In the United States Court of Appeals for the Ninth Circuit

No. 12-72266

THOMAS J. ANDERSEN,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Petitioner Thomas Andersen owns property on a lake created by a hydroelectric project on the Missouri River in Montana. Respondent Federal Energy Regulatory Commission (Commission or FERC) previously issued a federal license to intervenor PPL Montana, LLC (PPL) to operate that project. The question presented by Mr. Andersen's petition for review is:

Whether the Commission reasonably investigated and denied allegations raised by Mr. Andersen, concerning shoreline erosion caused by ice formation and thawing, that PPL failed to comply with the terms of its license.

COUNTERSTATEMENT REGARDING JURISDICTION

This Court has jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), over all of Mr. Andersen's claims except for one – his allegation (Br. at 31-33) that Commission actions have resulted in a taking of his property in violation of the Takings Clause of the Fifth Amendment of the Constitution (for which he sought $5,908 in damages). *See infra* pages 30-31. The Tucker Act, 28 U.S.C. § 1491(a)(1), and the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), vest exclusive jurisdiction in the Court of Federal Claims (the district courts have concurrent jurisdiction over claims for $ 10,000 or less) to render judgment upon any claim against the United States for money damages that "is founded upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). *See Knott v. FERC*, 386 F.3d 368, 373-74 (1st Cir. 2004) (claim that FERC violated the Fifth Amendment Takings Clause is not within court's jurisdiction).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This proceeding began in 2007, when the Commission initiated an investigation into Mr. Andersen's allegations challenging PPL's compliance with its license erosion requirements. The Commission concluded the investigation in 2011, when it issued a letter setting forth its findings and determination that PPL had not violated its license. In a complaint filed August 1, 2011, Mr. Andersen reasserted the same compliance allegations against PPL.

In the orders on review, the Commission again denied Mr. Andersen's claims set forth in the complaint that PPL was operating its hydroelectric project, the Hauser Development, in violation of erosion-related requirements of PPL's project license. *See* January 10, 2012 Letter from Commission's Division of Hydropower Administration and Compliance to Mr. Andersen, Docket No. P-2188 (2012 Letter Order), ER 35-36, *reh'g denied*, 139 FERC ¶ 61,231 (2012) (Rehearing Order), ER 1-21.[1]

The Commission determined that it had thoroughly investigated the allegations in the complaint and affirmed its prior conclusion that PPL had implemented the erosion measures recommended in the environmental impact

[1] "ER" refers to the Supplemental Excerpts of Record filed by the Commission with this brief. "P" refers to the internal paragraph number within a FERC order. "Br." refers to Mr. Andersen's brief.

statement and incorporated into PPL's license as required by the National Environmental Policy Act. *See* 2012 Letter Order at 1, ER 35; Rehearing Order PP 29-37, ER 16-19. The Commission held that its treatment of Mr. Andersen's complaint as an allegation of license noncompliance (handled by its Division of Hydropower Compliance), rather than as a formal complaint, was appropriate, "particularly given the extensive previous correspondence and meetings" with Mr. Andersen regarding his prior identical allegations. Rehearing Order P 28, ER 15. Last, the Commission found Mr. Andersen's Fifth Amendment, Endangered Species Act, and Clean Water Act claims to be meritless. *Id.* P 38, ER 19-20.

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Framework

1. Federal Power Act

The Federal Power Act (FPA), 16 U.S.C. §§ 791a, *et seq.*, empowers the Commission to issue and enforce licenses for hydroelectric projects. *See Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009) (FERC operates, under the FPA, a "complete scheme of national regulation" regarding the construction, operation and maintenance of hydroelectric projects). Section 6 of the Act specifies that each hydroelectric license is conditioned upon the licensee's acceptance of all the terms and conditions prescribed by the Commission. 16 U.S.C. § 799. Additionally, Congress provided the Commission with statutory

authority to enforce the license terms and conditions. Specifically, FPA section 31 requires that the Commission "shall monitor and investigate compliance with each license" it issues, and "shall conduct such investigations as may be necessary and proper" to enforce the license terms. 16 U.S.C. § 823b(a). Also, FPA section 10(c) requires a licensee to adequately maintain its hydroelectric facility and provides:

> 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 . . . constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c).

2. Other Federal Statutes

The Commission, when issuing a hydroelectric license, while primarily governed by the FPA, is subject to other federal statutes, including the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, the Clean Water Act, 33 U.S.C. § 1341, and the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq*.

The National Environmental Policy Act requires the Commission to prepare an environmental impact statement for "every . . . major Federal action[] significantly affecting the quality of the human environment," such as issuance of a hydroelectric license. 42 U.S.C. § 4332(C). Sections 401(a) and (d) of the Clean Water Act, 33 U.S.C. §§ 1341(a) and (d), require "an applicant for a FERC hydropower license to obtain a state water quality certification before FERC may

approve a license," and require the Commission to incorporate into the license any terms and conditions of such certification. *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *see also Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003) (detailing the Clean Water Act requirements that pertain to FERC in a hydroelectric licensing proceeding). Similarly, section (7)(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), imposes on the Commission a procedural consultation duty whenever a federal action, such as the issuance of a hydroelectric project license, "may affect an ESA-listed species." *Cal. Trout*, 572 F.3d at 1011 n.4 (detailing FERC's obligations under the Endangered Species Act in a hydroelectric licensing proceeding).

B. Events Leading To The Challenged Orders

At issue in this proceeding is PPL's operation of the Hauser Development, which is one of the nine hydroelectric developments that comprise the Missouri-Madison Hydroelectric Project (Project). The Project was originally licensed by the Commission in 1956 and was relicensed in 2000 for a 40-year term. *PP&L Montana, LLC*, 92 FERC ¶ 61,261, at 61,828 (2000) (Relicense Order). The Hauser Development has been in operation for over a century. *See PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1225 (2012) (detailing history of the Project). During the entire period of time relevant to this case, PPL has been the licensed operator of the Hauser Development.

The Hauser Development comprises a 700-foot-long, 80-foot high dam on the Missouri River that impounds two connected bodies of water, Hauser Lake and Lake Helena. Rehearing Order P 4, ER 2. The dam created Hauser Lake, which then inundated a creek causing the formation of Lake Helena. A three-mile long Causeway Arm connects the two lakes. *See* Map A, attached hereto in the Appendix.

Mr. Andersen owns property on the north shore of Lake Helena. *See* Map B, attached hereto in the Appendix. In March 2007, Mr. Andersen contacted the Commission regarding erosion of his shoreline caused by "ice heaving." March 5, 2007 Letter from Mr. Andersen to FERC, Docket No. P-2188, ER 84-88. "Ice heaving" occurs as a lake freezes forming an ice sheet. When the ice begins to thaw and water levels rise, the ice sheet expands, exerting a tremendous thrust against the shore causing erosion. *See* Rehearing Order P 1 n.1, ER 1.

From 2007 through 2010, Mr. Andersen submitted twelve letters to the Commission alleging that PPL was out of compliance with the license condition governing erosion (Article 402). *See* Rehearing Order PP 8-19 (detailing the correspondence between Mr. Andersen and FERC), ER 3-11. The Commission, specifically either the Chairman or the Commission's Division of Hydropower Compliance, responded to Mr. Andersen's letters. *Id.*; *see, e.g.*, April 9, 2009 Letter from Chairman Wellinghoff, ER 75-81.

