ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 21-1139 and 21-1186

WATERKEEPERS CHESAPEAKE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

Scott Ray Ediger
Attorney

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

INITIAL BRIEF: April 8, 2022

Certificate as to Parties, Rulings, and Related Cases

A. Parties:

Except for ShoreRivers, which was not an intervenor-party to the Commission proceeding, the parties appearing before this Court are as stated in the initial brief of Petitioners.

B. Rulings under review:

1. *Exelon Generation Company, LLC*, Order Issuing New License, 174 FERC ¶ 61,217 (March 19, 2021) (License Order), R. 1256, JA ____; and

2. *Exelon Generation Company, LLC*, Order Addressing Arguments Raised on Rehearing, 176 FERC ¶ 61,029 (July 15, 2021) (Rehearing Order), R. 1285, JA ____.

C. Related cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any related cases.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

April 8, 2022

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Br.	Brief of Petitioners
Commission or FERC	Respondent Federal Energy Regulatory Commission
Final EIS	Final Environmental Impact Statement, issued March 11, 2015, R. 722, JA ____
JA	Joint Appendix
Licensee	Exelon Generation Company, LLC, now Constellation Energy Generation, LLC
Maryland	Maryland Department of the Environment
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*
Orders	
License Order	*Exelon Generation Company, LLC*, Order Issuing New License, 174 FERC ¶ 61,217 (March 19, 2021), R. 1256, JA ____
Rehearing Order	*Exelon Generation Company, LLC*, Order Addressing Arguments Raised on Rehearing, 176 FERC ¶ 61,029 (July 15, 2021), R. 1285, JA ____
P	Paragraph in a FERC order
R.	Record Item
Settlement	Joint Offer of Settlement and Explanatory Statement of Licensee and Maryland, filed October 29, 2019, R. 1055, JA ____

Glossary

Waterkeepers	Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation
Watershed Assessment	Lower Susquehanna River Watershed Assessment, referred to in the record as LSRWA and attached to Licensee's Jan. 31, 2020 Comments, R. 1163, JA ____

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Statement of Issues

In this multi-year licensing proceeding, the Commission issued a 50-year license for the 570-megawatt Conowingo Hydroelectric Project to Licensee Exelon Generation Company, LLC (now Constellation Energy Generation, LLC). *See Exelon Generation Co.*, Order Issuing New License, 174 FERC ¶ 61,217 (2021) (License Order), R. 1257, JA ____; Order Addressing Arguments Raised on Rehearing, 176 FERC ¶ 61,029 (2021) (Rehearing Order), R. 1285, JA ____. Prior to license

issuance, Commission staff issued an environmental impact statement (Final EIS, R. 722) that evaluated the Project's impacts and alternatives to it.

In compliance with the Clean Water Act, Licensee sought and received a water quality certificate from the Maryland Department of the Environment (Maryland). However, Maryland's certificate was subject to multiple legal challenges, including further state administrative proceedings, state and federal court challenges, and a petition for declaratory order before the Commission.

As a result of this litigation uncertainty, Licensee and Maryland agreed to settle their disputes (Settlement). In exchange for agreement by both Licensee and Maryland to seek Commission adoption of agreed-upon measures for the protection, mitigation, and enhancement of ecological, recreational, and water quality resources, Maryland agreed to waive Clean Water Act certification. The Commission adopted the Settlement's proposed license articles when it issued the license.

On review, Petitioners raise three issues:

1. Did the Commission correctly determine that the Settlement's voluntary waiver of state water quality certification was

valid, thereby removing any Clean Water Act requirement to incorporate the terms of the Maryland-issued certificate into the FERC-issued license?

2. Did the Commission appropriately balance factors (developmental and environmental) as required by the Federal Power Act when it incorporated the Settlement's measures into the license?

3. Did the Commission reasonably analyze water quality impacts related to the Settlement consistent with the agency's responsibilities under the National Environmental Policy Act?

Counterstatement of Jurisdiction

Because Petitioner ShoreRivers was not a party to the underlying agency proceeding, *see infra* pp. 20-21, it is unable to seek judicial review of the agency orders. *See* 16 U.S.C. § 825*l*(b) (permitting any "party to a proceeding" to obtain review). Dismissal of ShoreRivers would not affect this Court's jurisdiction to resolve the petition for review (and the issues it presents) as filed by the remaining Petitioners (Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, and Chesapeake Bay Foundation).

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

Statement of Facts

I. Statutory overview and regulatory landscape

The Federal Power Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). It is unlawful for any person to operate or maintain a hydroelectric project on navigable waters, such as the Conowingo Project, except in accordance with the terms of a license issued under the Act. 16 U.S.C. § 817(1).

The public interest standard of Federal Power Act section 4(e), 16 U.S.C. § 797(e), as relevant here, grants the Commission jurisdiction to issue licenses for the construction, operation, and maintenance of hydroelectric projects that are located on waterways that are subject to congressional regulation under the Commerce Clause. Thus, "in addition to the power and development purposes for which licenses are issued," the Commission "shall give equal consideration to the purposes

of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e); *see also Dep't of Interior v. FERC*, 952 F.2d 538, 543-45 (D.C. Cir. 1992).

Under Federal Power Act section 10(a)(1), the approved project must be "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-powered development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title." 16 U.S.C. § 803(a)(1); *see also Dep't of Interior v. FERC*, 952 F.2d at 543-45.

Further, under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), the Commission may not issue a license or permit for an activity that may result in any discharge into waters of the United

States unless the appropriate state agency has either issued a water quality certification for the activity or has waived certification. *See City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). The Commission "may not alter or reject conditions imposed by the states through section 401 certificates." *Dep't of Interior v. FERC*, 952 F.2d at 548 (explaining that sections 401(a) and (d) of the Act, 33 U.S.C. §§ 1341(a) and (d), require "an applicant for a [Commission] hydropower license to obtain a state water quality certification before [the Commission] may approve a license," and require the Commission to make any terms and conditions of such certification terms and conditions of the license); *see also Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003). Clean Water Act section 401(a)(1) further requires the appropriate state agency to "establish procedures for public notice" of the water quality certification application and, as appropriate, public hearings for specific applications. *See Tacoma*, 460 F.3d at 68 (explaining Commission's obligation "to obtain some minimal confirmation of [public notice] compliance, at least in a case where compliance has been called into question").

While the Commission's primary responsibility with respect to administering hydroelectric licenses is governed by the Federal Power Act, the Commission's licensing decisions are subject to the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*. (NEPA), which requires federal agencies to follow certain procedures designed to ensure that environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA imposes "a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad [public] dissemination of relevant environmental information." *Id.* (internal quotation marks and citation omitted).

As relevant here, NEPA requires "federal agencies . . . to prepare an environmental impact statement ("EIS") for 'every . . . major Federal action [] significantly affecting the quality of the human environment.'" *City of Dania Beach, Florida v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007) (quoting 42 U.S.C. § 4332(2)(C)). The statute does not, however, mandate particular results, but rather "simply prescribes the necessary process." *Id.*; *see also Myersville Citizens for a Rural Cmty., Inc. v.*

FERC, 783 F.3d 1301, 1322 (D.C. Cir. 2015) ("NEPA does not require any particular substantive result.").

II. The Conowingo Project

The Conowingo Project is located on the Susquehanna River where it crosses from Pennsylvania into Maryland. *See* License Order P 1, JA ____; Final EIS at 36-39 (description of Conowingo Project), JA ____-__. The following maps illustrate the location of the Project:

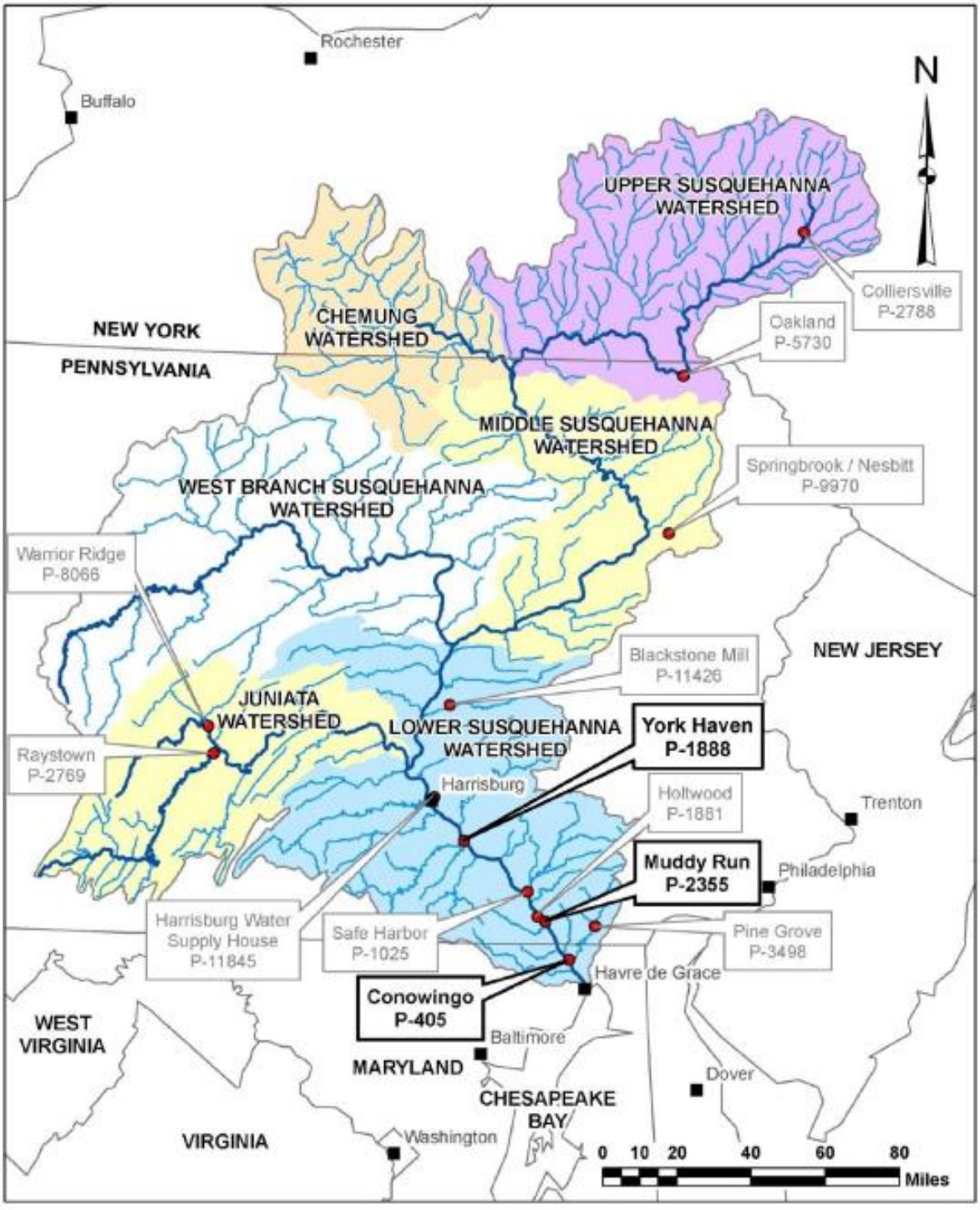

Figure 1-1. Susquehanna River Projects location (Source: FERC, 2009, as modified by staff).

Final EIS at 2, JA ____.

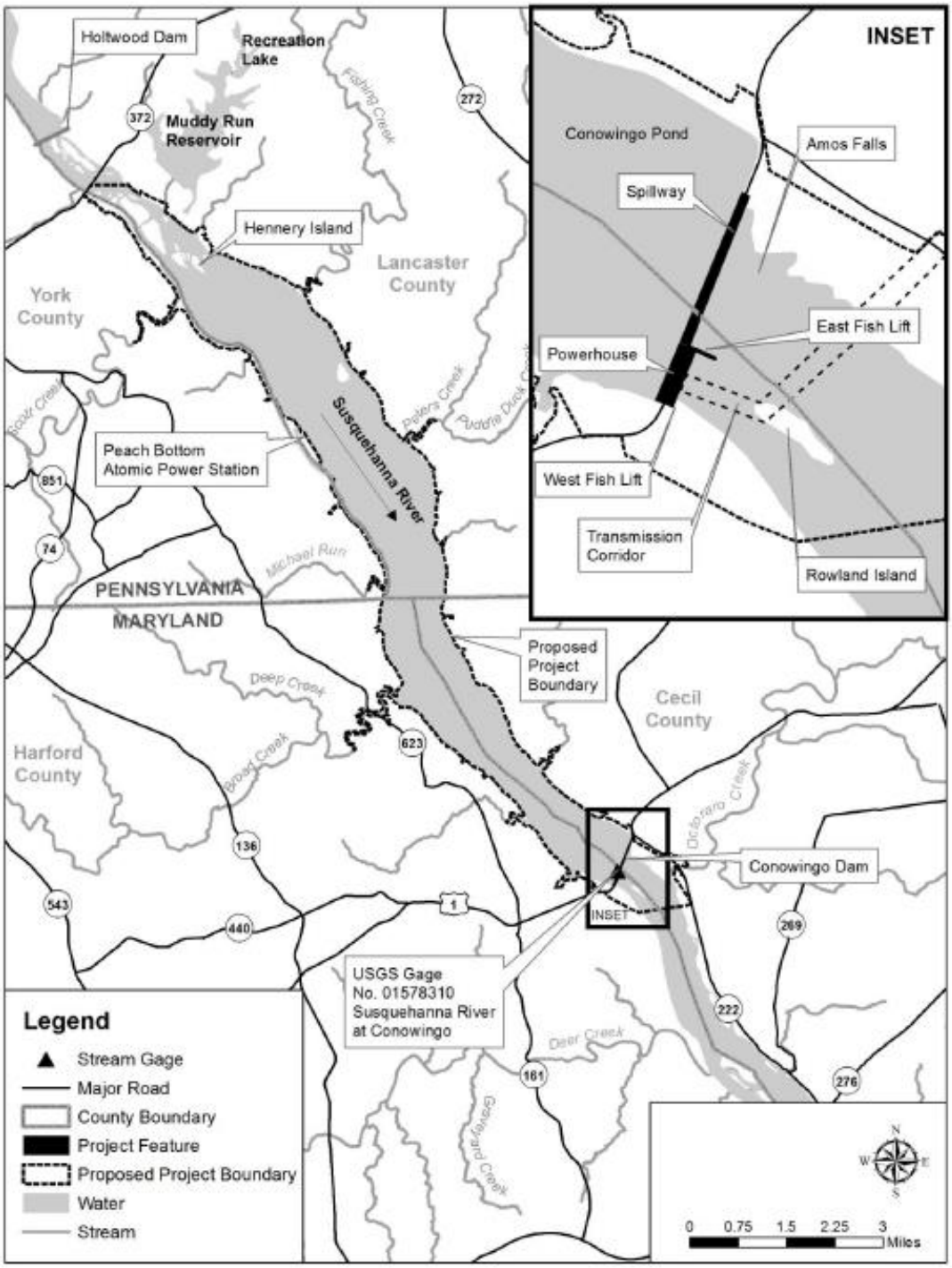

Figure 2-4. Project facilities for the Conowingo Project (Source: staff).

Id. at 37, JA ____.

The Susquehanna River Basin drains over 27,000 square miles in New York, Pennsylvania, and Maryland and provides approximately half of the total freshwater inflow into the Chesapeake Bay. *See* Rehearing Order P 3, JA ____. The Project is a peaking facility, which means that it uses reservoir storage to generate electricity during periods of high electricity demand. *See* License Order P 21, JA ____; Final EIS at 41, JA ____. Under the previous license, Licensee operated the Project to maintain minimum downstream flows between 3,500 and 10,000 cubic feet per second. *See* License Order P 22, JA ____; FEIS at 41 (table showing detailed minimum flows for various times of the year), JA ____.

In August 2012, Licensee applied, pursuant to sections 4(e) and 15 of the Federal Power Act, 16 U.S.C. §§ 797(e), 808, for a new license to continue operation and maintenance of the Project. *See* License Order P 1, JA ____. The Commission issued notice of the application, soliciting intervention and comment. *See id.* P 4, JA ____. Numerous federal and state agencies, public interest groups, and individuals intervened and filed comments. *See id.* PP 5-6, JA ____.

III. Environmental review

In July 2014, Commission staff issued a draft multi-project Environmental Impact Statement that analyzed the proposed project's impacts and alternatives to it. *See* License Order P 7, JA ____. The Statement also analyzed two nearby, upstream projects (York Haven and Muddy Run). *See* Final EIS at 29-33 (description of York Haven Project), 33-36 (description of Muddy Run Project), JA ____-__, ____-__.

Multiple parties filed comments on the draft, and Commission staff issued the Final EIS in March 2015, followed by another round of comment. *See* License Order P 8, JA ____.

IV. Clean Water Act certification

A. 2018 Maryland Certificate

In January 2014, Licensee requested of Maryland a water quality certification, and subsequently withdrew and refiled its certification request in March 2015, April 2016, and May 2017. *See* License Order P 42, JA ____; Rehearing Order P 6, JA ____. Maryland issued its certification for the Conowingo Project in April 2018. *See* License Order P 42, JA ____; Rehearing Order P 6; *see also* License Order PP 43-45 (description of measures), JA ____-__.

The Maryland certificate measures addressed: fish passage and invasive species; adaptive management; floating and water surface trash and debris; pollutants in fish tissue; and shoreline management. *See* License Order P 43, JA ____. The certificate also required Licensee to develop and implement a plan to annually reduce the amount of nitrogen and phosphorus from upstream sources in the Project's discharges using some combination of a payment of annual in-lieu fees, installation of best management practices or ecosystem restoration activities, and dredging. *See id.* P 44, JA ____. Finally, the certificate required License to file plans to monitor water quality; manage impacts to wildlife and aquatic resources, and their habitat; and monitor flow. *Id.* P 45, JA ____.

Licensee challenged Maryland's 2018 certificate in multiple ways. As relevant here, the certificate was subject to: (1) a request for further state administrative proceedings, including an administrative evidentiary hearing; (2) state and federal judicial proceedings; and (3) a petition for declaratory order before the Commission. *See* License Order PP 45-46 & n.29 (citing filings by Maryland and Licensee and describing various challenges to the 2018 certificate), JA ____;

Rehearing Order P 7, JA ____; Licensee's May 25, 2018 Letter, R. 977, JA ____; Maryland's Jan. 31, 2020 Comments, 5-8, R. 1165, JA ____; *see also* Licensee Feb. 28, 2019 Petition for Declaratory Order at 12 (describing pending litigation), R. 1016, JA ____.

B. Settlement between Maryland and Licensee

As required by the state court procedures, Licensee and Maryland entered into mediation to resolve their pending litigation. *See* License Order P 47 n.33 (citing Maryland's Jan. 31, 2020 Comments at 6-7 ("It is this mediation process that successfully resulted in the . . . Settlement."), JA ____-__), JA ____. And in October 2019, License and Maryland jointly filed the Settlement that resolved outstanding water quality certification issues. *See* License Order P 47, JA ____; Maryland and Licensee October 29, 2019 Joint Offer of Settlement and Explanatory Statement, R. 1055, JA ____.

