In the United States Court of Appeals for the Ninth Circuit

No. 13-73971

CRESCENT BAR CONDOMINIUM MASTER ASSOCIATION AND
CRESCENT BAR RECREATIONAL VEHICLE HOMEOWNERS ASSOCIATION,
Petitioners,

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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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 88 FERC ¶ 61,012 (1999).
Initial Order	*Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 143 FERC ¶ 61,046 (2013), ER 25.
Island	Crescent Bar Island
Island Residents	Crescent Bar Condominium Master Association and Crescent Bar Recreational Vehicle Homeowners Association
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
Project	Priest Rapids Hydroelectric Project No. 2114 (P-2114)
Public Utility District	Public Utility District No. 2 of Grant County, Washington
Rehearing Order	*Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 144 FERC ¶ 61,210 (2013), ER 1.
Relicensing Order	*Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 123 FERC ¶ 61,049 (2008), ER 899.
Shoreline Management Plan or Plan	Priest Rapids Hydroelectric Project Shoreline Management Plan

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

This case is about the use and occupancy of land licensed for hydroelectric development. The Federal Energy Regulatory Commission (Commission or FERC) considered and approved a Shoreline Management Plan (Shoreline Management Plan or Plan) for Priest Rapids Hydroelectric Project No. 2114 (Project). Public Utility District No. 2 of Grant County, Washington (Public Utility District) filed the Plan in compliance with a 2008 Commission order

granting it a new, 44-year license to operate the Project on the Columbia River in the State of Washington.

Petitioners Crescent Bar Condominium Master Association and Crescent Bar Recreational Vehicle Homeowners Association (collectively, Island Residents) protested the Shoreline Management Plan. They argued to the Commission that the Plan did not contemplate the continuation of Island Residents' long-term leases of residential property on Crescent Bar Island (Island), and was therefore inconsistent with the Public Utility District's project license and with Commission precedent permitting such use of project land. Island Residents further contended that the Commission's environmental analysis under the National Environmental Policy Act (NEPA) was insufficient and reached erroneous conclusions.

The Commission approved the Shoreline Management Plan, with minor modifications not at issue here, in the challenged orders. *Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 143 FERC ¶ 61,046 (2013) (Initial Order), ER 25.[1] The Commission found that the Shoreline Management Plan complied with the Federal Power Act, with Commission policy, and with the Public Utility District's project license. The Commission found that the issues concerning Island Residents' leases were the result of the Public Utility District's independent decisions, beyond the

[1] "ER" refers to the Excerpts of Record page number. "P" refers to the internal paragraph number within a FERC order.

scope of the Commission's consideration, and more properly considered in state or federal court. The Commission later denied Island Residents' request for rehearing. *Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 144 FERC ¶ 61,210 (2013) (Rehearing Order), ER 1.

Island Residents filed a petition for review before this Court. The questions presented on appeal are:

1. Are Island Residents aggrieved by, and do they have constitutional standing to challenge, the Commission orders presented for review, when the Commission found that their residential leases of project land are beyond the scope of Commission review of the Shoreline Management Plan?

2. Assuming jurisdiction, did the Commission reasonably determine that the Shoreline Management Plan was consistent with the Federal Power Act, 16 U.S.C. § 797(e), with established Commission policy concerning recreational development of project land, 18 C.F.R. § 2.7, and with Articles 419 and 420 of the project license?

3. Assuming jurisdiction, was the Commission's analysis of the Shoreline Management Plan under NEPA, 42 U.S.C §§ 4321, *et seq.*, sufficient to justify approval?

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are reproduced in the Addendum.

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the challenged orders under 16 U.S.C. § 825*l*(b) because Island Residents have not shown that they are aggrieved by the challenged orders or otherwise have standing to challenge the orders' conclusions. *See N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is aggrieved under the Federal Power Act if it satisfies constitutional and prudential requirements for standing). As explained *infra* in Part I of the Argument, Island Residents' alleged injury arises from the Public Utility District's decision to end its lease of the Island to the Port of Quincy, and not from the Commission's review of the Shoreline Management Plan in the challenged orders. Island Residents cannot establish standing because both causation and redressability depend on the independent actions of a third party. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires demonstration of injury, i.e., invasion of a legally protected interest that is fairly traceable to action of the defendant); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) (to establish standing, petitioner must show that there are no independent actions of third parties that

break the causal link between agency's action and petitioner's economic harm). Their claims are more appropriately pursued as a matter of contract or property law before another tribunal.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The Federal Power Act

The Federal Power Act (FPA), 16 U.S.C. §§ 791a, *et seq*., empowers the Commission to issue licenses for hydroelectric projects "necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water" over which Congress may regulate interstate commerce. *Id.* "The Commission operates, under the [Federal Power Act], a 'complete scheme of national regulation' intended to 'promote the comprehensive development of the water resources of the Nation,'" regarding the construction, operation, and maintenance of hydroelectric projects. *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009) (quoting *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946)).

In deciding whether to issue any license under this statute, the Commission must "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife

(including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). It is Commission policy to evaluate the recreational resources of all project applications and to "seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project." 18 C.F.R. § 2.7. Since 1963, the Commission has required applicants to submit a proposed recreation plan as part of their license application for an existing dam. *See* 18 C.F.R. § 4.51(f)(5). The Commission is empowered to require applicants, as a condition of receiving a project license, to modify their plans in order to ensure that they are consistent with a comprehensive plan for project uses including recreation. 16 U.S.C. § 803(a)(1)-(2).

In some cases, including this one, the Commission conditions a new or renewed hydroelectric license on the applicant's development, in consultation with other interested state and federal agencies, of a comprehensive shoreline management plan for project land. Shoreline management plans are developed at projects where the Commission determines that it is necessary to resolve potentially competing uses of land around a project reservoir. Rehearing Order at P 13 (citing *Pub. Serv. Co. of N.H.*, 119 FERC ¶ 61,170, at P 67 (2007)), ER 5; *see also Union Elec. Co.*, 137 FERC ¶ 61,114, at P 10 (2011) (same). For example,

when considering whether to require additional shoreline protection at a project, the Commission takes into account the current level of shoreline development, the likelihood of developmental pressure in the future, the kind and degree of resource protection and enhancement needed, and project economics. *Pub. Serv. Co. of N.H.*, 119 FERC ¶ 61,170, at P 67. Shoreline Management Plans are considered in post-license proceedings, and become part of the license after they have been approved. *Duke Power Co.*, 67 FERC ¶ 61,061, at 61,172 (1994).

B. The National Environmental Policy Act

The Commission's consideration of an application for a hydroelectric license triggers environmental review. *See* 42 U.S.C. § 4332(2)(C). NEPA sets out procedures for federal agencies to follow, to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, at 756-57 (2004) (citing *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 538 (1978)) (NEPA ensures a "'fully informed and well-considered decision, not necessarily the best'

decision"). An agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental assessment); *see, e.g., Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008) (summarizing regulations governing agency's determination whether an environmental impact statement is needed). Once the agency issues a finding of no significant impact, it has fulfilled NEPA's documentation requirements. *See, e.g., Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006) (citing 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13).

II. Licensing of the Priest Rapids Project

The Priest Rapids Hydroelectric Project is located on the mid-Columbia River, in portions of Grant, Yakima, Kittitas, Douglas, Benton, and Chelan Counties, Washington. The Project spans approximately 56 miles of the river, and it includes two hydroelectric dams: the Wanapum Dam and the Priest Rapids Dam, which together have generation capacity of 1,893 megawatts of electricity.

Excluding the reservoirs, the project area includes about 12,909 acres of land, which are owned by various federal, state, and private interests.