Over this four-year period, the Commission (and PPL) expended considerable resources investigating and responding to Mr. Andersen's allegations of non-compliance. The Commission's Division of Hydropower Compliance investigated whether erosion along Lake Helena is caused by the Project's operation or natural phenomenon and whether PPL is in compliance with the erosion provisions in its license. *See* April 3, 2009 Letter from FERC to PPL (requesting data from PPL regarding the alleged license violations), ER 82-83. The investigation included an environmental compliance inspection of the Project on August 11, 2010, at which time Commission staff met with Mr. Andersen at his property. *See* Rehearing Order PP 17-18, ER 10.

In response to the Commission's April 3, 2009 letter notifying PPL of Mr. Andersen's allegations of noncompliance, PPL provided the Commission with requested information regarding its operation of the Hauser Development. PPL met with Mr. Andersen at his Lake Helena property in April 2009, February 2010, and August 2010 to discuss the erosion issues. PPL also undertook several voluntary actions to monitor and potentially minimize ice-induced erosion. *See* Rehearing Order PP 10, 13, ER 4-5, 7.

On February 1, 2011, the Commission issued a letter to Mr. Andersen culminating the multi-year investigation into his allegations of noncompliance regarding shoreline erosion. *See* Feb. 1, 2011 Letter from FERC's Division of

Hydropower Compliance to Mr. Andersen, Docket No. P-2188 (2011 Letter), ER 61-63. The 2011 Letter details the record evidence the Commission reviewed in reaching its determination that PPL remained in compliance with both Article 402 (erosion monitoring) and 403 (water level requirements) of its license. Specifically, the Commission determined:

> Project operations are not causing or contributing to ice movement and ice heaving along the shoreline of Lake Helena. The formation of ice and ice heaving during the winter is a natural phenomenon that would occur regardless of whether Lake Helena is a part of the Missouri-Madison Project. Further, the project's approved Shoreline Erosion Monitoring Plan does not require PPL Montana to address shoreline erosion along Lake Helena adjacent to [Mr. Andersen's] property.

Id. at 3, ER 63.

C. The Challenged Proceeding

1. Complaint

On August 1, 2011, Mr. Andersen submitted to the Commission a complaint which led to this appeal. Complaint, ER 44-60. Mr. Andersen's complaint sets forth the same allegations previously raised in his correspondence with the Commission from 2007 through 2010. His fundamental argument remained the same – that PPL's failure to monitor and control shoreline erosion at his property violates the Project license. *Id.* at 1, ER 44.

Mr. Andersen challenged the Commission's determinations in the 2011 Letter. Specifically, he argued that: (1) PPL's license does not specify that

monitoring and controlling shoreline erosion is required only when erosion is caused by project operations (*id.* at 6, ER 49); (2) the existence of the reservoir creates conditions that contribute to ice formation and wave action that erode the shoreline (*id.* at 7, ER 50); and (3) PPL's compliance with the Commission-approved Shoreline Erosion Monitoring Plan does not exempt PPL from being required by Article 402 of its license to monitor and control all erosion on Lake Helena. *Id*.

Mr. Andersen further argued that the Commission violated several federal laws, in addition to his Constitutional rights, by failing to require PPL to monitor and control erosion resulting from ice formation on Lake Helena. Specifically, Mr. Andersen alleged violations of the Fifth Amendment Takings Clause, the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act. *Id.* at 9-12, ER 52-55.

In his request for relief, Mr. Andersen asked that the Commission require PPL to monitor and control all erosion along the entire shoreline of Lake Helena. He also sought monetary damages for his lost property "taken" by erosion. *Id.* at 13-14, ER 56-57.

PPL answered the complaint, denying Mr. Andersen's allegations. PPL asserted, among other things, that his claims with respect to shoreline erosion caused by ice formation (and thawing) had already been resolved in the prior

compliance proceeding. PPL Answer, ER 37-43.

2. Commission's Letter Order

On January 10, 2012, the Commission's Division of Hydropower Compliance issued a delegated letter order addressing the allegations of license noncompliance that Mr. Andersen reasserted in his complaint. 2012 Letter Order, ER 35-36. The Commission noted that the complaint raises the same issues, with no new information, that were reviewed and responded to in the February 1, 2011 Letter. 2012 Letter Order at 1, ER 35. Accordingly, the Commission affirmed its prior determinations that PPL is not required to take additional action to monitor and control shoreline erosion at Mr. Andersen's property and, further, that Project operations are not responsible for erosion caused by ice heaving along Lake Helena. 2012 Letter Order at 1-2 (citing 2011 Letter), ER 35-36.

3. Rehearing Order

On January 31, 2012, Mr. Andersen requested rehearing of the 2012 Letter Order (Request for Rehearing, ER 22-34), which the Commission denied by order dated June 21, 2012. At the outset, the Commission denied Mr. Andersen's request for rehearing of the February 2011 Letter as untimely and stated that the complaint was a collateral attack on the Commission's 2011 Letter. Rehearing Order PP 25-26, ER 14-15. The Commission then addressed the merits of each of Mr. Andersen's objections in the rehearing request. *Id.* PP 27-40, ER 15-20.

On the merits, the Commission rejected Mr. Andersen's argument concerning the Commission's procedural treatment of the complaint, confirming that the agency was not required to treat his compliance allegations as a formal complaint. *Id.* P 28, ER 15-16. The Commission also rejected Mr. Andersen's assertion that it had violated the National Environmental Policy Act, finding that PPL had implemented the erosion conditions in the license. *See id.* P 34, ER 18. Specifically, the Commission held that Mr. Andersen's assertion that PPL's license requires it to monitor and control all shoreline erosion on Lake Helena, regardless of the cause, is incorrect. *Id.* The Commission determined that PPL is required to control erosion (i) caused by the Project's operation and (ii) only at sites identified in its Commission-approved erosion plan as "active erosion sites." *Id.* PP 34-35, ER 18-19. The Commission confirmed that the only active erosion site is on Hauser Lake and that the Project's operation does not cause ice-related erosion. *Id.*

The Rehearing Order also addressed Mr. Andersen's Constitutional and statutory claims. The Commission found that Mr. Andersen's claims that the agency violated the Fifth Amendment Takings Clause, the Endangered Species Act, and the Clean Water Act were each based on the allegation that the Commission failed to implement the license requirements regarding erosion; i.e., that the Commission failed to require PPL to monitor and control erosion resulting from ice heaving at Mr. Andersen's property. *Id.* P 38, ER 19-20. Based on the

Commission's determination that PPL's license does not require PPL to address naturally occurring erosion at Lake Helena, the Commission found the Constitutional and statutory claims meritless. *Id.*

SUMMARY OF ARGUMENT

Fundamentally, this case is about a landowner's disagreement with the Commission's determination that the operator of a hydroelectric project is not responsible for annual winter erosion caused by naturally-occurring ice formation and subsequent thawing. In response to Mr. Andersen's allegations, the Commission initiated a multi-year investigation. As part of that investigation: (1) the Commission (and licensee PPL) met with Mr. Andersen at his property; (2) the Commission obtained extensive operating data from the licensee; and (3) the licensee voluntarily conducted additional erosion monitoring and adopted mitigation measures. As a result of its investigation, the Commission found that neither the Commission-issued license nor the Commission-approved erosion plan required the licensee to take further steps to control the ice-related erosion occurring at Mr. Andersen's property.

The landowner's dissatisfaction with the conduct and outcome of the agency's investigation, and with the agency's consideration of his subsequent complaint, does not make the Commission's actions arbitrary or capricious. The Commission fully investigated and responded to Mr. Andersen's allegations of

license violations. The Commission's findings are supported by record evidence and are consistent with agency precedent. It is irrelevant that Mr. Andersen formally presented his allegations as a complaint, where the Commission has discretion to choose the procedural mechanism for handling an issue. Here, the Commission reasonably delegated Mr. Andersen's reasserted allegations to its Division of Hydropower Compliance to address given the Division's extensive prior involvement in the matter. And, the Commission itself reasonably reaffirmed on rehearing that PPL satisfied its license responsibilities.

