ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 13-1074

SMITH LAKE IMPROVEMENT AND STAKEHOLDERS ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
U.S. SECRETARY OF INTERIOR, AND
U.S. SECRETARY OF AGRICULTURE,
Respondents.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

DAVID L. MORENOFF
ACTING GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

LISA B. LUFTIG
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

FINAL BRIEF: FEBRUARY 21, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in the brief of Petitioner. Additionally, pursuant to the Court's order dated December 12, 2013 (granting motions and lodging briefs), *amici curiae* are as follows: (1) The County of Winston, Alabama and Winston County School System, Alabama; and (2) Alabama Rivers Alliance, Inc., Black Warrior Riverkeeper, Inc. and Waterkeeper Alliance, Inc.

B. Rulings Under Review

1. Order Issuing New License, *Alabama Power Company*, FERC Docket No. P-2165-022, 130 FERC ¶ 62,271 (Mar. 31, 2010) ("License Order"), R. 552, JA 1111;

2. Order Denying Rehearing and Clarifying License, *Alabama Power Company*, FERC Docket No. P-2165-030, 141 FERC ¶ 61,127 (Nov. 15, 2012) ("Rehearing Order"), R. 736, JA 1393;

3. Notice Rejecting Request for Rehearing, *Alabama Power Company*, FERC Docket No. P-2165-049, 142 FERC ¶ 61,039 (Jan. 16, 2013) ("Notice"), R. 758, JA 1461;

4. Concurrence Letter of the U.S. Department of Interior, through U.S. Fish and Wildlife Service (Apr. 11, 2008), R. 397, JA 666; and

5. Mandatory conditions of the U.S. Department of Agriculture, through U.S. Forest Service, established by June 29, 2007 Letter, R. 297, JA 444, incorporating the terms of the May 4, 2007 Settlement Agreement, R. 285, JA 414.

C. Related Cases

The orders under review in this proceeding have not previously been before this Court or any other court.

/s/ Lisa B. Luftig
Lisa B. Luftig
Attorney

February 21, 2014

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

COURT CASES:

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

STATUTES:

Federal Power Act

REGULATIONS:

GLOSSARY

Br.	Petitioner Smith Lake Improvement and Stakeholders Association opening brief
Commission or FERC	Federal Energy Regulatory Commission
Association	Petitioner Smith Lake Improvement and Stakeholders Association
FPA	Federal Power Act
JA	Joint Appendix
Alabama Power	Intervenor and licensee Alabama Power Company
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
License Order	"Order Issuing New License," *Alabama Power Co.*, FERC Docket No. P-2165-022, 130 FERC ¶ 62,271 (Mar. 31, 2010) ("License Order"), R. 552, JA 1111
Rehearing Order	"Order Denying Rehearing and Clarifying License," *Alabama Power Co.*, FERC Docket No. P-2165-030, 141 FERC ¶ 61,127 (Nov. 15, 2012) ("Rehearing Order"), R. 736, JA 1393

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

No. 13-1074

SMITH LAKE IMPROVEMENT AND STAKEHOLDERS ASSOCIATION,
***Petitioner*,**

v.

FEDERAL ENERGY REGULATORY COMMISSION,
U.S. SECRETARY OF INTERIOR, AND
U.S. SECRETARY OF AGRICULTURE,
***Respondents*.**

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The Federal Energy Regulatory Commission ("Commission" or "FERC") approved the relicensing of Alabama Power Company's existing 211.5-megawatt Warrior River Hydroelectric Project ("Warrior Project"), after considering and balancing the power and non-power uses of the waterway. The question presented on appeal is:

Whether the Commission satisfied its responsibilities under the Federal Power Act and the Endangered Species Act, when it issued a comprehensive

environmental assessment that considered all potential environmental issues and all beneficial uses of the waterway, when it attached numerous conditions and measures to improve the operation of the Warrior Project over operation under the previous license, and when the U.S. Fish and Wildlife Service concurred in the Commission's findings.

STATEMENT REGARDING JURISDICTION

Petitioner Smith Lake Improvement and Stakeholders Association ("Association"), dissatisfied with the Commission's decision to issue a new license to Alabama Power, twice petitioned for agency rehearing. The Commission denied the first on the merits and rejected the second as improper. The Association filed a petition for review with this Court after the second rehearing order, and Alabama Power responded with a motion to dismiss, arguing that the Association's petition for review should have been filed after the first rehearing order and is now untimely. The Court, by Order dated September 10, 2013, referred the matter to the merits panel and instructed the parties to address the issue in their briefs.

The judicial review provision of the Federal Power Act, 16 U.S.C. § 825*l*(b), contemplates review on petition by an "aggrieved" party within 60 days of the Commission's rehearing order. This provision allows for judicial review only of final agency action. *See, e.g.*, *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980) (non-final action not subject to review under statute). As this

Court explained in *Clifton Power Corp. v. FERC*, "a request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party." 294 F.3d 108, 110 (D.C. Cir. 2002). Additionally, subsequent action on an outstanding request "does not ripen the petition for review or secure appellate jurisdiction." *Id*. (citing *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 143 (D.C. Cir. 1989)). This Court routinely dismisses petitions filed while rehearing is pending as incurably premature. *See, e.g.*, *Clifton*, 294 F.3d 108; *Bellsouth Corp. v. FCC*, 17 F.3d 1487 (D.C. Cir. 1994); *Tenn. Gas Pipeline Co. v. FERC*, 9 F.3d 980 (D.C. Cir. 1993). Had the Association filed its petition for review while it simultaneously was seeking rehearing of the Commission's rehearing order, that petition would have been dismissed as incurably premature.

In its Motion to Dismiss filed with this Court on May 20, 2013, Alabama Power asserts that, because the Commission denied rehearing on all issues, and only clarified one minor issue in the license not raised on appeal, the Association was not required to seek rehearing of the Commission's Rehearing Order. Motion at 6-7. The precedent on when an additional request for rehearing is required (where the agency changes the result) and when it is not required (where the agency only provides a different rationale) is well-established. *See Allegheny Power v. FERC*, 437 F.3d 1215, 1222 (D.C. Cir. 2006); *Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990). We agree that the Association's

second rehearing request was not required in order to seek judicial review of the Rehearing Order. *See* Notice Rejecting Request for Rehearing, 142 FERC ¶ 61,039 (Jan. 16, 2013), R. 758, JA 1461 ("Rehearing of an order on rehearing lies when the later order modifies the result reached in the original order in a manner that gives rise to a wholly new objection.") (citing cases).

Until recently, this Court did not distinguish whether the permissive/mandatory nature of a pending rehearing request had any bearing on whether a petition was incurably premature. The law was simply that one "may not simultaneously seek both agency reconsideration and judicial review of an agency order." *Clifton*, 294 F.3d at 111 (citing *Tenn. Gas Pipeline*, 9 F.3d at 980). In a recent decision cited by Alabama Power, this Court directly addressed this issue. *See Western Area Power Admin. v. FERC*, 525 F.3d 40 (D.C. Cir. 2008). There, this Court viewed its precedent on the mandatory or permissive nature of seeking rehearing as also guiding when a challenge is ripe for judicial review. *Id*. at 52. In that case, this Court held that "[w]hen a petition for rehearing is not necessary – i.e., when a rehearing has been denied in its entirety with no substantive modification in the order – the case is ripe for judicial review and the clock on the jurisdictional time-bar starts ticking." *Id*. at 53. Notably, however, the Court did not address how or whether its holding affects the rule followed in *Clifton* and *Tennessee*.