A. Island Residents' Use of Project Land

In 1955 the Commission's predecessor, the Federal Power Commission, granted the Public Utility District a 50-year license to construct and operate the Project. *Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 14 F.P.C. 1067 (1955). Crescent Bar Island, covering 60 acres, was formed by the construction of the Wanapum Dam. Initial Order at P 6, ER 26. The Public Utility District leased it to the Port of Quincy in 1962, for a 50-year period expiring in 2012. Approximately 50 percent of the developed portion of the Island is privately used by residential tenants, the result of a series of further subleases. *Id.* P 6 & n.4, ER 27.

In 1998, groups representing Island business lessees, condominium lessees, and recreational vehicle tenants filed complaints against the Public Utility District with the Commission. They claimed that the Public Utility District was violating the Federal Power Act because it had not applied for a license amendment to exclude the land underlying their homes and businesses, which they stated were unnecessary for project purposes, from the project boundary. The Commission dismissed the complaints, finding that "at least part" of the Island was needed for shoreline control and flowage (i.e., flooding for project operations), and anticipated revisiting the issue of excluding land from the project boundary during relicensing.

Pub. Util. Dist. No. 2 of Grant Cnty., Wash., 88 FERC ¶ 61,012 (1999) (Complaint Order), *reh'g denied*, 89 FERC ¶ 61,177 (1999).

On October 29, 2003, the Public Utility District filed its final application for a new license for the Project. The application included a draft shoreline management plan that provided for seven categories of land use, and that would have permitted additional development on the island such as marinas, docks, and a hiking trail. Initial Order at PP 10-11, ER 28-29.

Commission staff completed an Environmental Assessment, followed by a Final Environmental Impact Statement, that recommended no further development on the island except for a hiking trail. In its order granting the Public Utility District a new license for the Project, the Commission relied on the Environmental Impact Statement to find that the Island was a Washington Department of Fish and Game Riparian Priority Habitat, that the Island provided habitat for wintering bald eagles, and that further development on the Island posed the risks of habitat fragmentation, loss of riparian habitat and species, potential exclusion of public access to project land and water, and potential adverse effects on juvenile Chinook salmon. *Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 123 FERC ¶ 61,049, at P 127 (2008) (Relicensing Order), ER 916.

Article 419 of the new license required the Public Utility District to file for Commission approval a final Shoreline Management Plan to protect the scenic

quality of the mid-Columbia River. The license required the Public Utility District to consult, and to take into account the recommendations of, the U.S. Fish and Wildlife Service, Washington Department of Fish and Wildlife, Washington Recreation Conservation Office, Washington Department of Natural Resources, and the Wanapum Indians. The license further required that the Shoreline Management Plan include a land use classification system that identifies and describes seven land use classifications. Finally, the Shoreline Management Plan was to "contain a provision to protect and enhance Crescent Bar Island," and the Island was to be managed under two land use classifications: Planned Development and Conservation. Relicensing Order at P 128, Ordering Par. J, Article 419, ER 947-48. License Article 420 permits the Public Utility District to allow certain types of minor use and occupancy of project land and water, including items such as non-commercial boat docks and landscape plantings. All other uses of project land, including residential use, require prior Commission approval. *Id.* Ordering Par. J, Article 420, ER 947-50.

Following public outreach, the Public Utility District filed a proposed Shoreline Management Plan on March 2, 2010. The Shoreline Management Plan incorporated requirements of several license conditions, including conditions related to wildlife habitat management, recreation resource management, and water quality certifications. It proposed three land use classifications for the Project:

Project Facilities, Public Recreation Development, and Resource Management. The Public Utility District replaced its original land use classifications for the Island – Planned Development and Conservation – with the new classifications called Public Recreation Development and Resources Management. The Public Utility District indicated that it would improve public access when its lease with the Port of Quincy expired in 2012. Priest Rapids Hydroelectric Project Shoreline Management Plan at 4, ER 356.

B. Orders Presented for Review

The Commission approved the Shoreline Management Plan (with minor modifications not at issue here). The Commission found that the Shoreline Management Plan was consistent with the Federal Power Act and with Commission policy, and "in the public interest because it comprehensively manages the project shoreline in a manner that protects environmental and public recreation resources, preserves history and cultural resources, and protects scenic quality and aesthetic resources." Initial Order at P 1, ER 25.

In its ruling, the Commission evaluated the proposals in the Shoreline Management Plan that were of concern to Island Residents, i.e., to end residential use of the Island and to convert it to recreational use, and Island Residents' arguments that this plan would violate the Public Utility District's project license and Commission policy. *Id.* at PP 34-51, 76, ER 36-42, 50. The Commission

stated that it has not required licensees to permit private use of project land, and that long-term leasing of project land for private purposes is at odds with the Commission's policy of maximizing recreation at licensed projects. *Id.* at P 43, ER 39; Rehearing Order at P 9, ER 4. However, the Commission found that the dispute between Island Residents and the Public Utility District was outside the scope of its review, because the Commission had neither required the Public Utility District to renew the lease nor prohibited it from doing so; rather, the Public Utility District had independently determined that not renewing the lease was in the best interest of itself and its ratepayers. Initial Order at P 2, ER 25; Rehearing Order at P 9, ER 4.

Next the Commission considered Island Residents' arguments that Commission staff had inadequately and erroneously analyzed the environmental impacts of the Shoreline Management Plan under NEPA. The Commission found that its staff had appropriately prepared an Environmental Assessment rather than the Environmental Impact Statement that Island Residents suggest is necessary; that the Public Utility District had not proposed to remove existing buildings and build recreation facilities on the Island, so analysis of these possibilities was speculative and unnecessary; and that the Environmental Assessment enabled the Commission to take the "hard look" at the impact of the Shoreline Management

Plan that NEPA requires. Initial Order at PP 63-75, ER 48-53; Rehearing Order at PP 39-46, ER 21-24.

SUMMARY OF ARGUMENT

Island Residents fail to demonstrate that they have standing to challenge the Commission orders on appeal. The Commission has not ordered any particular action with respect to existing private facilities on Crescent Bar Island. All the Commission has done here is to approve a Shoreline Management Plan that ensures the future management of project land. Island Residents complain about the possible loss of their homes on the Island, but any such loss is the direct result of the Public Utility District's decision not to renew their lease, not of Commission action. As the Commission explained in the challenged orders, causes of action concerning property and lease rights are appropriately pursued in court – and Island Residents are doing exactly that. As Island Residents are seeking relief in federal district court, there is no need for this Court to intercede at this time.

Even if Island Residents have standing to pursue this appeal, their arguments lack merit. First, the Commission did not err in approving the Shoreline Management Plan. It is consistent with Federal Power Act section 10(a), 16 U.S.C. § 803(a), and with the Commission's regulations, 18 C.F.R. § 2.7, to reserve project land for public recreation, as the Public Utility District proposed to do. The Commission treated the Plan as a license amendment filing, consistent

with its established practice. And it was appropriate for the Commission to limit its review to the filing before it, and to refrain from looking past that filing to assess the Public Utility District's motivations for proposing to terminate the residential leases, as all parties agreed that this issue was appropriately considered in state or in federal court, not in Commission proceedings.

Second, with respect to the Commission's environmental review under the NEPA, Island Residents' specifications of error are grounded in the mistaken premise that the Public Utility District had proposed to remove structures from the Island and to build new recreation facilities. The record does not support this argument; rather, it shows that the Public Utility District did not make the same proposal to the Commission, and the Commission stated that it did not authorize such action. Because there was no proposal before the Commission to remove structures or to begin construction on the Island, the Commission cannot be said either to have improperly deferred its environmental review, or to have underestimated the impact of the Shoreline Management Plan on the human environment of the Island.

ARGUMENT

I. Island Residents Lack Standing to Challenge the Orders Before This Court

"Section 313 of the [Federal Power Act] 'limits judicial review to those parties who have been aggrieved by an order of the Commission.'" *City of*

Redding v. FERC, 693 F.3d 828, 835 (9th Cir. 2012) (citing 16 U.S.C. § 825*l*(b) and quoting *Port of Seattle v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007)). In addition, a party seeking judicial relief from a Commission decision must establish the constitutional requirements for standing. *Port of Seattle*, 499 F.3d at 1028. Constitutional standing requires that petitioners establish, at a minimum, injury in fact to a protected interest. *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The petitioner's "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *E.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). Island Residents have not made such a showing.

