

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals

for the Ninth Circuit

**Nos. 19-72915 & 19-73079
(Consolidated)**

NATIONAL PARKS CONSERVATION ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

EAGLE CREST ENERGY COMPANY,
Respondent-Intervenor.

ON PETITION FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION
AND ON PETITION FOR WRIT OF MANDAMUS

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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APRIL 6, 2020

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GLOSSARY

2014 License Order	<i>Eagle Crest Energy Co.</i> , 147 FERC ¶ 61,220 (June 19, 2014), ER618–714
2015 License Rehearing Order	<i>Eagle Crest Energy Co.</i> , 153 FERC ¶ 61,058 (Oct. 15, 2015), SER11–58
2019 Extension Order	<i>Eagle Crest Energy Co.</i> , 167 FERC ¶ 61,117 (May 7, 2019), ER19–29
2019 Rehearing Order	<i>Eagle Crest Energy Co.</i> , 168 FERC ¶ 61,186 (Sept. 19, 2019), ER1–18
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Commission or FERC	Respondent Federal Energy Regulatory Commission
Mandamus Pet.	Petition for Writ of Mandamus of National Parks Conservation Association
P	Internal paragraph number in a FERC order

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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

In 2009, Respondent-Intervenor Eagle Crest Energy Company (“Eagle Crest”) filed an application with the Federal Energy Regulatory Commission (“Commission” or “FERC”) to construct and operate a hydroelectric project using an abandoned mine. When completed, the Eagle Mountain Project (“Project”) would supply 1,300 megawatts of zero-emission electric generating capacity. In June 2014, after weighing the public need for the Project and its environmental impacts, the

Commission issued Eagle Crest a license to construct and operate the Project (“2014 License Order”).

Under the Federal Power Act, an entity seeking judicial review of the License Order was required to have party status in the licensing proceeding. Numerous entities intervened in order to obtain that status; Petitioner National Parks Conservation Association (“Association”) was not one of them. In fact, even when the Commission amended Eagle Crest’s license to extend the deadline for construction from 2016 to 2018, the Association stayed silent.

It was not until the Commission exercised its authority to further extend Eagle Crest’s construction deadline in 2019—after Congress allowed it to do so in 2018—that the Association sought party status in *that* proceeding. The Commission denied the Association’s motion to intervene, explaining that neither the Federal Power Act nor its regulations accommodate intervention in post-licensing proceedings that consider only *when* an already-licensed project should be constructed. The Commission also found that, were the Association to succeed in upending that policy, Commission license orders would effectively be subjected to untimely collateral attacks. Indeed, instead

of disputing the merits of extending the deadline to construct the Project, the Association seeks intervention here to challenge the Commission's approval of the Project itself.

The questions presented for review are:

1. Did the Commission abuse its discretion in denying the Association's motion to intervene in Eagle Crest's extension-of-time proceeding, where the Federal Power Act, Commission regulations, and past agency decisions allow intervention only where the licensee's proposal would significantly modify a physical aspect of a licensed project, or adversely affect the rights of property holders in a manner not contemplated by the license?
2. Should the Court grant the extraordinary remedy of mandamus relief, where the Association's petition for review, if successful, offers it meaningful relief through the possibility of a remand of Eagle Crest's extension-of-time proceeding, and where the Commission explained the legal basis for granting the extension?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the Addendum.

JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over either of the Association's petitions (Nos. 19-72915 and 19-73079) because the Association lacks Article III standing: The Association fails to allege an injury that is fairly traceable to the post-licensing orders on review, rather than to the Commission's 2014 order authorizing the Project in the first place. *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1092 (9th Cir. 2017); *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139–40 (9th Cir. 2013).

If the Court disagrees and holds that the Association *does* have standing, then review of its petition in No. 19-72915 is limited to assessing whether the Commission abused its discretion in denying the Association's motion to intervene. 16 U.S.C. § 825l(b); *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 n.7 (9th Cir. 2009). As for the Association's petition for writ of mandamus in No. 19-73079, the Court has jurisdiction under the All Writs Act. 28 U.S.C. § 1651; *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1119 (9th Cir. 2001).

STATEMENT OF FACTS

I. Background

A. The Commission's 2014 licensing of the Eagle Mountain Project

In June 2009, Eagle Crest filed an application with the Commission for a license to construct and operate the Eagle Mountain Pumped Storage Hydroelectric Project. *Eagle Crest Energy Co.*, 153 FERC ¶ 61,058, P 3 (2015) (“2015 License Rehearing Order”), SER12.

The Project, which would occupy public and private lands at the abandoned Eagle Mountain mine site in Riverside County, California, would operate as a closed-loop pumped storage facility. *Id.*; *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, P 2 (2019) (“2019 Rehearing Order”), ER1. Eagle Crest proposed filling two reservoirs on-site with groundwater, and replenishing the reservoirs periodically as needed. 2015 License Rehearing Order P 3, SER12. Once operational, the Project would pump water into the higher elevation reservoir during periods of low electricity demand, and release water into the lower elevation reservoir—generating electricity in the process—during periods of high demand. *Eagle Crest Energy Co.*, 147 FERC ¶ 61,220, P 25 (2014) (“2014 License Order”), ER624.

In January 2010, the Commission published notice of the Project in the *Federal Register*, and set a March 2010 deadline for filing motions to intervene and providing comments. 2014 License Order P 3, ER619. Numerous entities intervened—thereby conferring party status—and many more filed comments. *Id.* PP 4–5, ER619.

Petitioner National Parks Conservation Association filed comments. *Id.* P 5, ER619. It raised numerous concerns over the Project, namely that it would require excessive water commitments, could contaminate groundwater aquifers, and would adversely impact local wildlife and the nearby Joshua Tree National Park. National Parks Conservation Association Comments (Feb. 13, 2009 and Mar. 11, 2010), SER1–10. The Association did not, however, intervene in the licensing proceeding as necessary to confer party status and thus preserve its right to seek judicial review of the 2014 License Order. *See* 16 U.S.C. § 825l(a)–(b).

In January 2012, the Commission issued a final Environmental Impact Statement for the Project, followed by the June 2014 license approval authorizing Project construction and operation. 2014 License Order PP 2, 7, ER618, 620. The License Order included several

measures aimed at addressing environmental concerns raised by the Association and others. To protect plants and wildlife, it required Eagle Crest to implement wildlife protection plans. *Id.* PP 34–42, 106–110, 120–23 & License Article Nos. 415–17, ER625–27, 647–48, 650–51, 691–93. To address potential impacts to groundwater supplies, it required monitoring and mitigation measures, as needed (*id.* P 72, ER635), though it explained that total groundwater withdrawal would be less than one percent of the volume of available groundwater stored in the aquifer, *id.* P 70, ER634–35; *see also id.* P 76, ER636–37. To prevent pollution of groundwater, it mandated operation of a reverse osmosis desalination facility. *Id.* P 75, ER636. And to minimize impacts to Joshua Tree, the License Order required consultation with the National Park Service to protect groundwater, air quality, wildlife, and plants in the area, while also requiring mitigation measures to limit the effects of construction on recreation, land use, and aesthetics. *Id.* PP 44, 84–85, ER627, 639–40.

The Commission also assessed Project need. It found that the Project would complement wind and solar energy production in the region by balancing the intermittent nature of those renewable power

sources. *Id.* PP 163, 167, ER660–62. And it deemed the Project economical, finding that it would cost less than the likely alternative source of power. *Id.* P 165, ER661.

The Association did not challenge the Commission’s findings, nor did it seek to intervene as a party at any time after the Commission issued the License Order. Only two intervenor-parties sought agency rehearing of that Order¹—the U.S. Department of the Interior and the Desert Protection Society (2015 License Rehearing Order P 2, SER11)—and *no* party sought judicial review after the Commission denied rehearing in 2015.

B. Eagle Crest’s requests for extensions of time to commence and complete construction

Eagle Crest’s license required it to commence construction within two years of license issuance (by June 19, 2016), and to complete construction within seven years of issuance (by June 19, 2021). *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, P 2 (2019) (“2019 Extension Order”), ER19–20. On March 17, 2016, Commission staff granted Eagle

¹ Kaiser Eagle Mountain, LLC, which had proposed building a landfill near the Project site, also sought rehearing, but later withdrew its rehearing request. 2015 License Rehearing Order PP 2–3, SER11–12.

Crest's request to extend the deadline to commence construction by two years, to June 19, 2018. *Id.* P 3, ER20. Under Section 13 of the Federal Power Act, 16 U.S.C. § 806, as it existed at the time, the Commission was authorized to issue a single, two-year extension of time to commence construction. The Association did not seek to intervene in Eagle Crest's 2016 extension-of-time proceeding.

While the Association never challenged the 2014 license, it did attempt to halt the Project in other ways. For example, it filed an administrative appeal of the Bureau of Land Management's August 2018 approval-in-principle of a right-of-way to Eagle Crest. ER265–66. The Bureau manages the public portion of the Project land, 2019 Rehearing Order P 2, ER1, and a right-of-way is necessary for Project construction, *see* Bureau of Land Management, Decision Approving Eagle Crest Right-of-Way, BLM Case File No. CACA-050946, at 2–4 (Aug. 1, 2018), SER60–62. In fact, it was not until February 18, 2020 that Eagle Crest received—and subsequently signed—a final right-of-way grant from the Bureau. Eagle Crest Request to FERC for Extensions of Construction Deadlines, FERC Project No. 13123, at 5–6

(Mar. 19, 2020), SER84–85.² The administrative appeal remains pending.³

With final approval of a right-of-way and easements from private landowners left outstanding, the clock ran out on Eagle Crest’s initial deadline extension. *See* 2019 Extension Order P 11, ER23–24; Eagle Crest Request for Extension of Commencement-of-Construction Deadline, FERC Project No. 13123, at 6 (Nov. 6, 2018), SER75; *see also* Mar. 2020 Extension Request at 7, SER86. The same day the deadline expired—June 19, 2018—the Association requested that the Commission terminate Eagle Crest’s license pursuant to Section 13 of the Federal Power Act, 16 U.S.C. § 806. ER320. That provision provides that, “[i]n case the licensee shall not commence actual construction ...

² According to Eagle Crest, with execution of the right-of-way grant, it now has “legal certainty as to property rights to the [central Project area] land.” Mar. 2020 Extension Request at 7, SER86. The Commission granted Eagle Crest’s March 2020 extension request on March 30, 2020. *Eagle Crest Energy Co.*, Order Granting Extension of Time to Commence and Complete Project Construction Pursuant to Article 301, FERC Project No. 13123 (delegated order). Eagle Crest now has until June 19, 2022 and June 19, 2025 to commence and complete construction, respectively. *Id.* P 1.

³ Interior Board of Land Appeals, “Pending Appeals” (updated Feb. 29, 2020), *available at* <https://tinyurl.com/shuoky6>.

within the time prescribed in the license or as extended by the [C]ommission, then, after due notice given, the license shall ... be terminated upon written order of the Commission.” 16 U.S.C. § 806.

On October 23, 2018, the America’s Water Infrastructure Act of 2018 (“2018 Infrastructure Act”) became law. 2019 Rehearing Order P 4, ER2. The legislation amended Section 13 of the Federal Power Act by changing the maximum construction extension a licensee could receive from a one-time, two-year extension, to any number of extensions totaling “not more than 8 additional years.” 2018 Infrastructure Act, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018), A7–8. On November 7, 2018, Eagle Crest requested a two-year extension of time to commence Project construction, and, on December 18, 2018, it requested a corresponding two-year extension to complete construction. 2019 Rehearing Order P 4, ER2.

On November 15, 2018, the Association filed a motion to intervene and comments opposing the request for extension of time to commence construction. *Id.* P 5, ER2; ER350.

II. The Commission orders on review

The Commission granted Eagle Crest’s requests in the May 2019 Extension Order, extending the deadlines to commence and complete construction to June 19, 2020 and June 19, 2023, respectively. 2019 Extension Order P 14, ER25. It explained the extension was warranted because Eagle Crest had diligently pursued the Project by, among other things, submitting to the Commission 16 required preconstruction monitoring and management plans, and seeking to obtain necessary land rights—including the Bureau of Land Management right-of-way approval. *Id.* P 11, ER23–24 (citing 16 U.S.C. § 806); *see also* Nov. 2018 Extension Request at 4–6, SER73–75.

The Commission rejected the Association’s challenges to the extension requests. It explained that applying the new version of Federal Power Act Section 13—as amended by the 2018 Infrastructure Act—to Eagle Crest’s requests was appropriate because nothing in the Infrastructure Act restricted its application to projects licensed *after* the bill’s enactment. 2019 Extension Order P 9, ER22–23. Further, because Eagle Crest retained a valid license at the time it requested its

extensions, the Commission acted within its statutory authority to extend the deadlines *in* the license. *Id.*

The Commission also rejected the Association’s motion to intervene in the proceeding. *Id.* P 12, ER24–25. It explained its policy of allowing interventions in post-licensing proceedings that entail “fundamental and significant changes” to the physical aspects of a project, or to the terms and conditions of the license, or that would adversely affect property rights in a way not contemplated by the license. *Id.*; 2019 Rehearing Order PP 16, 19, ER7, 9–10. The Commission disagreed with the Association that Rule 214 of the Commission’s regulations, 18 C.F.R. § 385.214, mandates intervention. 2019 Rehearing Order PP 14–17, ER6–8. It explained that the Rule—which prescribes the *contents* of an intervention motion—does not require intervention in *all* types of proceedings. *Id.* P 15, ER6–7. Citing its own regulations and Commission precedent, it held that Eagle Crest’s extension-of-time proceeding did not qualify because it involved no “fundamental and significant changes” to the physical contours of the Project. *Id.* P 19 & nn.52–55 (citing, *e.g.*, 18 C.F.R. § 4.35(f)(1)), ER9–10. Indeed, Rule 210, 18 C.F.R. § 385.210, and Section 4.202, 18 C.F.R.

§ 4.202, of the Commission’s regulations require notice and intervention only in proceedings involving a “significant alteration” of a license. *Id.* PP 23–28, ER11–13 (quoting 18 C.F.R. § 4.202(a)).

The Commission also explained the rationale for its policy. Among other things, denying the Association’s motion to intervene prevented the Association from using the extension-of-time proceeding to collaterally attack the long-final 2014 license. *Id.* P 20, ER10.

Finally, the Commission denied the Association’s motion to stay the 2019 Extension Order. *Id.* P 8, ER3–4. It rejected the argument that, absent a stay, the Association would be unable to challenge the merits of the Order because it was not a party to the proceeding. *Id.* P 11, ER5. The Commission explained that, should a reviewing court hold that the Commission erred in denying the Association intervention as a party, the Commission would consider the Association’s challenge to the extension requests on remand, and the Association would have an opportunity to seek judicial review of the order resulting from the remand proceeding. *Id.*

While the Commission was unanimous that Eagle Crest’s extension requests were warranted, one Commissioner would have

granted the Association’s motion to intervene and requested stay of the Extension Order. *See* 2019 Extension Order, Comm’r Glick Partial Dissent PP 1–2, ER27–28; 2019 Rehearing Order, Comm’r Glick Dissent PP 1–2, 4–6, ER15–16, 17–18. In doing so, however, that Commissioner concluded that—notwithstanding the Commission’s denial of intervention—the majority had provided a “convincing” response to the Association’s merits arguments. 2019 Rehearing Order, Dissent P 4, ER17.

SUMMARY OF ARGUMENT

The Association challenges the new construction deadlines in the 2019 Orders on review because, it argues, the Eagle Mountain Project should not be constructed at all. Its collateral attack on the 2014 License Order is jurisdictionally barred by this Court’s precedent and, in any event, fails on the merits.

The Court should dismiss both Petitions (Nos. 19-72915 and 19-73079) for lack of Article III standing. The Association’s asserted injury stems from the 2014 License Order authorizing construction of the Project, not any order *delaying* its construction. Looked at another way, because the License Order decided the merits of the Project’s

development with finality, the Association's attempt to scuttle the Project by leveraging a subsequent proceeding—concerning only the timing of Project construction—is an impermissible collateral attack on the License Order.

The Association's challenge to the Commission's denial of its motion to intervene as a party also fails on the merits. The Federal Power Act vests the Commission with discretion to decide which types of proceedings warrant public notice and the opportunity to intervene. The Association is wrong that Commission Rule 214 grants it the right to intervene here: that Rule explains *who* may intervene and *how*, but says nothing about *whether* a particular proceeding accommodates intervention.

Under Commission policy, an entity is entitled to notice and intervention in proceedings that consider fundamental, significant changes to the physical contours of a project, or changes that could adversely affect the rights of property-holders in a way not contemplated by a license. That policy, dating back decades, hews closely to the text of the Commission's regulations. Indeed, the regulations explain that notice and intervention are triggered by

“significant alterations” or “material amendments” to a license. And they expressly define such changes in terms of a project’s *physical* features. A proposal to extend the time to construct an already-approved project reasonably does not qualify.

The Association’s petition for writ of mandamus also fails. Mandamus relief is warranted only in extraordinary circumstances, where justice cannot otherwise be secured. But the same relief the Association seeks through mandamus is already available through its companion petition for judicial review: If the Court finds that the Commission erred in denying intervention, it retains the equitable authority to order reopening of the Commission proceeding on remand.

Further, the Commission did not clearly err in granting the requested extensions—a necessary showing for mandamus relief. In fact, the Federal Power Act *supports* the Commission’s authority to extend the Project construction deadline, because the license had yet-to-be terminated when the Commission granted the extension. And because the Commission applied the law in effect at the time it decided Eagle Crest’s extension requests, assessing those requests under the

amended, 2018 version of the Federal Power Act was not retroactive application of law.