We believe that the instant case is closer to *Clifton* and *Tennessee* than it is to *Western*, and that the former cases, rather than the latter, should control as to jurisdiction. Because the Commission did not alter its result in its Rehearing Order, the Association was not required to file a second request for rehearing to secure judicial review of the merits of the Commission's licensing decision. (And the Commission is not obligated to consider the merits of a second request for rehearing if it does not address any new result.) But once the Association decided to petition, again, for agency rehearing, the agency's earlier order no longer was final and, in the phrasing of this Court in *Western*, the clock on the jurisdictional time-bar stopped ticking. Should, however, the circumstances presented approach those in *Western*, where a petitioner is burdening the agency with repetitive, vexatious submissions or trying to delay appellate review, then dismissal could be appropriate. *See Western*, 525 F.3d at 52 (party other than petitioner sought rehearing of the fourth order in a series of orders, when the Commission had "simply reiterated its argument – which it had offered many times before," using only "slightly different words to do so"). Because we do not find such gamesmanship in the instant circumstances, we support full briefing on the issues raised by the Association.

But we do not support merits consideration of arguments raised by *amici curiae* Alabama Rivers Alliance, *et al*. (primarily concerning the agency's decision

not to prepare an environmental impact statement) that are beyond the scope of the issues raised by the Association. *See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("Because we ordinarily do not entertain arguments not raised by parties," the court considered brief of amicus only to the extent it supported arguments of petitioner); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (court ordinarily "would not entertain an amicus' argument if not presented by a party"). Alabama Rivers Alliance (unlike *amicus curiae* Winston County) was a party to the FERC proceeding (R. 282, JA 394 (motion to intervene and comments)) and raised similar issues before the Commission (R. 390, JA 560 (comments)). As a party, Alabama Rivers Alliance could have, but did not, seek rehearing before the Commission and, given that time to seek agency rehearing (and judicial review) has passed, has waived its right to raise its own issues before the Court. *See DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005) (finding failure to seek rehearing fatal to challenge of FERC order in petition for review) (citing *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002)).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

In the FERC orders on review, pursuant to Federal Power Act sections 4(e) and 15, the Commission issued a new license to Alabama Power to continue to operate and maintain the Warrior Project for a 30-year term. *See Alabama Power Co.*, 130 FERC ¶ 62,271 (Mar. 31, 2010) ("License Order"), R. 552, JA 1111; *Alabama Power Co.*, 141 FERC ¶ 61,127 (Nov. 15, 2012) ("Rehearing Order"), R. 736, JA 1393. The Warrior Project is an existing 211.5 megawatt hydroelectric generation facility, consisting of two coordinated developments, the 157.5 megawatt Lewis Smith ("Smith") and 54 megawatt Bankhead developments. *See* Final Environmental Assessment For Hydropower License, Warrior River Hydroelectric Project (March 2009) at 1 ("Environmental Assessment" or "EA"), R. 456, JA 802.

The Smith development is located in north central Alabama on the headwaters of the Black Warrior River on the Sipsey Fork in Cullman, Walker, and Winston Counties. *Id*., JA 809. The Bankhead development is located in west central Alabama downstream of the Smith development, on the Black Warrior River in Tuscaloosa County. *Id*. The Smith development occupies 2,691.44 acres of federal lands administered by the U.S. Forest Service, and the Bankhead development occupies 18.7 acres of federal lands administered by the Bureau of Land Management. *Id*. The Project is operated for flood control and hydroelectric

generation, and it also supplies water for navigation on the Black Warrior and Tombigbee Rivers. *Id*. 13, 14, JA 827, 828. The Project has an incidental benefit of providing flows downstream for maintenance of water quality near Alabama Power's Gorgas Steam Plant. *Id*. 15, JA 829.

Petitioner Smith Lake Improvement and Stakeholders Association (the "Association") is an organization comprising over 3,000 members, many of whom own property on or near the reservoir created by the Smith development ("Smith Lake"). Br. 4. The Association intervened in the FERC relicensing proceeding and objected to Alabama Power's proposal to continue operation as it had in the past. The Association argued that low lake levels are a detriment to private and public recreation at the lake, specifically boating, and hinder the fullest residential and commercial economic development of the Smith Lake shoreline. Rehearing Order P 12, JA 1398. The Association proposed that the Smith development elevations be kept higher and more level throughout the year by requiring that the licensee maintain a higher lake elevation during the recreation season (Memorial Day through Labor Day), using a guide curve proposed by the Association. *Id*.

In agency proceedings extending almost five years (from the filing of the application to the issuance of the License Order), and resulting in the detailed 200-page Environmental Assessment, the Commission thoroughly examined the environmental impacts of the Warrior Project and its consistency with the power

and non-power uses of the Black Warrior River. The Commission sought and obtained multiple rounds of submittals from the Association and Alabama Power analyzing the Association's proposed alternative. Based on substantial evidence in the record, the Commission considered the Association's proposal, but ultimately rejected it as not in the public interest. *See* License Order PP 66-68, JA 1133-1134; Rehearing Order PP 58- 61, JA 1415-1417.

This appeal followed, challenging the sufficiency of the Commission's findings under the Federal Power Act and the Endangered Species Act.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

This appeal raises challenges to the Commission's findings pursuant to the Federal Power Act ("FPA"), 16 U.S.C. §§ 797(e), 803(a), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2). As it relates to the Association's claims, the Federal Power Act gives the Commission broad discretion to balance the power and non-power uses of a waterway and to license or relicense hydroelectric projects consistent with the Commission's factual findings. In particular, Part I of the Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946).

Under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), FERC has authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause. *See generally Dep't of Interior v. FERC*, 952 F.2d 538, 543-45 (D.C. Cir. 1992). Under this section, the Commission must balance power and non-power values in arriving at a licensing decision:

> [T]he 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 or 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).

Section 10(a) of the FPA, 16 U.S.C. § 803(a), as relevant here, requires the Commission, in issuing hydroelectric licenses, to find that the project approved will be the "best adapted to a comprehensive plan for improving or developing a waterway or waterways" for a number of purposes, such as "the improvement and utilization of water-power development . . . the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses," including recreation. Section 10(a)(1) also allows the Commission to include in license articles requirements for periodic

review and adjustment of the license measures, if warranted. Further, standard or individualized license articles provide the Commission the means to ensure that a hydroelectric project continues to meet the public interest/comprehensive development standard of the statute throughout the license term.

Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), adds an additional requirement. Federal agencies must ensure that their actions are not likely to jeopardize the continued existence of federally-listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat. The U.S. Fish and Wildlife Service (among other federal agencies) has established regulations regarding inter-agency cooperation to implement the provisions of the Endangered Species Act. *See* 50 C.F.R. § 402.13 (describing informal consultation process); 50 C.F.R. § 402.14 (describing formal consultation process).

II. THE COMMISSION'S REVIEW OF THE WARRIOR PROJECT

A. The Project

There are five dams on the Black Warrior River Basin. Beginning from the headwaters of the Black Warrior, they are the Smith dam, the Bankhead dam, the Holt dam (which includes Alabama Power's Holt Project No. 2203), the Oliver lock & dam, and the Selden lock and dam. License Order P 6 n.11, JA 1113. The

Black Warrior River flows into the Tombigbee River which joins the Alabama River to form the Mobile River. *Id*.

Originally licensed in 1957 for a 50-year term, the Warrior Project is operated for flood control and hydroelectric generation, and it also supplies water for navigation on the Black Warrior and Tombigbee Rivers. EA 13, 14, JA 827, 828. The Smith development's lake levels fluctuate from a combination of project operation, flood control, municipal water withdrawals, and natural variation in precipitation. EA 9, JA 823. As explained in the Environmental Assessment, from April 1 until June 30, the lake is operated near the normal full pool level of 510 feet mean sea level. Drawdown begins July 1 and reaches winter pool level of 496 feet mean sea level by December 1. The winter pool level is maintained until January 31 and the lake is returned back to full pool (510 feet mean sea level) by April 1. Alabama Power normally keeps the pool at or below 510 feet mean sea level at all times when flooding is not occurring. However, the project can be drawn down 22 feet from elevation 510 feet mean sea level to elevation 488 feet mean sea level to augment for low inflows and for flood control capability. EA 13, JA 827.