The agency properly rejected Mr. Andersen's contention that it had violated the National Environmental Policy Act by allegedly failing to require PPL to implement the erosion measures contained in the license. Rather, the agency appropriately determined that PPL had satisfied the license requirements by developing and implementing the Commission-approved erosion monitoring plan.

The Commission correctly dismissed as meritless Mr. Andersen's claims that the agency had violated the Endangered Species Act and the Clean Water Act. The Commission's obligations under both statutes are limited to licensing proceedings and are not triggered in a compliance proceeding such as this case.

Finally, the agency correctly held that it does not have jurisdiction over Mr. Andersen's claim for compensation for his property "taken" by erosion.

ARGUMENT

I. STANDARD OF REVIEW

This court's "review of the Commission's decisions is by law highly deferential. [The court] examine[s] only whether a decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with law." *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1166 (9th Cir. 2001), *as amended by* 282 F.3d 609 (9th Cir. 2001) (upholding FERC's summary dismissal of petitioners' allegations that a hydroelectric licensee had failed to comply with its license terms). *See also Fall River Rural Elec. Coop. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008) (upholding FERC's dismissal of application for license for hydroelectric facility); *County of Butte v. FERC*, 445 Fed. Appx. 928, 930 (9th Cir. 2011) (FERC's finding that licensee was in compliance with its hydroelectric license not arbitrary and capricious).

Under the arbitrary and capricious standard, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998)). "[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Cal. Trout*, 572 F.3d at 1021

(quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Commission's factual findings are conclusive if supported by substantial evidence. 16 U.S.C. § 825*l*(b). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008).

II. THE COMMISSION RESPECTED MR. ANDERSEN'S DUE PROCESS RIGHTS IN THE PPL COMPLIANCE PROCEEDING

The Commission reasonably exercised its discretion in delegating Mr. Andersen's complaint to its Division of Hydropower Compliance rather than proceeding under its formal complaint procedures contained in Rule 206, 18 C.F.R. § 385.206. Rehearing Order P 28 & n.87, ER 15. *See also Cal. Trout,* 572 F.3d at 1007 ("Agencies must have the ability to manage their own dockets. . . ."). The Commission's Office of Energy Projects has within it the Division of Hydropower Administration and Compliance, "a major mission of which is to ensure license compliance. When interested entities raise issues regarding compliance with license conditions, [the Division of Hydropower Compliance] investigates the matter and takes appropriate action." *Appalachian Power Co.*, 135 FERC ¶ 61,108, at P 61 n.4 (2011) (directing that a complaint alleging a license violation be handled by FERC's Division of Hydropower Compliance). *See also Pacific*

Gas and Electric Co., 115 FERC ¶ 61,324 (2006) (Chairman Kelliher concurring) (explaining that allegations of license non-compliance, whether styled as a "formal complaint" or otherwise, should be handled initially by FERC's Division of Hydropower Compliance).

Here, Mr. Andersen, by filing a "complaint," sought to re-initiate the completed compliance proceeding against PPL. The Commission is "entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem." *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) (citing *Mobil Oil Exploration v. United Distrib. Cos.*, 498 U.S. 211 (1991); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); and *Heckler v. Chaney*, 470 U.S. 821, 831-32, (1985)). *See also Wilderness Soc'y v. Tyrrel*, 918 F.2d 813, 816 (9th Cir. 1990) ("Courts have limited authority to impose procedural requirements upon a federal agency which seeks to exercise the responsibilities committed to it by Congress."); *Pacific Gas and Electric Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984) ("We must allow the FERC wide discretion in selecting its own procedures. . . ."). Moreover, a pleading's title does not dictate the Commission's process. *See, e.g., Borough of Central City*, 20 FERC ¶ 61,084, *reh'g denied*, 21 FERC ¶ 61,108 (1982) (dismissing complaint for being nothing more than an untimely appeal of the issuance of a permit to a hydroelectric licensee applicant); *Guadalupe-Blanco River Authority*, 52 FERC ¶

61,323 (1990) (dismissing filing styled as a complaint that was in essence an attempt to seek review of final Commission orders issuing a hydroelectric license).

Furthermore, the Commission's procedural rules, Rule 101(e), permit it to waive, for good cause, any of its procedural rules and to provide for procedures different from those contained in the rules. 18 C.F.R. § 385.101(e). Here, the Commission delegated Mr. Andersen's renewed license compliance allegations to the Division of Hydropower Compliance for good cause, noting that "such treatment was appropriate, particularly given the [Division's] extensive previous correspondence and meetings on this subject." Rehearing Order P 28, ER 15.

Process aside, the Commission fully investigated Mr. Andersen's allegations. After reviewing the record evidence and determining that PPL was in compliance with the erosion requirements, the Commission set forth its analysis and conclusions in the 2011 Letter. Thus, the Commission's decision not to initiate a second investigation of the same erosion allegations, just because they were presented in a different pleading format, was well within the agency's procedural discretion. *See Friends of the Cowlitz*, 253 F.3d at 1165 (holding "the Commission has virtually unreviewable discretion whether to enforce any alleged license violations"). Indeed, Mr. Andersen does not assert, nor could he, that had the Commission followed the notice and comment procedures for complaints, the substantive outcome on the merits of his allegations would have changed.

Last, Mr. Andersen's argument that the Commission erred by "denying his request for rehearing as untimely," and by finding that his complaint was a "collateral attack on the Commission's February 1, 2011 Letter" (Br. at 19-27), is rendered moot by the fact that the Commission fully addressed the merits of his request for rehearing. *See* Rehearing Order PP 27- 40, ER 15-20. Thus, the Commission did not deny Mr. Andersen's request for rehearing for a procedural failing (timeliness or collateral attack). Rather, the Commission denied rehearing only after evaluating and determining that Mr. Andersen's rehearing request was meritless. *Id.* P 26 ("In any event, as explained below, Mr. Andersen's rehearing request is substantively without merit."), ER 15.

Mr. Andersen erroneously claims that the Rehearing Order "does not address the Request for Rehearing of the January 10, 2012 letter." Br. at 24. Thirteen paragraphs of the Rehearing Order prove otherwise. *See* Rehearing Order PP 27-40, ER 15-20. The Commission parsed through each of Mr. Andersen's rehearing arguments and provided a response. The breadth of the Commission's merits discussion in the Rehearing Order stands in contrast to the case cited by Mr. Andersen for the proposition that the Commission failed to "articulate a satisfactory explanation for denying the Request for Rehearing." Br. at 25 (citing *PSEG Energy Res. & Trade LLC v. FERC*, 360 F.3d 200, 210 (D.C. Cir. 2004) (FERC failed to respond at all, much less meaningfully, to party's objections).

That the Commission responded to Mr. Andersen's National Environmental Policy Act, Endangered Species Act, Clean Water Act, and Fifth Amendment Takings Clause claims in the later Rehearing Order, rather than in the earlier 2012 Letter Order, is irrelevant. *See Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (rehearing allows FERC "to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review.").