ARGUMENT

I. Standards of review

A. Petition for review of the Commission’s denial of intervention

The Federal Power Act explicitly “prescribe[s] the procedures and conditions under which, and the courts in which, judicial review of [the Commission’s] orders may be had.” *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009). Under the Act, only a “party” to a Commission proceeding may seek judicial review of the Commission’s final orders, following agency rehearing, resolving the proceeding: “Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain review of such order” in the appropriate United States Court of Appeals. 16 U.S.C. § 825l(b); *Cal. Trout*, 572 F.3d at 1013 (nonparties to Commission proceedings “may not challenge the Commission’s final determination in any court”).

An entity denied party status in a Commission proceeding may, however, obtain judicial review in a limited sense. “[B]ecause ‘it would

be grossly unfair to deny judicial review to a petitioner objecting to an agency's refusal to grant party status on the basis that the petitioner lacks party status,' the petitioner is 'considered a party for the limited purpose of reviewing the agency's basis for denying party status.'" *Cal. Trout*, 572 F.3d at 1013 n.7 (quoting *Covelo Indian Cmty. v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990)). This rule, first articulated by the D.C. Circuit in 1960 and adopted by this Court, has been reaffirmed several times, most recently in 2016. *See Pub. Serv. Comm'n of N.Y. v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960); *see also New Energy Capital Partners, LLC v. FERC*, 671 F. App'x 802, 804 (D.C. Cir. 2016); *Green Island Power Auth. v. FERC*, 577 F.3d 148, 159 (2d Cir. 2009); *Covelo*, 895 F.2d at 585–86; *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984).

Denial of party status is reviewed for abuse of discretion. *Cal. Trout*, 572 F.3d at 1012; *Covelo*, 895 F.2d at 587. An abuse of discretion is “a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (internal quotations omitted).

Disagreement with an agency’s judgment alone does not meet that standard. *United States v. Dunn*, 728 F.3d 1151, 1159 (9th Cir. 2013); *United States v. Lewis*, 611 F.3d 1172, 1180 (9th Cir. 2010). Indeed, in assessing Commission orders under the Administrative Procedure Act’s arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), the Court’s review is narrow and highly deferential. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016); *Cal. Trout*, 572 F.3d at 1012 n.6; *Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008).

B. Petition for writ of mandamus

The writ of mandamus “is a drastic and extraordinary remedy reserved for really extraordinary causes.” *United States v. Guerrero*, 693 F.3d 990, 999 (9th Cir. 2012) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). “The party seeking mandamus relief must establish that its right to issuance of the writ is ‘clear and indisputable.’” *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotations omitted)).

In agency matters, the Ninth Circuit has applied a three-part test to mandamus petitions. Under the *Hodel* test, “[m]andamus relief is

only available to compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986) (internal quotations and citations omitted) (adopted by *Cal. Power Exch.*, 245 F.3d at 1120, and by *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995)). The test is conjunctive. *Cal. Power Exch.*, 245 F.3d at 1124 & n.13.

While the Ninth Circuit has not explained the circumstances in which it applies an alternative standard, it appears the similar *Bauman* test generally applies in non-agency matters. Under that test, the Court assesses five factors: (1) whether the petitioner "has no other means to obtain the desired relief"; (2) the risk of prejudice to the petitioner; (3) "whether the district court's order is clearly erroneous"; (4) the frequency of the district court's error; and (5) "whether the district court's order raises new and important problems or issues of first impression." *Guerrero*, 693 F.3d at 999 (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)).

Both tests assess whether the petitioner may secure adequate relief through alternative means, and under either test, whether the petitioner is “clear[ly]” correct—i.e., whether the agency has committed “clear[] error[]”—is dispositive. *Cal. Power Exch.*, 245 F.3d at 1124 & n.13; *Guerrero*, 693 F.3d at 999. “‘Clear error’ is a highly deferential standard of review.” *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). In the mandamus context, the Court “must have a definite and firm conviction that the [Commission’s] interpretation ... was incorrect.” *Id.* (internal quotations omitted).

II. The Association lacks Article III standing

The “irreducible constitutional minimum” for Article III standing requires the petitioner to show that it has (1) suffered a “concrete and particularized,” “actual or imminent” “injury in fact,” that is (2) “fairly traceable” to the conduct complained-of, and that is (3) “likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (internal quotations omitted); *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 766 (9th Cir. 2018). The Association fails to satisfy Article III standing’s traceability requirement, and, relatedly, its

petitions are an impermissible collateral attack on the 2014 License Order.

A. The Association’s injury is not fairly traceable to the May 2019 Extension Order

All three prongs of the standing analysis—injury, causation, and redressability—must be satisfied. *Wash. Eenvtl. Council v. Bellon*, 732 F.3d 1131, 1139–40 (9th Cir. 2013). While the “‘fairly traceable’ and ‘redressability’ components for standing overlap,” “[t]he two are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief.” *Id.* at 1146 (citing *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). Thus, whether the requested relief will remedy a cognizable injury is not dispositive: the causal connection must be independently shown. *See Allen*, 468 U.S. at 753 n.19, 757.

The Association’s standing founders on traceability. While it fails to articulate an actionable injury-in-fact, which by itself suffices to show lack of standing,⁴ a generous reading of its brief suggests an injury to

⁴ The Association fails to show injury for either organizational standing, *see La Asociacion de Trabajadores de Lake Forest v. City of*

the Association’s organizational interest in preserving the Project area from further development. *See, e.g.*, Br. 32 (seeking “to protect the [Project area land] from development”). But that injury stems from the Commission’s original, long-final approval of the Project, reflected in the 2014 License Order—not the 2019 Extension Order *delaying* the date of construction and thus preserving the land in its current state for longer than the original license prescribed.⁵ *See* 2019 Rehearing Order PP 2, 20, ER1, 10 (citing the 2014 License Order). *Cf. Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012)

Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010), or representational standing, *see Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004).

⁵ Should the Association argue (belatedly) on reply that its injury is the denial of intervention in the post-licensing, extension-of-time proceeding, that argument fails. While a procedural injury—e.g., denial of intervention, *Palmieri v. New York*, 779 F.2d 861, 864 (2d Cir. 1985)—is cognizable, it must still be tied to a substantive, concrete harm. *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009); *see also Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 10, 12–13 (D.C. Cir. 2020) (dismissing petition for review of denial of intervention for lack of standing where petitioner failed to show ongoing concrete harm). The Association seeks to vindicate a procedural right to intervene in order to ameliorate the concrete harm of Project development. But, as discussed, the Association’s concrete harm stems from the 2014 License Order, not the Commission’s denial of intervention in the post-licensing proceeding.

(holding that petitioners lacked standing to challenge an agency rule that delayed application of a regulatory burden because the delay “mitigate[d] Petitioners’ purported injuries”), *rev’d in part on other grounds sub nom. Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *Nat’l Comm. for New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005) (holding that allegations of environmental harm for an already-approved pipeline were inadequate because the petitioner “already lost that battle when this Court upheld FERC’s certification of the pipeline”).

The Association does not purport to challenge the 2014 License Order, nor could it: that order is long-since final and the Association never intervened in the licensing proceeding as a party, meaning it forfeited its right to Commission rehearing of that order. *See* 16 U.S.C. § 825l(a) (only an intervening party may seek rehearing of a Commission order). And because party status is a prerequisite to seeking judicial review following the agency’s rehearing order, the Association also passed up its opportunity to contest the License Order in court. *See id.* § 825l(b) (a party to a Commission proceeding may

seek judicial review of the Commission’s rehearing order within 60 days of the rehearing order).

Nor is this a case where the Association previously sought but was denied party status. Despite its awareness of and participation in the licensing proceeding (as a nonparty) (*see* Br. 33; National Parks Conservation Association Motion to Intervene, at 3 (Nov. 15, 2018), ER352; 2009 and 2010 Association Comments, SER1–10), the Association made no attempt to intervene as a party in that proceeding. Instead, it waited *nearly a decade* from the date it first filed comments on the Project to intervene as a party, and then did so only in the agency proceeding that extended construction deadlines. *See* 2009 Association Comments, SER1–5.

In short, the Association fails to demonstrate a distinct injury “as a result of the [2019 Extension Order]” that is not instead traceable to the 2014 License Order. *New River*, 433 F.3d at 832. It therefore lacks Article III standing.

B. The Association cannot collaterally attack the 2014 License Order

The incongruity between the Association’s injury and the orders on review reveals another jurisdictional flaw: its petitions collaterally

attack a Commission order it was required to challenge years ago. *See* 2019 Rehearing Order P 20, ER10 (the Association “does not directly challenge the extensions sought by Eagle Crest but rather uses the extensions as a basis to renew its challenges to the license itself”; it is “mount[ing] an untimely collateral attack on the license order”).

“The collateral attack doctrine prevents litigants from ‘relitigating the merits of ... previous administrative proceedings’ or ‘evading ... established administrative procedures’ by raising a claim that is ‘inescapably intertwined with a review of the procedures and merits surrounding’ an underlying agency order.” *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1092 (9th Cir. 2017) (quoting *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006)). “At its core, the doctrine prohibits a plaintiff from using a later order that implements a prior agency action as a vehicle to undo the underlying action or order.” *Id.*

The collateral attack doctrine applies with particular force to petitions challenging FERC orders, as the Federal Power Act limits the Court’s jurisdiction to reviewing “new orders.” *Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006) (citing 16 U.S.C. § 825*l*(b)). As this Court has explained, “[t]he language of 16 U.S.C. § 825*l* does not

permit the intertwining of orders for review purposes, that is, using a timely petition to review an order for which the time limitations have run.” *Covelo*, 895 F.2d at 585 (internal quotations omitted).

In *Covelo*, the Court rejected a petition for review of a Commission order as an impermissible collateral attack. *See id.* At issue was the Commission’s relicensing of a hydroelectric project—an order petitioner California Trout, Inc. (“Cal Trout”) did not timely challenge before the Commission. *Id.* The Commission then sought voluntary remand of the relicensing order to correct an error pertaining to its legal scope. *Id.* Cal Trout *did* seek timely administrative rehearing of resulting remand order, but the Commission rejected it because it “raised issues relating to the substance of the agency’s [original] relicensing order.” *Id.*

This Court upheld the Commission’s decision. Because the Commission “did not ... reconsider the relicensing decision or open the door to reconsideration” in its remand order, Cal Trout’s attempt to relitigate the relicensing order was “precluded” under 16 U.S.C. § 825*l*. *Id.*; *see also Pacific Gas*, 464 F.3d at 865, 869–70 (rejecting petition for judicial review of a Commission order accepting application of a

particular rate-making method in an electricity market, because the Commission had approved the method itself in a prior order).

Same here. The Association’s petition is all about the merits of the Project—an issue the 2014 License Order squarely addressed and resolved with finality. *See, e.g.*, Br. 1–2, 16–19; *see also* 2019 Rehearing Order P 20, ER10. As the Association candidly admits, the 2014 License Order “is at the center of this litigation.” Br. 12. And it goes on, spending several pages objecting to the Project itself. *See, e.g.*, Br. 1 (seeking to “protect” the disputed land from the Project); 12 (asserting its desire to make “Joshua Tree ... once again ... whole”); 16 (challenging the “need for the project”); 17–19 (alleging risks to groundwater resources, plant communities, and wildlife habitat caused by the Project); 32 (explaining its desire “to protect the [Project area land] from development”). In other words, the Association seeks to relitigate *whether* the Project should proceed, not *when* Eagle Crest should break ground. *See* 2019 Rehearing Order P 20, ER10 (“[t]he Association essentially asks that the Commission reevaluate whether the [P]roject is in the public interest”). The collateral attack doctrine precludes such a maneuver: the Association cannot leverage a post-

licensing proceeding on one topic to belatedly challenge a prior determination on another. *Pacific Gas*, 464 F.3d at 868–70; *Covelo*, 895 F.2d at 585.

To the extent the Association asserts that its motion to intervene addresses a new issue—alleged retroactive application of amended Federal Power Act Section 13, *cf.* Br. 29, 33—not covered by the 2014 License Order, that argument is unconvincing. The fact remains that the Association seeks to use the 2019 Extension Order “as a vehicle to undo the underlying [2014 License Order]” by challenging the merits of the Project itself. *Ctr. for Biological Diversity*, 847 F.3d at 1092. Its attack on the Extension Order remains “inescapably intertwined with a review of the procedures and merits surrounding’ an underlying agency order.”⁶ *Id.* (quoting *Americopters*, 441 F.3d at 736).

⁶ This does not mean extension-of-time proceedings are immune from judicial review. An entity can seek mandamus relief by showing, for example, that the Commission “clear[ly]” erred. *Cal. Power Exch.*, 245 F.3d at 1120. But, as discussed *infra* pp. 61–74, the Commission did not clearly err in applying the amended version of Federal Power Act Section 13 here.

To be sure, the Association’s desired remedy—invalidation of the extended deadline to commence construction, *see* Mandamus Pet. 30; *see also* Br. 51—*could* set in motion events that ultimately halt the Project. But the bar on collateral attacks does not evaporate just because a petitioner-favorable ruling could provide relief. Indeed, a core purpose of the bar is to *prevent* such an outcome: a petitioner may not benefit from its own neglect in failing to challenge the appropriate order. *See Pacific Gas*, 464 F.3d at 869 (explaining that a petitioner “cannot obtain two bites of the proverbial apple”).

Nor does the bar’s force wane—and the Association cites no authority for its contrary assertion—with changed circumstances due to the passage of time. *See* Br. 16–17, 19–20 (noting, among other things, changed regulatory and economic conditions since license approval). As a first matter, most of the Association’s justifications for opposing the Project existed at the time of the 2014 License Order. *See, e.g.*, Br. 16 (“[t]he putative need for the project [was] dubious at best during its inception nearly 30 years ago”); Br. 17–18 (citing groundwater depletion concerns from filings made in 2012 and 2013 (ER252, 1136, 1148, 1163)); Br. 18 (citing acid mine seepage concerns from filings made in 2012 and

2013 (ER252, 1137, 1173); Br. 19 (citing concerns over impacts on plant and wildlife habitat, and to bighorn sheep and the desert tortoise, from filings made in 2012 and 2013 (ER251, 1179, 1182); Br. 19 (citing concerns over effects to viewsheds and recreational opportunities from a 2012 filing (ER1203)). Indeed, far from boosting its cause, these various points only highlight the collateral, untimely nature of the Association's challenge.

But even if changed circumstances *were* the driving force behind the Association's sudden desire for intervenor-party status, that would not somehow cure what remains a collateral attack on the 2014 License Order. Under the Association's approach, a petitioner could challenge an original license in a post-licensing proceeding, so long as it proffered new facts that, had they existed at the time of the original license review, might have changed the outcome of *that* proceeding. Not only does such an approach subvert the collateral attack doctrine root-and-branch—after all, one can generally point to changed circumstances—it also undermines two of the doctrine's animating concerns: (1) ensuring that final agency actions are, in fact, final, *see Ctr. for Biological Diversity*, 847 F.3d at 1092; and, relatedly, (2) preventing parties from

making an “end-run around the jurisdictional limitation imposed by [16 U.S.C. § 825l(b)],” setting a 60-day time-limit for challenging Commission orders, *Americopters*, 441 F.3d at 736 (internal quotations omitted).

III. The Commission reasonably interpreted the Federal Power Act and its own regulations in denying the Association’s motion to intervene

The Commission denied the Association’s motion to intervene because Eagle Crest’s post-licensing, extension-of-time proceeding did not involve a physical, “material change[] in the plan of [P]roject development or in the terms and conditions of the license,” nor did it “adversely affect the rights of property holders in a manner not contemplated by the license.” 2019 Rehearing Order PP 16, 19, ER7, 9–10 (collecting cases). If the Court proceeds to the merits, it should uphold the Commission’s decision. In exercising its discretion to deny intervention, *see* 16 U.S.C. § 825g(a), the Commission hewed closely to the text and structure of the Federal Power Act and implementing regulations, and acted consistent with its precedent. *See* 2019 Rehearing Order PP 16, 19, 24–26, ER7, 9–10, 11–12.

A. The Commission’s rules and regulations vest it with discretion to limit the types of proceedings affording a right to intervene

Congress enacted the Federal Power Act with the purpose of, as relevant here, promoting the “comprehensive development and full use of the nation’s navigable waters.” *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 82–83, 89 (D.C. Cir. 1983) (citing 16 U.S.C. § 803(a)); *see also Cal. Trout*, 572 F.3d at 1013. Congress also contemplated allowing entities to enter Commission proceedings as parties, but conferred no absolute right to do so. The Act provides that, “[i]n any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, *may* admit as a party any ... person whose participation in the proceeding may be in the public interest.” 16 U.S.C. § 825g(a) (emphasis added); *see also id.* § 825g(b) (all proceedings under the Federal Power Act “shall be governed by rules of practice and procedure to be adopted by the Commission”); *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965) (“[T]he Commission has ample authority reasonably to limit those eligible to intervene or to seek review.”); 2019 Rehearing Order PP 15–17 & n.47, ER6–8.

The Commission has established “rules of practice and procedure” governing the right to public notice and intervention, and those rules do not support the Association’s right to intervene here.

1. Rule 214 establishes who may intervene and how, not whether the right exists in a particular type of proceeding

The Association relies on the Commission’s generic regulation governing the process for intervening, Rule 214. Br. 30–34. Contrary to the Association’ framing, however, Rule 214 does not elucidate whether the Association may intervene in a particular proceeding. *See* 18 C.F.R. § 385.214; *see also* 16 U.S.C. § 825g(a) (explaining that the Commission “may” allow intervention).

Rule 214 explains *who* may intervene (“[a]ny person,” 18 C.F.R. § 385.214(a)(3)) and *how* to do so (by stating the movant’s “position,” *id.* § 385.214(b)(1), and “interest” in the proceeding or the “public interest” at stake, *id.* § 385.214(b)(2)(ii)–(iii)). But it says nothing about *whether* a proceeding is the type in which the Commission allows intervention in the first place. *See* 2019 Rehearing Oder P 15, ER6–7 (“Rule 214 of the Commission’s regulations is inapplicable because this is not a proceeding where the Commission permits intervention.”). Indeed, Rule

214’s application expressly turns on the operation of *other* regulations—which regulations generally limit intervention to proceedings involving significant changes to the physical aspects of a hydroelectric project.