The Bankhead development, 78 miles downstream of the Smith development, is operated primarily for navigation. Due to minimal storage capability, water entering the lake each day is released on the same day. EA 16,

JA 830. Although the prior license permits daily reservoir fluctuations of up to 3 feet for power generation, due to navigation requirements, the pool is not drawn down below elevation 252 feet mean sea level. Further, Alabama Power restricts drawdown at Bankhead to 253.7 feet mean sea level to maintain sufficient water levels in the reservoir for multiple uses, including municipal water supplies. *Id*.

B. The Commission's Review On Relicensing

On September 22, 2000, Alabama Power notified the Commission of its intent to seek relicensing of the Warrior River Project. EA 1, JA 815. Alabama Power conducted scoping meetings, completed studies, and filed an environmental analysis with its application for a 50-year license on July 28, 2005. *See* Application and Supporting Materials, R. 80, JA 238.

Well before Alabama Power filed its license application, Commission staff began its own analysis starting with issuing a scoping document and inviting appropriate resource agencies, Indian tribes, and other interested entities to participate in, and contribute to, the scoping process. EA 9, JA 823. Commission staff also held a scoping meeting in Birmingham, Alabama on March 12, 2002, to provide interested persons an opportunity to provide input for the Environmental Assessment. *Id*. On March 5, 2007, the Commission issued public notice of the license application in the Federal Register (R. 257, JA 369), soliciting motions to intervene and protests, and soliciting comments, final recommendations, terms and

conditions, and prescriptions. In response to this notice, comments and recommendations were filed by the Association, U.S. Department of Interior, U.S. Forest Service, Alabama Department of Conservation and Natural Resources, and (jointly) Alabama Rivers Alliance and American Rivers.

Commission staff prepared and issued a Draft Environmental Assessment on March 7, 2008. *See* Draft Environmental Assessment, R. 350, JA 518. Comments on the Draft Environmental Assessment were received from the Association, U.S. Department of Interior, Alabama Power, Alabama Rivers Alliance, and the U.S. Army Corps of Engineers. In addition, over 30 entities filed comments in support of Alabama Power's proposal. EA 136, JA 950.

The Association filed numerous sets of comments and analyses in response to the Draft Environmental Assessment requesting less fluctuation in the water levels in Smith Lake. *See, e.g.*, "Comments of Smith Lake Improvement and Stakeholders Association" (Mar. 6, 2008), R. 349, JA 509; "Smith Lake Improvement Stakeholders Association Comments on Environmental Assessment" (Apr. 7, 2008), R. 388, JA 564; "Resource Decisions Updated Comments on EA Concerning Power Benefit Calculations" (Apr. 23, 2008), R. 404, JA 668; "Comment of [the Association]" (Oct. 31, 2008), R. 430, JA 716; "Comment by Resource Decisions on Power Benefit Calculations on Behalf of [the Association]"

(Nov. 10, 2008), R. 432, JA 741; "Resource Decisions Reply to [Alabama Power's] November 26 Comments to FERC" (Dec. 3, 2008), R. 436, JA 755; "Smith Lake Operations Files [the Association's] Submission of OASIS Simulations" (Jan. 9, 2009), R. 444, JA 759. Specifically, the Association proposed that Smith Lake elevations remain between 505 and 510 feet above sea level from Memorial Day to Labor Day, and that the lake elevation not drop below 502 feet during the rest of the year. Rehearing Order P 13, JA 1398.

In response to these comments, the Commission sought and obtained extensive analysis of the alternative lake levels from Alabama Power. *See, e.g.*, "Letter from Mark Pawlowski, FERC, to Jerry L. Stewart, Alabama Power" (July 2, 2008), R. 420, JA 673 ; "Letter from R.M. Akridge, Alabama Power, to Kimberly Bose, FERC" (Oct. 3, 2008), R. 426, JA 677; "[Alabama Power] Response to [the Association's] October 31, 2008 Comment Letter to FERC" (Nov. 26, 2008), R. 435, JA 745; "[Alabama Power's] Response to [the Association's] OASIS Simulations" (Feb. 4, 2009), R. 452, JA 794. All of these comments were considered and addressed in the Final Environmental Assessment issued on March 2, 2009. *See* EA App. D, JA 1003. Only the Association and individual Marvin Feldman filed comments on the Environmental Assessment. *See* License Order P 5, JA 1113. Based on the substantial record evidence,

Commission staff considered the Association's lake level proposal, but rejected it as not in the public interest. *See* EA 132-36, JA 946-50.

C. The License Order

On March 31, 2010, the Commission issued a new 30-year license to Alabama Power. The License Order considered a number of public interest factors in its decision whether to issue a new license. Consistent with its approach in evaluating the economics of hydropower projects, as articulated in *Mead Corp.*, 72 FERC ¶ 61,027 (1995), the Commission determined that, in the first year of operation, that the project would have a net annual benefit of $42,821,890 (in relation to the likely alternative cost of power). License Order P 100, JA 1143. Further, the Commission noted that hydroelectric projects offer unique operational benefits to the electric system, including aiding in stability by quickly adjusting output to changes in system load, and responding quickly to power shortages. *Id*. P 102, JA 1143.

The License Order addressed the Warrior Project's compliance with all applicable statutes and regulatory provisions. *See* License Order PP 24-25, JA 1119-20 (Clean Water Act); PP 26-27, JA 1120 (Coastal Zone Management Act); PP 28-40, JA 1120-24 (section 4(e) of the Federal Power Act (consistency with purpose of federal reservations)); PP 41-42, JA 1124-25 (section 18 of the Federal Power Act (fishway prescriptions)); PP 43-49, JA 1125-26 (Endangered Species

Act); PP 50-52, JA 1127 (Wild and Scenic Rivers Act); PP 53-54, JA 1128 (National Historic Preservation Act); PP 55-57, JA 1128-30 (recommendations of federal and state fish and wildlife agencies under section 10(j) of the Federal Power Act); PP 58-75, JA 1130-37 (recommendations of Fish and Wildlife Service under section 10(a)(1) of the Federal Power Act); P 86, JA 1138-39 (consistency with state and federal comprehensive plans); and PP 87-98, JA 1139-42 (evaluating Alabama Power's record as a licensee under sections 10(a)(2) and 15(a) of the Federal Power Act).

The License Order also specifically addressed the Association's lake level proposal. Balancing the need for power, flood control, navigation and commerce, water quality, aquatic resources, and recreation, and the fact that the project currently provides considerable benefits to recreation which would continue under the licensed operation, the Commission concluded that the costs of the Association's alternative outweigh the benefits, and it is not in the public interest. *See* License Order P 67-68, JA 1133-34.

Ultimately, the License Order concludes, "based on the record of this proceeding, including the Environmental Assessment and comments thereon, that relicensing the Warrior Project as described in this order would not constitute a major federal action significantly affecting the water quality of the human environment." License Order P 104, JA 1144. Further, based on the extensive

review and evaluation of the project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the Environmental Assessment, the Commission selected the Warrior Project as best adapted to a comprehensive plan for improving or developing the Black Warrior River and Sipsey Fork. License Order P 105, JA 1144.