Licensee and Maryland agreed to propose a series of license articles for Commission consideration pursuant to the Federal Power Act. *See* Settlement Agreement § 3.1, JA ____; *see also* Explanatory Statement at 18 (explaining that because the Settlement measures would provide "substantial environmental and recreational

enhancements . . . the "public interest" would be "well-served" by adopting of the measures "without modification or expansion"), JA ____. In addition, Licensee agreed to dismiss pending litigation, and Maryland agreed to waive its authority to issue water quality certification. *See* License Order PP 47-48, JA ____-__; *see also* Settlement Agreement § 3.2(a)(1) (Maryland's agreement to "waive its rights to issue" a Clean Water Act certificate upon Commission approval of the Settlement and incorporation of the proposed license articles), JA ____.

Maryland waived the water quality certification "for the purposes of securing important environmental benefits pursuant to the Agreement and avoiding protracted litigation." Explanatory Statement at 5, JA ____. As explained by Maryland, the "most significant" litigation risk was the "prospect of having zero ability to impose environmental conditions on the operation of the Project for the entire term of the new federal license." Maryland Jan. 31, 2020 Comments at 11, JA ____. "Through settlement, however, [Licensee and Maryland] have successfully negotiated a comprehensive resolution to their various disputes." *Id.*

As relevant here, the Settlement provided for a flow regime that included increased minimum flow requirements and restrictions on up-ramping, down-ramping, and maximum generation flow, all of which are focused on the spring migratory fish season. *See* License Order P 49, JA ____; Explanatory Statement at 17-18, JA ____-__. The Settlement's proposed minimum flows range from 4,000 to 18,200 cubic feet per second. *See* License Order P 49, JA ____.

The Settlement included many additional measures. *See id.* PP 49-59 (describing measures), JA ____-__. These included measures for improving a fish lift and other eel passage measures that will provide "significant benefits to migratory and resident fish." Explanatory Statement at 17, JA ____. The Settlement contains measures to reduce barriers to upstream passage for American shad, river herring, and American eel. *Id.* Measures for addressing invasive species and requiring compliance with dissolved oxygen standards will "protect against adverse impacts to resident and migratory fish populations above and below Conowingo Dam." *Id.* at 17-18, JA ____-__. Additional measures address: trash and debris removal; shoreline management activities; stream flow monitoring; and fish and wildlife

resources such as turtles, waterfowl nesting, and sturgeon. *Id.* at 18, JA ____.

Finally, the Settlement included some measures that were not intended to be included in the license. *See* License Order P 60, JA ____; *see also* Explanatory Statement at 4 ("Pursuant to its commitments in the [Settlement], on both licensing and non-licensing issues, [Licensee] will invest more than $200 million in environmental protection, mitigation, and enhancement measures over the 50-year term of the new license."), JA ____.

The Commission provided public notice of the Settlement and solicited comment. *See* License Order P 10, JA ____. Multiple parties commented, including those supporting and opposing the Settlement. *See id.*; *see also* License Order PP 61-64 (summarizing comments), JA ____. Licensee (*see* R. 1163, JA ____) and Maryland (*see* R. 1165, JA ____) filed timely reply comments in support of the Settlement. *See* License Order P 10, JA ____.

V. Challenged FERC orders

In March 2021, the Commission issued a 50-year license for the Project, and in July 2021, the Commission issued the Rehearing Order,

which modified the discussion in the License Order while sustaining the result. *See* License Order at Ordering Para. A, JA ____; Rehearing Order P 2, JA ____. The license authorized over 570 megawatts of renewable energy generation capacity and adopted Licensee-proposed measures in addition to staff-recommended modifications and additional measures. *See* License Order PP 32-40 (summary of license requirements), JA ____-__.

The Commission issued a new license for the project based on the proposed operational and environmental measures set forth in Licensee's application, as modified by the Settlement with Maryland and another settlement between Licensee and the U.S. Department of the Interior. *See id.* PP 10, 49-59 (describing Settlement measures), JA ____-__, ____-__; *id.* PP 9, 80-85 (describing measures in settlement with Department of Interior), JA ____-__, ____-__; Rehearing Order P 9 (describing License Order), JA ____. In addition to the developmental considerations, the Commission found that the license measures would protect and enhance water quality, fish and wildlife resources, terrestrial resources, threatened and endangered species, recreational opportunities, and cultural resources. *See* License Order P 32, JA ____.

The Commission dismissed Licensee's petition for a declaratory order as moot based on adoption of the Settlement. *See id.* P 77, JA ____.

As relevant here, the Commission rejected the argument that the Settlement was developed without proper public input. *See id.* PP 65-69, JA ____-__. The Commission noted Maryland's public outreach, in addition to the Commission's own notice and comment process. *See id.* PP 65-66 (citing Maryland Jan. 31, 2020 Comments at 17, JA ____), JA ____-__. The Commission rejected Waterkeepers' argument that Maryland cannot undo its water quality certification by waiving its right to certification. *See id.* P 73, JA ____; Rehearing Order PP 13-18, JA ____-__.

The Commission determined that adoption of the Settlement's flow regime did not violate the Federal Power Act or the National Environmental Policy Act. *See* Rehearing Order PP 19-51, JA ____-__. First, the Commission determined that it fully analyzed and considered project effects on water quality as required by the two statues. *See id.* PP 20-21, JA ____-__. Second, the Commission determined that the flow regime analysis in the Final EIS was sufficient for purposes of approving the Settlement's flow regime. *See id.* PP 22-35, JA ____-__.

Third, the Commission disagreed that adoption of the Settlement measures required a supplemental NEPA analysis. *See id.* PP 36-47, JA ____-__. Finally, the Commission found no justification for requiring Licensee to implement additional measures, such as dredging, to help control sediment and nutrient loading in the Chesapeake Bay. *See id.* PP 48-51, JA ____-__.

The Commission rejected the request for rehearing filed by ShoreRivers and the four Waterkeeper organizations that it includes (Miles-Wye Riverkeeper, Choptank Riverkeeper, Chester Riverkeeper, and Sassafras Riverkeeper) because they had not intervened in the agency proceeding. *See id.* P 10, JA ____. ShoreRivers, which is one of Petitioners here, sought rehearing, of the rejection, which the Commission denied. *See Exelon Generation Co.*, 176 FERC ¶ 61,153 (2021) (September 2021 Order), JA ____.

In the September 2021 Order, the Commission continued to find that ShoreRivers and the four organizations that it includes lack individual party status because none of these entities filed a motion to intervene on its own behalf. *Id.* PP 5-6, JA ____. The Commission granted rehearing in part to recognize that the four organizations are

also members of Waterkeepers Chesapeake (also one of Petitioners here), which may represent their interests. *Id.* P 5, JA ____. No party has sought judicial review of the September 2021 Order.

Summary of Argument

The Commission properly determined that Maryland waived its Clean Water Act authority to issue a water quality certificate when it entered into a comprehensive settlement with Licensee. On review, Maryland does not question waiver of its Clean Water Act authority; rather, Petitioners (collectively, Waterkeepers) do so, in an attempt to maintain the terms of the earlier-issued Clean Water Act certificate. The Act does not prohibit waiver, even after initially granted, when waiver is at the behest of a state (such as Maryland) that believes it better can advance environmental objectives through a settlement that eliminates litigation risk. Given that the Act's certification authority is for the state's benefit, disallowing state-requested waiver would be contrary to the purpose of the statute. Adopting Waterkeepers' interpretation would have the unfortunate outcome of limiting states' ability to both avoid litigation risk and pursue environmental objectives.

None of Waterkeepers' arguments warrant upsetting the Settlement or the Commission's inclusion of the Settlement's terms in the project license. Nothing in the record demonstrates violation of the Clean Water Act's requirement that Maryland provide public notice of the application for a water quality certificate and procedures for public hearings. The Commission provided parties to this proceeding ample opportunity to comment on the Settlement. Given valid waiver, the Commission was justified in not making the license subject to the terms of Maryland's voluntarily-abandoned water quality certificate.

Adoption of the Settlement did not violate the Federal Power Act. Contrary to Waterkeepers' arguments on brief, the Commission's orders were balanced, i.e., they considered effects—both environmental and developmental—related to the Settlement and various flow regimes.

The Commission fully considered effects related to sediment and nutrients in the Chesapeake Bay, and, based on this analysis, reasonably declined to impose additional mitigation measures. First, the Commission reasonably determined that the Conowingo Project is not responsible for sediment and nutrients being transported to the

Chesapeake Bay. Second, the Commission reasonably determined that dredging would not be cost effective.

Finally, the Commission's extensive review of various flow regimes, in the Final EIS and in its orders, fully satisfied the agency's NEPA obligation to take a hard look at environmental impacts. Under NEPA's "rule of reason," the Settlement did not pose impacts in a significant manner or to a significant extent not already considered. In these circumstances, the Commission reasonably found that it was not obligated to supplement its environmental review.

Argument

I. Standard of review

Judicial review of the Commission's hydroelectric licensing decisions is deferential, and limited to determining whether they are arbitrary and capricious. *See Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 375-76 (D.C. Cir. 2008) (citing 5 U.S.C. § 706(2)(A)); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016) (review of agency's NEPA compliance is subject to arbitrary and capricious standard). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). "A court is

not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* Rather, the court must uphold the decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)) (alterations in original); *see also FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) ("deferential" arbitrary-and-capricious standard requires only that agency action "be reasonable and reasonably explained").