2. The Commission reasonably determined that extension-of-time requests do not trigger notice and intervention

a. Rule 214 sets the point of departure. It states that intervention motions be filed within the “time period established under Rule 210.” 18 C.F.R. § 385.214(b)(3). For its part, Rule 210 provides for intervention “[w]hen the [Commission] gives notice of,” among other things, “applications.” *Id.* § 385.210(a)–(b). It explains that “[a] notice given under this section will establish the dates for filing interventions and protests.” *Id.* § 385.210(b).

Section 6 of the Federal Power Act, in turn, explains when the Commission must issue such notice: where, as relevant here, a licensee seeks to “alter” the license. 16 U.S.C. § 799 (providing that “[l]icenses ... may be altered ... only upon mutual agreement between the licensee and the Commission after thirty days’ public notice”); *see also* 2019 Rehearing Order PP 24–25, ER11–12 (addressing Section 6 and Rule 210); Br. 9 (asserting that Section 6 and Rule 210 are “intertwine[d]”).

b. So what constitutes an “alter[ation]” of a license? Subpart L of the regulations—“Application for Amendment of License”—provides the answer. 18 C.F.R. Subpart L. It sets forth procedures applicable to “any application for amendment of a license.” *Id.* § 4.200. One type of “amendment” is an “exten[sion of] the time fixed in the license for commencement or completion of project works.” *Id.* § 4.200(c). But Subpart L also explains that notice is only required for a license “amendment” that constitutes a “significant alteration.” *Id.* § 4.202(a); 2019 Rehearing Order P 25, ER11–12. Stated in full, “[i]f it is determined that approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. § 799, public notice of such application shall be given at least 30 days prior to action upon the application.” 18 C.F.R. § 4.202(a).

The Association elides this distinction by suggesting that because an extension of time is an “amendment” under Section 4.200, proceedings addressing such requests are subject to notice and intervention. *See* Br. 38–39. But the Commission explained that, under its rules and precedent, an extension of time to construct a project does

not involve a “substantial modification or departure from the plan of development,” and therefore does not constitute a “significant alteration.” 2019 Rehearing Order PP 25–26 & n.69, ER11–12 (citing *Application for License for Major Unconstructed Projects and Major Modified Projects; Application for License for Transmission Lines Only; and Application for Amendment to License*, Order No. 184, 46 Fed. Reg. 55,926, 55,931 (1981), A43, and Third Annual Report of the Federal Power Commission at 225 (1923), A52).

The Commission’s interpretation is reasonable because it is consistent with the structure and context of Subpart L. Section 4.202(a) makes plain that “amendment” describes the universe of license changes, and that “significant alteration[s]” are only a subset thereof. 18 C.F.R. § 4.202(a). If a bare “amendment”—e.g., an extension of time—sufficed for notice, then Section 4.202’s discussion of “significant alteration[s]” would be superfluous. *See* 2019 Rehearing Order P 25, ER11–12 (emphasizing significance requirement); *see also Mac’s Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 188 (2010) (statutes should be interpreted “in a manner that gives effect to all of their provisions” (internal quotations omitted)).

The preamble to Section 4.202—Order No. 184—confirms this reading. *See Husyev v. Mukasey*, 528 F.3d 1172, 1181 (9th Cir. 2008) (reading regulatory preamble together with the codified regulatory provisions); *see also San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 137 (D.C. Cir. 2019) (same, in the FERC context). Order No. 184 describes the types of amendments triggering notice and intervention as those proposing “fundamental” *physical* changes to the “plan of development.” 46 Fed. Reg. at 55,931, A43; 2019 Rehearing Order P 25 & n.69, ER11–12. Specifically, it states that, “[a]s a general matter, amendments to a license, whether they add capacity, change project works, or otherwise reshape the project, are not so fundamental as to create a different licensed project, thereby necessitating public notice, intervention, and protest procedures.” 46 Fed. Reg. at 55,931.

In other words, not only must a license amendment “reshape” the physical aspects of a project to trigger notice and intervention, it must also do so in a “fundamental” way. Because granting Eagle Crest’s extension-of-time requests did not “reshape” the Project *at all*, the Commission reasonably held that the relevant proceeding did not

warrant notice and intervention. *See* 2019 Rehearing Order PP 19, 25–27, ER9–12.

c. The Association’s attacks on the Commission’s interpretation of its own regulations are unpersuasive. First, the Association tries to cast doubt on the lawfulness of Section 4.202 with two case citations. Br. 48. But neither case even mentions Section 4.202, let alone questions its legitimacy. *See Fall River*, 543 F.3d at 525–26; *Pacific Gas*, 720 F.2d at 89–90 & n.36. To the extent *Pacific Gas* addressed the Commission’s approach, it held that certain license amendments do *not* trigger notice under Section 6. *See* 720 F.2d at 89–90 (explaining that “‘altered’” in Section 6 “is not self-defining” and “must incorporate some common sense limits”). And the court expressly agreed that the Commission has discretion “to define what types of actions ... ‘alter[]’ ... an existing license and thus invoke the protections of Section 6.” *Id.* at 90 n.36 (internal quotations omitted).

As for this Court’s decision in *Fall River*, the panel there assumed a standard consistent with Section 4.202: that “in order to violate Section 6, a proposed project must *substantially* alter an existing license.” 543 F.3d at 525 (emphasis in original).

Second, the Association argues that whether the Commission properly applied the amended version of Federal Power Act Section 13—allowing construction deadline extensions of up to eight years—is an “important legal question” that, under Rule 214, implicates the “public interest.” Br. 32–33. But this assumes Eagle Crest’s extension-of-time proceeding triggers notice and intervention, and thus the filing requirements of Rule 214. As discussed, it does not (*see supra* pp. 36–40), and, in any event, the Commission did not err in applying amended Section 13 (*see infra* pp. 61–74).

Third, the Association’s own interpretation of the regulations is internally contradictory. The Association insists primarily that because it met Rule 214(b)’s criteria prescribing the *contents* of a motion, it was entitled to intervene. Br. 3, 23, 28, 31, 34, 38. But later, it acknowledges that Rule 214 applies *if* the proceeding is one “where the Commission is required to provide public notice” under Rule 210. *See* Br. 29, 47; *see also* Br. 9. Shifting gears yet again, it argues finally that because it was entitled to intervene, the Commission was required to issue notice under Rule 210. Br. 47.

The Association gets it right the second time⁷: Rule 214 expressly incorporates by reference Rule 210 by requiring that a motion to intervene be filed within the “time period established under Rule 210.” 18 C.F.R. § 385.214(b)(3). To reiterate, Rule 210 provides that, in proceedings requiring notice—i.e., those that involve “significant alteration[s]” to a license, *id.* § 4.202(a)—such notice shall include a deadline to intervene, *id.* § 385.210(a)–(b). The Commission has, as in this case, reasonably declined to find a right to intervene where Rule 210 does not apply. *See* 2019 Rehearing Order PP 15, 24, ER6–7, 11.

The Commission’s approach makes sense. Pausing to consider the consequences of the Association’s first interpretation—that the Court should limit its review to whether the Association properly filled out its motion to intervene (*see* 18 C.F.R. § 385.214(b); Br. 3, 23, 28, 31, 38)—helps explain why. Under that interpretation, a license amendment constituting a “significant alteration” would trigger Rule 210’s

⁷ Even under the correct interpretation, the Association still insists intervention is mandated here. *See* Br. 29, 48–49. Its misconception flows directly from its failure to confront the Commission’s reasonable interpretation of “significant alteration” as applying to physical changes to a project.

requirement that the Commission set a deadline for intervention. So far so good. But relatively minor amendments that do not implicate Rule 210 would, accordingly, involve no such deadline; putative intervenors would presumably enjoy unlimited time to intervene. The Commission has reasonably declined to interpret its regulations in a way that could result in such anomalies. *See Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1125 n.8 (9th Cir. 2017) (where possible, courts avoid constructions that result in “internal inconsistencies”).

Finally, the Association argues that Eagle Crest’s extension-of-time requests trigger notice and intervention because, in its view, the requests constitute a “significant alteration.” Br. 47–49. The Association reasons that extending the construction deadline would enable Eagle Crest to pursue an “otherwise-defunct Project,” make it more difficult to conserve the Project area land, and foreclose the Association’s ability to secure additional environmental review. *Id.* at 48–49.

All these concerns—assuming they are correctly based in law and fact—reflect the *Association’s* preferred definition of “significant alteration.” But the Association cannot swap out the Commission’s

reasonable definition for its favored alternative. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019) (an agency’s reasonable interpretation of an ambiguous regulation deserves deference). As the Commission’s rules and regulations explain, “significant alteration” refers to a “fundamental” change to the project itself—not all those things a project could affect. *See supra* pp. 38–40. And, in any event, the Association’s interpretation fails on its own terms. Section 4.202(a) requires notice for a “significant alteration of *[a]* license.” 18 C.F.R. § 4.202(a) (emphasis added). That extending a deadline might “alter” the Association’s ability to conserve the Project area land does not speak to how *the license itself* is “alter[ed].”

* * *

At this point, the Court should conclude that the Commission’s denial of the Association’s motion to intervene was reasonable. Rule 214 says nothing about *whether* a right to intervene applies to a particular proceeding. And the Commission has reasonably interpreted other parts of its rules and regulations—namely, Rule 210, Order No. 184, and Section 4.200 *et seq.*—as generally limiting intervention to

proceedings involving proposals that “significantly alter[]” a physical aspect of a licensed project.

But, lest there be any doubt, further textual support abounds.

d. Section 16.9 of the Commission’s regulations ties the right to intervene to requests for “material amendments,” and defines that term to mean *physical* changes to a project. It explains that “public notice” of a proposal to “amend[]” a license application—and “dates for ... intervention”—are required only if such amendment constitutes a “material amendment,” as set forth in Section 4.35(f). 18 C.F.R. §§ 16.9(b)(3), (d)(1), 4.35(f); *see also Green Island*, 577 F.3d at 163 (applying the “materially amend[ed]” standard to a dispute over an amended relicensing application); 2019 Rehearing Order P 19 & n.55, ER9–10 (citing cases).

Section 16.9, governing amendments to license applications, is substantially similar to Section 4.202, governing amendments to FERC-issued licenses. Both explain that a bare “amendment”—to a license application (Section 16.9(b)(3)) or to the license itself (Section 4.202(a))—does not trigger notice and intervention. And while the two provisions use slightly different terminology—“significant

alteration” (Section 4.202(a)) versus “material amendment” (Section 4.35(f))—to describe changes that *do* trigger notice and intervention, the term “material amendment” is defined in the regulations, whereas “significant alteration” is not.

For its part, Section 4.35(f) defines “material amendment” to mean “any fundamental and significant change” to “plans of development proposed in an application for a license.” 18 C.F.R. § 4.35(f)(1); 2019 Rehearing Order P 19 n.55, ER9–10. It then provides an illustrative list of eligible amendments, all of which share a common trait—they describe *physical* changes to a project: certain “change[s] in the installed capacity, or the number or location of any generating units of the proposed project” (Section 4.35(f)(1)(i)); certain “material change[s] in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir” (Section 4.35(f)(1)(ii)); or a “change in the number of discrete units of development to be included within the project boundary” (Section 4.35(f)(1)(iii)).

Under the interpretive maxim *noscitur a sociis*—“a word is known by the company it keeps”—the term “material amendment” must be

read in the context of the list that follows. *See Yates v. United States*, 574 U.S. 528, 543–44 (2015). Thus, because the listed items share a common trait—all refer to tangible aspects of a project—a “material amendment” reasonably means some *physical* change to the project itself. *See id.* (courts should “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words” (internal quotations omitted)). Indeed, the Commission has adopted precisely this interpretation. *See, e.g., Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, PP 14, 17 (2010) (construing “material amendment” in Section 4.35(f) to mean “significant changes to ... the project’s *physical* features” (emphasis added)), *aff’d sub nom. Green Island Power Auth. v. FERC*, 497 F. App’x 127 (2d Cir. 2012); *see also* 2019 Rehearing Order P 19 & n.55, ER9–10 (explaining that “material amendment” in Section 4.35(f)(1) refers to “physical changes”). A request to extend time to construct a project does not qualify.

e. In the orders on review, the Commission considered whether Eagle Crest’s extension-of-time requests constituted a “material amendment[]” to its license, such that Commission policy required it to “accept[] interventions” in that proceeding. 2019 Rehearing Order

PP 16, 19 & n.55, ER7, 9–10. The Commission’s application of Section 4.35(f)’s definition of “material amendment” (again, applicable to license *application* amendments) was reasonable. First, an “amendment” that constitutes a “significant alteration” is reasonably a “material amendment.” Second, the standard governing a right to notice and intervention reasonably applies equally to both a license application amendment (18 C.F.R. §§ 4.35(f) and 16.9(b)(3)) and an amendment to an extant license (*id.* § 4.202).

Third, the Commission’s rules treat the two terms—“significant alteration” and “material amendment”—as virtual synonyms. As discussed, *supra* pp. 38–40, Order No. 184—the preamble to Section 4.202—describes the former as applying only to “fundamental” *physical* changes to the “plan of development”—the same terms used in Section 4.35(f). 46 Fed. Reg. at 55,931, A43; *see also* 2019 Rehearing Order P 25 & n.69, ER11–12.

* * *

The Association’s real quarrel is with the Commission’s interpretation of “significant alteration” and “material amendment,” not the Commission’s specific application of those terms here. Yet, by

reasonably interpreting those terms as generally not applying to extension-of-time requests, the Commission acted well within its discretion in denying the Association’s motion to intervene. *See Cal. Trout*, 572 F.3d at 1012 (under the “highly deferential” arbitrary and capricious standard of review, a court may not reject an agency’s reasonable interpretation of its own regulations in denying a motion to intervene); *see also Elec. Power Supply Ass’n*, 136 S. Ct. at 782 (a court must uphold an agency decision that bears a “rational connection between the facts found and the choice made” (internal quotations omitted)).

B. The Commission has followed a consistent policy for decades

Besides adhering to its regulations’ text and structure, the Commission’s interpretation here also comports with its precedent. *See Kisor*, 139 S. Ct. at 2417–18 (considering an agency’s past practice).

In 1923, the Commission requested the opinion of its chief counsel regarding Section 6 of the Act, 16 U.S.C. § 799. To reiterate, Section 6 requires 30 days’ public notice where a licensee seeks to “alter” its license. The resulting opinion—approved by the Commission—concluded that public notice is *not* required for “extensions of time

within the scope authorized by the act.” 2019 Rehearing Order P 26, ER12 (quoting Third Annual Report at 225, A52). The opinion reasoned that such a change involves no “substantial modification or departure from the plan of development,” nor does it “constitute new terms and conditions” that result in “substantial modification of the original provisions of the license.” *Id.* (quoting Third Annual Report at 225, A52).

The Commission has consistently adhered to its regulations, as informed by the 1923 Opinion. *See* 2019 Rehearing Order PP 16, 19, 26 ER7, 9–10, 12. It has explained that a proposed license amendment triggers the right to notice and intervention if it “entail[s] material changes in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of property-holders in a manner not contemplated by the license, such that the Commission should have issued notice [of], and entertained intervention petitions in, these post-issuance filings.”⁸ *Kings River*

⁸ To the extent the Association asserts on reply that a deadline for construction is a “term[] and condition[] of the license,” that argument goes nowhere. The quoted phrase is used in the 1923 Opinion, which expressly states that an extension of time is *not* a new term or condition of a license.

Conservation Dist., 36 FERC ¶ 61,365, 61,883 (1986); *Pac. Gas & Elec. Co.*, 40 FERC ¶ 61,035, 61,099 (1987) (same). Applying this rule, the Commission has consistently held that a delay in construction—due to a requested stay or extension of time, as here—generally does not qualify for notice and intervention. *See* 2019 Rehearing Order P 19 n.53, ER9 (collecting cases). That is because “[e]xtending the time to finish project construction makes no substantial or material change to the project, nor will it adversely affect any property holder’s rights.” *Baldwin Hydroelectric Corp.*, 84 FERC ¶ 61,132, 61,743 (1998); *see also Pub. Util. Dist. No. 1 of Okanogan Cty.*, 160 FERC ¶ 61,094, PP 6–7 & n.6 (2017); *Felt Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094, 61,409 (1999).

Indeed, “[t]he Commission has explained that ‘[e]very case where the Commission concluded that amendments to the applicant’s plan of development were material involved significant changes to the project’s *physical* features.’” 2019 Rehearing Order P 19, ER9–10 (emphasis added) (quoting *Erie Boulevard*, 131 FERC ¶ 61,036, P 17, *aff’d sub nom. Green Island*, 497 F. App’x 127). Thus, “changes that do not concern a project’s physical features would seldom, if ever, rise to the level of a fundamental and significant change to the plans of

development.” *Id.* (quoting *Erie*, 131 FERC ¶ 61,036, P 17) (invoking 18 C.F.R. § 4.35(f)(1)).

To be sure, one of the *Kings River* factors triggering notice and intervention—changes adversely affecting a property holder’s rights in a way not “contemplated by the license”—is not found in the regulations. The Commission included it in the interest of due process. *Kings River*, 36 FERC ¶ 61,135, 61,882–83; *see also* 2019 Rehearing Order P 15, ER6–7. The Association argues that factor pertains here because a deadline extension will make it more difficult to “devote the Project area to conservation in the foreseeable future.” Br. 40. But granting Eagle Crest’s requested extensions means property rights will be affected precisely *as* “contemplated by the license”: the land will be used for a pumped-hydro facility, just as the license intends. *See City of Summersville*, 86 FERC ¶ 61,149, 61,534 (1999) (explaining that a filing that provided details of a transmission line route previously approved did not “adversely affect the rights of property-holders in a manner not contemplated by the 1997 order” approving the route). *Invalidating* the requested extensions would, by contrast, have unanticipated effects on property rights: the Project area might be converted into protected

public land, as the Association desires. *See* 2019 Rehearing Order P 18, ER8–9 (explaining that if the extensions are denied and the license terminated, the Association hopes to petition the National Park Service to include Project lands within the Joshua Tree boundary).