D. The Rehearing Order

Of the many interested parties that commented during environmental and project review, the Association was the only party to seek rehearing of the License Order. *See* Rehearing Order P 1, JA 1393. Asserting that the Commission violated the Federal Power Act, the National Environmental Policy Act, and the Endangered Species Act when it declined to adopt the Association's alternative lake level proposal, the Association raised the following seven issues: whether the Warrior Project license was best adapted to a comprehensive plan of development as required by FPA section 10(a)(1) (Rehearing Order PP 18-21, JA 1399-1400); whether the License Order failed to comply with FPA section 10(a)(1) because it failed to make factual findings over the next 30 years and relied on post-licensing studies (*id*. PP 23-24, JA 1401-02); whether the License Order improperly relied on the studies of others, failed to fill gaps in the record, or improperly resolved inconsistencies in the record (*id*. PP 26-27, JA 1403); whether the License Order failed to protect specific resources (e.g., water quality, downstream erosion,

fisheries, threatened and endangered species, recreation, socioeconomics, the Bankhead National Forest, and navigation) or was otherwise deficient for failing to make specific findings or relying on disputed evidence without adequate explanation (*id*. PP 29-73, JA 1404-22); whether the Commission was required to enter formal consultation with U.S. Fish and Wildlife Service (*id*. PP 44-53; JA 1410-13); whether the Commission should have prepared an environmental impact statement (*id*. PP 75-76, JA 1423-24); and whether the Environmental Assessment's consideration of alternatives satisfied the National Environmental Policy Act and implementing regulations (*id*. PP 78-85, JA 1424-28).

The Commission, after discussing each of these issues, concluded that the Environmental Assessment and License Order were based on an "extensive record" of the relevant resource issues, including a thorough evaluation of the potential environmental effects on these issues under various alternatives. Rehearing Order P 21, JA 1400. The Commission further explained that "the license establishes a comprehensive set of operational and environmental measures that, together with the reservations of the Commission's authority to require changes to the project if future circumstances warrant, ensures that the project will be operated throughout the term of its license in a manner that appropriately balances developmental and non-developmental interests." *Id*.

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving relicensing of the Warrior Project. Its comprehensive record in this proceeding on all aspects of the beneficial public uses of the waterway, along with thorough analysis of the potential environmental impacts, provided substantial evidence necessary to satisfy the Commission's obligations under the Federal Power Act and Endangered Species Act. (On appeal, the Association now has abandoned its objections based on the National Environmental Policy Act.) In fact, the Association concedes, as it must, that "the record for this relicensing is 'extensive,' totaling tens of thousands of pages," and that the Association "does not dispute that somewhere in the record there may be evidence that supports [the Commission's] finding on a given issue." Br. 55-56.

Despite the comprehensive record and substantial analysis by the Commission that addressed each of the Association's arguments, the Association now urges this Court to essentially adopt a new standard for hydroelectric licensing – one that would require the Commission to undertake extraordinary fact-finding that, for example, would require an extrapolation of the amount of recreation that is desirable over a 30-year period – and then asserts that the Commission's review failed to meet that standard. And although the Association continues to argue that it would have preferred that its alternative lake level proposal be adopted, its

preference does not translate into a legally enforceable right; the Commission addressed the alternative lake level proposal and found that it was not in the public interest. Specifically, it found the Association's proposal would provide speculative benefits to already healthy property values and recreation values at the certain expense to generation and dependable capacity from an important renewable resource. At bottom, the Commission's determinations are supported by substantial evidence and, when measured against the applicable legal standards, demonstrate that each of the Association's evidentiary arguments lacks merit.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of Commission hydroelectric licensing decisions is limited to determining whether FERC's action was arbitrary and capricious, and whether factual findings underlying the decision were supported by substantial evidence. *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). Under this standard, all that is required is that FERC examine the relevant data and provide a "reasoned explanation supported by a stated connection between the facts found and the choice made." *Id*. (quoting *Dep't of Interior*, 952 F.2d at 543); *see also* FPA § 313(b), 16 U.S. C. § 825*l*(b) (the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive"). Because substantial evidence is more than a scintilla, but something less than a preponderance of the

evidence, the possibility that different conclusions may be drawn from the same evidence does not render the Commission's conclusions unreasonable. *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

Agency action's consistency with the Endangered Species Act is reviewed under the deferential arbitrary and capricious standard. *See Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (noting that Court "will not vacate an agency's decision unless it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'") (quoting *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

II. THE COMMISSION'S EVALUATION AND BALANCE OF ALL BENEFICIAL USES OF THE BLACK WARRIOR RIVER SATSIFIED ITS OBLIGATIONS UNDER THE FEDERAL POWER ACT

The Commission's development of a detailed record of all beneficial uses of the Black Warrior River, and its appropriate balance of those resource issues, satisfied its statutory responsibilities. The Commission satisfies section 10(a)(1) of the Federal Power Act, 16 U.S.C. § 803(a), by licensing projects determined by the Commission to be best adapted to a comprehensive plan for improving or developing a waterway, taking into account all beneficial uses of the waterway

(e.g., waterpower development; protection, mitigation, and enhancement of fish and wildlife; irrigation; flood control; water supply; and recreation). Rehearing Order P 19, JA 1399 (citing *Appalachian Power Co.*, 132 FERC ¶ 61,236, at PP 14-16 (2010)). Section 10(a)(1) does not require the Commission to prepare a single comprehensive plan against which a license application is measured, nor does it require that the license order itself constitute a comprehensive plan. Rather, the Commission develops a record in a proceeding on all aspects of the beneficial public uses relating to the comprehensive development of the waterway or waterways. *See Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1475 (D.C. Cir. 1990) (acknowledging FERC's statement that "comprehensive development is a concept that evolves over time, reflecting different eras' technical options, economic realities, and resource use priorities").

"In deciding whether to issue any license under [the Federal Power Act] for any project, . . . in addition to the power and development purposes for which licenses are issued, [the Commission] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, . . . the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). Interpreting this language, this Court found that the "equal consideration" provision does not change the applicable standard of review on

appeal and "[does] not give environmental factors preemptive force." *Dept. of Interior*, 952 F.2d at 545. Rather, FERC is still charged with balancing power and non-power values to determine the public interest. *Id*.; *see also Conservation Law Found.*, 216 F.3d at 45 (same). That is exactly what the Commission did here.

The Commission developed a thorough record on the future condition of the Black Warrior River under various alternatives and, where appropriate, applied necessary conditions to ensure that the Warrior Project will remain best adapted to a comprehensive plan for development over the term of the license. The Association challenges the Commission's analysis and public interest balance; its objections under Federal Power Act section 10(a)(1) can be grouped into three general areas: (1) the Warrior Project's consistency with a desired future condition of the Black Warrior River; (2) the Commission's evaluation of alternatives; and (3) the sufficiency of the Commission's findings. Each of these issues is addressed below.

A. The Commission Thoroughly Considered The Warrior Project's Consistency With Desired Future Conditions For Each Specific Resource Area

Much of the Association's brief is devoted to arguing that the Commission failed to comply with section 10(a)(1) of the Federal Power Act for a variety of fact-based reasons, most of which involve the Association's dispute with record evidence. First, the Association argues that the Commission failed to make

adequate findings showing the Warrior Project's consistency with a comprehensive plan. The Association cites the Commission's analysis of recreation and threatened mussels as examples.[1] *See* Br. 35-36. Second, the Association questions the Commission's use of license conditions as a means to ensure the Warrior Project's continuing consistency with a comprehensive plan. *See* Br. 50-54. Neither of these contentions has merit.

First, the Association contends that the Commission did not comply with the statute because it failed to make findings for each resource area as to what future conditions would be over the next 30 years. The Association claims that the Commission was required to "make a finding as to how the various license requirements will likely function as a whole to effect or contribute to a comprehensive plan of development for the [Black] Warrior River for the next 30 years." Br. 33. This line of argument fails.