II. The Commission properly found that Maryland voluntarily waived its authority to issue a Clean Water Act certificate.

Waterkeepers argue that the Commission violated the Clean Water Act by giving effect to Maryland's waiver of its own authority to issue certification and by not including the 2018 state certification measures in the FERC-issued license. *See* Br. 32-44. However, the Commission properly found that (1) the Act does not prohibit waiver, even after the state certificate issued; and (2) the Commission could therefore issue the license subject to the measures contained in the later Settlement, rather than those in the nullified 2018 state

certificate. *See* License Order PP 65-69, 73-77, JA ____-__, ____-__; Rehearing Order PP 13-18, JA ____-__.

A. The Clean Water Act does not prohibit waiver of certification, even after it has been granted.

Waterkeepers assert that the Clean Water Act does not permit state waiver after certification. *See* Br. 35-38; *see also* Wildlife Federation Amicus Br. 10-12. However, these arguments fail because the Act does not prohibit waiver under the circumstances here and because Waterkeepers ignore the terms and purpose of the relevant provisions of the Act.

1. Nothing in the Clean Water Act's text or purpose precludes a state from affirmatively waiving certification.

Waterkeepers assert that the state's authority to waive certification, even after already granted, is refuted by the Clean Water Act's text. *See* Br. 35-38. But nothing in the Act prevents a state from affirmatively waiving its authority to issue a water quality certification before the statutory time period expires or during the pendency of the certification's appeal. *See* Rehearing Order P 15 (quoting 33 U.S.C. § 1341(a)(1)), JA ____; License Order P 73 (citing case law and EPA's interpretation of the Act), JA ___.

Section 401 of the Clean Water Act, 33 U.S.C. § 1341, "gives a primary role to states 'to block . . . local water projects' by imposing and enforcing water quality standards that are more stringent than applicable federal standards." *City of Tacoma*, 460 F.3d at 67 (quoting *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)); *see also Keating*, 927 F.2d at 622 (explaining that the Act provides a veto power to states); *Envtl. Def. Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.") (quoting legislative history; cited in Rehearing Order P 15 n.31, JA ____).

But the state veto cannot be exercised without limit. The Clean Water Act also requires states to act "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). Thus, the Act advances an interest in preventing delay that could "usurp [the Commission's] control over whether and when a federal license will issue." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972-73 (D.C. Cir. 2011); *see also New York State Dep't of Env't Conservation v. FERC*,

991 F.3d 439, 448 (2d Cir. 2021) (explaining that the purpose of the one-year limit was to "limit[] a certifying state's discretion and eliminat[e] a potential source of regulatory abuse," such as "prevent[ing] delay due to a certifying state's passive refusal or failure to act").

Given these purposes, and the general rule that statutory rights are subject to waiver by voluntary agreement, the Commission properly reasoned that a state can withdraw a water quality certification before the one-year period expires and while a certification is under appeal. *See* License Order P 73, JA ____; *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit." (quoting *Shutte v. Thompson*, 82 U.S. 151, 159 (1873)); *Price v. U.S. Dep't of Just. Att'y Off.*, 865 F.3d 676, 679 (D.C. Cir. 2017) (citing *Mezzanatto* and explaining that "[s]tatutory rights are generally waivable unless Congress affirmatively provides they are not").

This court's precedent supports that determination. *See Alcoa Power Generating*, 643 F.3d at 969 (acknowledging that a state could decide to affirmatively waive its certification rights rather than revise the certificate to accommodate a ruling on appeal); License Order P 73

n.94 (citing *Alcoa*), JA ____; Rehearing Order P 15 n.32 (same), JA ____. Waterkeepers' position (*see* Br. 35-38) that a state can waive certification, but only after state litigation is complete, not before, is inconsistent with *Alcoa*, and unsupported by anything in the Clean Water Act. *See* Maryland Jan. 31, 2020 Comments at 2, 11 (explaining that, in the face of "expensive and highly uncertain litigation," Maryland was concerned with the "prospect of having zero ability to impose environmental conditions"), JA ____; Br. 37 (acknowledging that *Alcoa* "merely suggests" that a state could waive after state review "has been resolved and the challenger has prevailed") (quotation marks omitted). Amicus downplays these concerns as merely about Maryland's concern about "avoiding litigation delays." Charter Boat Amicus Br. 4. But much more was at stake. Given the substantial rights provided states under the Clean Water Act, it makes sense that a state can, through settlement that avoids unnecessary risk and delay, consensually ensure its ability to impose measures to protect the environment. *See* Maryland Jan. 31, 2020 Comments at 11 (disagreeing that states "lack[] the authority after issuance of a certification to effect a waiver in the context of a negotiated settlement"), JA ____.

2. Clean Water Act section 401(a)(3) language, limiting a state's ability to halt a federal project through revocation of an already-issued certificate, does not support Waterkeepers' interpretation.

Waterkeepers also assert that Clean Water Act section 401(a)(3), 33 U.S.C. § 1341(a)(3), confirms their interpretation. *See* Br. 38-40. Reasoning that section 401(a)(3) provides the sole means for revocation, Waterkeepers assert that no other means is permissible and that the Commission's interpretation allowing for waiver or nullification of an already-issued water quality certificate would render that statutory provision meaningless. *See id.*

But Waterkeepers fail to recognize the distinction between: (1) a waiver of a state's authority to issue a water quality certificate (such as the situation here, where the project can move forward); and (2) a revocation of a water quality certificate (such as the situation in *Keating*, where the project cannot move forward). *See* Rehearing Order P 16 (explaining that it is a "flawed comparison" to compare revocation to waiver), JA ____.

A revocation pursuant to Clean Water Act section 401(a)(3) results in denial of state certification. *See* Rehearing Order P 16, JA ____. The

reliance consequences of revocation (denial of certification) are substantial: "[T]he picture changes dramatically once that decision has been made and a federal agency has acted upon it." *Keating*, 927 F.2d at 623; *see also* Rehearing Order P 16 n. 35 (citing *Keating*), JA ____. Here, by contrast, Licensee asked the Commission to "defer action on the federal license while . . . significant state and federal law issues are addressed" in litigation arising out of Maryland's 2018 certificate. *See* Licensee May 25, 2018 Filing at 3, JA ____. Thus, there has been no agency action on the Maryland certificate, and no reliance on it. Accordingly, assuming, *arguendo*, that the Clean Water Act logically creates a presumption that an existing certification remains valid unless revoked "under limited circumstances expressly defined in the statute," it does not follow that language in section 401(a)(3) of the Act prevents voluntary waiver, which permits the federal project to move forward. *Keating*, 927 F.2d at 623.

The Commission's interpretation allowing for post-certificate waiver does not undermine the statute's public participation requirements. *See* Br. 41-43 (citing Clean Water Act's "provision for state-level public hearings" and Maryland's notice regulations). The

Clean Water Act requires a state to establish procedures for "public notice" of applications, and, "to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Here, the Commission recognized that the Act requires certain "[p]rocedures and substantive requirements when a state exercises its authority to issue a water quality certification." Rehearing Order P 18, JA ____. And this Court has recognized that the Act requires the Commission to "obtain some minimal confirmation" that a state has complied with their "public notice procedures." *City of Tacoma*, 460 F.3d at 68. The Commission has done that here.

The Commission addressed Maryland's compliance with the Clean Water Act's public notice procedures. *See* License Order P 65, JA ____; Rehearing Order PP 17-18, JA ____. But Waterkeepers never "allege[d] any non-compliance with particular public participation requirements relevant to [Maryland's] waiver or participation in the [Settlement]." Rehearing Order P 18, JA ____. Moreover, there is no allegation that Maryland did not provide public notice of Licensee's application as required in section 401(a)(1), 33 U.S.C. § 1341(a)(1). *See* Maryland

Jan. 31, 2020 Comments at 3 (explaining that that state issued public notice of the request for water quality certification), JA ___.

The record indicates that Maryland allowed public participation throughout the settlement negotiations. Specifically, Maryland reached out to interested parties "for the express purpose of informing them about, and soliciting their input on, settlement strategy." License Order P 65 (quoting Maryland Jan. 31, 2020 Comments at 17, JA ____), JA ____.

Maryland called the "secrecy" allegations "false" and indicated that they were offered "by parties with whom [Maryland] did meaningfully engage during the settlement process." Maryland Jan. 31, 2020 Comments at 17, JA ____. Maryland explained that it asked stakeholder groups "how they would suggest resolving the challenges posed by the Conowingo relicensing, especially given difficult constraints like the high cost of large-scale dredging and recent legal developments that are adverse to state authority under Section 401 of the Clean Water Act." *Id.*; *see also id.* 8-9 (citing to this Court's 2019 *Hoopa Valley* decision, invalidating state compliance with Clean Water Act), JA ____-__. However, Maryland observed that "there are no easy

solutions for the complex environmental issues related to Conowingo." *Id.* at 17, JA ____.

Accordingly, the record demonstrates that Maryland properly exercised its discretion under the Clean Water Act to conduct public hearings and that the Commission has obtained "minimal confirmation" that Maryland has complied with public notice procedures. *See City of Tacoma*, 460 F.3d at 63.