The Commission rejected a similar argument in *Felt Mills*. There, New York Rivers sought to intervene in an extension-of-time, post-licensing proceeding, asserting an interest in preserving land where the Commission had licensed a hydroelectric project. 87 FERC ¶ 61,094, 61,409–10. New York Rivers reasoned that but for the license deadline extension, New York State would have been able to purchase the subject land for conservation purposes. *Id.*

The Commission denied intervention. It explained that the hydroelectric license “d[id] not by itself create or alter property rights” *Id.* at 61,410. Further, New York Rivers had no property interest in the affected area: a different entity owned the land, and yet another entity had the option of purchasing it. *Id.* While New York Rivers may have had an organizational interest in conserving the land, it lacked a *property* interest in the land itself. *See id.*

Same here. Besides the fact that the 2019 Extension Order affects property rights precisely as “contemplated by the license,” the Association asserts no *property* interest in the Project land at all. And even if it did, the conclusion in *Felt Mills* would still hold because the Project license does not “by itself create or alter property rights.” *Id.*

C. The Commission’s interpretation aligns with the Federal Power Act’s purposes

Finally, limiting intervention in post-licensing proceedings to generally exclude applications for extensions of time is consistent with the purposes of the Federal Power Act and, indeed, the Commission’s own regulations. *See Kisor*, 139 S. Ct. at 2415 (courts should consider a regulation’s purpose). Congress enacted the Act to promote “comprehensive development” of the nation’s waters, balanced against the public interest in participating in hydroelectric project proceedings, *see Pacific Gas*, 720 F.2d at 82–83, 89 (citing 16 U.S.C. § 803(a)); *Cal. Trout*, 572 F.3d at 1013; *see also* 16 U.S.C. § 825g(a) (granting the Commission discretion to allow intervention); *Scenic Hudson*, 354 F.2d at 617 (recognizing this discretion); 2019 Rehearing Order PP 15, 17 & n.47, ER6–8.

The Commission’s regulations reflect the competing interests of public participation and “comprehensive development.” The Commission allows intervention in proceedings that evaluate the project itself, including its need and environmental impacts. *See, e.g.*, 2014 License Order PP 3–4 & n.6, ER619; *see also* 2019 Rehearing Order P 20, ER10 (explaining that the Commission considered project need and environmental concerns in the original licensing proceeding). But it generally does not permit intervention in proceedings involving process requests. *See* 2019 Rehearing Order P 19, ER9–10. Performing its gatekeeping function in this way ensures a right to judicial review of Commission approvals (or denials) of project licenses or material amendments thereto, *see* 16 U.S.C. § 825l(b), while allowing “the Commission to act on numerous hydroelectric compliance matters in a manner that is administratively efficient” 2019 Rehearing Order P 15, ER6–7; *see also Scenic Hudson*, 354 F.2d at 617 (the Commission may “limit the number of those who might otherwise apply for intervention ... to expedite the administrative process”).

The Commission’s approach also screens for collateral attacks by preventing precisely the sort of license reevaluation the Association

attempts here. *See* 2019 Rehearing Order P 20, ER10; *see also supra* pp. 26–33. As discussed, Congress expressly sought to inoculate final licensing decisions from challenge after 60 days. *See* 16 U.S.C. § 825l(b).

* * *

Determining the meaning of agency regulations requires “careful[] consider[ation]” of “the[ir] text, structure, history, and purpose.” *Kisor*, 139 S. Ct. at 2415 (internal quotations omitted). Contrary to the premise grounding the Association’s entire argument, FERC Rule 214 provides no universal, standalone right to intervene in a Commission proceeding. *See* 18 C.F.R. § 385.214(b). Indeed, other parts of the Commission’s regulations—and the Commission’s decades-old precedent interpreting them—generally limit intervention to proceedings considering significant changes to a physical aspect of a hydroelectric project. Accordingly, the Commission reasonably denied the Association’s motion to intervene in the proceeding assessing Eagle Crest’s extension-of-time requests. *See Cal. Trout*, 572 F.3d at 1012; *see also Elec. Power Supply Ass’n*, 136 S. Ct. at 782.

IV. The Association’s mandamus petition is meritless

Because the Commission did not abuse its discretion in denying the Association’s motion to intervene, the Court should not address the Association’s petition for extraordinary relief. But if it does, it should deny the mandamus petition: the Association can secure its desired relief through its petition for judicial review and, in any event, the Commission did not clearly err in granting Eagle Crest’s extension requests.

A. The Association can obtain its desired relief through its petition for judicial review (No. 19-72915)

In assessing a petition for the extraordinary remedy of mandamus relief, the Court considers, among other things, whether “no other adequate remedy is available.” *Cal. Power Exch.*, 245 F.3d at 1120 (internal quotations omitted); *see also Guerrero*, 693 F.3d at 999 (substantially the same). The Association insists it cannot obtain its desired relief—“challeng[ing] the legality of the [2019 Extension Order]”—through its petition for judicial review, and therefore argues mandamus relief is warranted. Mandamus Pet. 16, 20–21. The Association assumes that, while the Court can grant it intervention, the Court cannot also compel the Commission to re-open the extension-of-

time proceeding. *See id.* Thus, the Association’s right to intervene would, it reasons, be a hollow victory: because the 30-day statutory limit for an intervenor-party to seek agency rehearing of the *original* May 2019 Extension Order has long-since expired, there would be no live proceeding in which to intervene today. *See id.*

Not so. The Association correctly observes that a party to Eagle Crest’s extension-of-time proceeding was required to seek rehearing of the May 2019 Extension Order within 30 days, 16 U.S.C. § 825l(a), and that doing so was a prerequisite to seeking judicial review, *id.* § 825l(b). But the Association appears to assume that, because it was not a party to that proceeding, the Court is powerless to put it back in the position it *would have been in* had the Commission originally granted intervention. *See* Mandamus Pet. 16, 20–21.

Far from “protect[ing] this Court’s prospective jurisdiction” over the 2019 Extension Order, *id.* at 17, the Association takes an exceedingly dim view of it. In *Green Island*, the Second Circuit required the Commission to reconsider its denial of a motion to intervene. 577 F.3d at 168–69. Without belaboring the point, the court held that if FERC granted the motion on remand, it was required to re-open the

matter on the merits, thereby putting the petitioner in the position it would have enjoyed had the Commission granted intervention in the first place. *See id.* It mattered not that the time for rehearing had lapsed. *See id.*

The D.C. Circuit reached the same conclusion decades ago. In *Public Service Commission of New York*, the court explained that, if the Commission's "order denying intervention was in error, ... it will follow that the proceeding before the Commission would have to be reopened to permit the [petitioner] to become a full participant in the proceeding and to present whatever evidence and argument it might choose to present." 284 F.2d at 206; *see also N. Colo. Water Conservancy Dist.*, 730 F.2d at 1515 (a court has final authority to decide whether an agency shall re-open a matter under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

A court's power to effectuate its relief touches on a broader point. This Court long-ago explained that "the equity jurisdiction of the federal courts traditionally has permitted the fashioning of broad and flexible decrees molded to the necessities of the individual case." *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 228 (9th Cir.

1978). This rule applies with particular force to disputes that, as here, concern matters of public law. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679–80 (9th Cir. 2007). In such circumstances, “absen[t] [a] congressional directive,” federal courts retain “broad power[] to order mandatory affirmative relief, if such relief is necessary to accomplish complete justice.” *Id.* at 680–81 (internal quotations and citation omitted) (citing its “equitable power” to “set aside” an unlawful action under 5 U.S.C. § 706(2)(A) (emphasis omitted)).

Nothing in the Federal Power Act limits the Court’s equitable powers necessary to “accomplish complete justice” here. *Id.* at 681 (internal quotations omitted). Should the Court reverse and remand the Commission’s denial of the Association’s motion to intervene, it retains authority to order the Commission to re-open the extension-of-time proceeding. *See* 2019 Rehearing Order P 11, ER5. That would put the Association in the position it would have been in had the Commission originally granted intervention. And should the Commission (again) grant Eagle Crest’s extension requests in *that* proceeding, the Association could seek judicial review of the Commission’s decision on the merits at that time. *See* 16 U.S.C.

§ 825l(a)–(b); *see also* 2019 Rehearing Order P 11, ER5 (explaining absence of irreparable injury and possibility of future agency consideration of Association’s merits argument following judicial review on intervention issue).

Because the Association can secure “full and effective relief” through its petition for judicial review, the Court should deny the Association’s extraordinary mandamus petition on this factor alone. *See Pub. Util. Comm’r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985) (Kennedy, J.) (denying mandamus relief where petitioners failed to show that their injury was not redressable through a future challenge to an agency decision).

B. The Commission properly applied the 2018 amended version of the Federal Power Act to Eagle Crest’s extension requests

In October 2018, Congress enacted the current version of Section 13 of the Federal Power Act. *See supra* p. 11. While the prior version allowed only a single extension of time to commence construction of up to two years, 16 U.S.C. § 806 (2017)—which expired for Eagle Crest in June 2018 (2019 Rehearing Order P 3, ER1–2)—the revised version allows multiple extensions for up to eight years, 16 U.S.C. § 806 (2018).

Eagle Crest applied for additional two-year extensions for commencement and completion of construction under the new law in November and December 2018, respectively—bringing its total extensions to four years—which the Commission granted in the May 2019 Extension Order. *See* 2019 Rehearing Order PP 4, 6, ER2–3.

The Commission did not err in applying the 2018 version of Federal Power Act Section 13 to Eagle Crest’s requests. And even if the Court disagrees, the point is at least debatable, meaning the Association fails to show that its right to mandamus relief is “clear and indisputable.” *Cal. Power Exch.* 245 F.3d at 1120 (internal quotations omitted); *Guerrero*, 693 F.3d at 999.

1. The Commission reasonably interpreted the Federal Power Act to allow extensions of time after a license deadline has passed

Section 13 of the Act provides that: “In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the [C]ommission, then, after due notice given, the license shall ... be terminated upon written order of the [C]ommission.” 16 U.S.C. § 806. The Association reasons that because—in its view—the Commission

was required to terminate Eagle Crest’s license when the deadline therein expired in June 2018, granting Eagle Crest’s requested extensions under the October 2018 amended version of Section 13 amounted to impermissible retroactive application of law. Mandamus Pet. 25–27.

The Association is incorrect. The Commission has reasonably interpreted Section 13 to mean that it must terminate the license after the original license deadline expires *unless* it extends a deadline in a license. *See* 2019 Extension Order PP 8–9, ER22–23 (explaining that because the license was still in effect when Eagle Crest sought an extension, the Commission acted within its statutory authority in granting an extension).

The Association cites just one trigger for license termination, but Section 13 lists two. The Commission shall terminate a license if the deadline in a license expires “*or*” if a licensee fails to meet a deadline that is “extended by the [C]ommission.” 16 U.S.C. § 806 (emphasis added). The Association’s argument assumes that once a deadline expires, it cannot be extended—it must be terminated. But nothing in Section 13—pre- or post-amendment—is so restrictive. Indeed, Section

13 lists the two conditions as alternatives: a license deadline can expire, but the Commission would still not be required to terminate the license unless it also fails to extend the deadline. *See* 2019 Extension Order P 8, ER22 (explaining that the Commission lawfully extended Eagle Crest’s construction deadline because the license was still in effect). *Cf. Keating v. FERC*, 569 F.3d 427, 429, 431 (D.C. Cir. 2009) (upholding Commission’s termination of a license *11 years* after it granted the single, two-year extension allowed under Section 13, and where continued delay of construction was “indefinite”).

Another part of Section 13 accommodates this interpretation. Section 13 requires the Commission to provide notice *before* terminating a license for failure to timely commence construction. 16 U.S.C. § 806. The notice provision contemplates a lag-time between deadline expiration and license termination. *See* 18 C.F.R. § 6.3 (“if there is failure to commence actual construction ... within the time prescribed in the license,” then the Commission must provide at least 90 days’ notice to the licensee before it may terminate the license); *see also, e.g., Fall Line Hydro Co.*, 114 FERC ¶ 61,034, PP 4–7, Ordering P B (2006) (terminating license nearly seven months after deadline expiration, and

more than four months after noticing termination). The Association tacitly concedes as much, asserting that the Commission should have “timely terminated the Eagle [Crest] license *after* June 19, 2018.” Mandamus Pet. 27 (emphasis added).

This delay between deadline expiration and license termination undermines the Association’s argument: nothing in Federal Power Act Section 13 precludes extending an *expired* deadline in a license that has not yet been terminated, or requires that the Commission act immediately to terminate a license. *See* 2019 Extension Order P 8, ER22. And because Section 13 and the Commission’s implementing regulations expressly contemplate a license’s continued existence well after—at least 90 days after, 18 C.F.R. § 6.3—deadline expiration, the Commission acted reasonably here in extending a deadline under newly-granted statutory authority.

The Association’s cited cases (Mandamus Pet. 25–26) are not to the contrary. In *Fall Line*, the Commission denied an extension request not because the deadline had passed (which it had), but because the licensee had exhausted its one-time, two-year extension under Section 13. 114 FERC ¶ 61,034, PP 4–7. Indeed, like the Association’s other

cited cases (see *City of Alton*, 72 FERC ¶ 62,132, 64,249 (1995); *Jewett City Elec. Light Plant*, 65 FERC ¶ 62,227, 64,556 (1993), *Fall Line* does not stand for the Association’s asserted proposition: that the Commission shall terminate a license if a deadline expires, *and cannot thereafter extend the deadline*.

For all these reasons, the premise underlying the Association’s argument—that the Commission may not extend a deadline in a license after the deadline has passed—is at least debatable, thus undermining any “firm conviction that the [Commission’s] interpretation ... was incorrect,” and rendering its determination *not* “clearly erroneous.” See *Van Dusen*, 654 F.3d at 841, 846 (internal quotations omitted); see also *id.* at 845–46 (holding that the district court’s decision was not “clearly erroneous,” even while finding it likely erred).⁹

⁹ Eagle Crest observes that 18 C.F.R. § 4.202(b) requires an application for an extension-of-time to be filed three months before a license deadline expires. See Br. 21–22; Mandamus Pet. 9. It makes no *argument* on this point, however, meaning any such basis for invalidating the 2019 Extension Order is forfeited. See *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); see also *Mo. River Energy Servs. v. FERC*, 918 F.3d 954, 960 (D.C. Cir. 2019). In any event, such an argument would fail because the Commission has discretion to grant late-filed requests for extensions of time. See 18 C.F.R. § 385.2008(b).

Finally, the Commission reasonably exercised its statutory authority in granting Eagle Crest’s extension requests. *See Elec. Power Supply Ass’n*, 136 S. Ct. at 782–83 (upholding Commission decision under deferential “arbitrary and capricious” standard where the Commission “examined the relevant considerations” and “articulated a satisfactory explanation for its action” (internal quotations omitted)). The Commission found that Eagle Crest had pursued the Project diligently by, among other things, submitting 16 required preconstruction monitoring and management plans, and seeking to obtain necessary land rights from the Bureau of Land Management and private landowners. 2019 Extension Order P 11, ER23–24; *see also* Nov. 2018 Extension Request at 4–6, SER73–75; *supra* p. 12. That assessment recently bore fruit when, on February 18, 2020, Eagle Crest received the final right-of-way grant from the Bureau. Mar. 2020 Extension Request at 5–6, SER84–85. Thus, according to its latest filing with the Commission, it now has the requisite “legal certainty” over property rights in the core Project area. *Id.* at 7, SER86.

2. The Commission’s application of the October 2018 version of Section 13 to Eagle Crest’s extension requests was not retroactive

The Association does not dispute that Eagle Crest’s November 2018 two-year extension request falls within the eight years provided by the October 2018 version of Federal Power Act Section 13. Instead, it insists that granting the extension amounts to retroactive application of the 2018 law. Mandamus Pet. 27.

The Association’s argument rests on a faulty premise: that the license “expired” with the June 19, 2018 deadline to commence construction. Mandamus Pet. 27. But, as discussed, this conflates two occurrences: the passing of a deadline *in* a license, and termination of the license itself. *See supra* pp. 63–65. And because the license remained in effect when Congress passed the 2018 Infrastructure Act—and when Eagle Crest filed its November and December 2018 extension requests—the Commission properly applied the Infrastructure Act’s amended version of Section 13 to Eagle Crest’s requests: “When the law is amended before an administrative agency hands down a decision, the agency must apply the new law.” *Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 n.4 (9th Cir. 1993); *see also Ziffrin, Inc. v. United States*, 318

U.S. 73, 78 (1943) (allowing agencies to apply obsolete laws would mean “the administrative body would issue orders contrary to the existing legislation”).

Nor is this the first time the Commission has followed this approach. In *City of Batesville*, the Commission approved a licensee’s extension-of-time request filed *after* legislation authorizing the extension was enacted, which occurred *after* the license deadline had expired, but before license termination. *See City of Batesville*, 97 FERC ¶ 61,114, 61,566 (2001), and *Indep. Cty.*, 49 FERC ¶ 61,281, 62,062 & n.3 (1989).

Further, “[w]hen the intervening statute authorizes or affects the propriety of prospective relief”—here, an eight-year rather than two-year extension of time—then “application of the new provision is not retroactive.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). Thus, far from applying a new law retroactively to pre-enactment conduct, the Commission simply applied the law as it existed to Eagle Crest’s post-enactment requests.

3. The October 2018 amended version of Section 13 authorized Eagle Crest’s extension requests

Having explained that the Commission properly applied the October 2018 version of Federal Power Act Section 13 to Eagle Crest’s extension requests, the remaining question is whether amended Section 13 itself accommodates such extensions.