The Commission did all that the Federal Power Act requires – it examined the project's effects on all aspects of the public interest, balanced competing considerations, and, based on substantial, current evidence, imposed conditions to provide an appropriate level of protection to affected resources. This approach

[1] Although not specifically mentioned in its brief, on rehearing below the Association disputed the adequacy of the Commission's findings on water quality, erosion, fisheries, socioeconomics, the Bankhead National Forest, and navigation. Each of these resource issues was discussed in detail in the Environmental Assessment, License Order, and Rehearing Order.

ensures that the Commission can meet its obligation to ensure the public interest through the license term. This is all that is required. *See LaFlamme v. FERC*, 945 F.2d 1124, 1128 (9th Cir. 1991) (affirming the Commission's determination that it had satisfied the FPA's requirements by considering the "comprehensive picture of the water system of which the project is a part, based in the record developed in each particular proceeding"). *See also City of Fort Smith*, 44 FERC ¶ 61,160, at 61,510 (1988), *aff'd, Nat'l Wildlife Fed'n*, 912 F.2d 1471, where the Commission stated that neither section 10(a)(1) nor *LaFlamme* mandates that when determining whether to grant a license, the Commission must consider each conceivable use of the project or environment and "develop an immutable master plan."

Here, to the extent feasible, the Commission made cumulative findings on each resource area. *See generally* EA 30-114, JA 844-928; *see also* EA at 30, JA 844 (explaining that "[t]he temporal scope of [its] cumulative analysis includes a discussion of past, present, and future actions and their effect on each resource that could be cumulatively affected. . . . [B]ased on the potential terms for licenses, we projected 30 to 50 years into the future, concentrating on the effects on resources from reasonably foreseeable future actions.").

As an example, the Association contends that the Commission must make specific findings for the next 30 years regarding how much recreational use is desirable or appropriate now or in 2040. Br. 35-36. Indeed, the Commission

obtained substantial record evidence with respect to recreation, and thoroughly analyzed present and future recreation use at the Smith development. EA 83-84, JA 897-98. The Commission's analysis also addressed all of Alabama Power's proposals to enhance recreation facilities, including its proposed Recreation Plan. EA 91-96, JA 905-10. Further, Alabama Power's license requires it to submit recreation data every six years. The Environmental Assessment notes that "reviewing and updating the Recreation Plan every 6 years would provide an opportunity to factor in a cycle of recreational data collected and filed with the Commission . . . . Consequently, recreational use data would be available to support any update to the Recreation Plan." EA 97, JA 911. Finally, contrary to the Association's statements (Br. 35), the Commission considered the license's consistency with the Alabama Statewide Comprehensive Outdoor Recreation Plan and found no conflicts. EA 82, 149 n.58, JA 896, 963; License Order at 86, JA 1138. Although the Commission did not review the updated Alabama Statewide Plan, it used the record information available to it. EA 82, JA 896 (noting that Alabama DCNR had not filed with the Commission any updates to its 1986 statewide plan, and that the 1986 plan presents available information relevant to the project).

The Commission need not speculate, but rather "furnish only such information as appears to be reasonably necessary under the circumstances for

evaluation of the project." Rehearing Order P 84, JA 1428 (citing *Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975)); *see also Columbia Land Basin Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (adequacy of environmental analysis is determined by a "rule of reason"). On this extensive record, and with appropriate conditions to monitor recreation at the Smith development for possible adjustments over the course of the license, the Commission's orders here "easily pass[] muster." *Dep't of Interior*, 952 F.2d at 545.

The Association also claims that the Commission failed to appropriately consider whether survival of some mussels in the project boundary is a desirable condition now or in 2040. Br. 35-36. Yet, here again, the Commission addressed the Warrior Project's consistency with maintenance of habitat conditions for federally listed mussels. EA 77-79, JA 891-93; License Order PP 43-49, JA 1125-27. Contrary to the Association's statement (Br. 20 n.7), the Environmental Assessment specifically referred to the Fish and Wildlife Service's November 2000 Mobile River Basin Aquatic Ecosystem Recovery Plan. EA 77, JA 891. The Environmental Assessment noted that this plan "is designed to prevent the further decline of these species by locating, protecting, and restoring streams with remaining populations." *Id.* The Commission's environmental review concluded that of the 13 threatened, endangered, or candidate species occurring or having

potential to occur within the project boundary, only the Alabama streak-sorus fern and flattened musk turtle are currently found in the project area. *See* Rehearing Order PP 45-48, JA 1410-11. The Environmental Assessment also recognized that an area within the project boundary is designated by the Fish and Wildlife Service as critical habitat for five listed mussels. The Environmental Assessment thoroughly examined the impact on these species and concluded that the Warrior Project, with staff's recommended measures, would not be likely to adversely affect any of the listed species or any designated critical habitat. License Order P 47, JA 1126; *see also* EA 77-79, JA 891-93 (same). The Fish and Wildlife Service, the expert agency charged with the protection of threatened and endangered species, repeatedly agreed with this conclusion. *See infra* Section III.

Finally, the Commission directed Alabama Power to consult with the Fish and Wildlife Service in the development of a revised shoreline management plan, to be reviewed and updated every six years. License Order P 61, Article 418, JA 1131. The Commission's comprehensive review of this issue, along with continuing oversight and review provisions, satisfies the Commission's obligation with respect to the Black Warrior River's maintenance of habitat conditions for federally listed mussels.

Although the Association takes issue with the perceived lack of specificity in the Commission's findings of fact and law with respect to this issue (and other

issues), their expectation misses the mark. As this Court has explained, a "point-by-point rebuttal is not necessarily required." *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010). Rather, this Court will uphold the agency's decision – even one of less than ideal clarity – as long as the agency's "path may reasonably be discerned." *Id*. (quoting *Transcont'l Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 922 (D.C. Cir. 2008)).

B. The Commission Properly Rejected The Association's Lake Level Alternative As Inconsistent With The Public Interest

On rehearing, the Association argued to the Commission that its analysis of alternatives violated the requirements of the National Environmental Policy Act. *See* Br. 38-39 (citing 42 U.S.C. § 4332(2)(E)). In its petition to this Court, the Association drops the issue of whether the Commission's analysis satisfied NEPA (*see* Br. 14-15 ("Statement of Issues")), and focuses on whether that same analysis was sufficient to satisfy the Federal Power Act. The record reflects that it was.

Under FPA section 10(a)(1), 16 U.S.C § 803(a), the Commission must find that the project approved will be the "best adapted to a comprehensive plan for improving or developing a waterway or waterways" for a number of purposes, such as "the improvement and utilization of water-power development, . . . the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses," including recreation. Additionally, FPA Section 4(e) requires the Commission to

balance power and non-power values in arriving at a licensing decision and to 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). "So long as the Commission examines options that include environmental enhancements, its choice of a baseline will not prevent it from giving 'equal consideration' to non-power values." *Conservation Law Found.*, 216 F.3d at 46. Here, as addressed below, the Commission sought and obtained significant analysis of the Association's proposals, carefully weighed the power and non-power values impacted by that proposal, and, in so doing, satisfied its obligations under the statute.

