate decisions). In *Hoopa Valley Tribe v. FERC*, 629 F.3d 209 (D.C. Cir. 2010), this Court upheld the Commission's refusal to impose additional conditions on PacifiCorp's annual licenses because those licenses did not give rise to "unanticipated, serious impacts" on fishery resources. *Id.* at 212. This Court held that the Commission had substantial evidence for this determination, namely that "the Klamath River trout fishery had sustained some adverse effects but was nevertheless thriving." *Id.* at 213 (internal citation omitted).

On February 25, 2004, PacifiCorp filed an application with the Commission

for a new Klamath Dam license. *See* Initial Order at P 3, JA 798; Rehearing Order at P 3, JA 851. In 2007, the Commission issued a final environmental impact statement in the relicensing proceeding. *See* Initial Order at P 3, JA 799. The Commission recommended adopting PacifiCorp's proposal – with additional environmental measures. *Id.*

C. The Klamath Hydroelectric Settlement Agreement

On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). *See* Initial Order at P 4, JA 799; Rehearing Order at P 4, JA 851. The Settlement Agreement was signed by 48 parties, including the Governors of the States of California and Oregon (collectively, States), PacifiCorp, the U.S. Department of the Interior, the U.S. Department of Commerce's National Marine Fisheries Services, several Native American tribes (not including the Hoopa Valley Tribe), and a number of local counties, irrigators, and conservation and fishing groups. Settlement Agreement (Mar. 5, 2010), R. 13, JA 342-43; *see also* Initial Order at P 4, JA 799; Rehearing Order at P 4, JA 851.

According to PacifiCorp, the Settlement Agreement resulted from "months of intensive negotiations among the parties as well as outreach to other stakeholders, including Tribes, irrigators, non-governmental organizations, commercial fishermen, and local governments." Agreement in Principle re

Klamath Hydroelectric Project filed by PacifiCorp (Nov. 24, 2008), R. 8, JA 281. The 48 signees viewed the "Settlement as an important part of the resolution of longstanding, complex, and intractable conflicts over resources in the Klamath Basin." Settlement Agreement, § 1.1, JA 343.

The Settlement Agreement provides for decommissioning PacifiCorp's licensed Klamath Dams by 2020. *See* Agreement in Principle, JA 281; *see also* Initial Order at P 4, JA 799; Rehearing Order at P 4, JA 851. The parties believe that the removal of PacifiCorp's facilities "will help restore Basin natural resources, including anadromous fish, fisheries and water quality." Settlement Agreement, § 1.1, JA 343. Decommissioning and removal is provided for "in a manner consistent with the public interest in water resources and fisheries of the Klamath Basin," by balancing the "best interests of PacifiCorp's customers, and . . . preventing or minimizing any adverse impacts on affected communities, businesses, and properties." Agreement in Principle, JA 281. The federal agencies and tribal parties to the Settlement Agreement also agree that the "Settlement advances the trust obligations of the United States to protect Basin Tribes' federally-reserved fishing and water rights in the Klamath and Trinity River Basins." Settlement Agreement, § 1.1, JA 344.

As part of the Settlement Agreement, PacifiCorp pledged to annually withdraw and re-file its water quality certification application to avoid waiver by

California and Oregon. Settlement Agreement § 6.5, JA 383. The settling parties did not request the Commission's review or action on the Settlement Agreement. *See* Initial Order at P 4, JA 799; Rehearing Order at P 4, JA 851. The Agreement's completion was instead contingent on federal legislation and action by the Secretary of the Interior. Initial Order at P 5, JA 799. To date, no federal legislation has been enacted. *Id.*; Rehearing Order at P 5, JA 851.

On March 29, 2006, PacifiCorp filed requests with the California Water Board (California) and Oregon Department of Environmental Quality (Oregon) for water quality certification. Initial Order at P 7, JA 799-800; Rehearing Order at P 7, JA 851-52. As contemplated by the Settlement Agreement, PacifiCorp has annually withdrawn and refiled its application eight times. Initial Order at P 7, JA 799-800; Rehearing Order at P 7, JA 851.

D. The Tribe's Declaratory Request And The Commission Orders

On May 25, 2012, the Tribe requested declaratory relief from the Commission. The Tribe requested that the Commission dismiss PacifiCorp's relicense application and direct PacifiCorp to decommission the Project. *See* Initial Order at P 1, JA 798; Rehearing Order at P 1, JA 850. The Tribe alternatively argued that California and Oregon waived their authority to issue water quality certification for the Klamath Project by failing to act within the Clean Water Act's one-year deadline.

Sixteen parties – including PacifiCorp, California, and Oregon – opposed the Tribe's request. *See* Initial Order at P 9, JA 800; *see also* Answer in Opp'n of PacifiCorp and Other Opposing Parties, R. 23, JA 556. The Commission denied the Tribe's declaratory request on both bases.

1. Dismissal Would Not Result In A Positive Outcome

The Commission found that it had "considerable discretion" with respect to administering the Tribe's declaratory request because neither the Federal Power Act nor the Commission's regulations impose requirements on such proceedings. Rehearing Order at P 12 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 524-25 (1978)), JA 865.

Applying that standard, the Commission agreed that the "circumstances of this case are far from ideal." Initial Order at P 11, JA 800. The Commission found that the parties to the Settlement Agreement were complicit in delaying water quality certification, that there was no apparent prospect for federal legislation or action by the Secretary of the Interior, and that delay in licensing proceedings is contrary to the public interest. *See* Initial Order at P 12, JA 801; Rehearing Order at PP 13, 20, JA 853, 856.