A. Island Residents Cannot Show Aggrievement or Injury-In-Fact

Island Residents' petition challenges the Commission's 2013 orders approving the Shoreline Management Plan. But their alleged injury stems not from the challenged orders, but from the Public Utility District's decision to end its lease of the Island to the Port of Quincy and, thus, their residential leases of Island land.

Island Residents trace controversy about their leases over four decades, from the 1970s until the time that the Shoreline Management Plan was *filed* with the Commission – not to its approval. Br. at 8-30. For example, they recount that as long ago as 1978 the Public Utility District "did not resubmit the lease agreements

for FERC's approval," Br. at 13; that it "considered not renewing its lease with the Port of Quincy as early as 2008," Initial Order at P 50, ER 41; that it "refused homeowners' requests to seek clarification regarding FERC's policy on residential use" in 2010, Br. at 28; and that it "voted to end homeowners' leases in 2012." Br. at 13, 28, 29. The Commission issued the first of the challenged orders on April 18, 2013 – five years after the Public Utility District began to consider ending its lease with the Port of Quincy, and more than one year after it voted to do so.

In the challenged orders, the Commission noted that it "appears that the only matter that [Island Residents] dispute is the term of the lease and whether [the Public Utility District] has carried out its obligations in good faith. These issues, all parties agree, should be determined by a court, not the Commission." Rehearing Order at P 24, ER 10. *See also* Initial Order at P 50 ("The Commission has no jurisdiction to rule on private lease terms . . . such matters must be resolved in an appropriate court."), ER 41. Indeed, Island Residents have engaged the Public Utility District, the Port of Quincy, and other defendants in litigation before the United States District Court for the Eastern District of Washington, concerning the decision not to extend the lease.[2] The litigation – in which Island Residents seek to enforce their claimed leasehold rights to Island land, or alternatively claim

[2] For simplicity the Commission will maintain the shorthand "Island Residents" and "Public Utility District" to refer to the plaintiffs and defendants before the District Court, but the parties to that litigation and to this appeal are not identical.

money damages – commenced in January 2011, more than two years before the Commission issued the first of the challenged orders. *See* Br. at 7-8, 66 (related ligitation). In August 2012, the Public Utility District brought this dispute to this Court's attention in the form of an interlocutory appeal (Nos. 12-35639 and 12-35700) of the District Court's order denying the Public Utility District's motion for binding arbitration. This court denied the interlocutory appeal.

These events all suggest that the dispute regarding future residential use of the Island does not involve, or only tangentially involves, the Commission. Accordingly, the challenged orders did not inflict immediate or irreparable injury on Island Residents, worthy of sustaining a challenge to the Commission's orders. *See N.Y. Reg'l Interconnect*, 634 F.3d 581, 586 (aggrievement and standing require a direct stake in the outcome of the litigation); *Ass'n of Pub. Agency Customers*, 733 F.3d 939, 953 (for standing, petitioner must show that no independent actions of third parties break the causal link between agency action and petitioner's economic harm); *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141-42 (9th Cir. 2013) (same); *id.* at 1146 (redressability requires "a substantial likelihood that the injury will be redressed by a favorable court decision.").

B. Island Residents Cannot Show a Causal Connection Between the Loss of Their Leases and the Challenged Orders

To establish constitutional standing, a petitioner must show "a causal connection between the injury and the conduct complained of – the injury has to be

'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560; *see also id.* at 562 (increased burden on petitioner when standing is based on "the government's allegedly unlawful regulation (or lack of regulation) of someone else"). Island Residents allege analytical errors in the challenged orders, but they cannot and do not argue that the loss of their leasehold interests in Island property is a direct consequence of those orders.

As the Commission found, the issue of continued residential use of the Island was not before it. Initial Order at P 44, ER 39; Rehearing Order at P 15, ER 7. The Public Utility District proposed to devote the Island to recreational use and to take measures to protect and enhance the scenic quality of the Island "*after the existing lease with the Port of Quincy expires in 2012.*" Initial Order at P 34 (quoting Shoreline Management Plan at 4, ER 356) (emphasis added), ER 36. The Public Utility District did not propose to devote any portion of the Island to residential use.

The Commission found that because the Public Utility District did not propose to extend its lease with the Port of Quincy, "whether, or under what conditions, we would consider approving the continued private residential use of the [I]sland is not before us. We have not ordered [the Public Utility District] to not renew the leases; it has *independently* determined that doing so is in the best

interest of it and its ratepayers." Initial Order at P 44 (emphasis added), ER 39. The Commission restated this finding on rehearing:

> Our [Initial] Order . . . was explicit in holding that the 'disagreement between [the Public Utility District] and private entities as to whether [the Public Utility District] must renew or extend a lease that allows the private entities to maintain facilities on project lands . . . is outside the scope of our review.' Had [the Public Utility District] proposed to continue the lease, we would have had to decide whether private use of Crescent Bar Island was consistent with project purposes. Because it elected not to do so, and because we have no right to impose such a requirement, that issue does not arise here. Nothing in our approval of the [Shoreline Management Plan] dictates the result of the dispute over the lease or imposes any requirements – proscriptive or prescriptive – with respect to the disposition of facilities on Crescent Bar Island.

Rehearing Order at P 15, ER 7; *see also id.* P 31 (Public Utility District's own decision, and not the Commission's mandate, to discontinue private residential use of the Island), ER 15. The Commission's orders made no findings that would have caused the loss of Island Residents' leasehold interests, but in fact were careful to make *no* such findings. Island Residents therefore cannot fairly trace their alleged injury to these orders. *See, e.g., Ass'n of Pub. Agency Customers*, 733 F.3d at 953 (9th Cir. 2013) (no standing if independent action of third party breaks the causal link between agency action and petitioner's economic harm); *Wash. Envtl. Council*, 732 F.3d at 1141-42 (same); *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (same).

B. Island Residents Cannot Show Redressability

In order to demonstrate standing, Island Residents must show that there is "a substantial likelihood that the injury will be redressed by a favorable judicial decision." *Wash. Envtl. Council v. Bellon*, 732 F.3d at 1146. Island Residents allege procedural errors in the Commission's analysis of the Shoreline Management Plan. They have not shown that reversal of the challenged orders is likely to bring them the result that they seek. They have, however, asked the District Court to find that they are entitled to specific performance of an extended lease termination date, and of an alleged promise that the Public Utility District would negotiate a new lease with Island Residents; injunctive relief prohibiting their eviction; or, in the alternative, money damages. Complaint at 24-28, No. CV-11-023-JLQ (E.D. Wash. Jan. 19, 2011).

Before this Court, Island Residents first seek remand of the Shoreline Management Plan to the Public Utility District for further public process. Br. at 2, 64. In order to grant this request for relief, this Court would have to find error in the challenged orders that is grounded in their assessment of the Public Utility District's process to date. But as noted *supra*, the challenged orders do not address the lease, which is Island Residents' principal concern; nor do they concern the Public Utility District's outreach to stakeholders other than interested government agencies and Indian tribes. More to the point, Island Residents do not indicate that

the Public Utility District would have anything but "unfettered choices" in addressing a remand of the Shoreline Management Plan, *see Lujan*, 504 U.S. at 542. They do not establish that a favorable decision from this Court will redress the loss of their leases. But they have asked the District Court for relief that could enable them to keep their homes.

Island Residents next seek a more detailed explanation of the Commission's decision to accept the Shoreline Management Plan, including a full Environmental Impact Statement. Br. at 64. They allege that the loss of their leases raises significant questions about socioeconomic impacts, Br. at 60-62. They do not say how considering such impacts in an Environmental Impact Statement would lead the Commission to a different conclusion about issues that are, in any event, beyond the scope of this case.