1. The Record Contains Substantial Evidence On The Association's Alternative Lake Level Proposal

Unlike the cases cited by the Association (*see* Br. 39, citing *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), and *Green Island Power Auth. v. FERC*, 577 F.3d 148 (2d Cir. 2009)), here the Commission gave considerable attention to the Association's proposal. *See* EA 132-36, JA 946-50; License Order PP 66-68, JA 1133-34; Rehearing Order PP 58-65, JA 1415-18. With existing operations as a baseline, the Commission's analysis considered three alternatives: (1) Alabama Power's proposal, which included measures for erosion

and sedimentation, water quality, drought management, fishery enhancement, and recreation enhancement, and plans to manage wildlife habitat aquatic vegetation, shoreline development, and historic properties; (2) a staff alternative that included most, but not all, of Alabama Power's proposed measures and additional staff-recommended measures; and (3) no action, i.e., continued project operation under the conditions of the then-current license. Rehearing Order P 82, JA 1427. The Environmental Assessment also discussed the Association's recommendations, comments, and proposed alternative mitigation measures as they applied to the particular resources at issue. *Id*. P 83 & n.125, JA 1427 (citing Environmental Assessment discussion of the Association's proposed operating curve (EA 132-36, JA 946-50); erosion (EA 191, JA 1005); habitat fragmentation (EA 191, JA 1005); effect of low lake levels on recreational boating (EA 192, JA 1006); effect of conversion of downstream fishery to a coldwater fishery (EA 194, JA 1008); and addressing operational alternative that would have resulted in dissolved oxygen levels higher than state standards (EA 194, JA 1008)).

As part of its support for its preferred alternative, the Association filed a report titled "Economic Analysis of Non-Power Values of Smith Lake" (Feb. 11, 2008), R. 342, JA 468. This report notes the rapid growth of residential homes on the shores of Smith Lake over the previous 12 years. *Id*. at 1, JA 469. Specifically, the report states that the number of developed homes on the shores of

Smith Lake had more than doubled since 1995 (115%), with approximately 6,853 developed properties in 2007. *Id*. at 9, JA 477. Further, the report states that, in 2007 dollars, the value of these homes had increased from $0.7 billion in 1995 (adjusted to 2007 dollars) to $1.8 billion in 2007 (169%), generating $5.8 million in property taxes to Smith Lake counties. *Id*. at 9, 30, JA 477, 498. Additionally, the report estimates that Smith Lake generates $88 million per year in revenues to local business. *Id*. at 1, JA 469.

The Association claimed that substantial benefits would accrue if their alternative were adopted. These benefits would include: (1) an increase in recreation use by extending the recreation season September through December; (2) double the annual visitation days at Smith Lake; (3) an increase in local property values by $342 to $547 million; (4) an increase in the property tax base and property tax revenues by $1.8 million; (5) an increase in annual local expenditures by $34 million; (6) benefits to marina owners and local businesses by extending the recreation season; (7) reduced damage to boat docks and shoreline facilities; and (8) savings to homeowners by as much as $9.7 million annually in repair and maintenance costs to private docks. EA 132-33, JA 946-47.

In response to the Association's proposal, the Commission sought detailed analysis from Alabama Power of the effects of maintaining the Association's proposed reservoir levels. Alabama Power concluded that the proposal would: (1)

reduce generation when energy is most needed and valued highest in the non-peak season; (2) reduce dependable capacity which would need to be replaced; (3) reduce flows available for use at Gorgas Plant during July through October, which could be mitigated by constructing cooling towers at Gorgas with less efficiency and at great cost; (4) provide inadequate flows to operate municipal water intakes during low flow years (20% of the time); (5) provide inadequate flows to maintain a minimum 9-foot navigation channel for barge traffic in low flow years (20% of the time); (6) potentially affect the bass and trout fishery downstream of the project; (7) reduce habitat for threatened and endangered species; (8) affect flood control and potential for increased use of flood easements; (9) reduce recreation use of the project trailrace during low flows; (10) increase the frequency of flood storage usage at Smith Lake; and (11) potentially encroach on the habitat of the federally-threatened Alabama streak-sorus fern and federally-listed threatened mussels. EA at 133-34, JA 947-48.

In response, the Association filed another report with its own analysis and a slightly modified proposal. The Commission reviewed this report and concluded that "it presents a pattern for effect on resources which are similar to [Alabama Power's] conclusions." EA 135, JA 949. Under the modified proposal, inadequate flows for navigation and water supply could occur 7.5 percent of the time (which could be mitigated by allowing drawdowns during drought conditions), inadequate

flows would be available for cooling at Gorgas, and peak generation would be reduced by 13 percent. *Id*. Further, the Commission noted that the Association's analysis did not include peak losses at the Bankhead development and Holt project.

2. The Commission Reasonably Balanced Power and Non-Power Values In Evaluating The Association's Proposal

Reviewing all this evidence, on the *non-power* side of the ledger, the Commission concluded that the Warrior Project already provides considerable benefits to recreation and property values around the lake and along associated tributaries. *See* EA 91-99, JA 905-13 (discussing proposed enhancements to recreation facilities); License Order P 68, JA 1134; Rehearing Order PP 58-61, JA 1415-17. The Environmental Assessment acknowledged that "the area has exhibited rapid growth in the number and value of residential homes, increased recreation use, and increased local revenues[.]" EA 135, JA 949. On this basis, the Commission concluded that it considers the "Association's alternative an enhancement measure rather than a mitigation measure." *Id*. Additionally, the Commission concluded that the potential annual increase of $48 million from an extended recreation season and increased property values of up to $0.5 billion are speculative because there is no guarantee that such benefits would be realized. *Id*.; Rehearing Order P 58 & n.80, JA 1415.

On the *power* side of the ledger, the Commission found that the costs to the developmental uses of the Warrior Project were certain to be incurred. For

example, there would definitely be a reduction in peak generation – be it the 13 percent loss estimated by the Association or the 27 percent loss estimated by Alabama Power. EA 135, JA 949; Rehearing Order P 59, JA 1415-16. Further, dependable capacity would be reduced at the Smith development and all downstream developments on the Warrior River. EA 135, JA 949; Rehearing Order P 60, JA 1417. The Environmental Assessment noted that this would result in monetary losses for Alabama Power, but would also necessitate replacing lost generation and capacity from a renewable resource, which it noted is an increasingly valuable component in the region's energy mix. EA 135-36, JA 949-50. The Environmental Assessment also noted over 30 letters from stakeholders with downstream interests, and indeed some Smith Lake property owners, in support of Alabama Power's proposed operation. EA 136, JA 950.

Weighing the developmental and non-developmental uses of the Warrior Project, and "balancing the need for power, flood control, navigation and commerce, water quality, aquatic resources, and recreation," the Commission concluded that "the costs of the Association's alternative outweigh the benefits, and it is not in the overall public interest to adopt this measure." EA 136, JA 950; *see also* License Order P 67, JA 1133-34; Rehearing Order P 61, JA 1417. This balance of statutory values and perspectives, based on substantial record evidence, deserves this Court's respect. *See Conservation Law Found.*, 216 F.3d at 46-47

(upholding Commission's rejection of alternative lake levels that would cause a significant decrease in energy benefits in exchange for only marginal improvements to aquatic resources); *cf. Brady v. FERC*, 416 F.3d 1, 12 (D.C. Cir. 2005) (Williams, J., concurring) (although issue not raised on appeal, questioning FERC's statutory authority to weigh tourism, employment and tax revenues in public interest finding).