Yet the Commission denied the Tribe's request because there was "little to be gained" from dismissing PacifiCorp's relicensing application. Rehearing Order at P 13, JA 865-66; *see* Initial Order at P 17, JA 802. Hoopa's proposed remedy –

project decommissioning – would result in a discharge into navigable waters, requiring certification from California and Oregon. Initial Order at P 13, JA 801; Rehearing Order at P 14, JA 856. And "California and Oregon could not be expected to act more promptly" to grant certification "to authorize an outcome they do not support than they have in the relicensing proceeding." Rehearing Order at P 14, JA 854. "[I]t appears unlikely the [States] would issue certification for a decommissioning process that did not comport with the terms" of the Settlement Agreement. Initial Order at P 13, JA 801. It was instead more likely that the States would either deny certification – precluding decommissioning – or collude to ensure PacifiCorp continues to withdraw and re-file for certification. Initial Order at P 13, JA 801. For this reason, dismissal would only "likely result in further delay, litigation, and extensive expenditures of time and money by the parties and the Commission." Rehearing Order at P 13, JA 853.

The Commission further observed that PacifiCorp's application is just one of many "relicensing proceedings that have been pending for many years awaiting water quality certification." *Id.* at P 13 n.15 (citing four applications that have been pending for over ten years), JA 853. Of the 43 pending license applications for which the Commission has completed its environmental analysis, "29 (67 percent) are awaiting water quality certification." *Id.* Yet the Commission has only once ordered a licensee to decommission a project in the absence of a

licensee's consent. *See* Initial Order at P 14, JA 801. And the Commission has never dismissed a relicensing application for the licensee's failure to diligently pursue the application, "in large part because of the confusion such an action would cause and because we have not seen a clear path to resolving the issues in these cases." *Id.* at P 13, JA 853-54.

The Commission asserted that if "we had a viable way to require the parties to move forward, we would certainly consider it." Initial Order at P 14, JA 802; *see also* Rehearing Order at P 13 n.16 ("We continue to consider whether there are actions or incentives we can take that may be appropriate in individual proceedings to break these logjams.") , JA 854. But the Commission found that "demanding that PacifiCorp file a decommissioning plan when it had already taken substantial steps in that direction in concert with a large number of parties would [not] yield a positive result." Initial Order at P 14, JA 802. This is because "PacifiCorp and the other settling parties are committed to the process envisioned in the Settlement Agreement." *Id.* at P 17, JA 802.

2. The States Did Not Waive Water Quality Certification

Turning to the issue of waiver, the Commission concurred that it had the obligation to determine whether a State waived water quality certification under the Clean Water Act. Rehearing Order at P 18, JA 855. In making this determination, the Commission does not exercise discretion but applies Section

401(a)(1) of the Clean Water Act. *Id.*

The Commission reiterated that PacifiCorp and the States' actions (repeated withdrawals and re-submissions) violated the "spirit" of the Clean Water Act, *id.* at P 20, JA 856. They were "inconsistent with Congress' intent." *Id.* at P 18, JA 855. But the Commission concluded that California and Oregon had not waived certification under "the letter" of Section 401(a)(1). *Id.* at P 20, JA 856.

Clean Water Act Section 401(a)(1) "provides that a state waives certification when it does not act on an application within one year." *Id.* (citing 33 U.S.C. § 1341(a)(1)). The Commission found that the "Act therefore speaks solely to *state action or inaction*, rather than the repeated withdrawal and refiling of applications." Rehearing Order P 20 ("[T]he Act speaks directly only to state action within one year of a certification request."), JA 856. By "withdrawing its applications before a year has passed, and presenting the states with new applications, PacifiCorp has, albeit repeatedly, given the states new deadlines," ensuring that neither California nor Oregon "failed to act on an application that had been before it for more than one year." *Id.*

The Commission also found that finding waiver and issuing a license would unlikely resolve any delay. *See* Initial Order at P 17, JA 802-803. The Commission cannot force PacifiCorp to accept the license. *Id.* And "it is clear that PacifiCorp and the other settling parties are committed to the process envisioned in

the Settlement Agreement." *Id.* Finding waiver and issuing a license "would almost certainly lead to protracted litigation and would be unlikely to resolve the issues in this proceeding." *Id.* at P 17, JA 803.

SUMMARY OF ARGUMENT

PacifiCorp's relicensing request has been before the Commission for over a decade. The Commission has not been able to act with finality upon the application because PacifiCorp has not received the necessary state Clean Water Act certification.

The Commission sympathizes with the Tribe's impatience. It agrees that the delay is regrettable. But – in considering the Tribe's declaratory request – the Commission had to consider whether the situation would be helped or harmed by dismissing PacifiCorp's application or finding state waiver of water quality certification. It understandably judged the Tribe's approach to be counterproductive.

The States have not acted upon water quality certification because PacifiCorp, the States, and 45 other parties – including federal government resource agencies, several Native American tribes, and conservation groups – reached a Settlement Agreement to decommission PacifiCorp's dams by 2020. Under that Agreement, PacifiCorp agreed to annually withdraw and resubmit its

water quality applications to prevent State waiver and preclude Commission action.

Although the Commission agrees that PacifiCorp's annual re-filings are "contrary to the spirit of" the Clean Water Act, the Commission denied the Tribe's request because it found that California and Oregon had not waived state certification under the "letter" of Section 401 of that Act. By its terms, Section 401 requires "state action" on "a request for certification" within one year of the "State's receipt of such request." When PacifiCorp withdraws its application, there is no longer "a request for certification" from California and Oregon, so the corresponding deadline terminates. California and Oregon did not fail to act on a PacifiCorp application for more than one year because a PacifiCorp request was not before the States for more than one year.