It does. First, the language of Section 3001 of Public Law No. 115-270 (the Infrastructure Act)—i.e., the provision codified at Section 13 that expands the prior two-year extension to eight years—reasonably covers the Project deadline extensions here. That provision states in full: “Section 13 of the Federal Power Act (16 U.S.C. 806) is amended in the second sentence by striking ‘once but not longer than two additional years’ and inserting ‘for not more than 8 additional years.’” Pub. L. No. 115-270, § 3001, A8 (quoted in 2019 Extension Order P 9 & n.16, ER22–23). The 2019 Extension Order extends Eagle Crest’s construction deadline by a total of four years—considerably less than the maximum eight years allowed.

The Association cites two provisions of the Infrastructure Act (Mandamus Pet. 12–13) for the proposition that amended Section 13 does *not* permit the 2019 extensions, but they actually fortify the

Commission’s decision. Sections 3007 and 3008 establish specific procedures and time-limits for commencing construction on two hydroelectric projects. Pub. L. No. 115-270, §§ 3007, 3008, A10–12. Those provisions state that, “[n]otwithstanding the time period specified in section 13 ... *that would otherwise apply*,” those two projects will receive three, two-year extensions to commence construction. Pub. L. No. 115-270, §§ 3007(a), 3008(d)(1), A10–12 (emphasis added). In other words, but for Sections 3007 and 3008, those two projects would have been subject to “the time period specified in section 13”—i.e., up to an eight-year extension.

Further, contrary to the Association’s suggestion (Mandamus Pet. 12–13, 29), nothing in those project-specific provisions negates amended Section 13 for other projects. And while Sections 3007 and 3008 separately authorize reinstatement of an “expired license” (Pub. L. No. 115-270, §§ 3007(c), 3008(d)(2), A10–12), as discussed, Section 13 itself distinguishes between expired deadlines in a license, and termination of the license itself. *See supra* pp. 63–65. Nothing in Section 3007 or 3008 vitiates the Commission’s authority under Section 13 to extend a license deadline after the deadline expires.

In a further attempt to extract a (favorable) meaning from Section 13, the Association cites (Mandamus Pet. 29) an unenacted bill that would have granted a specific extension to Eagle Crest. But failure of that bill, H.R. 5817—which was introduced *before* the 2018 Infrastructure Act was proposed¹⁰—says nothing about the Project’s eligibility for an extension under the Infrastructure Act. Indeed, “unsuccessful attempts at legislation are not the best guides to legislative intent” in *successfully* enacted laws, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), and for good reason: “[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others,” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001). Rather than digging for clues in the graveyard of failed bills, courts look instead to the “contemporaneous intent of the Congress which enacted” the legislation that actually became law. *Cf. Fogarty v. United States*, 340 U.S. 8, 13–14 (1950).

¹⁰ S. 3021, 115th Cong. (introduced June 7, 2018); H.R. 5817, 115th Cong. (introduced May 15, 2018).

* * *

Neither the pre-amendment nor post-amendment version of Federal Power Act Section 13 “clear[ly] and indisputabl[y]” precludes the Commission from granting an extension of time to commence construction after a deadline set forth in a license expires. *Cal. Power Exch.*, 245 F.3d at 1120; *Guerrero*, 693 F.3d at 999. Nor did the Commission commit “clear and indisputable” error in applying the amended version of Section 13 to Eagle Crest’s requests. *Id.* Thus, the Court should reject the Association’s mandamus petition. *See Cal. Power Exch.*, 245 F.3d at 1124 n.13 (whether a petitioner’s claim is “clear and certain” is dispositive). *Cf. Wilson v. U.S. Dist. Court for E. Dist. of Cal.*, 103 F.3d 828, 830 (9th Cir. 1996) (“[W]e will not grant mandamus relief simply because a district court commits an error, even one that would ultimately require reversal on appeal.” (internal quotations omitted)).

In fact, by giving effect to all parts of Federal Power Act Section 13, in a way that fits with Congress’ statutory plan, the Commission’s interpretation is a reasonable—if not the *most* reasonable—one, meaning it deserves deference. *See, e.g., Humane Soc’y of U.S. v. Locke*,

626 F.3d 1040, 1054 (9th Cir. 2010) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

CONCLUSION

For the foregoing reasons, the Court should dismiss the petitions for judicial review and writ of mandamus for lack of jurisdiction, or, alternatively, deny the petitions.

Respectfully submitted,

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April 6, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a) and 32(g), and Circuit Rules 21-2 and 32-1, I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 365, in 14-point New Century Schoolbook LT), contains 13,975 words total (including the response to the mandamus petition), not including the cover page, the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum. (The portion of the brief responding to the mandamus petition is less than 30 pages.)

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April 6, 2020

STATEMENT OF RELATED CASES

Per Circuit Rule 28-2.6, counsel is not aware of any related case pending in this Court or any other court.

Respectfully submitted,

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April 6, 2020

National Parks Conservation Association v. FERC
9th Cir. Nos. 19-72915, 19-73079 (consolidated)

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 Ninth Circuit by using the appellate CM/ECF system on April 6, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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**In the United States Court of Appeals
for the Ninth Circuit**

**Nos. 19-72915 & 19-73079
(Consolidated)**

NATIONAL PARKS CONSERVATION ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

EAGLE CREST ENERGY COMPANY,
Respondent-Intervenor.

ON PETITION FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION
AND PETITION FOR WRIT OF MANDAMUS

**ADDENDUM TO BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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APRIL 6, 2020

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RULE:

*Application for License for Major Unconstructed Projects
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§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

Table with 3 columns: Derivation, U.S. Code, Revised Statutes and Statutes at Large. Row 1: 5 U.S.C. 1009(b), June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

Table with 3 columns: Derivation, U.S. Code, Revised Statutes and Statutes at Large. Row 1: 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

Table with 3 columns: Derivation, U.S. Code, Revised Statutes and Statutes at Large. Row 1: 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

Table with 3 columns: Derivation, U.S. Code, Revised Statutes and Statutes at Large. Row 1: 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.
802.	Congressional disapproval procedure.
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805.	Judicial review.
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808.	Effective date of certain rules.

§ 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 promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

- (A) the later of the date occurring 60 days after the date on which—
 - (i) the Congress receives the report submitted under paragraph (1); or

- (ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

- (A) necessary because of an imminent threat to health or safety or other emergency;
- (B) necessary for the enforcement of criminal laws;
- (C) necessary for national security; or
- (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

- (A) in the case of the Senate, 60 session days, or
- (B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

(Added Pub. L. 94-583, §4(a), Oct. 21, 1976, 90 Stat. 2897; amended Pub. L. 104-114, title III, §302(e), Mar. 12, 1996, 110 Stat. 818.)

REFERENCES IN TEXT

The International Organizations Immunities Act, referred to in subsec. (a), is title I of act Dec. 29, 1945, ch. 652, 59 Stat. 669, as amended, which is classified principally to subchapter XVIII (§288 et seq.) of chapter 7 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 288 of Title 22 and Tables.

Section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, referred to in subsec. (c), is section 302 of Pub. L. 104-114, which amended this section and enacted section 6082 of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

1996—Subsec. (c). Pub. L. 104-114 added subsec. (c).

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-114 effective Aug. 1, 1996, or date determined pursuant to suspension authority of President under section 6085(b) or (c) of Title 22, Foreign Relations and Intercourse, see section 6085 of Title 22.

EFFECTIVE DATE

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as a note under section 1602 of this title.

CHAPTER 99—GENERAL PROVISIONS

Sec. 1631. Transfer to cure want of jurisdiction.

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court (or, for cases within the jurisdiction of the United States Tax Court, to that court) in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

(Added Pub. L. 97-164, title III, §301(a), Apr. 2, 1982, 96 Stat. 55; amended Pub. L. 115-332, §2, Dec. 19, 2018, 132 Stat. 4487.)

AMENDMENTS

2018—Pub. L. 115-332 inserted “(or, for cases within the jurisdiction of the United States Tax Court, to that court)” after “any other such court”.

EFFECTIVE DATE

Section effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

PART V—PROCEDURE

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AMENDMENTS

2005—Pub. L. 109-2, §3(b), Feb. 18, 2005, 119 Stat. 9, added item for chapter 114.

CHAPTER 111—GENERAL PROVISIONS

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AMENDMENTS

1994—Pub. L. 103-465, title III, §321(b)(1)(B), Dec. 8, 1994, 108 Stat. 4946, added item 1659.
 1990—Pub. L. 101-650, title III, §313(b), Dec. 1, 1990, 104 Stat. 5115, added item 1658.
 1984—Pub. L. 98-620, title IV, §401(b), Nov. 8, 1984, 98 Stat. 3357, added item 1657.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, §90, 63 Stat. 102.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§342, 376, 377 (Mar. 3, 1911, ch. 231, §§234, 261, 262, 36 Stat. 1156, 1162).

Section consolidates sections 342, 376, and 377 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Such section 342 provided:

“The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.”

Such section 376 provided:

“Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.”

Such section 377 provided:

“The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

The special provisions of section 342 of title 28, U.S.C., 1940 ed., with reference to writs of prohibition and mandamus, admiralty courts and other courts and officers of the United States were omitted as unnecessary in view of the revised section.

The revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts.

The provisions of section 376 of title 28, U.S.C., 1940 ed., with respect to the powers of a justice or judge in issuing writs of ne exeat were changed and made the basis of subsection (b) of the revised section but the conditions and limitations on the writ of ne exeat were omitted as merely confirmatory of well-settled principles of law.

The provision in section 377 of title 28, U.S.C., 1940 ed., authorizing issuance of writs of scire facias, was omitted in view of rule 81(b) of the Federal Rules of Civil Procedure abolishing such writ. The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U.S. Alkali Export Assn. v. U.S.*, 65 S.Ct. 1120, 325 U.S. 196, 89 L.Ed. 1554, and *De Beers Consol. Mines v. U.S.*, 65 S.Ct. 1130, 325 U.S. 212, 89 L.Ed. 1566.

1949 ACT

This section corrects a grammatical error in subsection (a) of section 1651 of title 28, U.S.C.

AMENDMENTS

1949—Subsec. (a). Act May 24, 1949, inserted “and” after “jurisdictions”.

WRIT OF ERROR

Act Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54, as amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, § 23, 62 Stat. 990, provided that: “All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.”

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat. 944.)

HISTORICAL REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 725 (R.S. § 721).

“Civil actions” was substituted for “trials at common law” to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity.

Changes were made in phraseology.

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

(June 25, 1948, ch. 646, 62 Stat. 944.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 399 (Mar. 3, 1911, ch. 231, § 274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956).

Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 91, 63 Stat. 103.)

HISTORICAL REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 394 (Mar. 3, 1911, ch. 231, § 272, 36 Stat. 1164).

Words “as, by the rules of the said courts respectively, are permitted to manage and conduct causes therein,” after “counsel,” were omitted as surplusage. The revised section and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court.

Changes were made in phraseology.

1949 ACT

This section restores in section 1654 of title 28, U.S.C., language of the original law.

AMENDMENTS

1949—Act May 24, 1949, inserted “as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein”.

§ 1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a

PL 115-270, October 23, 2018, 132 Stat 3765

UNITED STATES PUBLIC LAWS

115th Congress - Second Session

Convening January 06, 2018

Additions and Deletions are not identified in this database.

**Vetoed are indicated by ~~Text~~;
stricken material by ~~Text~~.**

PL 115-270 [S 3021]

October 23, 2018

AMERICA'S WATER INFRASTRUCTURE ACT OF 2018

An Act To provide for improvements to the rivers and harbors of the United States, to provide for the conservation and development of water and related resources, to provide for water pollution control activities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 33 USCA § 2201 NOTE >>

(a) **SHORT TITLE.**—This Act may be cited as “America’s Water Infrastructure Act of 2018”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—WATER RESOURCES DEVELOPMENT

Sec. 2019. Report on Federal cross-cutting requirements.

Sec. 2020. Assistance for areas affected by natural disasters.

Sec. 2021. Monitoring for unregulated contaminants.

Sec. 2022. American iron and steel products.

Sec. 2023. Authorization for capitalization grants to States for State drinking water treatment revolving loan funds.

TITLE III—ENERGY

Sec. 3001. Modernizing authorizations for necessary hydropower approvals.

Sec. 3002. Qualifying conduit hydropower facilities.

Sec. 3003. Promoting hydropower development at existing nonpowered dams.

Sec. 3004. Closed-Loop pumped storage projects.

Sec. 3005. Considerations for relicensing terms.

Sec. 3006. Fair ratepayer accountability, transparency, and efficiency standards.

Sec. 3007. J. Bennett Johnston Waterway hydropower extension.

Sec. 3008. Stay and Reinstatement of FERC License No. 11393 for the Mahoney Lake Hydroelectric Project.

Sec. 3009. Strategic Petroleum Reserve drawdown.

TITLE IV—OTHER MATTERS

Subtitle A—Clean Water

Sec. 4101. Stormwater infrastructure funding task force.

<< 42 USCA § 300j-12 >>

“(1) There are authorized to be appropriated to carry out the purposes of this section—

“(A) \$1,174,000,000 for fiscal year 2019;

“(B) \$1,300,000,000 for fiscal year 2020; and

“(C) \$1,950,000,000 for fiscal year 2021.”;

(2) by striking “To the extent amounts authorized to be” and inserting the following:

<< 42 USCA § 300j-12 >>

“(2) To the extent amounts authorized to be”; and

<< 42 USCA § 300j-12 >>

(3) by striking “(prior to the fiscal year 2004)”.

TITLE III—ENERGY

SEC. 3001. MODERNIZING AUTHORIZATIONS FOR NECESSARY HYDRO-POWER APPROVALS.

(a) PRELIMINARY PERMITS.—Section 5 of the Federal Power Act (16 U.S.C. 798) is amended—

<< 16 USCA § 798 >>

(1) in subsection (a), by striking “three” and inserting “4”; and

(2) in subsection (b)—

<< 16 USCA § 798 >>

(A) by striking “Commission may extend the period of a preliminary permit once for not more than 2 additional years beyond the 3 years” and inserting the following: “Commission may—

<< 16 USCA § 798 >>

“(1) extend the period of a preliminary permit once for not more than 4 additional years beyond the 4 years”;

<< 16 USCA § 798 >>

(B) by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:

<< 16 USCA § 798 >>

“(2) after the end of an extension period granted under paragraph (1), issue an additional permit to the permittee if the Commission determines that there are extraordinary circumstances that warrant the issuance of the additional permit.”.

<< 16 USCA § 806 >>

(b) **TIME LIMIT FOR CONSTRUCTION OF PROJECT WORKS.**—Section 13 of the Federal Power Act (16 U.S.C. 806) is amended in the second sentence by striking “once but not longer than two additional years” and inserting “for not more than 8 additional years,”.

<< 16 USCA § 803 NOTE >>

(c) **OBLIGATION FOR PAYMENT OF ANNUAL CHARGES.**—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 shall commence not earlier than the latest of—

***3863**

- (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).

SEC. 3002. QUALIFYING CONDUIT HYDROPOWER FACILITIES.

Section 30(a) of the Federal Power Act (16 U.S.C. 823a(a)) is amended—

<< 16 USCA § 823a >>

(1) in paragraph (2)(C), by striking “45 days” and inserting “30 days”; and

<< 16 USCA § 823a >>

(2) in paragraph (3)(C)(ii), by striking “5” and inserting “40”.

SEC. 3003. PROMOTING HYDROPOWER DEVELOPMENT AT EXISTING NONPOWERED DAMS.

Part I of the Federal Power Act (16 U.S.C. 792 et seq.) is amended by adding at the end the following:

<< 16 USCA § 823e >>

“SEC. 34. PROMOTING HYDROPOWER DEVELOPMENT AT EXISTING NON-POWERED DAMS.

“(a) EXPEDITED LICENSING PROCESS FOR NON-FEDERAL HYDROPOWER PROJECTS AT EXISTING NONPOWERED DAMS.—

“(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

“(2) APPEAL.—If, pursuant to this subsection, a person seeks a rehearing under section 313(a), and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request *3869 because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 313(b).”.

SEC. 3007. J. BENNETT JOHNSTON WATERWAY HYDROPOWER EXTENSION.

(a) IN GENERAL.—Notwithstanding the time period specified in section 13 of the Federal Power Act (16 U.S.C. 806) that would otherwise apply to Federal Energy Regulatory Commission project numbers 12756, 12757, and 12758, the Commission may, at the request of the licensee for the applicable project, and after reasonable notice, in accordance with the good faith, due diligence, and public interest requirements of that section and the Commission's procedures under that section, extend the time period during which such licensee is required to commence the construction of its applicable project for up to 3 consecutive 2-year periods from the date of the expiration of the extension originally issued by the Commission under that section for such project.

(b) OBLIGATION FOR PAYMENT OF ANNUAL CHARGES.—Any obligation of a licensee for a project described in subsection (a) for the payment of annual charges under section 10(e) of the Federal Power Act (16 U.S.C. 803(e)) shall commence when the construction of the project commences.

(c) REINSTATEMENT OF LICENSE; EFFECTIVE DATE FOR EXTENSION.—

(1) REINSTATEMENT.—If the time period required for commencement of construction of a project described in subsection (a) has expired prior to the date of the enactment of this Act, the Commission may reinstate the license for such project, effective as of the date of the expiration of the license.

(2) EFFECTIVE DATE FOR EXTENSION.—If the Commission reinstates a license under paragraph (1) for a project, the first extension authorized under subsection (a) with respect

to such project shall take effect on the effective date of such reinstatement under paragraph (1).

SEC. 3008. STAY AND REINSTATEMENT OF FERC LICENSE NO. 11393 FOR THE MAHONEY LAKE HYDROELECTRIC PROJECT.

(a) DEFINITIONS.—In this section:

(1) COMMISSION.—The term “Commission” means the Federal Energy Regulatory Commission.