III. THE COMMISSION APPROPRIATELY FOUND NO VIOLATION OF PPL'S LICENSE

A. Substantial Evidence Supports FERC's Conclusion That PPL Complied With Its License

In the challenged orders, the only issue before the Commission was whether the Project license required PPL to monitor and control erosion caused by ice formation and thawing at Mr. Andersen's property on Lake Helena. As the Commission explained, Article 402 of PPL's license requires PPL to submit for Commission approval a plan to monitor and control reservoir shoreline erosion at the Project. Rehearing Order P 30, ER 16-17; Relicense Order, 92 FERC ¶ 61,261 at 61,845-46 (Article 402). Article 402 sets forth the following minimum requirements for the erosion plan: (1) that "the plan shall be based on, but not necessarily be limited to," the 1993 Shoreline Bank Erosion Assessment; (2) annual monitoring of the "active erosion" sites identified in the 1993 Erosion Assessment to determine if erosion control measures are needed and provisions for

implementing such control measures; (3) visual inspection on a 5- to 7-year basis of the "minor or moderate erosion" sites identified in the 1993 Erosion Assessment to determine whether any of those sites should be reclassified as "active erosion" sites; and (4) provisions for periodic review and modification of the erosion plan. *Id.*

On May 10, 2002, PPL submitted the required erosion plan for Commission approval. As the Commission explained, with respect to the Hauser Development, PPL's erosion plan requires visual inspection of 76 minor and moderate erosion sites every five years, and annual monitoring of a single active erosion site located on Hauser Lake (no active erosion sites on Lake Helena). Rehearing Order PP 31-33, n.96, ER 17, 18. The Commission further noted, under PPL's erosion plan, that the information collected from the annual monitoring forms the basis for determining whether and what type of erosion mitigation measures are appropriate "to address impacts from project operation." *PP&L Montana, LLC*, 101 FERC ¶ 62,127, at 64,298 (2002) (order approving erosion plan). All of the consulted federal and state agencies accepted the erosion plan without change. *Id.* The Commission approved PPL's erosion plan, finding that it would "help remediate project-induced erosion." *Id.*

In the challenged orders, based on its review of Article 402 and PPL's erosion plan implementing Article 402, as well as its earlier order approving the

erosion plan, the Commission confirmed that the specific requirements relating to erosion monitoring and control are contained solely in PPL's approved erosion plan. 2012 Letter Order at 1-2, ER 35-36. The Commission further held that (1) the erosion plan does not require annual monitoring or erosion control at any site on Lake Helena and (2) the erosion plan only provides for control of project-induced erosion. *Id.*; Rehearing Order PP 34-35, ER 18-19. Both determinations independently support the Commission's finding of no evidence of license violations by PPL. FERC's interpretation of the erosion requirements in PPL's license is entitled to deference. *See Pacific Gas and Electric Co. v. FERC*, 746 F.2d at 1387 ("This court will not set aside [FERC's] action merely because, were we to try the matter anew, we might reach a different result."). *See also Dilaura v. Power Auth. of New York*, 982 F.2d 73, 79 (2d Cir. 1992) (FERC has the power and the expertise to decide if a hydroelectric license was violated).

The Commission also reasonably declined Mr. Andersen's repeated requests (Br. at 27) that it expand the license requirements to include additional erosion monitoring and control at his property. *See County of Butte v. FERC,* 445 Fed. Appx. at 930 (holding that FERC did not act arbitrarily or capriciously by declining to expand license requirements to cover public safety services). The Commission's decision not to expand PPL's erosion plan, in the absence of evidence necessitating or otherwise justifying such an expansion, is a reasonable

exercise of its discretion under the Federal Power Act. *See Coal. For Fair & Equitable Regulation of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002) (Congress, in enacting in the Federal Power Act, created "a complete scheme of national regulation" over hydropower giving FERC the means to accomplish its tasks through statutory provisions vesting FERC with power and discretion).

B. The Commission's Determination That Ice-Related Erosion Is Not Project-Induced Is Consistent With Agency Precedent

Mr. Andersen disputes the Commission's determination that PPL's responsibility for controlling shoreline erosion is limited to erosion caused by the Project's operation. Br. 11, 29-30. *See also* Br. at 13 (stating that "Lake Helena's ice and water which are part of the reservoir and part of the project, cause erosion that takes land from the land owners."). First, as discussed *supra* at pages 20-22, the Commission reasonably interpreted PPL's erosion plan, approved in an earlier order, as limited to controlling project-induced erosion. This interpretation is consistent with Commission precedent. *See* Rehearing Order P 35, ER 18-19. *See also Cal. Trout*, 572 F.3d at 1012-13 (agency's reasonable interpretation of its own order entitled to deference from the reviewing court); *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007) (same).

As the Commission explained, erosion caused by ice formation is a result of a natural phenomenon, and the operation of the Hauser Development does not

contribute to it. *See* 2011 Letter at 1-2, ER 61-62; Rehearing Order PP 35-36, ER 18-19. The Commission has consistently differentiated between project-induced erosion and erosion resulting from natural causes, requiring licensees to be responsible only for erosion resulting from project operations. *See, e.g., Green Mountain Power Corp.*, 138 FERC ¶ 62,236 (2012) (noting that project operations, such as weekly peaking and the winter drawdown, were secondary causes of erosion where the primary causes of erosion were wind, waves, ice, and surface runoff); *Firstlight Hydro Generating Co.*, 126 FERC ¶ 61,025, at P 14 (2009) (noting that the Commission has limited the responsibility of licensees "to controlling and mitigating erosion caused by project operation, and not erosion caused by natural phenomena associated with the presence of the project"); and *Bangor Hydro-Elec. Co.*, 83 FERC ¶ 61,037 (1998) (distinguishing between erosional losses due to the existence of the impoundment rather than the manner in which the project is operated, and finding licensee is responsible only for the latter). The Commission defines project-induced erosion as "erosion that is not attributable to natural phenomena, such as wind-driven wave action against a shore, run-off from steep terrain during storms, and loss of vegetation due to fire or other natural causes . . . ." *Wis. Pub. Serv. Corp.*, 79 FERC ¶ 62,219 (1997); *see also Upper Peninsula Power Co.*, 87 FERC ¶ 62,125 (1999); *Upper Peninsula Power Co.*, 78 FERC ¶ 62,100 (1997); and *Niagara of Wis. Paper Corp.*, 79 FERC

¶ 62,095 (1997).

Another court of appeals recently upheld the Commission's differentiation between project-induced erosion and erosion caused by natural factors. *See Eastern Niagara Pub. Power Alliance v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (Commission reasonably concluded that a hydroelectric project is not a significant contributor to shoreline erosion). The Commission, in its underlying agency order upheld in *Eastern Niagara*, found, based on both the environmental impact statement and an expert report, that the primary causes of erosion, which included wind and ice, were unrelated to project operations. *See New York Power Auth.*, 120 FERC ¶ 61,266, at PP 21-25 (2007) (holding that because project operations are not the primary case of erosion, licensee is not required to implement erosion mitigation measures). In that case, the project-induced erosion resulted from water level fluctuations caused by project operations. However, the Commission found that while water level fluctuations can influence erosion, a daily fluctuation of less than a foot is so small it "borders on insignificant." *Id.* P 22.

Here, with respect to the Hauser Development, PPL is required, pursuant to Article 403 of its license, to limit water level fluctuations in Lake Helena to one foot. 2011 Letter at 1, ER 61. The Commission's compliance investigation found that PPL has maintained Lake Helena within the one-foot fluctuation limit. *Id.*

Accordingly, the Commission concluded that "[b]ecause Lake Helena has been operated in accordance with article 403 [water level requirements], the lake has not been subjected to wide fluctuations in surface elevations during the winter that could have contributed to ice movement and ice heaving along Lake Helena's shoreline." *Id.* Thus, the Commission held that any ice heaving is not related to the Project's operation and "would happen regardless of whether Lake Helena is a part of the Missouri-Madison Project." *Id.; see also* Rehearing Order P 36, ER 19. The Commission's conclusion is supported by substantial record evidence including the April 30, 2009 report by the licensee. *See* 2011 Letter at 1-2 (ice heaving not related to project operations based on review of PPL's records), ER 61-62; Apr. 30, 2009 Letter from PPL to FERC, Docket No. P-2188 (providing water level data for Lake Helena), ER 68-74.