Nor does Section 401 mandate that the Commission find the States waived certification by repeatedly failing to act on PacifiCorp's applications. The statute is silent on the repeated withdrawal and submission of new requests. This Court and the Commission consistently apply Section 401's text and decline to read additional terms or tests into the statute.

The Commission also reasonably denied the Tribe's request to dismiss PacifiCorp's relicensing application. The Commission has broad discretion to administer the Tribe's declaratory proceeding. Although the Commission

reiterated it was unhappy with the stalemated proceeding, it found that dismissing PacifiCorp's relicensing application would not resolve the impasse.

The Tribe's proposed remedy – decommissioning – would still require water quality certification. And the Commission determined – based on its experience and judgment – that California and Oregon were even more unlikely to grant water quality certification for dismissal than they for relicensing. It is more likely that the States would deny certification. Or PacifiCorp would continue to withdraw and resubmit its application, causing continued delay and expense.

The Commission's conclusion was supported by precedent. Delay in licensing proceedings for lack of state water quality certification is, lamentably, a common occurrence. The Commission observed that four licensing applications have been pending for over a decade and – of the 43 pending licensing applications – 27 are awaiting water quality certification. Yet the Commission has never dismissed a licensing application for a failure to diligently pursue a license, because such an action would only cause further delay.

Nevertheless, the Tribe asserts that the Commission has abdicated its statutory duties in failing to resolve PacifiCorp's relicensing proceeding. But the Tribe cites no specific statutory duty and concedes that the Commission has completed all steps within the Commission's control. The Tribe instead identifies PacifiCorp and the States as the cause of delay. So although the Commission

opposes delay, it reasonably found that dismissal would only cause further harm because it cannot force PacifiCorp and the States to act contrary to the Settlement Agreement.

ARGUMENT

I. STANDARD OF REVIEW

Under the Federal Power Act, the Court reviews Commission hydroelectric licensing decisions to determine whether the Commission's action was arbitrary and capricious, and whether its factual findings are supported by substantial evidence. *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) (citing 16 U.S.C. § 825*l*(b)); *see Alcoa Power*, 643 F.3d at 972 (Commission findings "are reviewed under the deferential arbitrary and capricious standard."). Commission decisions are upheld if the Commission "'examined the relevant data'" and "'provided a reasoned explanation that supported a stated connection between the facts found and the choice made.'" *North Carolina*, 112 F.3d at 1189 (quoting *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992)); *accord Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Commission's interpretation of Section 401 of the Clean Water Act, 33 U.S.C. §1341(a)(1), is not entitled to *Chevron* deference because the Commission

does not administer the statute. *See* Rehearing Order at P 23 & n.32 (citing *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003)), JA 857.

II. THE COMMISSION REASONABLY FOUND THAT THE STATES DID NOT WAIVE WATER QUALITY CERTIFICATION UNDER THE CLEAN WATER ACT

The Commission cannot issue a license until a State grants or waives water quality certification. Here, the Commission – consistent with prior decisions of this Court and the Commission's prior decisions – properly interpreted Section 401 of the Clean Water Act to find that California and Oregon did not fail to act on a PacifiCorp application within one year.

A. The Commission Properly Interpreted The Clean Water Act Based Upon The Statute's Text

Statutory construction "begins with the language of the statute." *Barnhart v. Sigmon Coal Co. Inc.*, 534 U.S. 438, 450 (2002); *accord W. Minn. Mun. Power Agency v. FERC*, No. 14-1153, slip. op. at 5 (D.C. Cir. Nov. 20, 2015) (same). Here the Commission held that, although PacifiCorp and the States were "violating the spirit of the Clean Water Act," Rehearing Order at P 20, JA 856, under Section 401(a)(1)'s language, California and Oregon had not waived certification by failing to act on a PacifiCorp request that was before the States for more than one year. *Id.*

Section 401 of the Clean Water Act provides that a State waives certification when it "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." 33 U.S.C. 1341(a)(1). The Act "speaks directly only to state action within one year of a certification request." Rehearing Order P 20, JA 868.

So when PacifiCorp withdraws its application, it is no longer requesting certification from California and Oregon, causing the deadline for state action to terminate. *See id.* Because PacifiCorp did not have a certification request before the States for more than one year, California and Oregon did not fail to act on "such request," 33 U.S.C. § 1341(a)(1), beyond Section 401's corresponding one-year deadline. *See* Rehearing Order at P 20, JA 856. As the Commission held, "[b]y withdrawing its applications before a year has passed, and presenting the states with new applications, PacifiCorp has, albeit repeatedly, given the states[] new deadlines." *Id.*

B. The Commission's Interpretation Is Consistent With This Court's And The Commission's Textual Reading Of Section 401

In response, the Tribe asserts that California and Oregon have effectively violated Section 401's one-year deadline by repeatedly failing to act upon PacifiCorp's applications before those requests are withdrawn. *See* Tribe Br. at 34-35. But Section 401 does not require state action within one year for multiple applications for the same project. "[A] request" indicates that the one-year deadline applies to a specific application. 33 U.S.C. § 1341(a)(1). Nor does the Act speak to the "repeated withdrawal and refiling of applications." Rehearing

Order at P 20, JA 856. Nothing mandates the Commission find waiver here – particularly when such a finding would not resolve the delay in PacifiCorp's relicensing proceeding. *See* Initial Order at P 17 ("We see little to be gained from finding that the states have waived certification and then issuing a license" because the Commission cannot force PacifiCorp to accept the license), JA 802-03.