(2) LICENSE.—The term “license” means the license for the Commission project numbered 11393.

(3) LICENSEE.—The term “licensee” means the holder of the license.

(b) STAY OF LICENSE.—On the request of the licensee, the Commission shall issue an order continuing the stay of the license.

(c) LIFTING OF STAY.—On the request of the licensee, but not later than 10 years after the date of enactment of this Act, the Commission shall—

(1) issue an order lifting the stay of the license under subsection (b); and

(2) make the effective date of the license the date on which the stay is lifted under paragraph (1).

(d) EXTENSION OF LICENSE.—

(1) IN GENERAL.—Notwithstanding the time period specified in section 13 of the Federal Power Act (16 U.S.C. 806) that *3870 would otherwise apply to the Commission project numbered 11393, the Commission may, at the request of the licensee, and after reasonable

notice, in accordance with the good faith, due diligence, and public interest requirements of, and the procedures of the Commission under, that section, extend the time period during which the licensee is required to commence the construction of the project for not more than 3 consecutive 2-year periods from the date of the expiration of the extension originally issued by the Commission.

(2) REINSTATEMENT OF EXPIRED LICENSE.—

(A) IN GENERAL.—If the period required for the commencement of construction of the project described in paragraph (1) has expired prior to the date of enactment of this Act, the Commission may reinstate the license effective as of the date of the expiration of the license.

(B) EXTENSION.—If the Commission reinstates the license under subparagraph (A), the first extension authorized under paragraph (1) shall take effect on the date of that expiration.

(e) EFFECT.—Nothing in this Act prioritizes, or creates any advantage or disadvantage to, Commission project numbered 11393 under Federal law, including the Federal Power Act (16 U.S.C. 791a et seq.) or the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601 et seq.), as compared to—

(1) any electric generating facility in existence on the date of enactment of this Act; or

(2) any electric generating facility that may be examined, proposed, or developed during the period of any stay or extension of the license under this Act.

<< 42 USCA § 6241 NOTE >>

SEC. 3009. STRATEGIC PETROLEUM RESERVE DRAWDOWN.

CODIFICATION

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

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

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

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared environmental assessments as part of the application. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(c) Effective date

This section shall take effect with respect to license applications filed after October 24, 1992. (Pub. L. 102-486, title XXIV, §2403, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

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

The Federal Power Act, referred to in subsecs. (a) and (b), 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.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

(a) Purpose

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of 4 years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

(b) Extension of period

The Commission may—

(1) extend the period of a preliminary permit once for not more than 4 additional years beyond the 4 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence; and

(2) after the end of an extension period granted under paragraph (1), issue an additional permit to the permittee if the Commission determines that there are extraordinary circumstances that warrant the issuance of the additional permit.

(c) Permit conditions

Each such permit shall set forth the conditions under which priority shall be maintained.

(d) Non-transferability and cancellation of permits

Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, §5, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§203, 212, 49 Stat. 841, 847; Pub. L. 113-23, §5, Aug. 9, 2013, 127 Stat. 495; Pub. L. 115-270, title III, §3001(a), Oct. 23, 2018, 132 Stat. 3862.)

AMENDMENTS

2018—Subsec. (a). Pub. L. 115-270, §3001(a)(1), substituted “4 years” for “three years”.

Subsec. (b). Pub. L. 115-270, §3001(a)(2), inserted dash after “The Commission may”, designated remaining provisions as par. (1), substituted “4 additional years beyond the 4 years” for “2 additional years beyond the 3 years”, and added par. (2).

2013—Pub. L. 113-23 designated existing first, second, and third sentences as subsecs. (a), (c), and (d), respectively, and added subsec. (b).

1935—Act Aug. 26, 1935, §203, amended section generally, striking out “and a license issued” at end of second sentence and inserting “or for other good cause shown after notice and opportunity for hearing” in last sentence.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such

license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

(June 10, 1920, ch. 285, pt. I, §6, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§204, 212, 49 Stat. 841, 847; Pub. L. 104-106, div. D, title XLIII, §4321(i)(6), Feb. 10, 1996, 110 Stat. 676; Pub. L. 104-316, title I, §108(a), Oct. 19, 1996, 110 Stat. 3832; Pub. L. 105-192, §2, July 14, 1998, 112 Stat. 625.)

AMENDMENTS

1998—Pub. L. 105-192 inserted at end “Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.”

1996—Pub. L. 104-316 struck out at end “Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.”

Pub. L. 104-106 struck out at end “Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.”

1935—Act Aug. 26, 1935, §204, amended section generally, substituting “thirty days” for “ninety days” in third sentence and inserting last sentence.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of Title 10, Armed Forces.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States, Indian tribes, and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United

States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

(June 10, 1920, ch. 285, pt. I, §7, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§205, 212, 49 Stat. 842, 847; Pub. L. 90-451, §1, Aug. 3, 1968, 82 Stat. 616; Pub. L. 99-495, §2, Oct. 16, 1986, 100 Stat. 1243; Pub. L. 115-325, title II, §201(a), Dec. 18, 2018, 132 Stat. 4459.)

CODIFICATION

Additional provisions in the section as enacted by act June 10, 1920, directing the commission to investigate the cost and economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, and also in connection with such project to submit plans and estimates of cost necessary to secure an increased water supply for the District of Columbia, have been omitted as temporary and executed.

AMENDMENTS

2018—Subsec. (a). Pub. L. 115-325 substituted “States, Indian tribes, and municipalities” for “States and municipalities”.

1986—Subsec. (a). Pub. L. 99-495 inserted “original” after “hereunder or” and substituted “issued,” for “issued and in issuing licenses to new licensees under section 808 of this title”.

1968—Subsec. (c). Pub. L. 90-451 added subsec. (c).

1935—Act Aug. 26, 1935, §205, amended section generally, striking out “navigation and” before “water resources” wherever appearing, and designating paragraphs as subsections. (a) and (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.

APPLICABILITY OF 2018 AMENDMENT

Pub. L. 115-325, title II, §201(b), Dec. 18, 2018, 132 Stat. 4459, provided that: “The amendment made by subsection (a) [amending this section] shall not affect—

“(1) any preliminary permit or original license issued before the date of enactment of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 [Dec. 18, 2018]; or

“(2) an application for an original license, if the Commission has issued a notice accepting that application for filing pursuant to section 4.32(d) of title 18, Code of Federal Regulations (or successor regulations), before the date of enactment of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017.”

DEFINITION OF INDIAN TRIBE

Pub. L. 115-325, title II, §201(c), Dec. 18, 2018, 132 Stat. 4459, provided that: "For purposes of section 7(a) of the Federal Power Act (16 U.S.C. 800(a)) (as amended by subsection (a)), the term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)."

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, pt. I, § 8, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.)

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(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 title¹ 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

¹ See Codification note below.

¹ So in original. Probably should be followed by “; and”.

power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

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

(b) Alterations in project works

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

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

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

(d) Amortization reserves

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

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

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and 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 Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f), 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 applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

such navigation facilities, whether constructed by the licensee or by the United States.

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

CHANGE OF NAME

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

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

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

(June 10, 1920, ch. 285, pt. I, § 12, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 806. Time limit for construction of project works; extension of time; termination or revocation of licenses for delay

The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompat-

ible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

(June 10, 1920, ch. 285, pt. I, § 13, 41 Stat. 1071; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

REFERENCES IN TEXT

Proceedings in equity, referred to in text, were abolished by the adoption of rule 2 of the Federal Rules of Civil Procedure, set out in the Appendix to Title 28, Judiciary and Judicial Procedure, which provided that "there shall be one form of action to be known as 'civil action'".

§ 807. Right of Government to take over project works

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues;

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

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

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

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

CHANGE OF NAME

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

under administrative supervision of Secretary of the Army.

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

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

(June 10, 1920, ch. 285, pt. I, §12, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.)

§ 806. Time limit for construction of project works; extension of time; termination or revocation of licenses for delay

The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended for not more than 8 additional years, and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the dis-

trict in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

(June 10, 1920, ch. 285, pt. I, §13, 41 Stat. 1071; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; amended Pub. L. 115-270, title III, §3001(b), Oct. 23, 2018, 132 Stat. 3862.)

REFERENCES IN TEXT

Proceedings in equity, referred to in text, were abolished by the adoption of rule 2 of the Federal Rules of Civil Procedure, set out in the Appendix to Title 28, Judiciary and Judicial Procedure, which provided that "there shall be one form of action to be known as 'civil action'".

AMENDMENTS

2018—Pub. L. 115-270 substituted "for not more than 8 additional years," for "once but not longer than two additional years" in second sentence.

§ 807. Right of Government to take over project works

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

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

In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its¹ 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*,

¹ So in original. Probably should be "it".

lates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Resort to courts of United States for failure to obey subpoena; punishment

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by

deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) Deposition of witness in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 10, 1920, ch. 285, pt. III, §307, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 856; amended Pub. L. 91-452, title II, §221, Oct. 15, 1970, 84 Stat. 929; Pub. L. 109-58, title XII, §1284(b), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “, electric utility, transmitting utility, or other entity” after “person” in two places and inserted “, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce” before period at end of first sentence.

1970—Subsec. (g). Pub. L. 91-452 struck out subsec. (g) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members

thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99-495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: "In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as mean-

ing 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action."

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter "without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States" have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89-554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

"Chapter 51 and subchapter III of chapter 53 of title 5" substituted in text for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

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

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

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

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amend-

ed Pub. L. 113-235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

“Sections 1535 and 1536 of title 31” substituted in text for “sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

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

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

§ 825l. 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 States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

- (1) acting as an officer or director of an electric utility; or
- (2) engaging in the business of purchasing or selling—
 - (A) electric energy; or
 - (B) transmission services subject to the jurisdiction of the Commission.

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(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(vii) Any potential applicant, resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement, but where staff assist-

ance is available and could expedite the proceeding.

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

[Order 533, 56 FR 23148, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 596, 62 FR 59810, Nov. 5, 1997; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003; Order 756, 77 FR 4893, Feb. 1, 2012; Order 800, 79 FR 59110, Oct. 1, 2014]

§ 4.35 Amendment of application; date of acceptance.

(a) *General rule.* Except as provided in paragraph (d) of this section, if an applicant amends its filed application as described in paragraph (b) of this section, the date of acceptance of the application under § 4.32(f) is the date on which the amendment to the application was filed.

(b) Paragraph (a) of this section applies if an applicant:

(1) Amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development; or

(2) Amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, or

(3) Amends its filed application in order to change its statement of intent of whether or not it will seek benefits under section 210 of PURPA, as originally filed under § 4.32(c)(1).

(c) An application amended under paragraph (a) is a new filing for:

(1) The purpose of determining its timeliness under § 4.36 of this part;

(2) Disposing of competing applications under § 4.37; and

(3) Reissuing public notice of the application under § 4.32(d)(2).

(d) If an application is amended under paragraph (a) of this section, the Commission will rescind any acceptance letter already issued for the application.

(e) *Exceptions.* This section does not apply to:

(1) Any corrections of deficiencies made pursuant to § 4.32(e)(1);

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(2) Any amendments made pursuant to § 4.37(b)(4) by a State or a municipality to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a state or a municipality;

(3) Any amendments made pursuant to § 4.37(c)(2) by a priority applicant to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a priority applicant;

(4) Any amendments made by a license or an exemption applicant to its proposed plans of development to satisfy requests of resource agencies or Indian tribes submitted after an applicant has consulted under § 4.38 or concerns of the Commission; and

(5)(i) Any license or exemption applicant with a project located at a new dam or diversion who is seeking PURPA benefits and who:

(A) Has filed an adverse environmental effects (AEE) petition pursuant to § 292.211 of this chapter; and

(B) Has proposed measures to mitigate the adverse environmental effects which the Commission, in its initial determination on the AEE petition, stated the project will have.

(ii) This exception does not protect any proposed mitigative measures that the Commission finds are a pretext to avoid the consequences of materially amending the application or are outside the scope of mitigating the adverse environmental effects.

(f) *Definitions.* (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:

(i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

(ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:

(A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the pro-

posed impoundment and the point of discharge from the powerhouse; or

(B) Cause adverse environmental impacts not previously discussed in the original application; or

(iii) A change in the number of discrete units of development to be included within the project boundary.

(2) For purposes of this section, a material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse.

(3) For purposes of this section, a change in the status of an applicant means:

(i) The acquisition or loss of preference as a state or a municipality under section 7(a) of the Federal Power Act; or

(ii) The loss of priority as a permittee under section 5 of the Federal Power Act.

(4) For purposes of this section, a change in the identity of an applicant means a change that either singly, or together with previous amendments, causes a total substitution of all the original applicants in a permit or a license application.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 533, 56 FR 23149, May 20, 1991; Order 2002, 68 FR 51115, Aug. 25, 2003; Order 756, 77 FR 4893, Feb. 1, 2012]

§ 4.36 Competing applications: deadlines for filing; notices of intent; comparisons of plans of development.

The public notice of an initial preliminary permit application or an initial development application shall prescribe the deadline for filing protests and motions to intervene in that proceeding (the *prescribed intervention deadline*).

(a) *Deadlines for filing applications in competition with an initial preliminary permit application.* (1) Any preliminary permit application or any development

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the capacity and mode of operation of the project if it is already generating electric power, and an explanation of the specific measures proposed by the applicant, the agencies consulted, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources.

(3) Any additional information the applicant considers important.

(f) *Exhibit F*. Exhibit F is a set of drawings showing the structures and equipment of the small hydroelectric facility and must conform to the specifications of § 4.41(g) of this chapter.

[Order 106, 45 FR 76123, Nov. 18, 1980, as amended by Order 225, 47 FR 19056, May 3, 1982; Order 413, 50 FR 11689, Mar. 25, 1985; Order 494, 53 FR 15381, Apr. 29, 1988; Order 533, 56 FR 23154, May 20, 1991; Order 2002, 68 FR 51121, Aug. 25, 2003; Order 699, 72 FR 45324, Aug. 14, 2007; Order 800, 79 FR 59111, Oct. 1, 2014]

§ 4.108 Contents of application for exemption from provisions other than licensing.

An application for exemption of a small hydroelectric power project from provisions of Part I of the Act other than the licensing requirement need not be prepared according to any specific format, but must be included as an identified appendix to the related application for license or amendment of license. The application for exemption must list all sections or subsections of Part I of the Act for which exemption is requested.

[Order 106, 45 FR 76123, Nov. 18, 1980]

Subpart L—Application for Amendment of License

§ 4.200 Applicability.

This part applies to any application for amendment of a license, if the applicant seeks to:

(a) Make a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an alteration of the license;

(b) Make a change in the plans for the project under license; or

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(c) Extend the time fixed in the license for commencement or completion of project works.

[Order 184, 46 FR 55943, Nov. 13, 1981, as amended by Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.201 Contents of application.

An application for amendment of a license for a water power project must contain the following information in the form specified.

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY
COMMISSION

Application for Amendment of License

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an amendment of license for the [name of project] water power project.

(2) The exact name, business address, and telephone number of the applicant are:

(3) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate, see 16 U.S.C. 796], licensee for the water power project, designated as Project No. _____ in the records of the Federal Energy Regulatory Commission, issued on the _____ day of _____, 19_____.

(4) The amendments of license proposed and the reason(s) why the proposed changes are necessary, are: [Give a statement or description]

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes are: [provide citation and brief identification of the nature of each requirement.]

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

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a hydropower project that involves additional capacity not previously authorized, and that would increase the actual or proposed total installed capacity of the project, would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and would result in an increase in the installed name-

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plate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

(1) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 1.5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter;

(3) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 5 MW or less, but more than 1.5 MW—Exhibits F and G under § 4.61 of this chapter, and Exhibit E under § 4.41 of this chapter;

(4) For amendment of a license for a water power project that, at the time the application for amendment is filed, has been constructed, and is proposed to have a total installed generating capacity of 5 MW or less—Exhibit E, F and G under § 4.61 of this chapter;

(5) For amendment of a license for a water power project that, at the time the application is filed, has been constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.51 of this chapter.

(c) *Required exhibits for non-capacity related amendments.* Any application to amend a license for a water power project that would not be a capacity related amendment as described in paragraph (b) of this section must contain those exhibits that require revision in light of the nature of the proposed amendments.

(d) *Consultation and waiver.* (1) If an applicant for license amendment under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit

such exhibit may be submitted to the Commission under § 385.207 of this chapter, after consultation with the Commission's Division of Hydropower Compliance and Administration.

(2) A licensee wishing to file an application for amendment of license under this section may seek advice from the Commission staff regarding which exhibit(s) must be submitted and whether the proposed amendment is consistent with the scope of the existing licensed project.

[Order 184, 46 FR 55943, Nov. 13, 1981, as amended by Order 225, 47 FR 19056, May 3, 1982; 48 FR 4459, Feb. 1, 1983; 48 FR 16653, Apr. 19, 1983; Order 413, 50 FR 11689, Mar. 25, 1985; Order 533, 56 FR 23154, May 20, 1991; Order 756, 77 FR 4894, Feb. 1, 2012]

§ 4.202 Alteration and extension of license.

(a) If it is determined that approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799, public notice of such application shall be given at least 30 days prior to action upon the application.

(b) Any application for extension of time fixed in the license for commencement or completion of construction of project works must be filed with the Commission not less than three months prior to the date or dates so fixed.

[Order 184, 46 FR 55943, Nov. 13, 1981]

Subpart M—Fees Under Section 30(e) of the Act

SOURCE: Order 487, 52 FR 48404, Dec. 22, 1987, unless otherwise noted.

§ 4.300 Purpose, definitions, and applicability.

(a) *Purpose.* This subpart implements the amendments of section 30 of the Federal Power Act enacted by section 7(c) of the Electric Consumers Protection Act of 1986 (ECPA). It establishes procedures for reimbursing fish and wildlife agencies for costs incurred in connection with applications for an exemption from licensing and applications for licenses seeking benefits under section 210 of the Public Utility

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restoration has been satisfactorily completed.