IV. THE COMMISSION FULFILLED ITS STATUTORY OBLIGATIONS

Mr. Andersen's National Environmental Policy Act, Clean Water Act, Endangered Species Act, and Fifth Amendment Takings Clause claims (Br. at 19-20, 27-34) are meritless, as each is predicated upon the Commission's alleged failure to require PPL to comply with the erosion requirements in the Project license. The Commission's determination that PPL is in compliance with the license requirements defeats these statutory and constitutional claims. *See* Rehearing Order P 38, ER 19-20. Moreover, as discussed below, Mr. Andersen's

arguments are misplaced, as the Commission's responsibilities under the three cited statutes relate to a license issuance proceeding, not to a license compliance proceeding such as this one.

A. The Commission Fully Implemented The Erosion Measures As Required By The National Environmental Policy Act

Mr. Andersen asserts that the Commission violated section 1505.3 of the regulations implementing the National Environmental Policy Act by failing to implement Article 402 of the license and by not implementing the recommendations in the environmental impact statement to control erosion. Br. at 27-31 (citing 40 C.F.R. § 1505.3). Section 1505.3 of the NEPA regulations provides: "Mitigation . . . and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3. In PPL's 2000 relicensing proceeding, the Commission incorporated the erosion-related recommendations from the Project's environmental impact statement into PPL's license as Article 402. And, as demonstrated *supra* at pages 20-21, the Commission has overseen PPL's implementation of Article 402 and also has ensured PPL's continued compliance with Article 402. *See also* Rehearing Order P 35, ER 18-19; October 22, 2009 Letter from Chairman Wellinghoff at 1-2, ER 64-65.

To the extent Mr. Andersen wants the Commission to initiate a supplemental

analysis to the 1999 Final Environmental Impact Statement that underlies the 2000 License (Br. at 18), the Commission's regulations categorically exclude compliance matters from the scope of NEPA. 18 C.F.R. § 380.4(a)(3). Specifically, the Commission's regulations provide that neither an environmental assessment nor an environmental impact statement will be prepared for compliance actions including investigations. *Id.*; *see, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (holding that once a major federal action requiring an environmental impact statement has been completed and the federal action implemented, allegations about damage arising from the federal action are not "significant new circumstances" requiring further evaluation under NEPA). Moreover, in this case, the Commission found no violation of PPL's license and, thus, the agency did not direct further compliance activities.

B. The Commission Complied With The Clean Water Act And The Endangered Species Act

Mr. Andersen argues that the Project-induced erosion on Lake Helena is the equivalent of PPL placing fill dirt in a protected water body (Lake Helena) requiring a fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344. Br. at 20, 34. He alleges that the Commission is in violation of the Act for failing to require PPL to obtain a section 404 fill permit. *Id.* But section 404 fill permits are beyond the Commission's jurisdiction. *See Duncan's Point Lot Owners Ass'n Inc. v. FERC*, 522 F.3d 371, 378 (D.C. Cir. 2008) (in a hydroelectric compliance

proceeding, FERC's obligations under the Clean Water Act limited to ensuring licensee is compliant with any license terms related to the Clean Water Act). It is the Army Corps of Engineers' responsibility to administer and enforce the section 404 permit program. Thus, any allegations of noncompliance with the permit program should be brought to that agency's attention. *See generally Rapanos v. United States*, 547 U.S. 715, 723 (2006) (section 1344 of the Clean Water Act authorizes the Secretary of the Army, acting through the Corps, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."). Moreover, Mr. Andersen's argument fails because the erosion is unrelated to the Project. Because PPL's operation of the Project is not causing the erosion, *see supra* pages 23-26, PPL is not causing "shore material" or "fill" to be "washed into Lake Helena." *See* Complaint at 12, ER 55.

Mr. Andersen's allegation that the Commission violated the Endangered Species Act by failing to require PPL to comply with license Article 402 also is misplaced. Br. at 15, 19, 33. The Commission's statutory responsibility under the Endangered Species Act arises when the Commission contemplates taking a federal action. *Cal. Trout*, 572 F.3d at 1011 n.4 (describing the circumstances under which FERC must engage in consultation under the Act). With respect to hydroelectric projects, the triggering federal action is the Commission's issuance of a license, not the continued operation of the project or continued compliance

with the project license. *See California Sportfishing Prot. Alliance v. FERC*, 472 F.3d 593, 598 (9th Cir. 2006) (operation of a hydroelectric project pursuant to a FERC-issued license is not a "federal action" under the Endangered Species Act). Here, the Commission complied with the Endangered Species Act in the relicensing proceeding in 2000. *See* Relicense Order, 92 FERC ¶ 61,261 at 61,832 (noting the U.S. Fish and Wildlife Service's concurrence with FERC's conclusion that the Project, if relicensed, is not likely to adversely affect threatened or endangered species). PPL's continued operation of the Project, in compliance with the terms of its license, does not give rise to any requirements under the Endangered Species Act.

C. There Is No Taking Of Mr. Andersen's Property Under The Fifth Amendment

This Court does not have subject matter jurisdiction to hear Mr. Andersen's Fifth Amendment Takings Clause claim for which Mr. Andersen sought monetary damages. Mr. Andersen argues that the Commission, in issuing PPL a license, violated the Fifth Amendment of the Constitution for failing to include in the license sufficient erosion mitigation measures. Br. at 19, 31-33 (asserting that FERC's decision to issue PPL a license "that result[s] in landowners losing their land without a hearing or compensation" violates the Fifth Amendment). Mr. Andersen sought $5,908 in compensation for the eroded land. Complaint at 13-14, ER 56-57. The Fifth Amendment provides that the government shall not take

private property for public use without just compensation. U.S. Const. amend. V.

A Fifth Amendment Takings Clause claim is outside this Court's jurisdiction. The Tucker Act, 28 U.S.C. § 1491(a)(1), and the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), vest exclusive jurisdiction in the Court of Federal Claims (the district courts have concurrent jurisdiction over claims for $10,000 or less) to render judgment upon any claim against the United States for money damages that is founded upon the Constitution, or any Act of Congress or any regulation of an executive department. *See Knott v. FERC*, 386 F.3d at 373-374 (holding petitioner, claiming that FERC's order asserting mandatory hydroelectric licensing jurisdiction constitutes a "taking" of his private property rights in violation of the Fifth Amendment, may not pursue this cause of action on a petition for review brought under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*); *see also Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 743 (D.C. Cir. 2001) (holding that while petitioner seeking review of FERC orders imposing conditions on its license "may be able to advance a colorable Takings-Clause claim, it is not within our jurisdiction to adjudicate it").