The Commission has consistently adopted a literal interpretation of Section 401's text to determine if waiver occurred. *See Duke Energy Carolinas, LLC*, 147 FERC ¶ 61,037 at P 18 (2014) (holding that Section 401 only provides that a State must "act" on a certification request within one year, not "final action" by a State); *see also Ga. Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 at P 7 (2004) ("The clear and unambiguous language in section 401(a)(1) required [the State] to act within one year of receiving [the pipeline's] request for section 401 certification.").

For instance, in a case cited by the Commission, the parties had a similar agreement for the licensee to withdraw and resubmit its application. *See* Rehearing Order at PP 21 (citing *Cent. Vt. Pub. Serv. Comm'n*, 113 FERC ¶ 61,167 at P 9 (2005)), JA 856. But in March 2005, the licensee failed to withdraw its application and the State failed to act upon the pending application for more than one year. 113 FERC ¶ 61,167 at P 9. The Commission found state waiver. *Id.* at P 14. The Commission rejected the argument that its interpretation was "overly formalistic," *id.* at P 15, finding that the State failed to act within one year and thus waived state

certification. *Id.* at P 16.[1]

This Court has likewise upheld Commission orders applying Section 401's text without inserting additional terms in the statute. In *Alcoa Power*, Alcoa sought a declaratory order that North Carolina waived its Section 401 authority. *See* 643 F.3d at 966. North Carolina issued a certificate within one year but attached a bond condition that the applicant had to fulfill after the one-year deadline. *See id.* Alcoa argued that, by requiring steps to be completed after one year, the State waived certification. *Id.* The Commission rejected the argument, ruling that the issued certificate was the "act" required by Section 401. *Id.*

On appeal, this Court held that the "Commission's interpretation of Section 401(a)(1) to allow licensing once a certification has been 'obtained,' even if the certification is not by its terms immediately 'effective,' is consistent with the plain text and statutory purpose of the provision." *Id.* at 974 (quoting 33 U.S.C. § 1341(a)(1)). Section 401's text "requires only that a State 'act' within one year of an application." *Alcoa Power*, 643 F.3d at 972. The Court rejected Alcoa's

[1] Hoopa Valley's reliance on *Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (2000), is unhelpful. *See* Tribe Br. at 44. *Mountain Rhythm* involved the separate Coastal Zone Management Act that permitted a State to object to an applicant's certification within six months of filing with the state agency. *Mountain Rhythm Resources*, 90 FERC ¶ 61,088, at 61,297. The applicant refused to file for state certification. *Id.* The Commission affirmed the dismissal, finding that, by failing to file, the applicant failed to take one of the necessary certification steps. *Id.* Here, by contrast, PacifiCorp has filed for water quality certification and the States are abiding by the terms of Section 401(a)(1) by not failing to act on an application within one year.

proposed extra qualification because it would require "adding terms to the statute that Congress has not included." *Id.* (quotation omitted).

In *North Carolina*, this Court affirmed the Commission finding that Clean Water Act water quality certification is not required when an activity will "result in an altered discharge." 112 F.3d at 1188. The Court held that Section 401 certification rights vest only if an activity "may result" in a discharge. *Id.* While "result implies causation," alter means "to change something from its previous state,' implying that the thing changed was already in existence." *Id.* (quoting dictionary definition). The Court continued that, "[g]iven the disparity between petitioners' proposed test and the words of [Section 401], "the Court "elect[s] to remain faithful to the language chosen by Congress and require that an activity result in a discharge in order to trigger the certification requirements of Section 401(a)(1)." 112 F.3d at 1188.

C. The Tribe Misunderstands The Commission's Application Of Clean Water Act Section 401

Contrary to the Tribe's assertion, the Commission did not find that Section 401's language provides for a stay, or permits PacifiCorp and the States to toll certification. *See* Tribe Br. at 40; *see also* Rehearing Order at PP 19-20, JA 867-68. Instead, when PacifiCorp withdraws its application it terminates the one-year deadline for state action because there is no request for certification before the States. *Id.* When PacifiCorp submits a new request, it provides the States a new

one-year deadline for consideration. *Id.*

The Tribe also argues that Section 401's "reasonable" language requires the Commission to find waiver within one year of a party filing for certification. *See* Tribe Br. at 36-37. But the Commission applied the one-year threshold permitted by statute. *See* Rehearing Order at P 20, JA 856. The Tribe does not specify anything in Section 401 requiring the Commission to find that a "reasonable time" is less than one year. [2]

D. The Legislative History Cited By The Tribe Does Not Require A Different Interpretation

The Tribe also focuses on selected legislative history. *See* Tribe Br. at 33-34; *see also* Yurok Tribe Br. at 5-6 (asserting "fundamental policies" of Clean Water Act warrant remand). Legislative history – along with other tools of construction – can assist the court in identifying congressional intent when the statute is unclear. *See Bullcreek v. NRC*, 359 F.3d 536, 541 (D.C. Cir. 2004) (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). *But see N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1518-19 (D.C. Cir. 1984) (holding that a "conference report, because [recommended] to the entire Congress, carr[ies]

[2] Commission regulations "give the certifying [state] agency the entire year" to make a Section 401 certification decision. *FPL Energy Me. Hydro LLC*, 108 FERC ¶ 61,261, P 7 (2004) (citing 18 C.F.R. § 4.38(f)(ii)). The Ninth Circuit upheld the Commission's regulation as "fully consistent with the letter and intent of 401(a)(1)." *State of Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992).

greater weight than comments from floor debates by individual legislators"). Legislative history is not illustrative if it is silent on a particular matter. *See Port Auth. of N.Y. & N.J. v. Dep't of Transp.*, 479 F.3d 21, 30 (D.C. Cir. 2007) (upholding agency order while finding legislative history silent on the relevant interpretative issue).