[Order 175, 19 FR 5217, Aug. 18, 1954]

§ 6.3 Termination of license.

Licenses may be terminated by written order of the Commission not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail to the last address whereof the Commission has been notified by the licensee, if there is failure to commence actual construction of the project works within the time prescribed in the license, or as extended by the Commission. Upon like notice, the authority granted under a license with respect to any separable part of the project works may be terminated if there is failure to begin construction of such separable part within the time prescribed or as extended by the Commission.

(Administrative Procedure Act, 5 U.S.C. 551-557 (1976); Federal Power Act, as amended, 16 U.S.C. 291-628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101-7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8491, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 6.4 Termination by implied surrender.

If any licensee holding a license subject to the provisions of section 10(i) of the Act shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

[Order 141, 12 FR 8491, Dec. 19, 1947]

§ 6.5 Annual charges.

Annual charges arising under a license surrendered or terminated shall continue until the effective date set forth in the Commission's order with respect to such surrender or termination.

[Order 175, 19 FR 5217, Aug. 18, 1954]

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CROSS REFERENCE: For annual charges, see part 11 of this chapter.

PART 8—RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

Sec.

8.1 Publication of license conditions relating to recreation.

8.2 Posting of project lands as to recreational use and availability of information.

8.3 Discrimination prohibited.

AUTHORITY: 5 U.S.C. 551-557; 16 U.S.C. 791a-825r; 42 U.S.C. 7101-7352.

§ 8.1 Publication of license conditions relating to recreation.

Following the issuance or amendment of a license, the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes, and of the license conditions of interest to persons who may be interested in the recreational aspects of the project or who may wish to acquire lands in its vicinity. Such efforts shall include, but are not limited to: the publication of notice in a local newspaper once each week for 4 weeks, and publication on any project website, of the project's license conditions which relate to public access to and the use of the project waters and lands for recreational purposes, recreational plans, installation of recreation and fish and wildlife facilities, reservoir water surface elevations, minimum water releases or rates of change of water releases, and such other conditions of general public interest as the Commission may designate in the order issuing or amending the license.

[Order 852, 83 FR 67068, Dec. 28, 2018]

§ 8.2 Posting of project lands as to recreational use and availability of information.

(a) Following the issuance or amendment of a license, the licensee shall post and maintain at all points of public access required by the license (or at such access points as are specifically designated for this purpose by the licensee) and at such other points as are

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

(ii) The provisions of §16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

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

(j) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §16.7(d)(7).

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513-A, 55 FR 16, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51140, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003; 68 FR 61743, Oct. 30, 2003; Order 769, 77 FR 65475, Oct. 29, 2012]

§ 16.9 Applications for new licenses and nonpower licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to sections 14 and 15 of the Federal Power Act.

(b) *Filing requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of §4.32 (except that the Director of the Office of Energy Projects may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of §4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with

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the provisions of §16.9(d)(1) if an amendment described in §4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of §4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in §16.9(b)(1).

(c) *Final amendments.* All amendments to an application, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under paragraph (d)(2).

(d) *Commission notice.* (1) Upon acceptance of an application for a new license or a nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once every week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies, Indian tribes, and non-governmental organizations, by electronic means if practical, otherwise by mail.

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under §4.32 of this chapter, estimated dates for further processing deadlines under §4.32 of this chapter, deadlines for complying with the provisions of §4.36(d)(2) (ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish the notice in the FEDERAL REGISTER;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies and Indian tribes, by electronic means if practical, otherwise by mail; and

(iii) Serve the notice on all parties to the proceedings pursuant to §385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have

been filed for the same project, the final amendment date and deadlines for complying with the provisions of § 4.36(d)(2) (ii) and (iii) of this chapter established pursuant to the notice issued under paragraph (d)(2) of this section will be the same for all such applications.

(4) The provisions of § 4.36(d)(2)(i) of this chapter will not be applicable to applications filed pursuant to this section.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003; Order 653, 70 FR 8724, Feb. 23, 2005]

§ 16.10 Information to be provided by an applicant for new license: Filing requirements.

(a) *Information to be supplied by all applicants.* All applicants for a new license under this part must file the following information with the Commission:

(1) A discussion of the plans and ability of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(i) Increase capacity or generation at the project;

(ii) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(iii) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(2) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(i) The reasonable costs and reasonable availability of alternative sources of power that would be needed by the applicant or its customers, including wholesale customers, if the applicant is not granted a license for the project;

(ii) A discussion of the increase in fuel, capital, and any other costs that would be incurred by the applicant or its customers to purchase or generate power necessary to replace the output of the licensed project, if the applicant is not granted a license for the project;

(iii) The effect of each alternative source of power on:

(A) The applicant's customers, including wholesale customers;

(B) The applicant's operating and load characteristics; and

(C) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(3) The following data showing need and the reasonable cost and availability of alternative sources of power:

(i) The average annual cost of the power produced by the project, including the basis for that calculation;

(ii) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(A) Energy and capacity resources, including the contributions from the applicant's generation, purchases, and load modification measures (such as conservation, if considered as a resource), as separate components of the total resources required;

(B) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(C) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(iii) For alternative sources of power, including generation of additional power at existing facilities, restarting deactivated units, the purchase of power off-system, the construction or purchase and operation of a new power plant, and load management measures such as conservation:

(A) The total annual cost of each alternative source of power to replace project power;

(B) The basis for the determination of projected annual cost; and

(C) A discussion of the relative merits of each alternative, including the issues of the period of availability and dependability of purchased power, average life of alternatives, relative equivalent availability of generating alternatives, and relative impacts on the applicant's power system reliability and other system operating characteristics; and

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

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

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

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

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

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

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

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

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

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

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

§ 385.212 Motions (Rule 212).

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

(1) At any time, unless otherwise provided;

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

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

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

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

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

(2) The specific relief or ruling requested.

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

§ 385.213 Answers (Rule 213).

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

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

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

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

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

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

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

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

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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

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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 intervenor to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervenor 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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proceedings in the relevant matter are closed and all deadlines for further administrative or judicial review have passed.

(c) *Electronic signature.* In the case of any document filed in electronic form under the provisions of this Chapter, the typed characters representing the name of a person shall be sufficient to show that such person has signed the document for purposes of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 619, 65 FR 57092, Sept. 21, 2000; Order 653, 70 FR 8724, Feb. 23, 2005]

§ 385.2006 Docket system (Rule 2006).

(a) The Secretary will maintain a system for docketing proceedings.

(b) Any public information in any docket is available for inspection and copying by the public during the office hours of the Commission, to the extent that such availability is consistent with the proper discharge of the Commission's duties and in conformity with part 388 of this chapter.

[Order 226, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§ 385.2007 Time (Rule 2007).

(a) *Computation.* (1) Except as otherwise required by law, any period of time prescribed or allowed by statute or Commission rule or order is computed to exclude the day of the act or event from which the time period begins to run.

(2) The last day of any time period is included in the time period, unless it is a Saturday; Sunday; a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business, even though some official duties may continue through telework-ready employees; part-day holiday that affects the Commission; or legal public holiday as designated in section 6103 of title 5, U.S. Code. In each case the period does not end until the close of the Commission business of the next day which is not a Saturday; Sunday; a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business even though some official duties may continue through telework-ready employees; part-day holiday that affects

the Commission; or legal public holiday.

(b) *Date of issuance of Commission rules or orders.* (1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following:

(i) Posts a full-text copy in the Division of Public Information;

(ii) Mails or delivers copies of the order to the parties; or

(iii) Makes such copies public.

(2) Any date of issuance specified in a rule or order need not be the date on which the rule or order is adopted by the Commission.

(c) *Effective date of Commission rules or orders.* (1) Unless otherwise ordered by the Commission, rules or orders are effective on the date of issuance.

(2) Any initial or revised initial decision issued by a presiding officer is effective when the initial or revised initial decision is final under Rule 708(d).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 376, 49 FR 21707, May 23, 1984; Order 645, 69 FR 2504, Jan. 16, 2004; 84 FR 3983, Feb. 14, 2019]

§ 385.2008 Extensions of time (Rule 2008).

(a) Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the decisional authority for good cause, upon a motion made before the expiration of the period prescribed or previously extended.

(b) If any motion for extension of time is made after the expiration of a specified time period, the decisional authority may permit performance of the act required or allowed, if the movant shows extraordinary circumstances sufficient to justify the failure to act in a timely manner.

§ 385.2009 Notice (Rule 2009).

Unless actual notice is given or unless newspaper notice is given as required by law, notice by the Commission is provided by the Secretary only by publication in the FEDERAL REGISTER. Actual notice is usually given by service under Rule 2010.

**46 FR 55926-01, 1981 WL 148950(F.R.)
RULES and REGULATIONS
DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission
18 CFR Parts 2, 4, 5, 16, and 131
[Docket No. RM80-39; Order No. 184]**

Application for License for Major Unconstructed Projects and Major Modified Projects; Application for License for Transmission Lines Only; and Application for Amendment to License

Friday, November 13, 1981

***55926 Issued: November 6, 1981.**

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) amends the regulations governing three kinds of licensing under Part II of the Federal Power Act (Act) for: (1) Major water power projects that have an installed generating capacity greater than 1.5 megawatts and that would either utilize the water power potential of a dam that, at the time application is filed, is not constructed (“major unconstructed project”) or that would change the state of existing project works so as to produce a significant increase in the normal maximum surface area or elevation of an impoundment or otherwise produce a significant environmental impact (“major modified project”) ; (2) only the transmission lines that transmit power from a licensed water power project or other hydroelectric project authorized by Congress to the point of junction with the distribution system or with the interconnected primary transmission system; and (3) any amendment to a license that would entail a change in the physical features, plans, mode of operation, or construction period of the project or its boundary.

The rule would also make conforming changes in §§ 4.31, 4.50, 16.7, 131.2, and Appendix A of Part 2 of the Commission’s requirements. The regulations would reorganize the license applications. The regulations are designed to ease the burden of preparing applications and to assist the Commission in processing applications for license. The rulemaking is therefore expected to expedite hydropower development.

DATE: This rule is effective December 14, 1981.

FOR FURTHER INFORMATION CONTACT:

Ronald Corso, Director, Division of Hydropower Licensing, Office of Electric Power Regulation, Federal Energy Regulatory Commission, 825 N. Capitol Street, NE., Washington, D.C. 20426, (202) 376-9171

James Hoeker, Division of Rulemaking & Legislative Analysis, Office of the General Counsel, Federal Energy Regulatory Commission, 825 N. Capitol Street, NE., Washington, D.C. 20426, (202) 357-9342

SUPPLEMENTARY INFORMATION:

Issued: November 6, 1981.

The Federal Energy Regulatory Commission (Commission) amends three regulations governing applications for license under Part I of the Federal Power Act (Act). First, the Commission revises the licensing regulations governing major water power projects with an installed generating capacity greater than 5 megawatts (MW) that would utilize the water power potential of a dam that, at the time application is filed, is not constructed (“major unconstructed project”) or that would change the state of existing project works so as to produce a significant increase in the normal maximum surface area or elevation of an impoundment or otherwise produce a significant environmental impact (“major modified project”). Second, the Commission revises the regulations governing applications for license for transmission lines that transmit power from a licensed water power project or other hydroelectric project authorized by Congress to the point of junction with the distribution system or with the interconnected primary transmission system. Third, the Commission revises the regulations governing applications for any amendment to a license that would entail a change in the physical features, plans, mode of operation, or construction period affecting the project or its boundaries.

The rule would also make conforming changes in §§ 4.31, 4.50, 16.7, 131.2, and Appendix A of Part 2 of the Commission’s regulations.

I. Background

This final rule is the third phase of a program of licensing reform for all projects within the Commission’s jurisdiction built for the generation of electric power by means of water power. The Commission issued its Notice of Proposed Rulemaking in this docket on January 23, 1981 (46 FR 10165, February 2, 1981).

The first phase of the program was instituted in 1978, when the Commission issued the so-called “short-form” application procedures for all “minor” projects, i.e., those with a capacity

of 1.5 MW or less.[FN1] On October 22, 1979, the Commission issued procedures applicable to both preliminary permit and license applications, and which simplify the procedures for application for preliminary permits, amendments to permits, and cancellations of permits.[FN2]

- 1 Order No. 11, “Regulations Governing Applications for Short-form License (Minor)” (Docket No. RM78-9), issued September 5, 1978, 43 FR 40215, September 11, 1978. The 1.5 MW capacity criterion was based on the fact that the Commission is authorized under Section 10(i) of the Act (16 U.S.C. 803(i)) to ease certain requirements for minor projects. “Minor” projects should not be confused with so-called “small” hydroelectric power projects with an installed capacity of 30 MW or less at existing dams which are encouraged under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) (16 U.S.C. 2705 et seq.). PURPA mandates simplified and expeditious licensing for such small water power projects, and, as amended by the Energy Security Act of 1980 (94 Stat. 611), permits the Commission to exempt from licensing and other requirements of the Act certain small hydroelectric power projects 5 MW or less. The first phase of the Commission’s reforms therefore covered only a portion of the projects identified under PURPA.

FN2 Order No. 54, “Regulations Prescribing General Provisions for Preliminary Permit and License Applications; and Regulations Governing Applications for Amendments to and Cancellation of Permits” (Docket No. RM79-23), issued October 22, 1979, 44 FR 61328, October 25, 1979.

On November 19, 1979, the Commission issued rules which established application procedures for licensing major projects that are located at existing dams and have a generating capacity greater than 1.5 MW.[FN3]

- 3 Order No. 59, “Regulations Governing Applications for License for Major Projects—Existing Dams” (Docket No. RM79-36), issued December 16, 1979, 45 FR 75383, December 20, 1979.

The Commission has also issued related rules to encourage development of specialized kinds of hydroelectric facilities. It recently established procedures to exempt from all, or part of, Part I of the Act any small conduit hydroelectric facility that has a generating capacity of 15 MW or less.[FN4] Similarly, the Commission issued rules on November 7, 1980, setting forth procedures to exempt from licensing and other requirements of the Act any small hydroelectric power projects having a proposed generating capacity of 5 MW or less.[FN5]

- 4 Order No. 76, “Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act” (Docket No. RM79-35), issued April 18, 1980, 45 FR 28085, April 28, 1980.

FN5 Order No. 106, “Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or Less” (Docket No.

RM80-65), issued November 7, 1980, 45 FR 76115, November 16, 1980.

The existing requirements for the types of license applications which are affected by the rulemaking in this *55927 docket are located in various parts of Title 18 of the Code of Federal Regulations. Substantive requirements applicable to one or all of these applications are found in §§ 2.80 and 2.81, Appendix A to Part 2, §§ 4.40, 4.41, 4.70, 4.71, 5.1 through 5.4, 16.7, 131.2, 131.3, and 131.4 of the Commission's regulations. A potential applicant now faces the prospect of meeting information requirements embodied in up the 23 separate exhibits.

The final rule set forth in this docket is designed to ease the burden of compliance in several ways. First, it reduces the information needed for the Commission to carry out its duties under law in an informed and responsible manner.[FN6] For example, the provisions requiring extensive documentation of the nature of the applicant and its authority to file the application have been eliminated or reduced, and requirements relating to evidence of compliance with state laws have been simplified.[FN7] In any case, an applicant will continue to be obligated to comply with any applicable state law not preempted by Part I of the Act.

6 Section 405 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. 2705) provides that the Commission's simplified licensing procedures must be "consistent with the applicable provisions of law" and that no project covered by the procedures will be exempted from "any requirement applicable to any such project under the National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the Endangered Species Act, or any other provision of Federal Law."

FN7 1See existing §§ 4.40(b) and 4.41—Exhibits A-F. These requirements have been distilled to simple statements in the initial portion of the application under § 4.41(a). Since the entire application is subscribed and verified under § 1.16 of our rules, the applicant's statements will suffice as evidence. Additional information will be requested in cases where it is needed. Consistent with the policy announced in the Notice of Proposed Rulemaking in Docket No. RM81-15, issued February 20, 1981, 46 FR 14751, March 3, 1981, the Commission will request from municipalities evidence of competency under state law to engage in the electric power business.

Second, the Commission has consolidated the requests for information according to related subject matter. All paragraphs and exhibits requesting information on environmental matters [FN8] have been consolidated into Exhibit E (Environmental Report), required under § 4.41(f). Improved organization of the application requirements should reduce confusion and redundancy in the materials submitted.

- 8 See existing §§ 2.80, 2.40(k) and (1), 4.41 (Exhibits H, R, S, V, and W), and Appendix A to Part 2.

Finally, the rule will help minimize the element of subjective interpretation in the Commission's requirements by reducing the requests for information, where possible, to simple, objective, descriptions of what is necessary. The Commission believes that clearer, simpler requirements and cooperation between the Commission and applicants will help avoid the application deficiencies that have slowed the licensing process in the past.

Projects to the type covered by this rulemaking usually result in more significant environmental impacts than do water, power projects at existing dams which do not entail significant construction or alteration of the impoundment level. Under the new regulations, the Commission therefore requires of any applicant for license for a major unconstructed project or a major modified project an Environmental Report of considerably greater detail than it does for smaller projects and most projects at existing dams. Under any of the Commission's hydropower licensing regulations, the Environmental Report (Exhibit E) submitted by the applicant must be commensurate with the size and type of water power project for which the applicant seeks a license or with the scope of any proposed amendment to an existing license.[FN9] N

- 9 Section 2.80 through 2.82 constitute most of the Commission's existing environmental review regulations, under the National Environmental Policy Act of 1969 (NEPA). Under this rulemaking, the environmental report requirement of Appendix A of Part 2 will cease to apply to any application relating to hydroelectric project licensing and will be replaced by the specialized Exhibit E in each licensing regulation.

Under the final rule, an applicant for license for any project with an installed generating capacity of 5 megawatts or less may file under the Commission's abbreviated application procedures.