Additional scrutiny is not in order. "[W]hether a state agency has complied with its own regulations rather than federal law is one to be determined in the first instance by the state." License Order P 74 (citing *Flambeau Hydro*, LLC, 113 FERC ¶ 61,291 P 8 (2005)), JA ____. But the Commission does not have jurisdiction to police Maryland's compliance with its own regulations. *See* License Order P 74 (citing *Flambeau Hydro, LLC*, 113 FERC ¶ 61,291 (2005)), JA ____. "[I]ssues concerning the validity of state actions under section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters." *Flambeau* Hydro, LLC, 113 FERC ¶ 61,291 P 8 (2005); *see also FPL Energy Maine Hydro LLC*, 111 FERC ¶ 61,104, at p. 61,503 (2005) ("Issues concerning the validity of state actions

under section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters.") (citing *Roosevelt Campobello Int'l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *American Rivers v. FERC*, 129 F.3d 99, 106 (2nd Cir. 1997)).

In addition to the public engagement at the state level, the Commission issued notice of the Settlement and invited public comment. *See* Rehearing Order P 66, JA ____. Accordingly, "interested parties and the public have had sufficient opportunity to provide input on the . . . Settlement." Rehearing Order P 66, JA ____.

B. Having determined that Maryland voluntarily waived its authority to issue a water quality certificate, the Commission appropriately declined to include in the license the measures from Maryland's 2018 certificate.

Building on the conclusion that a state lacks authority under the Clean Water Act to waive authority to issue a water quality certificate, Waterkeepers assert that the Commission's license omitting the terms of Maryland's 2018 certificate violated the Clean Water Act. *See* Br. 43-44; *see also* Wildlife Federation Amicus Br. 12. This argument misses the point.

The Commission recognized that the Clean Water Act requires federal incorporation of state water quality certificate conditions. *See* Rehearing Order P 13, JA ____. But as the Commission explained, "when a state waives its [Clean Water Act] authority, the statute does not require it to certify that the project will comply with water quality standards, or establish requirements necessary to assure compliance with those standards." *Id.* P 18, JA ____. As explained above, Maryland voluntarily waived its right, through its Settlement with Licensee, to issue a certificate in this case. *See supra* section II.A.1.

It is, of course, true that the Clean Water Act limits the Commission's authority to issue a license without a water quality certificate. *See* 33 U.S.C. § 1341(a)(1). But ignoring the centrality of the state's role in the certification process, Waterkeepers assert that once a certificate has issued, the Commission's only legal option is to issue a license subject to the terms of the certification, even if it has been waived. But nothing in the Clean Water Act "prohibits a state from waiving certification after granting it." Rehearing Order P 15 (citing cases and EPA guidance), JA ____.

According to Waterkeepers, the Settlement does not actually waive Maryland's authority and nullify its 2018 certificate. *See* Br. 34-35; *see also* Wildlife Federation Amicus Br. 12-13. But the Settlement states otherwise. *See* License Order PP 73-77, JA ____-__; Rehearing Order P 15, JA ____; Explanatory Statement at 4-5, JA ____-__.

Maryland "waive[d] any and all rights it had or has to issue a water quality certification under Section 401 of the Clean Water Act." Explanatory Statement at 4, JA ____. The state's waiver was intended to be "effective immediately and automatically upon, but only upon" the Commission's approval of the Settlement and incorporation of the proposed license articles. *Id.* at 4-5, JA ____.

III. The Commission fully complied with all statutory responsibilities when it issued a license that incorporated the Settlement's water quality measures.

A. The Commission extensively analyzed the Settlement's flow regime.

Waterkeepers assert that the Commission failed to adequately consider the Settlement's flow regime. The orders on review demonstrate otherwise. *See* License Order PP 119-27, JA ____-__; Rehearing Order PP 22-35, JA ____-__.

Section 10(a)(1) of the Federal Power Act conditions the grant of a hydroelectric license on the Commission finding that a project will be best adapted to a comprehensive plan for, among other things, protection and enhancement of fish and wildlife. 16 U.S.C. § 803(a)(1). Section 4(e) of the Act requires the agency to give "equal consideration" to protecting the environment and recreational opportunities, "in addition to the power and development purposes for which licenses are issued." 16 U.S.C. § 797(e); *see also Conservation Law Found. v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000) (explaining that "equal consideration is not the same as equal treatment") (cleaned up; quoting *State of California v. FERC*, 966 F.2d 1541, 1550 (9th Cir.1992)).

Under the Federal Power Act, a licensed hydroelectric project must be, in the Commission's judgment, best adapted to a comprehensive plan for improving or developing a waterway for all beneficial public uses. *See* 16 U.S.C. §§ 797(e), 803(a)(1). This analysis requires a careful balancing of a full range of public interest factors, while giving equal consideration to developmental and environmental values. *See City of Tacoma*, 460 F.3d at 73.

All of the potential beneficial uses of a waterway, "while unregulated, might well be contradictory rather than harmonious." *FPC v. Union Electric Co.*, 381 U.S. 90, 98 (1965). Congress therefore charged the Commission with bringing its expertise to bear upon the intricate task of balancing these wide ranging and competing factors to strike the "best adapted" balance. *Scenic Hudson Pres. Conference. v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965). All that is precisely what the Commission did here. *See* License Order PP 111-89, JA ____-__; Rehearing Order PP 19-51, JA ____-__.

In the Final Environmental Impact Statement, Commission staff considered three flow regimes: (1) Licensee's proposal, which also matched the current license and was therefore the no-action alternative; (2) a run-of-river mode of operation recommended by the Nature Conservancy; and (3) a recommended proposal by the Nature Conservancy with a set of operational constraints designed to meet its goals for habitat availability and other environmental metrics. *See* Rehearing Order P 23, JA ____; Final EIS at 148, JA ____. Each of these flow regimes was evaluated for impacts to submerged aquatic vegetation, fish habitat, fish migration, fish stranding, freshwater

mussels, and other aquatic invertebrates. *See* Rehearing Order P 23 (citing Final EIS at 145-61, JA ____-__), JA ____. The Commission also developed an additional (fourth) flow regime based on Licensee's proposal and staff's recommendations. *Id.*

The License Order considered yet another (fifth) flow regime when it evaluated the Settlement's flow regime. *Id.* The Settlement's proposal: (1) generally provides for higher flows than the Final EIS-recommended proposal; and (2) adopts elements of the Nature Conservancy flow regime. *Id.* (citing License Order P 121, JA ____).

As explained in the Final EIS, "[c]ertain flows may improve habitat for some species and life stages, while those same flows would reduce habitat for other species and life stages." Final EIS at 152, JA ____. "Selection of an alternative flow regime would require balancing among the several target species and life stages (determine which life stage is most important for each time interval), as well as consideration of the effects of an alternative regime on project power production and economics." *Id.*

When it evaluated the Settlement's flow regime, the Commission balanced interests. For example, the Settlement (1) "would be more

protective of aquatic resources" when compared to the Final EIS-recommended proposal; and (2) would result in "significantly less lost generation" at an upstream project (Muddy Run) when compared to the Nature Conservancy flow regime. Rehearing Order P 23 (citing License Order PP 125-26, JA ____-__), JA ____.

Based on this analysis, the Commission appropriately considered the Settlement's flow regime and found that it was adequately supported by the record. *Id.* P 24, JA ____. In particular, the Commission pointed out that the flows in the Settlement were within the range of flows used to compare impacts to aquatic habitat. *Id.* (citing Final EIS at 146-47, JA ____-__).

The Final EIS compared impacts to aquatic habitat using an index (weighted usable area), which is used to describe available habitat and is "meant to be used as a comparative statistic (for comparing alternative flow levels) and is not an absolute measure of habitat." *Id.* n.56, JA ____; *see also id.* n.58 (observing that Waterkeepers "do not dispute that the [index] is an appropriate tool to evaluate the environmental impacts of different flow regimes"), JA ____; Licensee Jan. 31, 2020 Comments at 48 (describing development of the index),

JA ____. The Final EIS considered the maximum weighted usable area available at flows ranging from 3,500 to 35,000 cubic feet per second. Rehearing Order P 24, JA ____. By comparison, the lowest flow under the Settlement is 4,000 cubic feet per second, well within the parameters studied in the Final EIS. *Id.* "Therefore, contrary to [Waterkeepers'] claim, the Commission assessed the environmental impacts of a minimum flow as low as the one allowed for in the Settlement." *Id.*

The Commission appropriately determined that the Settlement's flows are generally higher than those proposed and studied in the Final EIS and then analyzed the effects of the Settlement's flows. *See id.* P 26, JA ____-__. For most of the year (321 days outside the August 1 to September 14 period), the Settlement's flow regime provides minimum flows greater than the Final EIS-recommended flows, which would represent an improvement to habitat for American shad and striped bass across all months and life stages. *See id.* (table showing generally higher Settlement flows except for period between August 1 and September 14).

The Commission determined that these generally higher flows result in favorable outcomes. *See id.* (explaining that, "[a]cross all months and life stages of American shad and striped bass, these higher flows yield an increase in [maximum weighted usable area] from that of the staff alternative of 65% to 76% and 34% to 42%, respectively for the two species"). Thus, the Commission reasonably concluded that these increases to minimum flows, especially when combined with other Settlement improvements, "will be more protective of aquatic resources than Commission staff's." *Id.* (citing License Order PP 125-26, JA ____-__).