The Commission here accepted that PacifiCorp and the States' actions are "inconsistent with Congress' intent," Rehearing Order at P 18, JA 855, and with the "spirit of the Clean Water Act." *Id.* at P 20, JA 856; *accord* Initial Order at P 16 ("Indefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act."), JA 802. But the legislative history cited by the Tribe does not address whether state action is required when a party withdraws and submits new applications. Although the Tribe contends that the Commission has a "duty" to declare a waiver here, Tribe Br. at 18, it cites no authority requiring the Commission to find that California and Oregon waived certification either under Section 401's text or legislative history. *See* Rehearing Order at P 23 ("[I]t is the Clean Water Act that prescribes when a state agency has waived certification; it is not an exercise of discretion vested in the Commission."), JA 857.

Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207, 1215 (W.D. Wash. 2003) – cited by the Tribe (Tribe Br. at 33-34) – does not alter this conclusion. In that case, the State of Washington issued a Section 401 certification

within one year. 280 F. Supp. 2d at 1214. But it then sought to impose sixteen additional conditions after the one-year deadline. *See id*. The Army Corps of Engineers incorporated the certification when issuing a decision, but did not include the subsequent conditions. *Id.*

The *Airport Communities Coalition* court upheld the Army Corps' refusal to incorporate the additional requirements. *Id.* at 1215. In reviewing the Army Corps' order, the district court first addressed Section 401's language. *Id.* ("'As in all statutory construction cases, [the court] begin[s] with the language of the statute.'") (quoting *Barnhart*, 534 U.S. at 450) (insertions in original). The court held that, under Section 401's text, a state certification is only binding if issued within the statutory one-year period. *Airport Cmtys. Coal.*, 280 F. Supp. 2d at 1215. The court next reviewed legislative history and found it supportive of the Army Corps' decision. *Id.* But the court did not find that legislative history supplanted or altered Section 401's text. *See id.*

III. THE COMMISSION REASONABLY EXERCISED ITS DISCRETION IN NOT DISMISSING PACIFICORP'S RELECISING APPLICATION

The Tribe alternatively argues that the Commission must dismiss PacifiCorp's relicensing adjudication and decommission the Klamath Dam. But the Commission has broad discretion in administering agency proceedings. And it

reasonably determined that a declaratory order dismissing PacifiCorp's application for undue delay would only cause further delay.

A. The Commission Has Broad Discretion In A Relicensing Proceeding

In considering the Tribe's declaratory request, the Commission found that "neither the [Federal Power Act.] nor our regulations impose any requirements with respect to" requests to dismiss relicensing proceedings. Rehearing Order at P 13, JA 853. In such a situation, courts are not free to fashion administrative procedures that neither Congress nor the agency has sanctioned. *See Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169, 1174 (D.C. Cir. 1992) (rejecting petition for court to determine what type of hearing agency must administer). Instead, the "formulation of procedures is basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments." Rehearing Order at P 13 (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 524-25), JA 853; *accord Mobil Oil v. United District Cos.*, 498 U.S. 211, 230 (1991) (The Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues."); *Holrail v. Surface Transp. Bd.*, 515 F.3d 1313, 1318 (D.C. Cir. 2008) (finding no statutory requirement that agency first consider petitioner's request for an exemption from a public interest certificate before considering the certificate).

Applying that standard, the Commission agreed that lengthy delays in licensing proceedings are against the public interest. Rehearing Order at P 13, JA 853; Initial Order at P 12, JA 801. But dismissing PacifiCorp's relicensing application for unwarranted delay and decommissioning the Project would not resolve the impasse, because:

- Dismissal and decommissioning would result in a discharge into navigable waters – requiring water quality certification from California and Oregon;
- Given that dismissal is contrary to "the process envisioned by all the parties" to the Settlement Agreement, it was unlikely that California and Oregon would "issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed";
- Instead, the States would likely "either deny certification, thereby precluding decommissioning, or work with PacifiCorp and the other parties to repeatedly delay certification," leaving the Tribe (and the Commission) in the same position.

Initial Order at P 13, JA 801; *see also* Rehearing Order at PP 12, 14, JA 853-54.

So the Commission found "little to be gained by taking steps that would likely result in further delay, litigation, and extensive expenditures of time and money," Rehearing Order at P 13, JA 853 – particularly when PacifiCorp has already taken "substantial steps towards" decommissioning the Project. Initial Order at P 14, JA 802.

Nor did the Commission find the delay in PacifiCorp's relicensing proceeding for a lack of water quality certification extraordinary. Rehearing Order at P 13, JA 853. Four hydroelectric relicensing applications, similarly lacking

necessary state certification, have been pending for over a decade. *Id.* at n.15, JA 853; *see also City of Tacoma*, 560 F.3d at 60 (finding that the licensee had been operating under an annual license for 24 years). And "of [the] 43 pending license applications regarding which our staff has completed its environmental analysis, 29 (67 percent) are awaiting water quality certification." Rehearing Order at P 13 n.15, JA 853.