The Public Utility District owns the Island, holds the project license, leased the land to the Port of Quincy, declined to extend that lease, and eventually proposed the Shoreline Management Plan to the Commission. The Commission's role was limited to reviewing that plan. The Commission was not directly involved in, was not presented with, did not evaluate, and did not decide issues concerning future private use of the Island. For these reasons, Island Residents have not established, nor can they establish, that they are aggrieved by the Commission's orders within the meaning of section 313 of the Federal Power Act,

16 U.S.C. § 825*l*(b), or otherwise have standing to pursue their claims before this Court. The substance of their claims is more properly addressed before the District Court, which Island Residents have presented with requests for relief grounded in the lease.

II. The Commission Properly Approved the Shoreline Management Plan as Compliant With the Federal Power Act and Commission Policy

Assuming jurisdiction, the Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is "highly deferential." *Cal. Trout* at 1012. "[A]gency decisions may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)). The Court "may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Under the Federal Power Act, "'[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.'" *Id.* (quoting Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b)). Substantial evidence "constitutes more than a mere scintilla. It means such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." *Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008).

FERC's construction of the Federal Power Act is reviewed under the well-settled *Chevron* analysis. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 914 (9th Cir. 2005). If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Bonneville*, 422 F.3d at 914 (same). If the statute is silent or ambiguous, the Court "must defer to a 'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844); *see also Bonneville*, 422 F.3d at 914 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Similarly, the Commission's interpretation of its own regulations, as well as the terms and conditions of licenses it has granted, are entitled to *Chevron*-like deference. *See McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999) (properly promulgated regulations are entitled to full *Chevron* deference); *City of Seattle v. FERC*, 923 F.2d 713, 716 (9th Cir. 1991) (FERC interpretation of hydroelectric license terms entitled to deference).

A. Commission Policy Encourages Maximizing Recreational Use of Project Land

Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), requires that Commission-licensed hydropower projects be adapted "to a comprehensive plan for improving or developing a waterway or waterways for . . . beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes." 16 U.S.C. § 803(a)(1). In deciding whether to issue any license under this statute, the Commission must "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e).

Over time "the Commission, starting with a practice of considering project recreational possibilities on a case-by-case basis at the time of initial application, has gradually developed a comprehensive general pattern." *Recreational Development at Licensed Projects*, Order No. 313, 34 F.P.C. 1546, 1547 (1965). The Commission has required every applicant for a major project license to submit a recreation plan as part of its application since 1963. *Id.* (citing *License Applications – Revision of Regulations*, Order No. 260-A, 29 F.P.C. 777 (1963)). In 1965, it added section 2.7 to its regulations, stating that the Commission will

"seek, within its authority, the ultimate development" of recreational resources of all projects under federal license. 18 C.F.R. § 2.7.

Project land is licensee-held land within the project boundary that may be needed for project purposes – in this case, "the safe operation and maintenance of the project and other purposes, such as recreation, shoreline control, and protection of environmental resources." Relicensing Order at P 17, ER 904. Land should be excluded from the project boundary if it is unneeded for project purposes. Complaint Order at 61,032; *see also Union Elec. Co.*, 137 FERC ¶ 61,114, at P 24-25 (same).

Although Island Residents contend that there has been no determination that the leased property is necessary for recreation (Br. at 42), the Commission has made this finding in its orders concerning the Project. When Island Residents and other parties petitioned to have the Island removed from the project boundary in 1999, the Commission held that "at least part" of the Island was needed for the project purposes of flowage and shoreline control. Complaint Order at 61,032-33. The Commission also expressed concern that "removing the privately developed lands from the project could permit additional development that in turn would adversely and permanently affect public recreation and aesthetic values." *Id.* at 61,033. Because of the need to protect flowage, recreation, and aesthetic values at the project, the Commission found no basis to conclude that the Public Utility

District had violated the Federal Power Act or its license by not seeking to exclude the Island from the project boundary. *Id; see also* Rehearing Order at P 14 (describing uses of the Island), ER 6. In its 2008 Relicensing Order, the Commission again found that the Island is needed for project purposes. This time the Commission conclusively stated that those purposes include "flowage, public recreation, and aesthetic values." Relicensing Order at P 127 (describing findings of Environmental Impact Statement prepared during relicensing process), ER 916. *See also* Initial Order at P 12 (same), ER 29.

B. Reserving the Island for Public Recreation Is Consistent With the Project License

Island Residents contend that the Shoreline Management Plan, which proposes three categories of land use, is inconsistent with Article 419 of the project license, which required a seven-category land use plan. They argue that these changes to the Public Utility District's land use classifications are material and reflect a new public access policy. They contend that the Commission erred in approving the Shoreline Management Plan without either resolving this inconsistency or requiring the Public Utility District to apply for an amendment to Article 419 of the project license. Br. at 47-49. Both arguments are unavailing.

A license amendment is necessary when an applicant seeks to "[m]ake a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an

alteration of the license." 18 C.F.R. § 4.200. Island Residents fail to understand that the Commission's evaluation of a Shoreline Management Plan is a license amendment proceeding. Rehearing Order at P 34, ER 15-16. *See also Duke Power Co.*, 67 FERC ¶ 61,061, at 61,172 (1994) ("The Commission rejects the notion that Duke Power's shoreline management plan . . . is not a license amendment. The plan, when approved by the Commission, becomes a part of Duke Power's license and, as such, is clearly an amendment thereto."). The challenged orders carefully considered the change from seven land use classifications to three, and reached a reasoned decision that the proposal was consistent with the requirements of the license. *See* Initial Order at P 45-48, ER 39-41; Rehearing Order at P 33-34, ER 15-16.

Island Residents argue that the Shoreline Management Plan was not presented as a license amendment and that it did not indicate why the Public Utility District had changed its public access policy and proposed to change the use of the Island. They add that the Commission's public notice of the Shoreline Management Plan's filing was deficient because it did not say that there were substantive changes in the Shoreline Management Plan that might affect homeowners' rights. Br. at 47-49. But just because a licensee "did not style its shoreline management plan filing a request to amend its license and may not have complied with the requirements of 18 C.F.R. § 4.201 (amendment applications)

does not alter this fact" that the filing is a license amendment. *Duke Power*, 67 FERC ¶ 61,061, at 61,172. *See also* Rehearing Order at P 34, ER 16 (Shoreline Management Plan proceeding is a license amendment proceeding). The Commission gave public notice of the Shoreline Management Plan accordingly, as an application for amendment of a license. Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene, and Protests, ER 208-09; Rehearing Order at P 34 (describing notice), ER 16.

Further, as the challenged orders explain, Article 419 required the Public Utility District to develop its final Shoreline Management Plan in consultation with the United States Fish and Wildlife Service, Washington Department of Fish and Wildlife, Washington Recreation Conservation Office, Washington Department of Natural Resources, and the Wanapum Indians. Article 419 also required the Public Utility District to provide documentation of such consultation, along with copies of comments and recommendations on the completed plan after it has been presented to these entities, and specific descriptions of how the Plan accounts for those comments. The consultation aspect of the compliance requirement suggested that the final Shoreline Management Plan might differ from the one originally submitted. Initial Order at PP 45-48, ER 39-41 (discussing consultation with U.S. Fish and Wildlife Service and Washington Department of Fish and Wildlife). Indeed, two agency stakeholders' comments on the Shoreline Management Plan

indicate support for the change from seven land use classifications to three. *Id.* P 46, ER 40.