As for impacts at the lower range of the Settlement's flow regime (4,000 cubic feet per second between August 1 and September 14), the Commission explained that the impacts would not be significant. *See id.* The reduction in flows between August 1 and September 14, which would affect migrating American shad, "would not be significant," resulting in a decrease in the habitat index (maximum weighted usable area) during the juvenile stage from 94 percent (Final EIS-recommended 5,000 cubic feet per second) to approximately 90 percent

(Settlement's 4,000 cubic feet per second), but would extend through the end of the juvenile life stage in November. *Id.*

The Commission continued to find that the Final EIS-recommended flow regime compared favorably to the flow regime recommended by the Nature Conservancy. *See* Rehearing Order PP 31-33, JA ____-__. The Commission explained that the criticism of the Commission's analysis ignored the fact that Commission staff looked at a broad range of effects. *See id.* P 32 (explaining that criticism ignored the "full evaluation," which included evaluation of effects on "submerged aquatic vegetation, fish habitat, fish migration, fish stranding, freshwater mussels, and other aquatic invertebrates") (citing License Order P 119, JA ____, and Final EIS at 148-61, JA ____-__), JA ____. By contrast, the Nature Conservancy flow regime "would only provide limited benefits to some species, due to the high variability of species-specific flow preferences downstream of the project." *Id.* (citing License Order P 129, JA ____; Final EIS at 158, JA ____).

The Settlement compared favorably to both the Commission staff recommendation (generally higher flows) and the Nature Conservancy recommendation (limiting maximum generation and modifying ramping

rates) in other ways. *Id.* (citing License Order P 121, JA ____). The Settlement's flow regime would increase habitat availability for one month longer than staff's recommendation in the Final EIS, and provide additional benefits (when compared to the Nature Conservancy proposal) by limiting maximum generation and modifying ramping rates, which were not part of Commission staff's recommendation. *Id.* (citing License Order P 125, JA ____). Those benefits would inure particularly to aquatic resources such as migratory fish because "reducing flow variability could facilitate upstream passage and reduce fish stranding." *Id.* (quoting License Order P 125, JA ____).

The Commission weighed the environmental factors against developmental factors, and concluded that the Settlement represented an advantage over the Nature Conservancy flow regime. *See id.* P 33 (explaining that the Nature Conservancy's flow regime "would eliminate many of the project's peaking and ancillary service benefits to the regional wholesale electricity market . . . and would eliminate nine percent of the annual generation at the [upstream] Muddy Run Project") (citing License Order P 120, JA ____), JA ____. With emphasis on the renewable nature of the generation, the Commission adequately

compared the potential "environmental and economic effects" of both flow regimes, which "fully supported its approval of the [Settlement] for project operation under the new license." *Id.*

Although the Commission did not adopt measures preferred by Waterkeepers, the task of balancing factors under the Federal Power Act is the responsibility of the Commission, and it is entitled to deference. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. at 292; *see also* Final EIS at 149 (explaining that assessing the impacts of various flow regimes on any individual life stage and species of fish or invertebrate is a "complex challenge" and that any benefits to a particular species at a particular life state "may not necessarily transfer to another species and life stage"), 152 (explaining that combinations of minimum and maximum flows may reduce effects, but those combinations are "not consistent among evaluation species"), JA ____, ____.

B. The Commission was not required to find that the Conowingo Project would comply with voluntarily-waived state water quality standards.

According to Waterkeepers, the Commission violated the Federal Power Act and the National Environmental Policy Act by failing to

consider compliance with state water quality standards. *See* Br. 44-48. As the Commission explained, this argument "misconstrue[s] the requirements of the Clean Water Act." License Order P 76, JA ____.

If state certification is waived, the licensee is not compelled to construct, operate, or maintain a hydroelectric project in a manner consistent with state water quality standards unless the Commission includes such a requirement in the license. *See id.* (citing *Gustavus Elec. Co.*, 109 FERC ¶ 61,105 (2004), *reh'g denied*, 110 FERC ¶ 61,334 (2005)); Rehearing Order P 21, JA ____. "Because [Maryland] is waiving water quality certification in this proceeding, there are no certification conditions required to be included in the license." *Id.*; *see also Wisconsin Elec. Power Co.*, 76 FERC ¶ 61,183, at p. 62,018 (1996) (explaining that where waiver of certification has occurred, "the licensee's compliance with state water quality standards is not compelled by state law"); *Mead Corp.*, 76 FERC ¶ 61,352 (1996) (same).

It does not follow, however, that the Commission ignored water quality impacts or state water quality standards. *See* License Order P 76 ("The Commission has conducted its own analysis of the water quality impacts of the project as proposed and is requiring those

measures we deem necessary to protect aquatic resources."), JA ____; Rehearing Order PP 20-21, JA ____-__; Final EIS at 136, JA ____; *see also* License Order P 112 (explaining that it considered the Settlement's measures "under the broad public interest standard of [Federal Power Act] section 10(a)(1)"), JA ____; *supra* section III.A.

As part of its comprehensive public interest balancing, the Commission analyzed multiple issues. *See* License Order PP 111-82, JA ____-__. In particular, the Commission addressed water quality. *See* License Order PP 119-27 (flow management), 129-31 (dissolved oxygen), 140-46 (upstream sediment and nutrients entering the Lower Susquehanna River), JA ____-__, ____-__, ____-__; Final EIS at 81-211, JA ____-__.

This analysis included an extensive evaluation of the Project's potential impacts on water quality in the Final EIS, in the License Order, and in the Rehearing Order. *See* Final EIS at 136, JA ____; License Order P 76, JA ____; Rehearing Order P 21, JA ____. Finally, "[i]n some instances" the Commission did take account of state water quality standards. Rehearing Order P 21 (citing Final EIS), JA ____; Final EIS at 136 (noting that after environmental upgrades in 1989-

1991 and 2005-2008, Project operation generally does not exceed and fall below levels stipulated by the state standards for water temperature and dissolved oxygen, respectively), JA ____.

C. The Final EIS provided the Commission with an adequate basis to assess and consider the Settlement's flow regime, and no supplementation was required.

Waterkeepers assert that the Final EIS provided an inadequate basis to approve the flow regime as modified by the Settlement. *See* Br. 48-49; *see also* Wildlife Federation Amicus Br. 13. On the contrary, the analysis in the Final EIS, License Order, and Rehearing Order provided adequate support for adoption of the Settlement's flow regime. *See* License Order PP 119-27, JA ____; Rehearing Order PP 22-35, JA ____; *see also Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 879 F.3d 1202, 1210-12 (D.C. Cir. 2018) (an agency may augment its environmental review in its orders) (citing *Friends of the River v. FERC*, 720 F.2d 93, 97, 105-08 (D.C. Cir. 1983)); *see also supra* section III.A.

NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350. "NEPA imposes only procedural

requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

According to Council on Environmental Quality regulations in effect when Commission staff issued the environmental documents here, the Commission was obligated to supplement its environmental document only if: (i) the Commission "makes substantial changes in the proposed action that are relevant to environmental concerns;" or (ii) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (2019). (New regulations adopted in 2020 are substantially the same.)

But agencies "need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989). Such a requirement would render agency decisionmaking "intractable, always awaiting updated

information only to find the new information is outdated by the time a decision is made." *Id.* Rather, a "supplemental EIS must be prepared" only when a new action will, in the agency's judgment, affect the environment "in a significant manner or to a significant extent not already considered." *Id.* at 374. Put another way, a supplemental environmental impact statement is only required "where new information 'provides a *seriously* different picture of the environmental landscape.'" *Stand Up for California! v. United States Dep't of the Interior*, 994 F.3d 616, 629 (D.C. Cir. 2021) (quoting *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (emphasis in original); *see also Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000) ("'[N]ot every change requires [a supplemental EIS]; only those changes that cause effects which are significantly different from those already studied require supplementary consideration.'" (quoting *Corridor H Alternatives, Inc. v. Slater*, 982 F. Supp. 24, 30 (D.D.C. 1997)); *Mayo v. Reynolds*, 875 F.3d 11, 21 (D.C. Cir. 2017) ("So long as the impacts of the steps that the agency takes were contemplated and analyzed by the earlier NEPA analysis, the

agency need not supplement the original EIS or make a new assessment.").

Waterkeepers misconstrue the Commission's reasoning about the Final EIS as resting on a conclusion that the Settlement's flow regime is "less bad" than the alternatives studied in the Final EIS. *See* Br. 50; *see also* Br. 53 (suggesting Commission acknowledgement of substantial change to the proposed action). In fact, the Commission reasoned that the proposal does not present a "seriously different picture." Rehearing Order P 37 (quoting *Friends of Cap. Crescent Trail*, 877 F.3d at 1060), JA ____. Moreover, as the discussion above demonstrates, the Settlement did not present such a "seriously different picture." *See supra* section III.A.

Waterkeepers dispute the Commission's finding with respect to American shad and striped bass habitat. *See* Br. 51. But the Commission addressed this argument and concluded that the Settlement's flow regime would provide improved habitat for American shad and striped bass when compared to the staff-recommended alternative. *See* Rehearing Order P 28, JA ____.

Waterkeepers also argue that the Commission erred by failing to prepare a supplemental environmental document based on: (1) Maryland's 2018 issuance of the *Integrated Report of Surface Water Quality* (*see* Br. 47-48); and (2) the Settlement flow regime (*see* Br. 53-54). But, as explained below, the Commission properly concluded that neither the 2018 Report nor the Settlement required supplemental environmental review. *See* Rehearing Order PP 36-47, JA ____-__.

First, the Commission's environmental staff thoroughly examined the flow regime in the environmental documents. *See* Final EIS at 145-61, JA ____-__; *see also supra* section III.A. Although the Settlement's minimum flows are lower than the Final EIS-recommended flows between August 1 and September 14, the Commission thoroughly evaluated that difference and found that the Settlement's flow regime would, on balance, be better for aquatic habitat. *See* Rehearing Order P 28, JA ____.

Even if the Settlement's flow regime presented different parameters, the Commission thoroughly examined the Settlement's flow regime in the License Order and again in the Rehearing Order. *See* License Order PP 119-27, JA ____-__; Rehearing Order P 37,

JA ____. The Commission compared the Settlement's flow regime to the flow regime analyzed in the Final EIS to inform its decision to approve the Settlement's flow regime adopted in the new license. *See* Rehearing Order P 37, JA ____.