The Commission's decision was consistent with its practice and precedent. It has only once ordered a project decommissioned in the absence of the licensee's consent. *See* Initial Order at P 14, JA 801. And it has not dismissed a relicensing application for a failure to diligently pursue a new license – because of the "confusion such an action would cause and because we have not seen a clear path to resolving the issues in these cases." Rehearing Order at P 13, JA 853-54.

B. The Commission Based Its Findings On Judgment And Experience

In response, the Tribe argues that the Commission did not address whether PacifiCorp's application should be dismissed for failure to diligently prosecute. *See* Tribe Br. at 46-47. But the Commission self-evidently considered dismissal. *See* Rehearing Order at PP 12-13, JA 853. Within that context, the Commission considered the negative results from the Tribe's proposed remedy of decommissioning to demonstrate why dismissal is unwarranted. *See id.* at P 13, JA 853-54; Initial Order at PP 13-14, JA 801-02.

The Tribe also asserts that the Commission lacks evidence for finding that California and Oregon would delay or fail to issue water quality certification for decommissioning. *See* Tribe Br. at 47. But the Commission's judgment and experience – both in this proceeding and generally – led it to conclude that California and Oregon "could not be expected to act more promptly to authorize an outcome [dismissal] they do not support than they have in [PacifiCorp's] relicensing proceeding." Rehearing Order at P 14, JA 854.

The Commission could not have direct evidence of how the States would react to granting the Tribe's request – because it is a hypothetical future event. *Id.* & n.19 ("It is difficult to envision what evidence there could be, absent a statement by the agencies as to what they would do in a hypothetical situation"), JA 854. The Tribe's position – that it is "not apparent what incentive California or Oregon would have to delay decommissioning by withholding certification" – is equally speculative. Tribe Br. at 48.

But it is the Commission that is afforded deference to make "predictive judgments" – based upon agency "experience and expertise." *Nat'l Cable & Telecom. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) ("Substantial evidence does not require a complete factual record – we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency."); *see also FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775,

814 (1978) ("[A] forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency.") (internal citations omitted); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1580 (D.C. Cir. 1992) (Commission is afforded "wide deference" in making predictive judgments).

Contrary to the Tribe's claim, the Commission also found that decommissioning is not the only course of action. *See* Rehearing Order at P 15, JA 854. The Commission could consider the project orphaned and seek other applications. *Id.* Or it could issue PacifiCorp a non-power license for all or part of the project. *Id.* But such steps would also result in confusion and delay, providing further evidence that dismissing PacifiCorp's relicensing application would not create a positive outcome. *See Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) ("The question [the court] must answer . . . is not whether record evidence supports [petitioners' and intervenor's] version of events, but whether it supports FERC's."); *see also La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (same).

C. The Commission Respected All Licensing Responsibilities In Denying The Tribe's Declaratory Request

The Tribe also contends that the Commission's refusal to dismiss PacifiCorp's application is an abdication of its statutory duties. *See* Tribe Br. at 13, 19, 23. But the Tribe does not cite a specific "duty" requiring dismissal.

Instead – as the Tribe concedes – the Commission has "completed all steps necessary" to consider PacifiCorp's relicensing application. *Id.* at 5. The Tribe isolates "[t]he reason for the delay" as "an unlawful agreement between the licensee PacifiCorp and each of the States of California and Oregon," *id.* – a Settlement Agreement the Commission did not approve or review. *See id.* at 43. In fact, the Tribe repeatedly emphasizes that PacifiCorp and the States are the parties preventing Commission action:

- "The States' refusal and failure to act on PacifiCorp's certification requests is directly precluding FERC's ability to exercise its statutory licensing authority under the FPA." *Id.* at 29;
- "Here, PacifiCorp and the state certifying agencies are flouting the language and intent of the CWA." *Id.* at 34;
- "The States have taken affirmative and intentional action to not comply (and to refuse to comply) with their certification responsibilities for the purpose of preventing final action by FERC." *Id.* at 35;
- "The States of Oregon and California have taken affirmative intentional action to not comply with their delegated certification responsibilities in order to prevent FERC jurisdiction." *Id.* at 42.

Nonetheless, the Tribe argues the Commission is violating its obligations because the delay in relicensing could be "indefinite[]." *Id.* at 30. But the Tribe provides no statutory or regulatory standard for what constitutes indefinite delay – or when the Commission must dismiss a relicensing application for such delay. Nor is the Tribe's position consistent with Commission practice, which is not

dismissing a relicensing application for delay because of the undesirable results that would follow. *See* Rehearing Order at P 13, JA 853-54.

The Tribe instead only vaguely argues that the Commission must act in the public interest. The Commission agrees that delay is not in the public interest. It would consider, if available, "a viable way to require the parties to move forward." Initial Order at P 14, JA 802; *see* Rehearing Order at P 13, JA 854.

But delays in relicensing proceedings for a lack of state certification regularly – and regrettably – occur. And a dismissal of PacifiCorp's application would not resolve the impasse. It would only cause more delay.

CONCLUSION

For the foregoing reasons, the Tribe's petition should be denied and the Commission's orders should be upheld.

Respectfully submitted,

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November 24, 2014

Hoopa Valley Tribe v. FERC **Docket No. P-2082**
No. 14-1271

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,425 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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November 24, 2015

ADDENDUM
Statutes & Regulation

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MASSACHUSETTS BAY PROTECTION; DEFINITION; FINDINGS AND PURPOSE; FUNDING SOURCES

Pub. L. 100–653, title X, §§1002, 1003, 1005, Nov. 14, 1988, 102 Stat. 3835, 3836, provided that:

''SEC. 1002. DEFINITION.