3. The Commission Gave Due Consideration To The Association's Lake Level And Gorgas Cooling Tower Proposals

The Association argues (Br. 36-43) that the Commission should have considered its alternative lake level proposal and modifications to the Gorgas steam plant as discrete alternatives to Alabama Power's proposal. In response, the Commission stated that "the analytical approach taken in the [Environmental Assessment], which is the same approach that the Commission has employed for decades, considered a sufficient range of reasonable alternatives and enabled Commission staff to make an informed decision in relicensing the Warrior Project." Rehearing Order P 83, JA 1427. The Commission's extensive analysis thoroughly considered the Association's proposal. That is all that was required. *Id.* P 80, JA 1426 (citing *Idaho Power Co.*, 110 FERC ¶ 61,242 at PP 80-85 (2005) (noting there is no requirement to examine each proposed mitigation or enhancement measure (or groups of measures submitted by an entity) as separate

alternative or alternatives)); *see also Friends of the River v. FERC*, 720 F.2d 93, 108 (D.C. Cir. 1983) ("But insistence on form when we have before us a case in which the agency did in fact comply with the National Environmental Policy [Act], would jeopardize NEPA's lofty declarations. Remands in such cases would inevitably breed cynicism about court commands . . . ." (internal quotations and citations omitted)). Moreover, consideration of alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives. Rehearing Order P 38, JA 1408 (citing section 102(2)(C)(iii) of NEPA, 42 U.S.C. § 4332(2)(C)(iii), and *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976)).

Further, contrary to the Association's assertion (Br. 42), the Commission did not base its consideration of the Gorgas cooling tower alternative on a lack of jurisdiction. Rather, the Commission stated that "the operation of the Gorgas plant is just one element of the existing environment that has the potential to be directly or indirectly affected by the proposed action." Rehearing Order P 83, JA 1427-28. Under these circumstances, the Commission found that consideration of potential effects to Gorgas was more than adequate. *Id*. (citing EA 15-16, JA 829-30 (explaining project operations as incidental benefit to Gorgas); EA 40-41, JA 854-55 (describing Gorgas plant operation); EA 132-36, JA 946-950 (describing effects of the Association alternative on Gorgas plant operations)).

Ultimately, the Commission found that the relicensing of the Warrior Project, with suggested modifications by staff and further license conditions, would not have a significant environmental impact and, in fact, would provide incremental benefits over the prior license. EA 149, JA 963. The Association does not dispute this finding. *See* Br. 33 (citing its rehearing request, R. 563 at 14-16, JA 1214-16). "It is well-settled that under NEPA the range of alternatives that must be discussed is a matter within an agency's discretion." *Friends of the Ompompanoosic v. FERC*, 968 F.2d 1549, 1558 (2d Cir. 1992) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551-52 (1978)). "Indeed, the range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact." *Id*. (citing *City of New York v. DOT*, 715 F.2d 732, 743 n.11, 745 (2d Cir. 1983)).

Although the Commission did not adopt the Association's proposal, it included license conditions to address the Smith Lake level. Specifically, Article 402 of the license provides lake level management provisions intended to "protect the ecological and recreational values of Smith Lake and continue to provide for downstream navigation and flood control." License Order p. 41, JA 1151. Article 409 requires Alabama Power to file a plan to, among other things, monitor compliance with Article 402. *Id*. p. 47, JA 1157. The license also requires

Alabama Power to implement specific measures directed at improving recreation. For example, Article 415 requires the development and implementation of a Warrior River Project Recreation Plan. *Id*. p. 51, JA 1161. The Recreation Plan must include, among other things, provisions for an additional boat launch, a courtesy dock, and an expanded parking lot. *Id*. Finally, as mentioned above, the Commission reserved the right to make changes to the Recreation Plan. EA 97, JA 911.

The analysis in the Environmental Assessment and Commission orders, together with the reasonable conditions imposed on Alabama Power in furtherance of recreation, demonstrate the agency's attentiveness to the Association's concerns, and ensure that the Warrior Project is consistent with a comprehensive plan for development of the waterway.

C. The Commission's Federal Power Act Determinations Are Supported By Substantial Evidence

The Association acknowledges that the new license makes improvements to the prior operation of the Warrior Project. Br. 33. The Association also concedes that that "the record for this relicensing is 'extensive,' totaling tens of thousands of pages." Br. 55. Further, the Association concedes that "[g]iven the size of the record, [the Association] does not dispute that somewhere in the record there may be evidence that supports FERC's finding on a given issue." *Id*. The Commission has repeated that it need not "have perfect information before it acts" (Rehearing

Order PP 23, 27, 29, 40, 57, 65, JA 1401, 1403, 1405, 1408, 1414, 1418 (citing *Appalachian Power Co.*, 132 FERC ¶ 61,236 at PP 17-19)), yet that is what the Association seeks.

The Association's challenges to the sufficiency of the Commission's data and analysis can be grouped into three general categories: (1) the Commission's ability to rely on post-licensing studies; (2) the sufficiency of the data in the record; and (3) the Commission's decision not to reopen the record.

1. The Commission Properly Used Its Authority To Impose Conditions On The License To Monitor Resource Needs Through The License Term

The Commission regularly uses license conditions to monitor a project's consistency with the desired future use and condition of the waterway. The Association argues that FERC improperly relies on post-licensing studies and other conditions instead of making findings in advance of the license. The Association takes particular issue with license Article 402's directive to monitor compliance with the "guide curve," which provides parameters for lake level elevations, and other license requirements to study drought (low water-inflow) operations. Br. 51-52; *see also* Alabama Rivers Alliance Br. 23-24, 29 (challenging justification for 50-cubic feet per second minimum flow release and other post-license studies). The Association argues that these studies should have been performed during relicensing. *Id*. 52.

Relying on its precedent addressing the identical argument in *Appalachian Power Co.*, 132 FERC ¶ 61, 236, at PP 14-19 (2010), the Commission explained that case authority – including the Association's principal authority, *Confederated Tribes & Bands of Yakima Indian Nations v. FERC*, 746 F.2d 466 (9th Cir. 1984) – does not require the Commission to have perfect information before it acts. Rehearing Order P 23, JA 1401 (citing *Idaho Power Co*., 108 FERC ¶ 61,129, at P 41 (2004), *reh'g denied*, 110 FERC ¶ 61,242 (2005), *aff'd Idaho Rivers United v. FERC*, 189 F. App'x 629 (9th Cir. 2006)). Rather, the test is whether, given uncertainty, the Commission's action meets the standard for judicial review, which requires that the Commission's decision be supported by substantial record evidence. *Id*.; *see also Dep't of Interior*, 952 F.2d at 546 (agency need only establish a record to support its decisions; neither heightened degree of certainty for environmental facts, nor must all environmental concerns be definitively resolved before a license issues).

Here, the Commission used available information to support its findings on flows and drought operations. EA 41-42, JA 855-56 (using "delphi-type" approach conducted by biologists, found 50-cubic feet per second minimum flow release during times of non-generation would benefit recreational fishing over leakage flows), EA 46-49, JA 860-63 (discussing water quality under past operation, noting that it would not change, and explaining the benefit of water quality monitoring).

The monitoring conditions imposed are simply to confirm that Warrior Project operation is consistent with the license terms, and to continue to monitor the impacts of operation on resources so that the Commission can make necessary adjustments throughout the license term. *See, e.g.*, License Order P 73, JA 1136 ("Such a plan will establish a framework to periodically confirm the project is operated in compliance with a new license, and provide important data needed for the licensee and the resource agencies to evaluate what effects, if any, the required water levels and flows have on the resources.") Far from using an inappropriate *post hoc* approach, the Commission was simply carrying out its obligation under Federal Power Act section 10(a)(1) throughout the term of the license. *See Dep't of Interior*, 952 F.2d at 547-48 (under similar circumstances, recognizing FERC's liberal use of license conditions to protect against unknown risks).