The Commission has issued a companion rulemaking which provides abbreviated application procedures for all projects with a total generating capacity of 5 MW or less.[FN10]

- 10 "Regulations Governing Applications for License for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less," (Docket No. RM81-10), issued January 21, 1981. Many of the section numbers cross-referenced in the rules in this docket and in Docket No. RM81-10 derive from the new, rather than existing, regulations.

However, this change will not alter the current requirement that a more extensive Environmental Report (Exhibit E) be filed for any major unconstructed or major modified project with an installed capacity in excess of 1.5 MW.

II. Analysis of Comments

Most commenters express overall approval of the Commission's efforts to simplify licensing requirements pursuant to section 405 of PURPA. The single greatest source of concern is the type and amount of information required of a license applicant. A variety of comments declare that the Commission's proposed license application requirements are too burdensome. Others argue that more information should be required.

A. License application for Major Unconstructed Projects and Major Modified Projects

1. Exhibit E. (Environmental Report)

a. General Comments.

Exhibit E, the Environmental Report, received particular attention. Some public utilities claim that the proposed rule represents an increase in the amount and level of detail of data over that required in existing license requirements. This is an incorrect assumption. The final rule does not contemplate submittal of a greater variety of information than that required under existing §§ 4.40 and 4.41. Specifically, the data requirements under former Exhibits R, S, V, and W and the environmental report set forth in Appendix A of § 2.81, have been consolidated and reorganized. The Commission has reduced filing requirements, where possible, consistent with its previous hydroelectric rulemakings. However, of all of the revised Exhibits E established to date, the environmental report required for projects included in this rulemaking is the least susceptible to major reductions in data requirements because of the environmental consequences associated with the construction of a new dam and impoundment.

Most of the data now required under Appendix A, including that related to the temporary and permanent impacts of project construction on water use and quality, fish and wildlife resources, historic resources, socioeconomic and aesthetic features, is necessary to perform a thorough environmental analysis of a project that will fundamentally alter the ecology and geography of an area. The applicant's Exhibit E will form the basis for the Environmental Impact Statement that will usually be prepared for projects licensed under this rule. The data required is also important to the success of the consultation with agencies having responsibility to review project impacts that occurs during any licensing proceeding. In light of the variety of impacts that flow from dam construction and the creation or substantial alteration of the affected impoundment, an applicant must supply the Commission with a

imposes environmental requirements on actions undertaken by the Commission or a regulated entity pursuant to sections 202(b), 210, 211 and 212 of the Federal Power Act. The proposed amendment was designed only to indicate that Appendix A is replaced by the Exhibits E in Part 4, for water power projects, leaving other actions under the Act covered by Appendix A, to the extent an environmental report may be required. A change in title alone imposes no substantive requirements to prepare an Environmental Report for, say, wheeling or interconnection cases. It may otherwise be determined that these actions would entail construction which must be investigated under NEPA. Nevertheless, the title is revised to avoid this misunderstanding.

C. Amendment of License

Most comments on the regulations governing amendments to license suggest establishing a threshold level of proposed modification beyond which a licensee would be subject to competition by interested parties. Spiegel states that any proposed change in capacity of 1.5 MW or greater should be considered a “new project” subject to competition under the general licensing regulations.

The Commission acknowledges that a licensee’s proposal to change the configuration or operation of its licensed project may not, in all cases, be consistent with the plan of development contemplated when the project was licensed. As a general matter, amendments to a license, whether they add capacity, change project works, or otherwise reshape the project, are not so fundamental as to create a different licensed project, thereby necessitating public notice, intervention, and protest procedures. It would, in any case, be very difficult to prescribe universal criteria applicable to all projects indicating which amendments are permissible and which are not. For example, an increase of 1.5 megawatts of installed capacity may be incidental in one case and important in another. Such a change might necessitate major operational changes or virtually none at all, depending on the size, location or operational characteristics of the project. In any case, section 6 of the Act prohibits amendment of a project license without the mutual consent of the licensee and the Commission. In those instances where significant new project works are proposed to be added or a major change in existing works or mode of operation is proposed, the Commission may withhold its assent or issue public notice in order to permit participation in a proceeding by interested persons. However, the Commission may not initiate a process that might defeat a license based on a proposed amendment.[FN15] The final rule does not establish, in terms of installed capacity or other criteria, a threshold beyond which a new license is required rather than an amendment to an existing license. The Commission requests that, prior to submittal of any application for amendment, the licensee consult with the Commission to ascertain whether the proposed changes in the license is *55932 within the scope of the project. The final rule also encourages such a practice.

- 15 The reference to § 4.33 in existing § 5.4, which a commenter pointed out, is an errant and outdated cross-reference and does not imply that the competing application provisions in existing § 4.33 apply to any amendments of license, as such. Part 5 is revoked by this rule.

PG&E argues that the amendment of license requirements should not apply except to changes in capacity greater than 5 MW. As stated above, the consequences of change in project operation or configuration will vary from project to project. Terms and conditions may permit a change in one instance but not in another. Therefore, the Commission is reluctant to arbitrarily establish a threshold for applicability of §§ 4.200 and 4.201 based only on an amount of proposed installed capacity.

Some commenters express uncertainty about whether the installed capacity levels referred to in proposed § 4.201(b) pertain to the increment of additional capacity proposed in an application for amendment of license or the total installed capacity including any new generating capacity proposed by the licensee. The Commission clarifies this provision to indicate that total installed capacity after the amendment of a license is what determines the appropriate exhibits for submittal.

In response to a comment from EEI, the regulations now permit, in the interest of flexible application of the requirements and minimizing unnecessary filings, an applicant to submit only the revised portion of an exhibit affected by the amendment. The Commission maintains in its permanent records all exhibits and amendments submitted by an applicant-licensee.

D. Paperwork Reduction Act of 1980 (PRA)

One commenter perceives the revised Exhibit E, § 4.41(f), as an undue paperwork burden and requests review and approval of the regulation by the Office of Management and Budget under the PRA. The Commission has long recognized the practical need for, and legislative interest in, the reduction or elimination of unnecessary regulatory burdens. The final rules in this docket and in Docket No. RM81-10 manifest this recognition. The rulemaking in this docket completes the major portion of the Commission's three-year program to reorganize, clarify, and reduce all of its preliminary permit and license application requirements.

The Commission's revised hydropower regulations have thus far helped reduce, by an average of 50 percent, the time which the Commission requires to process preliminary permit and licensing applications for all types of projects. Regulatory delay increases the capital expenditures on projects by as much as one percent per month, if a 12 to 15 percent inflation rate is assumed. The duplicative, lengthy, and discursive hydropower application requirements which existed before the Commission's recent revisions (existing §§ 4.40 and 4.41

other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) [For any applicant which, at the time of application for license for transmission line only, is a licensee.] The statutory or regulatory requirements of the state(s) in which the transmission line would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, are: [provide citations and brief identification of the nature of each requirement.]

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

(b) Required exhibits. The application must contain the following exhibits, as appropriate:

(1) For any transmission line that, at the time the application is filed, is not constructed and is proposed to be connected to a licensed water power project with an installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For any transmission line that, at the time the application is filed, is not constructed and is proposed to be connected to a licensed water power project with an installed generating capacity of 5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter; and

(3) For any transmission line that, at the time the application is filed, has been constructed and is proposed to be connected to any licensed water power project—Exhibits E, F, and G under § 4.61 of this chapter.

9. Part 4 is amended by adding a new Subpart L to read as follows:

* * * * *

Subpart L—Application for Amendment of License

Sec.4.200 Applicability.4.201 Contents of application.4.202 Alteration and extension of license.* * * * *

Subpart L—Application for Amendment of License

18 CFR § 4.200

§ 4.200 Applicability.

This part applies to any application for amendment of a license, if the applicant seeks to:

(a) Make a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an alteration of the license;

(b) Make a change in the plans for the project under license; or

(c) Extend the time fixed on the license for commencement or completion of project works.
18 CFR § 4.201

§ 4.201 Contents of application.

An application for amendment of a license for a water power project must contain the following information in the form specified. As provided in the appropriate Exhibit E requirements, the appropriate Federal, state, and local resource agencies must be given the opportunity to comment on the proposed amendment prior to filing of the application for amendment of license. A list of the agencies to be consulted can be obtained from the Director of the Commission's Division of Hydropower licensing.

(a) Initial statement.

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION; APPLICATION FOR AMENDMENT OF LICENSE

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an amendment of license for the [name of project] water power project.

(2) The exact name, business address, and telephone number of the applicant are:

(3) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate, see 16 U.S.C. 796], licensee for the water power project, designated as Project No. _____ in the records of the Federal Energy Regulatory Commission, issued on the _____ day of _____, 19____.

(4) The amendments of license proposed and the reason(s) why the proposed changes are necessary, are: [Give a statement or description]

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes are: [provide citation and brief identification of the nature of each requirement.]

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

(b) Required exhibits. The application must contain the following exhibits, or revisions or additions to any exhibits on *55944 file, commensurate with the scope of the licensed project:

(1) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 1.5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter;

(3) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 5 MW or less, but more than 1.5 MW—Exhibits F and G under § 4.61 of this chapter, and Exhibit E under § 4.41 of this chapter;

(4) For amendment of a license for a water power project that, at the time the application for amendment is filed, has been constructed, and is proposed to have a total installed generating capacity of 5 MW or less—Exhibit E, F and G under § 4.61 of this chapter;

(5) For amendment of a license for a water power project that, at the time the application is filed, has been constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.61 of this chapter.

(c) Consultation and waiver. (1) If an applicant for license under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit such exhibit may be submitted to the Commission under § 1.7 of this chapter, after consultation with the Commission's Division by Hydropower Licensing.

(2) A licensee wishing to file an application for amendment of license under this section may seek advice from Commission staff whether the proposed amendment is consistent with the scope of the existing licensed project.

18 CFR § 4.202

§ 4.202 Alteration and extension of license.

(a) If it is determined that approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799, public notice of such application shall be given at least 30 days prior to action upon the

application.

(b) Any application for extension of time fixed in the license for commencement or completion of construction of project works must be filed with the Commission not less than three months prior to the date or dates so fixed.

PART 5—[REMOVED]

10. Part 5 is removed.

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENCED PROJECTS

18 CFR § 16.7

11. Section 16.7 is amended by revising the introductory statement to read as follows:

18 CFR § 16.7

§ 16.7 Application for non-power license.

Each application for a “non-power license” must conform to the requirements of § 4.51 of this chapter and must include the information specified in paragraphs (a) through (c) of this section. The application and all accompanying exhibits must be filed in accordance with § 4.31 of this chapter.

* * * * *

PART 131—FORMS

18 CFR § 131.2

§ 131.2 [Removed]

18 CFR § 131.2

12. Section 131.2 is removed.

18 CFR § 131.5

§ 131.5 [Removed]

18 CFR § 131.5

13. Section 131.5 is removed.

[FR Doc. 81-32680 Filed 11-12-81; 8:45 am]

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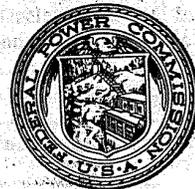
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Third Annual Report

of the

U.S. FEDERAL POWER COMMISSION

Fiscal Year Ended June 30, 1923



WASHINGTON
GOVERNMENT PRINTING OFFICE
1923

the discretion of the commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. Such permits shall not be transferable, and may be canceled by order of the commission upon failure of permittees to comply with the conditions thereof."

A preliminary permit is issued for the sole purpose, as stated in the act, of maintaining priority of application for license for such period or periods, not exceeding a total of three years, as in the discretion of the commission may be necessary for the purposes specified; that is, to secure the data and perform the acts necessary to perfect an application for a license. Priority is the right acquired by an applicant to be preferred over other applicants. In the branch of the law in which the word is largely used; that is, in the appropriation of water to irrigation and other beneficial uses, it is a right initiated by first use or first application for the right to use. The priority given by a preliminary permit attaches before use and before a definite application for use can be made, and subsists until application for license in proper form is filed in conformity with its requirements, or until the time which it grants for that purpose expires. When application for license, duly perfected, as required by the commission, is filed, the preliminary permit has served its purpose. The priority attaches to the application for a license and attends it until the application is withdrawn or is granted or rejected by the commission. It has no time limit, and can be lost only by withdrawal of the application by the applicant or by rejection thereof by the commission. In other words, the application having been filed by the permittee, when entitled to priority, such priority attaches to the application and will continue for such time as may be used by the commission in granting or denying the application.

In the light of these remarks the questions submitted are answered as follows:

Answer to question 1. If a permittee within the time prescribed by his permit has filed an application for a license in proper form and accompanied by the required data, his priority will not expire with the expiration of the period of the permit but will continue for such time as may be used by the commission in granting or denying the application. As stated above, the priority attaches to and inheres in the application for license and continues until the application is disposed of by withdrawal, denial, or the grant of the license.

Answer to question 2. This question is answered in the negative.

Answer to question 3. This question is also answered in the negative.

Approved by the commission, April 30, 1923.

ALTERATIONS OF LICENSES.

Changes in project plans involving no substantial modification in the original scheme of development as authorized in a license, and corrections in or changes of the provisions of a license involving no substantial modifications of its original terms and conditions do not constitute alterations of the license within the meaning of section 6 of the Federal water-power act so as to require the ninety days' public notice therein specified.

Chief Counsel to the Executive Secretary, March 12, 1923.

Subject: Alterations of licenses.

In your memorandum of February 24, 1923, you state that it becomes necessary to make changes in licenses for such purposes as correction of errors, modification of plans, extension of time, etc., and request my opinion upon

certain questions with regard to what changes constitute "alterations" of the license that require 90 days' public notice within the meaning of the provision of section 6 of the Federal water power act, that "licenses * * * may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice." You invite attention to section 4 (d) and (e), which provide "that upon the filing of any application for a license which has not been preceded by a preliminary permit," and "upon the filing of any application for a preliminary permit * * * 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 for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated;" and say—

"In consideration of the fact that every project is advertised and public notice thereof given in accordance with the requirement above quoted, and that before license is issued the original plans as thus advertised may be materially modified at the option of the applicant or upon requirement of the commission without additional advertising or public notice, it would appear that the 'alterations' contemplated by section 6, in so far as they involve the project plans, have reference only to such changes in project plans as would constitute a substantial modification of the development as originally proposed or authorized, and not to such changes in or adjustment of such plans as may be necessary to carry out in the most satisfactory manner the general scheme proposed; and that, in so far as they involve the license in general have reference only to such changes in its terms and conditions as would constitute new terms and conditions, and not to mere corrections of errors or to extensions of time within the scope authorized by the act, or to other changes of similar character involving no substantial modification of the original provisions of the license."

The question submitted is whether or not, after license is issued, changes falling within the two following classes constitute alterations of the license within the meaning of section 6 of the act so as to require the 90 days' public notice therein specified:

- "1. Changes in project plans involving no substantial modification of the general scheme of development as originally proposed or authorized; and
- "2. Corrections in or changes of the provisions of a license involving no substantial modification of its original terms and conditions."

The language of section 6, if literally construed, would include any change in a license or in the plans forming a part of the license, but other provisions of the act indicate that the provisions of section 6 should not receive this literal construction. Thus, section 10 (b) of the act provides—

"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 a capacity in excess of one hundred 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."

The implication from this language is that immaterial alterations, and substantial alterations conforming with the approved plans, may be made during construction of the project works, without requiring the prior approval of the commission, and that a substantial alteration or addition not in conformity with the approved plans, if made in emergency, shall thereafter be subject to

such modification and change as the commission may direct. Moreover, changes which do not affect the scheme of development or character of the project are covered by the public notice which was given before the license was issued, and, therefore, should not be assumed to be within the intent of the provision under consideration.

In construing a statute, each provision should be considered in the light of other provisions of the statute and the object and purpose of the act, so as to carry out the intent of the legislature. As stated by the Supreme Court in *Jacobson v. Massachusetts* (197 U. S. 39)—

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter."

I am, therefore, of opinion that the requirement of section 6 that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the commission after 90 days' public notice" should be construed as limited to such alterations in project plans as would constitute a substantial modification or departure from the plan of development as originally proposed or authorized and not to include such changes in or adjustment of such plans as may be necessary to carry out in the most satisfactory manner the general scheme authorized by the license; and further, that in so far as they involve the license in general, the provision has reference only to such changes in its terms and conditions as would constitute new terms and conditions and not mere corrections of errors or extensions of time within the scope authorized by the act, or to other changes of similar character involving no substantial modification of the original provisions of the license.

For the reasons stated above I would answer the questions submitted by stating that in my opinion changes in project plans or corrections in or changes in the provisions of the license falling within the two classes stated in the questions submitted do not constitute alterations of the license in the meaning of section 6 of the act, so as to require the 90 days' public notice therein specified.

Approved by the commission, April 30, 1923.

MUNICIPALITIES—COMPETENCY.

The term "municipality" is defined in the Federal water-power act as including a "political subdivision or agency of a State *competent under the laws thereof* to carry on the business of developing, transmitting, utilizing, or distributing power." Any statutory or constitutional limitation or restriction on its powers which would prohibit or prevent it from making such development as the Federal Power Commission finds to be required would go to the competency of the "municipality" as an applicant for such development. Preliminary permits are issued, as specified in the statute, "for the purpose of enabling applicants for a license" to secure the data and perform the acts required by the act prior to the issue of a license, so that the applicant for a preliminary permit must be competent to receive a license. A preliminary permit may not, therefore, be given for the purpose of enabling an applicant to qualify as to competency.

Chief Counsel to the Executive Secretary, March 27, 1923.

Subject: Competency of municipalities as applicants under the Federal water power act.

In the matter of the application of the city of Louisville, Ky., for a preliminary permit and license for the development of power to be made available by the proposed reconstruction of the United States Government lock and dam

National Parks Conservation Association v. FERC
9th Cir. Nos. 19-72915, 19-73079 (consolidated)

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 Ninth Circuit by using the appellate CM/ECF system on April 6, 2020.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Jared B. Fish
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