C. Residential Use of Project Land Requires Prior Commission Review and Approval, and the Public Utility District Has Not Sought Approval

Hydroelectric licenses include a standard land use article, which the Commission included in the Public Utility District's project license at Article 420. Relicensing Order at P 128, Ordering Par. J, Article 420, ER 948-51. The standard land use article allows licensees to authorize minor, non-project uses of project land, such as landscape plantings, residential boat docks, utility distribution lines, and embankments or bulkheads to protect the shoreline. *Alabama Power Co.*, 145 FERC ¶ 61,262, at P 3 (2013). The licensee must request prior Commission approval for non-project uses not covered by the standard land use article. *Id.* The licensee has an overall obligation to ensure that all non-project uses and occupancies of project land and water it authorizes are consistent with the purposes of the project, including public recreation and resource protection. *Id.* P 35.

As Island Residents contend, and as the Commission's orders acknowledge, residential development on project land is not prohibited, *per se*, but is not encouraged either: "It is generally best if private development on project lands is kept to a minimum." Rehearing Order at P 19, ER 8. Accordingly, residential use of project land is not a minor non-project activity that a lessee can permit. Long-

term leases of land within project boundaries are in conflict with the Commission's policy of maximizing public recreation at licensed projects. Complaint Order at 61,033 (citing *Cent. Me. Power Co.*, 75 FERC ¶ 61,052 (1996), and *East Bay Mun. Util. Dist.*, 64 FERC ¶ 61,043, *order on reh'g*, 66 FERC ¶ 61,199 (1994)). Accordingly, since the Commission issued Order No. 313, governing recreational use of projects land, licensees have been required to seek the Commission's permission before they enter into a long-term lease of project land. Complaint Order at 61,030-31 (citing Order No. 313, 34 F.P.C. at 1549-50).

The Public Utility District submitted the lease for approval in 1972, but, under then-current policy, the Commission was unable to approve it because it extended past the term of the project license. Complaint Order at 61,031. The Commission stated that it "wanted maximum flexibility, on relicensing, to meet the comprehensive development requirement" of the Federal Power Act. *Id.* To date the Commission has neither approved nor disapproved the Public Utility District's lease of the Island to the Port of Quincy.

But Article 420 provides an avenue for the Public Utility District to convey an interest in project land, including a lease, if it chooses to do so. It requires the Public Utility District to consult federal and state fish and wildlife or recreation agencies before making a conveyance, and to ensure that the conveyance is not inconsistent with recreational purposes. Relicensing Order at P 128, Ordering

Par. J, Article 420, ER 948-51. Some licensees have chosen to satisfy these requirements and have obtained Commission approval of conveyances of land. *See generally Ala. Power Co.*, 145 FERC ¶ 61,262 (2013) (noting approval of interested state and federal agencies before authorizing construction of a boat ramp, two pavilions, and a gravel trail on project land); *Pub. Util. Dist. No. 1 of Chelan Cnty., Wash.*, 139 FERC ¶ 61,118, at PP 12-13 (2012) (describing utility's receipt of four permits and one lease, from various federal, state and local agencies, necessary to construct a community boat dock).

The Public Utility District has not taken such action. It has, instead, noted to the Commission that its "original lease was developed with the intent to provide for public recreation facilities and commerce; however, subsequent subleases have resulted in private development and use occurring on nearly half the developed portion of Crescent Bar Island." Rehearing Order at P 30 (quoting October 27, 2010 Filing at 1), ER 14. The Public Utility District expressed substantial concerns about compliance with local regulations if it continued to allow residential use of the Island. *See id.* P 29 (quoting Public Utility District's concerns about fire safety, emergency vehicle access, and wastewater treatment), ER 12-14. Therefore, to the extent that Island Residents urged FERC to understand the reasons for the Public Utility District's decision not to renew the lease, the record showed that the Public Utility District "made an independent

decision with respect to its treatment of private facilities on Crescent Bar Island and had a number of substantial concerns that militated against continuing to allow private control of Crescent Bar Island." *Id.* P 29.

Island Residents rely on *Union Electric* to argue that once it became clear that Island Residents' claim to their leases after 2012 was unsettled, the Commission should have remanded the Shoreline Management Plan to the Public Utility District, so that the latter could resolve its dispute with Island Residents. Br. at 38 (citing *Union Electric Co.*, 137 FERC ¶ 61,114). But as the Commission's orders established, *see* Rehearing Order at PP 23-24, ER 9-10, the situation presented in *Union Electric* is not like the situation at hand. *Union Electric* involved the efforts of a licensee, Ameren, to address in its Shoreline Management Plan the presence of as many as 4,000 unauthorized structures that had been built over a period of 75 years. *Union Elec. Co.*, 137 FERC ¶ 61,114, at P 12. Some of those structures were thought to be encroachments, "structures built by entities on or over Ameren's property in violation of Ameren's property rights and without Ameren's consent." *Id.* P 21. In the course of evaluating Ameren's proposed Shoreline Management Plan, the Commission approved Ameren's proposal to re-evaluate the project boundary in order to ensure that the boundary encompassed only land needed for project purposes, before Ameren took action to

address the non-conforming status of the structures built on project land. *Id.* PP 20-21, 27.

By contrast, here the Commission examined the project boundary in 1999, and again during relicensing, and confirmed that the Island is needed for project purposes and must remain within the boundary. *See* Rehearing Order at P 24, ER 10; Initial Order at P 12, ER 29; Relicensing Order at P 127, ER 916; Complaint Order at 61,033. Island Residents do not explain why they expect a different result if the Shoreline Management Plan is remanded to the Public Utility District.

In short, while Island Residents contend that the Commission should have accounted for the dispute between themselves and the Public Utility District in its public notice and in its analysis of the Shoreline Management Plan, the Commission had no reason to do so. The Public Utility District presented a plan that complied with its license and with Commission policy favoring recreational use of project land. The Commission found that the issue of the lease was outside the scope of the case, and properly considered before a state or federal court rather than in the Shoreline Management Plan proceeding. Moreover, to any extent the Commission may have questioned the Public Utility District's motivations for ending its lease of Island land instead of seeking approval for it, the record included a reasonable explanation for the Public Utility District's decision. *See* Rehearing Order at P 29, ER 12-14 (quoting Public Utility District's explanation

that Island infrastructure needs substantial upgrades to meet local health and safety regulations).

III. The Commission's Analysis of the Shoreline Management Plan Met the Requirements of NEPA

NEPA, 42 U.S.C. §§ 4321, *et seq.*, requires agencies that propose a major federal action significantly affecting the quality of the human environment to prepare a statement detailing the environmental impact of the action contemplated. 42 U.S.C. § 4332(2)(C). It is well-settled that agencies must take a "hard look" at the environmental consequences of their actions. *E.g.*, *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008).

As regulations implementing this responsibility require, Commission staff performed an Environmental Assessment of the proposed Shoreline Management Plan. *See* 40 C.F.R § 1501.3-.4, 1508.9 (Council on Environmental Quality regulations defining Environmental Assessment and explaining when to prepare one); 18 C.F.R § 380.5(b)(6) (Commission's supplemental regulation). The Environmental Assessment is used to provide evidence and analysis for determining whether to prepare an Environmental Impact Statement or a finding of no significant impact. 40 C.F.R. § 1508.9; *see also LaFlamme v. FERC*, 852 F.2d 389, 398-99 (9th Cir. 1988). The latter finding means that the proposed action will not have a significant effect on the human environment. 40 C.F.R. § 1508.13.

The Environmental Assessment here identified and analyzed effects of the Shoreline Management plan on water quality, fisheries, terrestrial, threatened and endangered species, recreation, land use, and socioeconomic and cultural resources, and specifically considered the impact of the Shoreline Management Plan on the Island in many of these categories. Environmental Assessment at 42-47 (wastewater and effect on water of demolishing structures), ER 88-93; 56-58 (wildlife), ER 102-03; 62-68 (recreation), ER 108-14; and 74-97 (socioeconomics), ER 122-43. It concluded, and the Commission agreed, that the Shoreline Management Plan had no significant impact on the human environment for purposes of NEPA. *Id.* at 98, ER 144; Initial Order at P 69 ("We conclude that the [Environmental Assessment] provides all the information necessary for us to take a hard look at the proposed action."), ER 47. Accordingly, the Environmental Assessment included a finding of no significant impact, and stated that implementation of the Shoreline Management Plan, with minor staff-recommended measures, would not constitute a major federal action significantly affecting the human environment. Environmental Assessment at 98, ER 144.