Even if the Court had jurisdiction, Mr. Andersen's claim is without merit. Mr. Andersen casts his claim as an alleged failure of the Commission to provide "meaningful comment" on his Fifth Amendment claim made in his complaint. Br. at 32. The Commission correctly declined to consider Mr. Andersen's request for

monetary damages for the "taking" resulting from erosion of his shoreline, finding it to be a matter beyond its jurisdiction. As the Commission explained, section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), provides that the licensee, not the federal government, is liable for any damage caused by the operation of a project. Rehearing Order P 39, ER 20. Section 10(c) of the Act provides that "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 therefore." 16 U.S.C. § 803(c). The Commission held that if Mr. Andersen "feels he has been injured as a result of PPL[]'s operation of the [] Project, he may seek an appropriate remedy in court." Rehearing Order P 39, ER 20. *See also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 518-19 (9th Cir. 2005) (affirming that FPA section 10(c) does not provide a federal private right of action, but simply preserves existing state tort law with its own rules of liability for damages caused by licensees) (citing cases).

CONCLUSION

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

Respectfully submitted,

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November 5, 2012

PPL Montana, LLC **Project No. 2188**
9th Cir. No. 12-72266

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,206 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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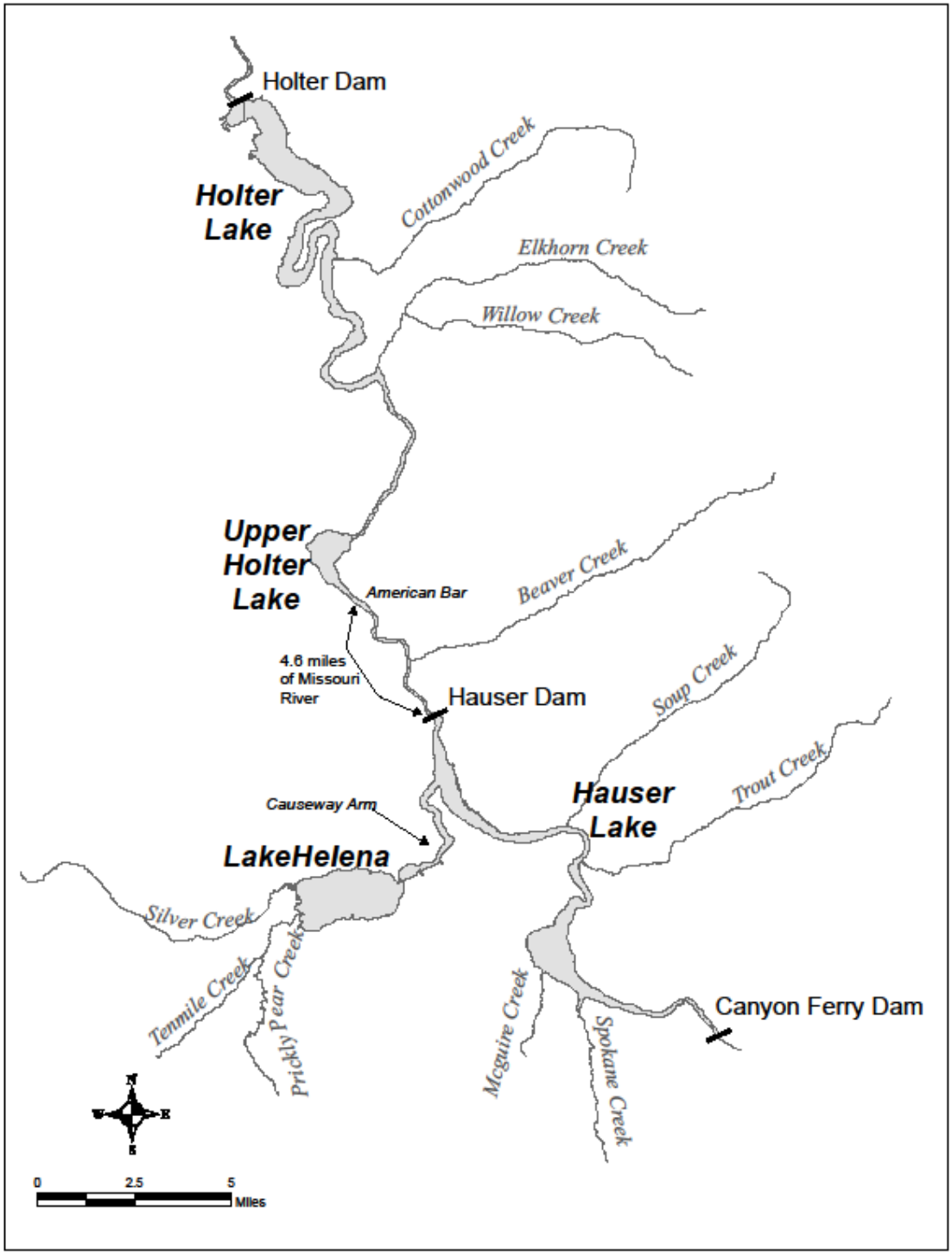
November 5, 2012

APPENDIX

MAPS

Map A
Project Map



Map B
Location of Andersen Property
Marked with "A" Pin

Address **2954 E Lincoln Rd**
Helena, Mt 59602

ADDENDUM

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(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, § 403, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98–67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term ''Secretary'' as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

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

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

(I) violation of any condition of the permit;

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

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

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

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

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after con-

sultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed

permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(*l*) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(*o*) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any

good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, ch. 758, title IV, § 404, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95–217, § 67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub. L. 100–4, title III, § 313(d), Feb. 4, 1987, 101 Stat. 45.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (r), 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.

AMENDMENTS

1987—Subsec. (s). Pub. L. 100–4 redesignated par. (5) as (4), substituted ''$25,000 per day for each violation'' for ''$10,000 per day of such violation'', inserted provision specifying factors to consider in determining the penalty amount, and struck out former par. (4) which read as follows:

''(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

''(B) For the purposes of this paragraph, the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.''

1977—Subsec. (a). Pub. L. 95–217, § 67(a)(1), substituted ''The Secretary'' for ''The Secretary of the Army, acting through the Chief of Engineers,'' and inserted provision that, not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary publish the notice required by this subsection.

Subsecs. (b), (c). Pub. L. 95–217, § 67(a)(2), substituted ''the Secretary'' for ''the Secretary of the Army''.

Subsecs. (d) to (t). Pub. L. 95–217, § 67(b), added subsecs. (d) to (t).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers' dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

MITIGATION AND MITIGATION BANKING REGULATIONS

Pub. L. 108–136, div. A, title III, § 314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

''(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the

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

Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

''(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003].''

REGULATORY PROGRAM

Pub. L. 106–377, § 1(a)(2) [title I], Oct. 27, 2000, 114 Stat. 1441, 1441A–63, provided in part that: ''For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $125,000,000, to remain available until expended: *Provided*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use funds appropriated herein to: (1) by March 1, 2001, supplement the report, Cost Analysis For the 1999 Proposal to Issue and Modify Nationwide Permits, to reflect the Nationwide Permits actually issued on March 9, 2000, including changes in the acreage limits, preconstruction notification requirements and general conditions between the rule proposed on July 21, 1999, and the rule promulgated and published in the Federal Register; (2) after consideration of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106–377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers' progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106–60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army, acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission.''

AUTHORITY TO DELEGATE TO STATE OF WASHINGTON FUNCTIONS OF THE SECRETARY RELATING TO LAKE CHELAN, WASHINGTON

Section 76 of Pub. L. 95–217 provided that: ''The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation.''

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

allocated in accordance with subsection (d) of this section.

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

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

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

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of

commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

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

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

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

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

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

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

CODIFICATION

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

AMENDMENTS

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 803. Conditions of license generally

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

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

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

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

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

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

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

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

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

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

(b) Alterations in project works

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

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

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

[1] See Codification note below.

[1] So in original. Probably should be followed by ''; 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 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

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

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

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

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

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

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

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

tion shall be treated as a violation of a rule or order of the Commission under this chapter.