Issuance of the Integrated Report of Surface Water Quality did not require the Commission to supplement the Final EIS. The Maryland-issued Report shows that one portion of the Susquehanna River is impaired by the Conowingo Dam. *See* Br. 47-48; *see also* Charter Boat Association Amicus Br. 8-11. Nevertheless, the Commission examined the Settlement's flow regime based on the existing record and included additional analysis in the orders on review. *See* Rehearing Order PP 36-37, JA ____-__; License Order P 142 & n.187 (discussing impairment under Clean Water Act and measures (Total Maximum Daily Load) to address the maximum amount of pollutant allowed in a waterbody), JA ____. In addition, the Final EIS included analysis of "several alternative operating scenarios" and included "those measures . . . deemed necessary to protect aquatic resources." *Id.* P 37 (citing Final EIS at 154-61, JA ____-__), JA ____. By comparing the flow regimes in the Final EIS to the proposed flow

regime as modified by the Settlement, the Commission reached an informed decision. *See* Rehearing Order P 37, JA ____; License Order P 119-27, JA ____-__.

The Commission's treatment of waterfowl (*see* Br. 52-53) does not demonstrate a flaw in its environmental review. The Final EIS found that (1) project operation results in reservoir water level fluctuations; and (2) varied downstream flows could flood waterfowl nests. *See* Final EIS at 231, 248-49, JA ____, ____-__. Based on these findings, the Final EIS concluded that the waterfowl nesting protection plan would verify the actual effects on waterfowl nesting. *See* Final EIS at 422, JA ____. In addition, the plan could establish any necessary protection or mitigation measures. *See id.*

Accordingly, the Commission required Licensee to develop and implement a waterfowl nesting protection plan. *See* License Order P 58, JA ____; Article 422 (requiring Licensee to file for Commission approval a Waterfowl Nesting Protection Plan that "verif[ies] specific project-related effects on nesting waterfowl"), JA ____; Rehearing Order P 35, JA ____.

According to Waterkeepers, the plan illustrates the need for additional environmental analysis because it requires Licensee to assess the impact on waterfowl. *See* Br. 52-53. This argument should be rejected for two reasons. First, the Final EIS addresses impacts to waterfowl nests. *See* Rehearing Order PP 34-35, JA ____-__; Final EIS at 248-49, 422, JA ____-__, ____. Second, this court should not discourage verification of results if "new project-related effects are identified." License Order, Article 422, JA ____; *see also Murray Energy Corp. v. FERC*, 629 F.3d 231, 239-40 (D.C. Cir. 2011) (approving, in Natural Gas Act pipeline certification case, Commission-imposed mitigation requiring development of a plan that includes monitoring and further mitigation if required).

D. The Commission adequately assessed and considered dredging to address sediment and nutrient loading in the Chesapeake Bay.

According to Waterkeepers, the Commission was negligent in assessing effects from sediment and nutrient transport and by not requiring dredging. *See* Br. 54-57. However, the Commission fully considered these impacts and properly rejected the dredging measures advocated by Waterkeepers. *See* License Order PP 140-46, JA ____-__;

Rehearing Order PP 48-51, JA ____-__; *see also* Final EIS at 75-81 (discussing sediment transport as a matter of impacts to geology and soils), 137-139 (discussing sediment and nutrient loading as a matter of impacts to water resources), JA ____-__, ____-_.

The Commission acknowledged that (1) the lower Susquehanna River and the Chesapeake Bay are affected by sediment and nutrients such as nitrogen and phosphorus; (2) the effect is worsened during storm events resulting in scour; and (3) dredging could yield some benefits. *See* License Order P 142-44, JA ____-__; Rehearing Order P 51, JA ____. However, the Commission reasonably determined that "transported sediment has a relatively short-term impact compared to the more harmful nutrients that are carried downstream by the scoured sediment." *Id.* (citing License Order P 144, JA ____; Final EIS at 78-79, JA ____-__), JA ____. Accordingly, the Commission reasonably concluded that dredging would be a temporary solution that would be more costly and less effective than land and water management measures. *See* License Order PP 145-46 (citing U.S. Army Corps of Engineers and Maryland Department of the Environment, Lower Susquehanna River Watershed Assessment (May 2015)), JA ____-__;

Rehearing Order P 51 (same), JA ____; Final EIS at 139, JA ____; Watershed Assessment at ES-4 to ES-6, 163-64, JA ____-__, ____-__.

The Watershed Assessment, which was sponsored by both the U.S. Army Corps of Engineers and the state of Maryland, "analyze[d] the movement of sediment and associated nutrient loads within the lower Susquehanna watershed through the series of hydroelectric dams," including the Conowingo Project. Watershed Assessment at ES-1, JA ____. Although the Watershed Assessment recognized that the reservoirs have served as sediment traps and that large storm and flood events "scour" sediment and nutrients from beyond the dams to adversely affect the Chesapeake Bay ecosystem, the assessment concluded that the "majority of the sediment load from the lower Susquehanna River entering the Chesapeake Bay during storm events originates from the watershed rather than from scour from the reservoirs." *Id.* at ES-2, JA ____. The assessment added that "both sources" of sediment and nutrient loads should be addressed. *Id.*

The Final EIS cites the draft version of the Watershed Assessment. *See* License Order P 145, JA ____; Final EIS at 139 (explaining that the draft Watershed Assessment "indicates that

operational changes at Conowingo would not address the sediment transport issue, and that dredging of Conowingo Pond would be cost prohibitive and ineffective"), JA ____. The final Watershed Assessment, which had not been issued at the time of the Final EIS, "reiterates that strategies focused on reducing nutrients, rather than sediment, are likely to be more effective at addressing impacts to Chesapeake Bay water quality and aquatic life than dredging." *See* License Order P 146, JA ____; Watershed Assessment at 162-64 (explaining that addressing sediment storage would yield "minimal, short-lived benefits at high costs" and that "[s]trategies focused on reducing nutrients, as opposed to sediment, are likely more effective at addressing . . . water quality and aquatic life"), JA ____-__; *see also id*. at 158-59 ("Sources upstream of Conowingo Dam deliver more sediment and nutrients and, therefore, have more impact on the upper Chesapeake Bay ecosystem, than do the scoured sediment and associated nutrients from the reservoir behind Conowingo Dam."); 161 ("Managing sediment via large-scale dredging, bypassing and dam operational changes, by itself does not provide sufficient benefits to offset the upper Chesapeake Bay water quality

impacts from the loss of long-term sediment trapping capacity."), JA ____-__, ____.

The Watershed Assessment also discussed how each of the Chesapeake Bay watershed jurisdictions will develop plans (watershed implementation plans), "which detail how each [jurisdiction] will meet . . . assigned nitrogen, phosphorus, and sediment load allocations as part of the Chesapeake Bay total maximum daily loads (TMDLs), and achieve all dissolved oxygen (DO), water clarity, [submerged aquatic vegetation], and algae (measured as chlorophyll) levels required for healthy aquatic life." Watershed Assessment at ES-2, JA ____. "Implementation of [these plans] was estimated to have a far larger influence on the health of Chesapeake Bay in comparison to scouring of the lower Susquehanna River reservoirs." *Id.* And although "increased frequency of scour and the amount of scoured sediment and associated nutrients from behind the dams on the lower Susquehanna River is a major contributor" to adverse aquatic life in the Chesapeake Bay, "[a]dditional management strategies for reducing sediment yield from the Susquehanna River watershed beyond the [plans] appear to be higher in cost, and ultimately, have a low influence on reducing the

amount of sediment available for a storm event." *Id.* ES-3 (first quotation), ES-5 (second quotation), JA ____-__. Accordingly, there was ample record support for the Commission's determination that dredging was not justified.

Waterkeepers favorably cite the Watershed Assessment for background (*see* Br. 9, 12), but largely ignore its conclusions as they relate to the Commission's findings, despite the Commission's reliance on it. *See* Rehearing Order P 51 (explaining that the Commission "appropriately relied" on the Watershed Assessment), JA ____. Any argument in reply will be too late. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

By contrast, Waterkeepers' arguments largely rely on Maryland's 2018 certificate. *See* Br. 54-55; *see also* Charter Boat Association Amicus Br. 5; Wildlife Federation Amicus Br. 1-5, 8; Maryland State Legislators Amicus Br. 12-13 (emphasizing adverse impacts of not including measures from the 2018 certificate). However, prior to the emergence of the Settlement, Maryland's 2018 certificate was subject to (1) further administrative proceedings, including a contested evidentiary hearing; (2) state and federal judicial proceedings; and (3) a

petition for declaratory order before the Commission. *See* License Order P 45 n.29, JA ____. As explained by Licensee, these proceedings "raise[d] significant legal challenges" to Maryland's 2018 certificate; therefore, Licensee requested that the Commission defer action on the license while these issues were pending and could be addressed. *See* Licensee May 25, 2018 Filing at 1-3. Accordingly, any reliance on the now withdrawn water quality certificate is unpersuasive.