Island Residents challenge the Commission's review of the Shoreline Management Plan on two grounds. First, they claim that the Commission improperly deferred its analysis of the environmental impact of removing homes from the Island and constructing recreational facilities in their place. Second, they

argue that the Commission did not convincingly explain why the Shoreline Management Plan would have only insignificant effects on the Island.

Both arguments are grounded in the erroneous premise that the Public Utility District had proposed to physically remove existing structures from the Island, and to build new recreational facilities, and that the Commission considered such an action. The record demonstrates that the Public Utility District did not file a proposal to do either one, in part because litigation surrounding the lease extension made it impossible for the Public Utility District to plan the Island's future. Accordingly, the Commission was not required to study the impacts of such action.

A. Standard of Review

Agency actions under NEPA are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). S*ee also, e.g.*, *Tri-Valley CAREs v. Dep't of Energy*, 671 F.3d 1113, 1123 (9th Cir. 2012); *Lands Council*, 537 F.3d at 987. The Court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency . . . ." *Lands Council*, 537 F.3d at 987.

An agency is required to prepare an Environmental Impact Statement if "substantial questions are raised as to whether a project . . . *may* cause significant

degradation of some human environmental factor." *LaFlamme* 852 F.2d at 397 (quoting *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980)). The court reviews an agency determination not to file an Environmental Impact Statement by considering whether the agency has reasonably concluded that the project will have no significant environmental consequences. *Id.* The court will not reverse an agency's determination that a particular project does not require the preparation of an Environmental Impact Statement if the determination is "fully informed and well-considered." *Id.* (quoting *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986)).

B. The Public Utility District Did Not Propose to Remove Homes from the Island

Island Residents begin their NEPA challenges from the erroneous premise that the Public Utility District has proposed to "physically demolish hundreds of homes and to construct public recreation facilities in their place." Br. at 53. They admit that that the Public Utility District "has not yet submitted specific work details and completion deadlines for the new recreation facilities on the Island." *Id.* at 55. The Commission found that the Public Utility District "could propose to retain the structures, to remove some part of them, or to remove them all, and could select a wide variety of methods for accomplishing these ends . . . and there is no way for us to study unknowns." Rehearing Order at P 39, 43, ER 18-19, 20. Yet Island Residents contend that the Commission improperly deferred its

environmental review of the demolition and construction, and that some assertions in the Environmental Assessment were conclusory and unsupported. Br. at 57-59. Their arguments fail because the Commission was not required to engage in speculative environmental analysis. *See Tri-Valley CAREs*, 671 F.3d at 1129 ("The purpose of an [Environmental Assessment] is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment.").

Island Residents point to statements in April 2010, October 2010, and December 2011 Public Utility District filings that they say demonstrate the Public Utility District's intent to demolish the structures on the Island. Br. at 53-54 (citing ER 248, 275, 291). Those filings responded to a Commission request for information about the Public Utility District's "intended proposals" for improving public recreation access and use, and enhancing wildlife habitat and scenic quality, of Crescent Bar Island after the leases expired in 2012. *See* March 10, 2010 Commission Staff Letter, ER 214.

The April 2010 filing included an "initial plan and schedule" for the Island. *See* Response of Public Utility District to March 10, 2010 Additional Information Request, ER 287-88. The initial plan refers to requiring that recreational vehicles and associated improvements be removed from the Island, and condominium units vacated. But it is marked "DRAFT," indicating its non-finality, and it does not say

what the Public Utility District plans to do with vacated structures. *Id.* at Plan and Schedule to Determine Interim Compliance Measures and Future Enhancements on Crescent Bar Island at 2, ER 291. The October 26, 2010 filing, which includes the final plan for the Island, refers only to providing information to recreational vehicle owners about mobile home movers, permits that may be required for removing their vehicles, "and demolition/disposal and/or relocation options within Washington State." Final Plan and Schedule for Crescent Bar Island at 13, ER 275. It does not say that the Public Utility District intends to do anything more than provide information. Further, the plan notes that due to "many uncertainties associated with existing and future site conditions," the public recreation and wildlife enhancement measures are subject to refinement, and that "more in-depth site analysis and inventory will be performed . . . on private leased areas after the residential and commercial areas are vacated . . . ." *Id.* at 4, ER 266.

Finally, the December 21, 2011 status update indicates that it is unclear when the Public Utility District will regain possession and control of the Island, due in part to the ongoing litigation before the District Court. In light of this uncertainty, the Public Utility District "has taken the approach to work with individual [recreational vehicle] unit owners to provide information and advisory support to aid in their *voluntary* removal of personal property." Progress Report on Final Plan and Schedule for Crescent Bar Island at 10 (emphasis added), ER

247. The report says that to minimize public closures to recreation, on-island demolition and construction need to start as soon as possible; however, it appeared that delays "may be unavoidable due to the lease transition and legal issues previously described." *Id.* at 11, ER 248.

None of this rises to a concrete proposal to demolish homes or to construct public recreation facilities, and the Commission found that its approval of the Shoreline Management Plan did not authorize the Public Utility District to take any action with regard to existing structures. Rehearing Order at P 39, ER 18. Island Residents' arguments that the Commission has delayed review therefore are incorrect. An agency is required to begin an Environmental Impact Statement "as close as possible to the time the agency is developing or is presented with a proposal." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785 (9th Cir. 2006) (quoting 40 C.F.R. § 1502.5). In the absence of a proposal, the Commission reasonably determined that it was not required to study the possibility that structures would be demolished or built. Initial Order at P 71, ER 47 (Shoreline Management Plan does not include any final plan for removing private structures); Rehearing Order at 39, ER 19 (in the absence of a proposal, the environmental analysis Island Residents request would require "pure speculation"). NEPA does not require speculative analysis. *See No GWEN Alliance*, 855 F.2d 1380, 1386

(9th Cir. 1988) (speculative scenarios need not be discussed in environmental impact statement).

C. The Commission Appropriately Justified Its Finding of No Significant Impact

Island Residents contend that the Commission should have prepared an Environmental Impact Statement because they have raised substantial questions about the adverse socioeconomic effects of the Shoreline Management Plan on Island homeowners. They again cite "significant physical disturbance to the environment associated with eliminating residences and replacing them with recreational facilities." Br. at 61. They argue that the effects of the Shoreline Management Plan on the human environment are likely to be highly controversial, and that they have raised significant questions about adverse effects of island closures and demolition and construction activities. Br. at 62, 63 (citing 40 C.F.R. § 1508.27(b)(4)).

As noted above, it is incorrect to assume that structures will be removed from the Island, or that there will be construction in the future, because the Public Utility District has not proposed these activities. This leaves only the argument that the Shoreline Management Plan requires further environmental process because it is controversial.

The Shoreline Management Plan was protested before the Commission only to the extent that it reflects the Public Utility District's decision to end its lease

with the Port of Quincy; no other controversy has resulted from its filing or its acceptance. *See* Initial Order at P 2, ER 25 (lease dispute is the only contested matter, and it is outside the scope of the Commission's review). In addition to public controversy, the Commission must consider nine other elements in evaluating the intensity of impacts, from public safety to effects on endangered species. 40 C.F.R. § 1508.27(b)(4). The Commission's detailed assessment of the Plan yielded no significant questions. *See* Initial Order at P 65, ER 46 (finding that the Shoreline Management Plan would "protect water quality, fisheries, terrestrial resources, threatened and endangered species, recreation, cultural resources, land use and socioeconomics, while providing increased opportunities for public access to project lands and waters."). "'[E]conomic and social effects are not intended by themselves to require preparation of an environmental impact statement.'" *Id.* P 65, ER 46 (quoting 40 C.F.R § 1508.14). Accordingly, the Commission reached a reasoned conclusion that the Shoreline Management Plan would have no significant impact, and that an Environmental Impact Statement was not required.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of standing and aggrievement. Otherwise, the petition should be denied on the merits and the Commission's orders should be upheld in all respects.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Commission states that it is not aware of any case related to this one, other than the case identified in Island Residents' Statement of Related Cases.