''For purposes of this title [amending section 1330 of this title and enacting provisions set out as notes under sections 1251 and 1330 of this title], the term 'Massachusetts Bay' includes Massachusetts Bay, Cape Cod Bay, and Boston Harbor, consisting of an area extending from Cape Ann, Massachusetts south to the northern reach of Cape Cod, Massachusetts.

''SEC. 1003. FINDINGS AND PURPOSE.

''(a) FINDINGS.—The Congress finds and declares that—

''(1) Massachusetts Bay comprises a single major estuarine and oceanographic system extending from Cape Ann, Massachusetts south to the northern reaches of Cape Cod, encompassing Boston Harbor, Massachusetts Bay, and Cape Cod Bay;

''(2) several major riverine systems, including the Charles, Neponset, and Mystic Rivers, drain the watersheds of eastern Massachusetts into the Bay;

''(3) the shorelines of Massachusetts Bay, first occupied in the middle 1600's, are home to over 4 million people and support a thriving industrial and recreational economy;

''(4) Massachusetts Bay supports important commercial fisheries, including lobsters, finfish, and shellfisheries, and is home to or frequented by several endangered species and marine mammals;

''(5) Massachusetts Bay also constitutes an important recreational resource, providing fishing, swimming, and boating opportunities to the region;

''(6) rapidly expanding coastal populations and pollution pose increasing threats to the long-term health and integrity of Massachusetts Bay;

''(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 agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

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 In-

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

terior, 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 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

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

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 storage 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 Representa-

whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) Relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its[1] does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

(June 10, 1920, ch. 285, pt. I, §14, 41 Stat. 1071; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§207, 212, 49 Stat. 844, 847; Pub. L. 90–451, §2, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, §4(b)(2), Oct. 16, 1986, 100 Stat. 1248.)

[1] So in original. Probably should be ''it''.

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 man-

ner 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

the disposition of competing applications.

[Order 413, 50 FR 11682, Mar. 25, 1985, as amended by Order 2002, 68 FR 51117, Aug. 25, 2003]

§ 4.38 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for an original license or an exemption from licensing that is described in paragraph (a)(6) of this section, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate State fish and wildlife agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1341(c)(1), and any Indian tribe that may be affected by the proposed project.

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall be construed to require as well that the potential applicant contact or consult with members of the public.

(3) If a potential applicant for an original license commences first stage pre-filing consultation on or after July 23, 2005 it shall file a notification of intent to file a license application pursuant to §5.5 and a pre-application document pursuant to the provisions of §5.6.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(5) An applicant for an exemption from licensing or an applicant for a license seeking benefits under section 210 of the Public Utility Regulatory Policies Act, as amended, for a project that would be located at a new dam or diversion must, in addition to meeting the requirements of this section, comply with the consultation requirements in §4.301.

(6) The pre-filing consultation requirements of this section apply only to an application for:

(i) Original license;

(ii) Exemption;

(iii) Amendment to an application for original license or exemption that materially amends the proposed plans of development as defined in §4.35(f)(1);

(iv) Amendment to an existing license that would increase the capacity of the project as defined in §4.201(b); or

(v) Amendment to an existing license that would not increase the capacity of the project as defined in §4.201(b), but that would involve:

(A) The construction of a new dam or diversion in a location where there is no existing dam or diversion;

(B) Any repair, modification, or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or elevation of an existing impoundment; or

(C) The addition of new water power turbines other than to replace existing turbines.

(7) Before it files a non-capacity related amendment as defined in §4.201(c), an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section to the extent that the proposed amendment would affect the interests of the agencies or tribes. When consultation is necessary, the applicant must, at a minimum, provide the resource agencies and Indian tribes with copies of the draft application and allow them at least 60 days to comment on the proposed amendment. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment, propose reasonable protection, mitigation, or enhancement measures to respond to impacts identified as being caused by the proposed amendment, and respond to any objections, recommendations, or conditions submitted by the agencies or Indian tribes. Copies of all written correspondence between the applicant, the agencies,

and the tribes must be attached to the application.

(8) This section does not apply to any application for a new license, a nonpower license, a subsequent license, or surrender of a license subject to sections 14 and 15 of the Federal Power Act.

(9) If a potential applicant has any doubt as to whether a particular application or amendment would be subject to the pre-filing consultation requirements of this section or if a waiver of the pre-filing requirements would be appropriate, the applicant may file a written request for clarification or waiver with the Director, Office of Energy Projects.

(b) *First stage of consultation.* (1) A potential applicant for an original license that commences pre-filing consultation on or after July 23, 2005 must, at the time it files its notification of intent to seek a license pursuant to §5.5 of this chapter and a pre-application document pursuant to §5.6 of this chapter and, at the same time, provide a copy of the pre-application document to the entities specified in §5.6(a) of this chapter.

(2) A potential applicant for an original license that commences pre-filing consultation under this part prior to July 23, 2005 or for an exemption must promptly contact each of the appropriate resource agencies, affected Indian tribes, and members of the public likely to be interested in the proceeding; provide them with a description of the proposed project and supporting information; and confer with them on project design, the impact of the proposed project (including a description of any existing facilities, their operation, and any proposed changes), reasonable hydropower alternatives, and what studies the applicant should conduct. The potential applicant must provide to the resource agencies, Indian tribes and the Commission the following information:

(i) Detailed maps showing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the proposed project, with a description of any proposed diversion of a stream through a canal or penstock;

(iii) A summary of the proposed operational mode of the project;

(iv) Identification of the environment to be affected, the significant resources present, and the applicant's proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) (A) A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities in §292.203 of this chapter;

(B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes diversion (as that term is defined in §292.202(p) of this chapter) and a request for the agencies' view on that belief, if any;

(vii) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(viii) Any statement required by §4.301(a) of this part.