(e) Fees for studies

The Commission, in addition to the requirements of section 803(e) of this title, shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) of this section for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

(June 10, 1920, ch. 285, pt. I, § 30, as added Pub. L. 95–617, title II, § 213, Nov. 9, 1978, 92 Stat. 3148; amended Pub. L. 99–495, § 7, Oct. 16, 1986, 100 Stat. 1248.)

REFERENCES IN TEXT

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

PRIOR PROVISIONS

A prior section 30 of act June 10, 1920, was classified to section 791 of this title, prior to repeal by act Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495, § 7(a), inserted provision setting the maximum installation capacity for exemptions under subsec. (a) at 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes.

Subsec. (c). Pub. L. 99–495, § 7(b), which directed the insertion of ''National Marine Fisheries Service'' after ''the Fish and Wildlife Service'' in both places such term appears, was executed by inserting ''National Marine Fisheries Service'' after ''the United States Fish and Wildlife Service'' and ''the Fish and Wildlife Service'', as the probable intent of Congress.

Subsec. (e). Pub. L. 99–495, § 7(c), added subsec. (e).

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.

APPLICATION OF SUBSECTION (c)

Section 8(c) of Pub. L. 99–495 provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect the application of section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)] to any exemption issued after the enactment of this Act [Oct. 16, 1986].''

§ 823b. Enforcement

(a) Monitoring and investigation

The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

(b) Revocation orders

After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this subchapter or any exemption granted from any requirement of this subchapter where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) of this section after completion of judicial review (or the opportunity for judicial review); and

(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) of this section shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

(c) Civil penalty

Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter, or any order issued under subsection (a) of this section shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a) of this section, inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a) of this section, or unless an election is made within 30 calendar

ation, 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 Public Printer 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 Printing 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.)

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.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

§ 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words ''civil action'' were substituted for ''suits,'' in view of Rule 2 of the Federal Rules of Civil Procedure.

Words ''United States Senator'' were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words ''civil actions, suits or proceedings'' were substituted for ''suits of a civil nature, at common law or in equity'' in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word ''agency'' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase ''Except as otherwise provided by Act of Congress,'' at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

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

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

Sec.
[1493. Repealed.]
1494. Accounts of officers, agents or contractors.
1495. Damages for unjust conviction and imprisonment; claim against United States.
1496. Disbursing officers' claims.
1497. Oyster growers' damages from dredging operations.
1498. Patent and copyright cases.
1499. Liquidated damages withheld from contractors under chapter 37 of title 40.
1500. Pendency of claims in other courts.
1501. Pensions.
1502. Treaty cases.
1503. Set-offs.
[1504. Repealed.]
1505. Indian claims.
[1506. Repealed.]
1507. Jurisdiction for certain declaratory judgments.
1508. Jurisdiction for certain partnership proceedings.
1509. No jurisdiction in cases involving refunds of tax shelter promoter and understatement penalties.

HISTORICAL AND REVISION NOTES

1949 ACT

This section inserts in the analysis of chapter 91 of title 28, U.S.C., item 1505, corresponding to new section 1505.

AMENDMENTS

2006—Pub. L. 109–284, §4(1), Sept. 27, 2006, 120 Stat. 1211, substituted ''chapter 37 of title 40'' for ''Contract Work Hours and Safety Standards Act'' in item 1499.

1992—Pub. L. 102–572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516, substituted ''UNITED STATES COURT OF FEDERAL CLAIMS'' for ''UNITED STATES CLAIMS COURT'' as chapter heading.

1984—Pub. L. 98–369, div. A, title VII, §714(g)(3), July 18, 1984, 98 Stat. 962, added item 1509.

1982—Pub. L. 97–248, title IV, §402(c)(18)(B), Sept. 3, 1982, 96 Stat. 669, added item 1508.

Pub. L. 97–164, title I, §133(e)(2)(B), (f), (h), (j)(2), Apr. 2, 1982, 96 Stat. 41, substituted ''UNITED STATES CLAIMS COURT'' for ''COURT OF CLAIMS'' in chapter heading, substituted ''Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act'' for ''Penalties imposed against contractors under eight hour law'' in item 1499, and struck out items 1504 ''Tort Claims'' and 1506 ''Transfer to cure defect of jurisdiction''.

1976—Pub. L. 94–455, title XIII, §1306(b)(9)(B), Oct. 4, 1976, 90 Stat. 1720, added item 1507.

1960—Pub. L. 86–770, §2(b), Sept. 13, 1960, 74 Stat. 912, added item 1506.

Pub. L. 86–726, §4, Sept. 8, 1960, 74 Stat. 856, substituted ''Patent and copyright cases'' for ''Patent cases'' in item 1498.

1954—Act Sept. 3, 1954, ch. 1263, §43, 68 Stat. 1241, inserted ''; actions involving Tennessee Valley Authority'' in item 1491 and struck out item 1493 ''Departmental reference cases''.

1949—Act May 24, 1949, ch. 139, §86, 63 Stat. 102, added item 1505.

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6[1] of that Act.

(b)(1) Both the Unites[2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition

[1] See References in Text note below.

[2] So in original. Probably should be ''United''.

CODE OF FEDERAL REGULATIONS

Title 18

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(f) *Environmental report* or ER means that part of an application submitted to the Commission by an applicant for authorization of a proposed action which includes information concerning the environment, the applicant's analysis of the environmental impact of the action, or alternatives to the action required by this or other applicable statutes or regulations.

(g) *Finding of no significant impact* (FONSI) means a document by the Commission briefly presenting the reason why an action, not otherwise excluded by § 380.4, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It must include the environmental assessment or a summary of it and must note other environmental documents related to it. If the assessment is included, the FONSI need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 380.3 Environmental information to be supplied by an applicant.

(a) An applicant must submit information as follows:

(1) For any proposed action identified in §§ 380.5 and 380.6, an environmental report with the proposal as prescribed in paragraph (c) of this section.

(2) For any proposal not identified in paragraph (a)(1) of this section, any environmental information that the Commission may determine is necessary for compliance with these regulations, the regulations of the Council, NEPA and other Federal laws such as the Endangered Species Act, the National Historic Preservation Act or the Coastal Zone Management Act.

(b) An applicant must also:

(1) Provide all necessary or relevant information to the Commission;

(2) Conduct any studies that the Commission staff considers necessary or relevant to determine the impact of the proposal on the human environment and natural resources;

(3) Consult with appropriate Federal, regional, State, and local agencies during the planning stages of the proposed action to ensure that all potential environmental impacts are identified. (The specific requirements for consultation on hydropower projects are contained in § 4.38 and § 16.8 of this chapter and in section 4(a) of the Electric Consumers Protection Act, Pub. L. No. 99–495, 100 Stat. 1243, 1246 (1986));

(4) Submit applications for all Federal and State approvals as early as possible in the planning process; and

(5) Notify the Commission staff of all other Federal actions required for completion of the proposed action so that the staff may coordinate with other interested Federal agencies.

(c) *Content of an applicant's environmental report for specific proposals*—1) *Hydropower projects.* The information required for specific project applications under part 4 or 16 of this chapter.

(2) *Natural gas projects.* (i) For any application filed under the Natural Gas Act for any proposed action identified in §§ 380.5 or 380.6, except for prior notice filings under § 157.208, as described in § 380.5(b), the information identified in § 380.12 and Appendix A of this part.

(ii) For prior notice filings under § 157.208, the report described by § 157.208(c)(11) of this chapter.