Respectfully submitted,

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April 30, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 10,049 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Elizabeth Evans Rylander
Elizabeth Evans Rylander

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

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

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

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

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

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

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

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

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

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

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

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of ma-

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

terial fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

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

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, §4, 41 Stat. 1065; June 23, 1930, ch. 572, §2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; Pub. L. 97–375, title II, §212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, §3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, §241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109–58, which directed amendment of subsec. (e) by inserting after ''adequate protection and utilization of such reservation.'' at end of first proviso ''The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.'', was executed by making the insertion after ''adequate protection and utilization of such reservation:'' at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99–495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of environmental quality.

1982—Subsec. (d). Pub. L. 97–375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, §202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, §202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, §202, redesignated subsec. (c) as (d) and substituted ''3d day of January'' for ''first Monday in December'' in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, §202, redesignated subsec. (d) as (e) and substituted ''streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations

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

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''.

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

§ 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.

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

PART 2—GENERAL POLICY AND INTERPRETATIONS

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS OF THE COMMISSION

Sec.

2.1 Initial notice; service; and information copies of formal documents.
2.1a Public suggestions, comments, proposals on substantial prospective regulatory issues and problems.
2.1b Availability in contested cases of information acquired by staff investigation.
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STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE FEDERAL POWER ACT

2.2 Transmission lines.
2.4 Suspension of rate schedules.
2.7 Recreational development at licensed projects.
2.8 [Reserved]
2.9 Conditions in preliminary permits and licenses—list of and citations to ''P—'' and ''L—'' forms.
2.12 Calculation of taxes for property of public utilities and licensees constructed or acquired after January 1, 1970.
2.13 Design and construction.
2.15 Specified reasonable rate of return.
2.17 Price discrimination and anticompetitive effect (price squeeze issue).
2.18 Phased electric rate increase filings.
2.19 State and Federal comprehensive plans.
2.20 Good faith requests for transmission services and good faith responses by transmitting utilities.
2.21 Regional Transmission Groups.
2.22 Pricing policy for transmission services provided under the Federal Power Act.
2.23 Use of reserved authority in hydropower licenses to ameliorate cumulative impacts.
2.24 Project decommissioning at relicensing.
2.25 Ratemaking treatment of the cost of emissions allowances in coordination transactions.
2.26 Policies concerning review of applications under section 203.

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE NATURAL GAS ACT

2.51 [Reserved]
2.52 Suspension of rate schedules.
2.55 Definition of terms used in section 7(c).
2.57 Temporary certificates—pipeline companies.
2.60 Facilities and activities during an emergency—accounting treatment of defense-related expenditures.
2.67 Calculation of taxes for property of pipeline companies constructed or acquired after January 1, 1970.
2.69 [Reserved]
2.76 Regulatory treatment of payments made in lieu of take-or-pay obligations.
2.78 Utilization and conservation of natural resources—natural gas.

STATEMENT OF GENERAL POLICY TO IMPLEMENT PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

2.80 Detailed environmental statement.

STATEMENT OF GENERAL POLICY TO IMPLEMENT THE ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED, AND EXECUTIVE ORDERS 11615 AND 11627

2.100–2.102 [Reserved]
2.103 Statement of policy respecting take or pay provisions in gas purchase contracts.
2.104 Mechanisms for passthrough of pipeline take-or-pay buyout and buydown costs.
2.105 Gas supply charges.

RULES OF GENERAL APPLICABILITY

2.201 [Reserved]

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE NATURAL GAS POLICY ACT OF 1978

2.300 Statement of policy concerning allegations of fraud, abuse, or similar grounds under section 601(c) of the NGPA.

STATEMENT OF INTERPRETATION UNDER THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

2.400 Statement of interpretation of waste concerning natural gas as the primary energy source for qualifying small power production facilities.

the Federal department having supervision over the lands or waterways involved.

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

§ 2.4 Suspension of rate schedules.

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

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

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

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

(1) Increases.

(2) Reductions.

(3) Discriminatory changes.

(4) Cancellation or notice of termination.

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

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

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

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

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

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

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

§ 2.7 Recreational development at licensed projects.

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

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

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

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

(d) To encourage governmental agencies and private interests, such as operators of user-fee facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.

(e) To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and

maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

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

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

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

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

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

§ 2.8 [Reserved]

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

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

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

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

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

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

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

(4) *Non-Federal lands.* For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:

(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired or to be acquired by easement or lease.

[Order 184, 46 FR 55936, Nov. 13, 1981; 48 FR 4459, Feb. 1, 1983, as amended by Order 413, 50 FR 11684, Mar. 25, 1985; Order 464, 52 FR 5449, Feb. 23, 1987; Order 540, 57 FR 21737, May 22, 1992; Order 2002, 68 FR 51119, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 63194, Nov. 7, 2003; 68 FR 69957, Dec. 16, 2003; Order 699, 72 FR 45324, Aug. 14, 2007]

Subpart F—Application for License for Major Project—Existing Dam

AUTHORITY: Federal Power Act, as amended (16 U.S.C. 792–828c); Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601–2645); Department of Energy Organization Act (42 U.S.C. 7101–7352); E.O. 12009, 42 FR 46267; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.).*

§ 4.50 Applicability.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, the provisions of this subpart apply to any application for either an initial license or new license for a major project—existing dam that is proposed to have a total installed capacity of more than 5 megawatts.

(2) This subpart does not apply to any major project—existing dam (*see* § 4.40) that is proposed to entail or include:

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

(ii) Any new development or change in project operation that would result in a significant environmental impact.

(3) An applicant for license for any major project—existing dam that would have a total installed capacity of 5 megawatts or less must submit application under subpart G (§§ 4.60 and 4.61).

(b) *Guidance from Commission staff.* A prospective applicant for a major license—existing dam may seek advice from the Commission staff regarding the applicability of these sections to its project (*see* § 4.32(h)), including the determinations whether any proposed repair or reconstruction of an existing dam would result in a significant change in the normal maximum surface area or the normal maximum surface elevation of an existing impoundment, or whether any proposed new development or change in project operation would result in a significant environmental impact.

[Order 59, 44 FR 67651, Nov. 27, 1979, as amended by Order 184, 46 FR 55942, Nov. 13, 1981; Order 413, 50 FR 11684, Mar. 25, 1985; Order 499, 53 FR 27002, July 18, 1988]

§ 4.51 Contents of application.

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

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for License for Major Project—Existing Dam

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

(2) The location of the project is:

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

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

_____
_____
_____

general expenses, and contingencies; and

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

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

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

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

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

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

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

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

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

(i) A description (including specified volume over time) of existing and proposed uses of project waters for irrigation, domestic water supply, steam-electric plant, industrial, and other consumptive purposes;

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

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

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

(v) A description of the continuing impact on water quality of continued

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

development of project facilities (including facilities proposed in this exhibit);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) *Report on land management and aesthetics.* The report must discuss the

historic preservation officer, and from local offices of Federal natural resources agencies.

(2) A description of the expected environmental impacts from the proposed construction or development and the proposed operation of the small hydroelectric power project, including any impacts from any proposed changes in the capacity and mode of operation of the project if it is already generating electric power, and an explanation of the specific measures proposed by the applicant, the agencies consulted, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources.