The Commission acknowledged Waterkeepers' suggestion that dredging could "yield some benefits" at an annual cost of $41 million. Rehearing Order P 51, JA ____. The Final EIS looked at estimates that ranged from $48 to $267 million. *See* Rehearing Order P 51 (citing License Order PP 145-46, JA ____-__), JA ____. The range is explained by the distance between dredging location and placement sites. *See* Watershed Assessment at 163, JA ____. In any event, those costs are likely to increase with time "as placement sites become less convenient." *Id.* But even with a lower cost of $41 million, the "positive influence on the Chesapeake Bay ecosystem is significantly minimized due to the majority of sediment loads coming from the Susquehanna River watershed during a scour event." *Id.*

The Commission found that dredging would achieve only "minor improvements in selected water quality parameters downstream of the project in the upper Chesapeake Bay." Rehearing Order P 51 (citing Final EIS at 138-39, JA ____-__), JA ____. Given these facts, the Commission appropriately determined that estimates of slightly less expensive dredging "do not provide a significantly different picture of the environmental impacts of the project." Rehearing Order P 41, JA ____.

Waterkeepers dispute that the discharges resulting from scour events are not of Licensee's making. *See* Br. 54-55. However, the Commission reasonably concluded that the impacts originate from the upstream watershed. *See* Rehearing Order P 51, JA ____; Final EIS at 79 (citing evidence that "the nutrients associated with scoured sediment are more harmful to the [Chesapeake Bay's] aquatic life than the sediment itself"), JA ____; Final EIS at 76 (describing Licensee's position that "sediment and nutrients are almost entirely introduced to the river during runoff from the watershed, which is outside of [Licensee's] control"), 77 ("Nearly all sediment entering Conowingo

Pond is contributed by the river's upstream watershed; contributions from project lands are minimal"), JA ____-__.

Nor is the Commission's dredging analysis flawed because of climate change impacts. *See* Br. 56-57 (arguing that "increased rainfall, flow, and nutrient and sediment loads" will make effects "far worse"). "[N]utrients associated with scoured sediment are more harmful to aquatic life than the sediment itself." Rehearing Order P 43, JA ____. But it is undisputed that nearly all sediment and sediment-bound nutrients entering Conowingo Pond originate from the upstream watershed (not the Conowingo Project). *Id.* In addition, sediment and nutrient loading in the Chesapeake Bay would occur in the long term whether or not the Conowingo Dam was in place; thus, the Conowingo Project's role with respect to storm-related impacts on sediment and nutrients is, in the long term, "unchanged by the number or intensity of storm events." *Id.*; *see also* License Order P 143 (explaining that because the Conowingo Dam has reached "dynamic equilibrium, it no longer traps any sediment on a long-term basis and the full sediment load carried by the river is transported into the Chesapeake Bay, as would have occurred prior to construction of the lower Susquehanna

River reservoirs"), P 146 ("While dredging can be beneficial, the benefits are short-lived and not worth the expense.") (citing Final EIS at 80-81, JA ____-__, and Watershed Assessment at 162-63, JA ____-__), JA ____-__. Finally, the license is subject to standard reopener articles that could be the "vehicle for making changes to [license conditions] should a material change in conditions occur that results in unanticipated environmental effects that would justify reconsideration of the License's conditions." Rehearing Order P 43, JA ____; Final EIS at H-45 to H-46 (discussing standard reopener article that could be used to address unanticipated environmental effects), JA ____-__; License Order, Form L-3 Terms and Conditions, Article 15, JA ____.

In short, Waterkeepers are wrong to assert (*see* Br. 55) that the Commission failed to "grapple" with relevant facts and that its findings as to Conowingo discharges were "conclusory." In fact, as explained above, the Commission rested its findings on substantial record evidence, and its orders demonstrate a thoughtful balance of competing interests and competing arguments. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. at 292 (explaining that appellate court's "important but limited role is to ensure that the Commission engaged in reasoned

decisionmaking—that it weighed competing views, selected [a result] with adequate support in the record, and intelligibly explained the reasons for making that choice).

Conclusion

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
scott.ediger@ferc.gov

April 8, 2022

Certificate of Compliance

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,293 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Century Schoolbook 14-point font, in Microsoft Word.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
(202) 502-8509
scott.ediger@ferc.gov

April 8, 2022

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

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''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;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

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(other than electric power solely from cogeneration facilities or small power production facilities);''.

Par. (18)(B). Pub. L. 109–58, §1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '''qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

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

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

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

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

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

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

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

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

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

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

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

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

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

FERC REGULATIONS

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

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

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

STATE AUTHORITIES; CONSTRUCTION

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

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

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

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 1301 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 1301 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

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

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

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

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

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

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

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

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

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

(f) Preliminary permits; notice of application

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

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

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

(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 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 Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

§ 797c. Dams in National Park System units

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

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

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under

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(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)[1] Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, § 9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 99–495, § 14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99–495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as pars. (1) and (2) of 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.

§ 803. Conditions of license generally

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

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

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

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

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

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

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

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

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

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

(b) Alterations in project works

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

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

That the licensee shall maintain the project works in a condition of repair adequate for the

[1] See Codification note below.

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

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

(d) Amortization reserves

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

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

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 5123 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

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

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

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

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

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

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

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Con-

gress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

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

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

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

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

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

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

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

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

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

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

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

(g) Conditions in discretion of commission

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

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

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

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

(i) Waiver of conditions

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

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

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

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applica-

ble law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

SAVINGS PROVISION

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

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relating to reporting recommendations to Congress every 5 years, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103–7.

OBLIGATION FOR PAYMENT OF ANNUAL CHARGES

Pub. L. 115–270, title III, § 3001(c), Oct. 23, 2018, 132 Stat. 3862, provided that: ''Any obligation of a licensee or exemptee for the payment of annual charges under section 10(e) of the Federal Power Act (16 U.S.C. 803(e)) for a project that has not commenced construction as of the date of enactment of this Act [Oct. 23, 2018] shall commence not earlier than the latest of—

''(1) the date by which the licensee or exemptee is required to commence construction; or

''(2) the date of any extension of the deadline under paragraph (1).''

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

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

(a) That such licensee shall, to the extent necessary to preserve and improve navigation fa-

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(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.)

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 808. New licenses and renewals

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

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

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

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

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

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

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

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

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

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, op-

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

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eration, 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) 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) 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 pre-

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ceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

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

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

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

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

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

(e) License term on relicensing

Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.

(f) Nonpower use licenses; recordkeeping

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

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

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

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

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

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

TERMINATION OF WAR AND EMERGENCIES

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

§ 810. Disposition of charges arising from licenses

(a) Receipts from charges

All proceeds from any Indian reservation shall be placed to the credit of the Indians of such res-

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after October 24, 1992, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.

(June 10, 1920, ch. 285, pt. I, § 21, 41 Stat. 1074; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 102–486, title XVII, § 1701(d), Oct. 24, 1992, 106 Stat. 3009.)

AMENDMENTS

1992—Pub. L. 102–486 substituted final proviso and sentence for period at end.

§ 815. Contract to furnish power extending beyond period of license; obligations of new licensee

Whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

(June 10, 1920, ch. 285, pt. I, § 22, 41 Stat. 1074; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 816. Preservation of rights vested prior to June 10, 1920

The provisions of this subchapter shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this subchapter and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this subchapter and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, § 23(a), 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 210, 212, 49 Stat. 846, 847.)

CODIFICATION

Section consists of subsec. (a) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (b) of section 23 of act June 10, 1920, is set out as section 817 of this title.

AMENDMENTS

1935—Act Aug. 26, 1935, § 210, amended section generally, substituting ''part'' for ''chapter'' wherever appearing, substituting ''heretofore'' for ''then'', and substituting the last sentence for ''Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they cannot agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.''

§ 817. Projects not affecting navigable waters; necessity for Federal license, permit or right-of-way; unauthorized activities

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

(2) No person may commence any significant modification of any project licensed under, or exempted from, this chapter unless such modification is authorized in accordance with terms

and conditions of such license or exemption and the applicable requirements of this subchapter. As used in this paragraph, the term ''commence'' refers to the beginning of physical onsite activity other than surveys or testing.

(June 10, 1920, ch. 285, pt. I, § 23(b), 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 210, 212, 49 Stat. 846, 847; Pub. L. 99–495, § 6, Oct. 16, 1986, 100 Stat. 1248.)

CODIFICATION

Section consists of subsec. (b) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (a) of section 23 of act June 10, 1920, is set out as section 816 of this title.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as par. (1) and added par. (2).

1935—Act Aug. 26, 1935, § 210, amended section generally, inserting first sentence, and substituting ''with foreign nations'' for ''between foreign nations'', ''shall before such construction'' for ''may in their discretion'' and ''shall not construct, maintain, or operate such dam or other project works'' for ''shall not proceed with such construction''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 818. Public lands included in project; reservation of lands from entry

Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further*, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

(June 10, 1920, ch. 285, pt. I, § 24, 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 211, 212, 49 Stat. 846, 847; May 28, 1948, ch. 351, 62 Stat. 275.)

AMENDMENTS

1948—Act May 28, 1948, inserted second proviso in last sentence so that States may apply for reservations of portions of power sites released for entry, location, or selection to the States for highway purposes.

1935—Act Aug. 26, 1935, § 211, amended section generally, inserting ''for such purpose or purposes and under such restrictions as the commission may determine'', substituted ''part'' for ''chapter'' wherever appearing, and striking out from proviso ''prior to June 10, 1920'' after ''made''.

§ 819. Repealed. Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847

Section, act June 10, 1920, ch. 285, pt. I, § 25, 41 Stat. 1076, related to offenses and punishment. See section 825m et seq. of this title.

§ 820. Proceedings for revocation of license or to prevent violations of license

The Attorney General may, on request of the commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this chapter or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of

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§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

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

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

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

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

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

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

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

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

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

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

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

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91–190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91–190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91–190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the ''Council''). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attain-

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(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to §385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent

known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

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as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

Certificate Of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 8, 2022. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8509
scott.ediger@ferc.gov

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