(3) *Electric transmission project.* For pre-filing requests and applications filed under section 216 of the Federal Power Act identified in §§ 380.5(b)(14) and 380.6(a)(5).

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 533, 56 FR 23155, May 20, 1991; Order 603, 64 FR 26611, May 14, 1999; Order 689, 71 FR 69470, Dec. 1, 2006; Order 756, 77 FR 4895, Feb. 1, 2012]

§ 380.4 Projects or actions categorically excluded.

(a) *General rule.* Except as stated in paragraph (b) of this section, neither an environmental assessment nor an environmental impact statement will be prepared for the following projects or actions:

(1) Procedural, ministerial, or internal administrative and management actions, programs, or decisions, including procurement, contracting, personnel actions, correction or clarification of filings or orders, and acceptance, rejection and dismissal of filings;

(2)(i) Reports or recommendations on legislation not initiated by the Commission, and

(ii) Proposals for legislation and promulgation of rules that are clarifying,

corrective, or procedural, or that do not substantially change the effect of legislation or regulations being amended;

(3) Compliance and review actions, including investigations (jurisdictional or otherwise), conferences, hearings, notices of probable violation, show cause orders, and adjustments under section 502(c) of the Natural Gas Policy Act of 1978 (NGPA);

(4) Review of grants or denials by the Department of Energy (DOE) of any adjustment request, and review of contested remedial orders issued by DOE;

(5) Information gathering, analysis, and dissemination;

(6) Conceptual or feasibility studies;

(7) Actions concerning the reservation and classification of United States lands as water power sites and other actions under section 24 of the Federal Power Act;

(8) Transfers of water power project licenses and transfers of exemptions under Part I of the Federal Power Act and Part 9 of this chapter;

(9) Issuance of preliminary permits for water power projects under Part I of the Federal Power Act and Part 4 of this chapter;

(10) Withdrawals of applications for certificates under the Natural Gas Act, or for water power project preliminary permits, exemptions, or licenses under Part I of the Federal Power Act and Part 4 of this chapter;

(11) Actions concerning annual charges or headwater benefits, charges for water power projects under Parts 11 and 13 of this chapter and establishment of fees to be paid by an applicant for a license or exemption required to meet the terms and conditions of section 30(c) of the Federal Power Act;

(12) Approval for water power projects under Part I of the Federal Power Act, of ''as built'' or revised drawings or exhibits that propose no changes to project works or operations or that reflect changes that have previously been approved or required by the Commission;

(13) Surrender and amendment of preliminary permits, and surrender of water power licenses and exemptions where no project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation;

(14) Exemptions for small conduit hydroelectric facilities as defined in §4.30(b)(26) of this chapter under Part I of the Federal Power Act and Part 4 of this chapter;

(15) Electric rate filings submitted by public utilities under sections 205 and 206 of the Federal Power Act, the establishment of just and reasonable rates, and confirmation, approval, and disapproval of rate filings submitted by Federal power marketing agencies under the Pacific Northwest Electric Power Planning and Conservation Act, the Department of Energy Organization Act, and DOE Delegation Order No. 0204–108.

(16) Approval of actions under sections 4(b), 203, 204, 301, 304, and 305 of the Federal Power Act relating to issuance and purchase of securities, acquisition or disposition of property, merger, interlocking directorates, jurisdictional determinations and accounting orders;

(17) Approval of electrical interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, that would not entail:

(i) Construction of a new substation or expansion of the boundaries of an existing substation;

(ii) Construction of any transmission line that operates at more than 115 kilovolts (KV) and occupies more than ten miles of an existing right-of-way; or

(iii) Construction of any transmission line more than one mile long if located on a new right-of-way;

(18) Approval of changes in land rights for water power projects under Part I of the Federal Power Act and Part 4 of this chapter, if no construction or change in land use is either proposed or known by the Commission to be contemplated for the land affected;

(19) Approval of proposals under Part I of the Federal Power Act and Part 4 of this chapter to authorize use of water power project lands or waters for gas or electric utility distribution lines, radial (sub-transmission) lines, communications lines and cables, storm drains, sewer lines not discharging into project waters, water

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385.1602 Civil penalties, as adjusted (Rule 1602)

Subparts Q–R [Reserved]

Subpart S—Miscellaneous

385.1901 Interpretations and interpretive rules under the NGPA (Rule 1901).
385.1902 Appeals from action of staff (Rule 1902).
385.1903 Notice in rulemaking proceedings (Rule 1903).
385.1904 Copies of transcripts (Rule 1904).
385.1907 Reports of compliance (Rule 1907).

Subpart T—Formal Requirements for Filings in Proceedings Before the Commission

385.2001 Filings (Rule 2001).
385.2002 Caption of filings (Rule 2002).
385.2003 Specifications (Rule 2003).
385.2004 Originals and copies of filings (Rule 2004).
385.2005 Subscription and verification (Rule 2005).
385.2006 Docket system (Rule 2006).
385.2007 Time (Rule 2007).
385.2008 Extensions of time (Rule 2008).
385.2009 Notice (Rule 2009).
385.2010 Service (Rule 2010).
385.2011 Procedures for filing on electronic media (Rule 2011).
385.2012 Petitions for review of Commission Orders (Rule 2012).
385.2013 Notification of requests for Federal authorizations and requests for further information (Rule 2013).
385.2014 Petitions for appeal or review of Federal authorizations (Rule 2014).
385.2015 Videotapes (Rule 2015).

Subpart U—Appearance and Practice Before the Commission

385.2101 Appearances (Rule 2101).
385.2102 Suspension (Rule 2102).
385.2103 Appearance of former employees (Rule 2103).

Subpart V—Off-the-Record Communications; Separation of Functions

385.2201 Rules governing off-the-record communications (Rule 2201).
385.2202 Separation of functions (Rule 2202).

AUTHORITY: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 792–828c, 2601–2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

SOURCE: Order 225, 47 FR 19022, May 3, 1982, unless otherwise noted.

Subpart A—Applicability and Definitions

§ 385.101 Applicability (Rule 101).

(a) *General rules.* Except as provided in paragraph (b) of this section, this part applies to:

(1) Any filing or proceeding under this chapter; and

(2) Any oil pipeline filing or proceeding under this chapter or 49 CFR Chapter X and replaces the Interstate Commerce Commission General Rules of Practice (49 CFR part 1100) with respect to any oil pipeline filing or proceeding.

(b) *Exceptions.* (1) This part does not apply to investigations under part 1b of this chapter.

(2) If any provision of this part is inconsistent with any provision of another part of this chapter, the provision of this part is inapplicable and the provision of the other part governs to the extent of the inconsistency.

(3) If any provision of this part is inconsistent with any provision of 49 CFR Chapter X that is not otherwise replaced by this part or Commission rule or order, the provision of this part is inapplicable and the provision of 49 CFR Chapter X governs to the extent of the inconsistency.

(c) *Transitional provisions.* (1) This part applies to any filing submitted on or after and to any proceeding pending on or initiated after, August 26, 1982.

(2) A decisional authority may, in the interest of justice:

(i) Apply the appropriate provisions of the prior Rules of Practice and Procedure (18 CFR part 1) to any filing submitted after, or to any proceeding or part of a proceeding pending on August 26, 1982;

(ii) Apply the provisions of this part to any filing submitted, or any proceeding or part of a proceeding initiated, after April 28, 1982 but before August 26, 1982.

(d) [Reserved]

(e) *Waiver.* To the extent permitted by law, the Commission may, for good cause, waive any provision of this part or prescribe any alternative procedures that it determines to be appropriate.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 607, 65 FR 51234, Sept. 22, 1999]

not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of November 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail.

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