(3) Any additional information the applicant considers important.

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

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

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

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

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

Subpart L—Application for Amendment of License

§ 4.200 Applicability.

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

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

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

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

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

§ 4.201 Contents of application.

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

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Amendment of License

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

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

_____

_____

_____

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

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

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

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

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a hydropower

project that involves additional capacity not previously authorized, and that would increase the actual or proposed total installed capacity of the project, would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and would result in an increase in the installed nameplate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

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

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

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

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

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

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

(d) *Consultation and waiver.* (1) If an applicant for license amendment under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit such exhibit may be submitted to the Commission under §385.207 of this chapter, after consultation with the Commission's Division of Hydropower Compliance and Administration.

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

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

§4.202 Alteration and extension of license.

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

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

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

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

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

§4.300 Purpose, definitions, and applicability.

(a) *Purpose.* This subpart implements the amendments of section 30 of the Federal Power Act enacted by section

original facilities were installed, and no significant nonjurisdictional facilities would be constructed in association with construction of the interconnection facilities;

(25) Review of natural gas rate filings, including any curtailment plans other than those specified in §380.5(b)(5), and establishment of rates for transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act and sections 311 and 401 through 404 of the Natural Gas Policy Act of 1978;

(26) Review of approval of oil pipeline rate filings under Parts 340 and 341 of this chapter;

(27) Sale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that require no construction of facilities;

(28) Abandonment in place of a minor natural gas pipeline (short segments of buried pipe of 6-inch inside diameter or less), or abandonment by removal of minor surface facilities such as metering stations, valves, and taps under section 7 of the Natural Gas Act so long as appropriate erosion control and site restoration takes place;

(29) Abandonment of service under any gas supply contract pursuant to section 7 of the Natural Gas Act;

(30) Approval of filing made in compliance with the requirements of a certificate for a natural gas project under section 7 of the Natural Gas Act or a preliminary permit, exemption, license, or license amendment order for a water power project under Part I of the Federal Power Act;

(31) Abandonment of facilities by sale that involves only minor or no ground disturbance to disconnect the facilities from the system;

(32) Conversion of facilities from use under the NGPA to use under the NGA;

(33) Construction or abandonment of facilities constructed entirely in Federal offshore waters that has been approved by the Minerals Management Service and the Corps of Engineers, as necessary;

(34) Abandonment or construction of facilities on an existing offshore platform;

(35) Abandonment, construction or replacement of a facility (other than compression) solely within an existing building within a natural gas facility (other than LNG facilities), if it does not increase the noise or air emissions from the facility, as a whole; and

(36) Conversion of compression to standby use if the compressor is not moved, or abandonment of compression if the compressor station remains in operation.

(b) *Exceptions to categorical exclusions.* (1) In accordance with 40 CFR 1508.4, the Commission and its staff will independently evaluate environmental information supplied in an application and in comments by the public. Where circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment, the Commission:

(i) May require an environmental report or other additional environmental information, and

(ii) Will prepare an environmental assessment or an environmental impact statement.

(2) Such circumstances may exist when the action may have an effect on one of the following:

(i) Indian lands;

(ii) Wilderness areas;

(iii) Wild and scenic rivers;

(iv) Wetlands;

(v) Units of the National Park System, National Refuges, or National Fish Hatcheries;

(vi) Anadromous fish or endangered species; or

(vii) Where the environmental effects are uncertain.

However, the existence of one or more of the above will not automatically require the submission of an environmental report or the preparation of an environmental assessment or an environmental impact statement.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended at 53 FR 8177, Mar. 14, 1988; Order 486-B, 53 FR 26437, July 13, 1988; 54 FR 48740, Nov. 27, 1989; Order 603, 64 FR 26611, May 14, 1999; Order 609, 64 FR 57392, Oct. 25, 1999; Order 756, 77 FR 4895, Feb. 1, 2012]

§380.5 Actions that require an environmental assessment.

(a) An environmental assessment will normally be prepared first for the actions identified in this section. Depending on the outcome of the environmental assessment, the Commission

may or may not prepare an environmental impact statement. However, depending on the location or scope of the proposed action, or the resources affected, the Commission may in specific circumstances proceed directly to prepare an environmental impact statement.

(b) The projects subject to an environmental assessment are as follows:

(1) Except as identified in §§ 380.4, 380.6 and 2.55 of this chapter, authorization for the site of new gas import/export facilities under DOE Delegation No. 0204–112 and authorization under section 7 of the Natural Gas Act for the construction, replacement, or abandonment of compression, processing, or interconnecting facilities, onshore and offshore pipelines, metering facilities, LNG peak-shaving facilities, or other facilities necessary for the sale, exchange, storage, or transportation of natural gas;

(2) Prior notice filings under § 157.208 of this chapter for the rearrangement of any facility specified in §§ 157.202 (b)(3) and (6) of this chapter or the acquisition, construction, or operation of any eligible facility as specified in §§ 157.202 (b)(2) and (3) of this chapter;

(3) Abandonment or reduction of natural gas service under section 7 of the Natural Gas Act unless excluded under § 380.4 (a)(21), (28) or (29);

(4) Except as identified in § 380.6, conversion of existing depleted oil or natural gas fields to underground storage fields under section 7 of the Natural Gas Act.

(5) New natural gas curtailment plans, or any amendment to an existing curtailment plan under section 4 of the Natural Gas Act and sections 401 through 404 of the Natural Gas Policy Act of 1978 that has a major effect on an entire pipeline system;

(6) Licenses under Part I of the Federal Power Act and part 4 of this chapter for construction of any water power project—existing dam;

(7) Exemptions under section 405 of the Public Utility Regulatory Policies Act of 1978, as amended, and §§ 4.30(b)(29) and 4.101–4.108 of this chapter for small hydroelectric power projects of 5 MW or less;

(8) Licenses for additional project works at licensed projects under Part I of the Federal Power Act whether or not these are styled license amendments or original licenses;

(9) Licenses under Part I of the Federal Power Act and part 4 of this chapter for transmission lines only;

(10) Applications for new licenses under section 15 of the Federal Power Act;

(11) Approval of electric interconnections and wheeling under section 202(b), 210, 211, and 212 of the Federal Power Act, unless excluded under § 380.4(a)(17);

(12) Regulations or proposals for legislation not included under § 380.4(a)(2);

(13) Surrender of water power licenses and exemptions where project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that require ground disturbing activity or changes to project works or operations; and

(14) Except as identified in § 380.6, authorization to site new electric transmission facilities under section 216 of the Federal Power Act and DOE Delegation Order No. 00–004.00A.

[Order 486, 52 FR 47910, Dec. 17, 1987; Order 486, 53 FR 4817, Feb. 17, 1988, as amended by 53 FR 8177, Mar. 14, 1988; Order 486-B, 53 FR 26437, July 13, 1988; Order 689, 71 FR 69470, Dec. 1, 2006; Order 756, 77 FR 4895, Feb. 1, 2012]

§ 380.6 Actions that require an environmental impact statement.

(a) Except as provided in paragraph (b) of this section, an environmental impact statement will normally be prepared first for the following projects:

(1) Authorization under sections 3 or 7 of the Natural Gas Act and DOE Delegation Order No. 0204–112 for the siting, construction, and operation of jurisdictional liquefied natural gas import/export facilities used wholly or in part to liquefy, store, or regasify liquefied natural gas transported by water;

(2) Certificate applications under section 7 of the Natural Gas Act to develop an underground natural gas storage facility except where depleted oil or natural gas producing fields are used;

(3) Major pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline;

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''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,'' as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

Crescent Bar Condominium Master Association and Crescent Bar Recreational Vehicle Homeowners Association v. FERC **Docket No. P-2114**
9th Cir. No. 13-73971

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will accomplished by the appellate CM/ECF system.

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