(3) (i) A potential exemption applicant and a potential applicant for an original license that commences pre-filing consultation;

(A) On or after July 23, 2005 pursuant to part 5 of this chapter and receives approval from the Commission to use the license application procedures of part 4 of this chapter; or

(B) Elects to commence pre-filing consultation under part 4 of this chapter prior to July 23, 2005; must:

(*1*) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies, Indian tribes, and members of the public to explain the applicant's proposal and its potential environmental impact, to review the information provided, and to discuss the data to be obtained and studies to be conducted by the potential applicant as part of the consultation process;

(*2*) Consult with the resource agencies, Indian tribes and members of the public on the scheduling and agenda of the joint meeting; and

(*3*) No later than 15 days in advance of the joint meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(ii) The joint meeting must be held no earlier than 30 days, but no later than 60 days, from, as applicable;

(A) The date of the Commission's approval of the potential applicant's request to use the license application procedures of this part pursuant to the provisions of part 5 of this chapter; or

(B) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences prefiling consultation under this part prior to July 23, 2005.

(4) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section by means of the public notice provision published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency, Indian tribe, or member of the public.

(5) Not later than 60 days after the joint meeting held under paragraph (b)(3) of this Section (unless extended within this time period by a resource agency, Indian tribe, or members of the public for an additional 60 days by sending written notice to the applicant and the Director of the Office of Energy Projects within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency and Indian tribe must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or the information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives that are affected by the proposed project.

(6)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) At the same time as the request for dispute resolution is submitted to the Director, the entity referring the

dispute must serve a copy of its written request for resolution on the disagreeing party and any affected resource agency or Indian tribe, which may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director pursuant to §4.38(b)(6).

(iv) The Director will resolve the disputes by letter provided to the potential applicant and all affected resource agencies and Indian tribes.

(v) If a potential applicant does not refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(2) of this section), or a study to the Director under paragraph (b)(6) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(2) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.

(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to §4.32(e)(1) or (e)(2) of this part, merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(6)(iv) of this section, that each study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the study methodology requested is not a generally accepted practice.

(7) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of Energy Projects of its need for more time to provide written comments under paragraph (b)(5) of this section, in which case the first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 120 days after the joint meeting held under paragraph (b)(5) of this section, whichever occurs first.

(c) *Second stage of consultation*. (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(6) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes under paragraph (b) of this section that are necessary for the Commission to make an informed decision regarding the merits of the application. These studies must be completed and the information obtained:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (*e.g.*, instream flow study) or technical feasibility of the project (*e.g.*, study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (*e.g.*, resource surveys), or suitable mitigation or enhancement measures, or to minimize impact on significant resources (*e.g.*, wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before issuance of a license or exemption, if the applicant otherwise complied with the provisions of paragraph (b)(2) of this section and the study or information gathering would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the expiration of the applicant's preliminary

permit or the application filing deadline set by the Commission;

(iii) After a new license or exemption is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (*e.g.*, post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency or Indian tribe requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis and reasoning for its request, under paragraphs (b)(5) (i)–(vi) of this section, the potential applicant must promptly initiate the study or gather the information, unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice. The applicant may refer any such request to the Director of the Office of Energy Projects for dispute resolution under the procedures set forth in paragraph (b)(6) of this section and need not conduct prior to filing any study determined by the Director to be unreasonable or unnecessary or to employ a methodology that is not generally accepted.

(3)(i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to §4.32 (e)(1) or (e)(2) merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency and Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information-gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measures; and

(iii) A written request for review and comment.

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold a joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency or Indian tribe to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures;

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting; and

(iii) At least 15 days in advance of the meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section and a resource agency or Indian tribe has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a license or exemption, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, other government offices, and consulted members of the public specified in paragraph (d)(2) of this section.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct the applicant must serve on every resource agency, Indian tribes, and member of the public consulted, and on other government offices copies of:

(i) Its application for a license or an exemption from licensing;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

(e) *Waiver of compliance with consultation requirements.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following October 23, 2003, a potential license applicant engaged in pre-filing consultation under part 4 may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

(f) *Application requirements documenting consultation and any disagreements with resource agencies.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe;

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in §2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

(7) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(3) of this section; and

(8) A list containing the name and address of every federal, state, and interstate resource agency and Indian tribe with which the applicant consulted pursuant to paragraph (a)(1) of this section.

(g) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3) of this section, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated. The notice shall include a summary of the major issues to be discussed at the joint meeting.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(2) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued on any license application.

(ii) The provisions of §4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section at least two copies of the information specified in paragraph (b)(2) of this section.

(h) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §4.32(k).

[Order 533, 56 FR 23153, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 2002, 68 FR 51117, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003; Order 756, 77 FR 4894, Feb. 1, 2012]

§4.39 Specifications for maps and drawings.

All required maps and drawings must conform to the following specifications, except as otherwise prescribed in this chapter:

Hoopa Valley Tribe v. FERC **Docket No. P-2082**
D.C. Cir. No. 14-1271

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 24th day of November 2015, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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