Given the practical difficulty of predicting resource needs so far out into the future ("it is not possible, as the [Association] argues we must do, to precisely identify and quantify how the license will impact specific project resources over the next 30 years," Rehearing Order P 24, JA 1402), it was reasonable for the Commission to rely on license conditions that monitor these resource needs. *See California v. FPC*, 345 F.2d 917, 925 (9th Cir. 1965) (upholding Commission's authority to incorporate appropriate conditions in hydroelectric licenses); *see also Portland Gen. Elec. Co. v. FPC*, 328 F.2d 165, 175 (9th Cir. 1964). "Thus, [the

Commission] reserves . . . the authority to reopen the license at any time conditions warrant to address resources issues that may arise through the term of the license." *Appalachian Power Co.*, 132 FERC ¶ 61,236 at P 19; s*ee also Nat'l Wildlife Fed'n*, 912 F.2d at 1475 (acknowledging FERC's statement that "comprehensive development is a concept that evolves over time, reflecting different eras' technical options, economic realities, and resource use priorities").

2. The Record Is Sufficient And Satisfies Applicable Standards For Substantial Evidence

The Association makes several arguments challenging the sufficiency of the evidence in the record. At bottom, the Association would have preferred the Commission to take additional evidence analyzing its lake level alternative, particularly in areas the Association believes would help support its cause. Notably, were the Commission to explore that evidence further, it would have needed to further investigate resource areas (primarily downstream areas) that would have been negatively impacted by the Association's proposal (*see supra* pp. 33-34).

Nevertheless, the Association argues that the Commission's analysis is not based on substantial evidence because the Commission did not fill gaps in the record on the issue of hydrology, particularly by independently developing or obtaining Alabama Power's hydrologic model. Br. 43-47. The Association argues that the Commission may not rely on a scientific method that is undisclosed and

unverifiable. Br. 44 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993); Fed. R. Evid. 702).

Yet technical rules of evidence applicable in trial courts do not govern agency proceedings. *See* 16 U.S.C. § 825g ("All hearings, investigations, and proceedings under this [Federal Power] Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied"); *see also Mont. Power Co. v. FPC*, 185 F.2d 491, 497-98 (D.C. Cir. 1950) (hearsay rule is inapplicable to administrative proceedings "so long as the evidence upon which an order is ultimately based is both substantial and has probative value"). Additionally, the Association concedes that the differences in modeling results were likely based on "significant differences in modeling assumptions, and [] if similar assumptions were used there would be a better match between Alabama Power's and the Lake Association's results." Rehearing Order P 27, JA 1403 (citing Association's Request for Rehearing, Exhibit 1.1 at 22-23, R. 563, JA 1329-30). Similarly, the Commission concluded that the different modeling results were likely based on: (1) the Association's strict adherence to the guide curve in its model, while Alabama Power's model may have used actual operations with variations in drought (low water inflow) years; and (2) the fact that the Association modeled 1940 through 2007, while Alabama Power modeled 1929 through 2008. Rehearing

Order P 59 n.84, JA 1416. The Commission carefully assessed the results of both models and reconciled the likely differences between the two. That is all that is required. *See Dep't of Interior*, 952 F.2d at 546 (holding that "virtually every decision must be made under some uncertainty; the question is whether the Commission's response, given uncertainty, is supported by substantial evidence and not arbitrary and capricious").

More important, the Commission explained that it was not relying solely on the calculations from Alabama Power's model. Rather, the Commission's determination was based on a balance of all the developmental and non-developmental uses. Although the Commission did look at power generation losses, it simply concluded that, by any calculation, they were certain to be incurred. *See* License Order P 67, JA 1133-34; Rehearing Order P 26, JA 1403; *see also Cities of Carlisle v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984) (upholding as reasonable the Commission's decision to dispense with elaborate calculations where context made it clear that even "worst case" calculations would not have been satisfactory); *E. Niagara Pub. Power Alliance v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (upholding FERC hydroelectric licensing decision where "FERC faced a difficult valuation question and answered it in a permissible way given the predictive and inherently speculative nature of the judgment it was required to make").

Under these circumstances, the Commission need not perform an apples to apples comparison of power and non-power values. The Association argues that the Commission cannot compare the benefits of the Association's alternative in dollars without reducing the potential reduction in peak generation (13%) to a dollar value as well. Br. 41. First, the Commission explained that calculating revenue losses from generation is a complicated exercise. Rehearing Order P 26 n.40, JA 1403. Second, as the Commission explained, it "did not need to calculate a precise dollar value for revenue losses to support its conclusion that the Lake Association's request for more stable lake elevations was not in the overall public interest. Its determination was based primarily on the reduction in generation and dependable capacity at the project's two developments, not the dollar value of those losses." Rehearing Order P 26, JA 1403; *see also City of Los Angeles v. FAA*, 138 F.3d 806, 808 (9th Cir. 1998) ("so long as an agency reasonably explains why further quantification is not necessary or feasible, our review is at an end"). The certainty of losses to an existing renewable resource with special operational characteristics (License Order P 102, JA 1143), compared with the speculative gains to already healthy property values and recreation levels, provided sufficient justification to reject the Association's alternative. No further quantification was necessary.

Likewise, the Association argues (Br. 42-43, 47-48) that more information was required on the coordination of operation between the Smith development and the downstream Gorgas Steam Plants to evaluate whether the Smith development was operating for the benefit of Gorgas. This information would only be cumulative, since the Commission was well aware that releases from the Smith dam provide cooling water benefits at Gorgas. EA at 15-16, 40-41, 132-36, 199, JA 829-30, 854-55, 946-950, 1013. Further, "releases from Smith dam provide[] benefits to multiple downstream uses and it would be difficult, if not impossible to separate out the effect on any one resource." EA at 199, JA 1013 (response to comment). Given the limited, if any, value of further investigation, and the fact that the Commission's determination was not based on the need for cooling water at Gorgas, there was no need to obtain further evidence on this issue. At each step, the Commission provided a reasoned explanation and supported its decision with the facts.

3. The Association's Motion To Reopen Should Be Denied

The Association seeks to reopen the record to include (1) Alabama Power's Hydro Energy Budget Model software and supporting data, and (2) Alabama Power's written procedures for coordinating operation of the Smith development with the Gorgas Coal Plant. *See* Br. 67-70; *see also* Court's Sept. 10, 2013 Order (referring motion to merits panel). First, the Association claims that it made

repeated, unsuccessful inquiries with the Commission to obtain this information. *See* Br. 68 (citing efforts). Because the Commission has discretion in the development of its record to support its findings with substantial evidence, "[a] petition seeking review of an agency's decision not to reopen a proceeding is not reviewable unless the petition is based on new evidence or changed circumstances." *Adv. Comm. Corp. v. FCC*, 376 F.3d 1153, 1156 (D.C. Cir. 2004) (quoting *Sw. Bell Tel. Co v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999)); s*ee also ICC v. Jersey City*, 322 U.S. 503, 516-517 (1944) (finding that "administrative tribunals 'have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest'") (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940)). Here, the Commission considered the Association's request to obtain this existing evidence, but denied it on the basis that it already had substantial evidence to support its findings. Rehearing Order P 27, JA 1403. There is no need for the Court to upset the agency's judgment as to the sufficiency of the record evidence it needed or relied upon.

Even accepting this information as "new," the Association has not reached the very high bar for reopening a record in an administrative proceeding. The standard requires the movant to show that it "clearly appear[s] that the new evidence would compel or persuade to a contrary result." *Conservation Law*

Found., 216 F.3d at 49 (quoting *Friends of the River*, 720 F.2d at 99 (citation omitted)). The Association fails to meet this high standard given that the introduction of either category of information would not have produced – let alone compelled – a different result in this case. As described above, the Commission's findings were based on a variety of considerations. A better understanding of the hydrology of the system or Gorgas' cooling water needs would not have changed the Commission's conclusion that the Association's alternative would provide speculative benefits to already healthy property values and recreational values at the certain expense to generation and dependable capacity from an important renewable resource.

The Commission received all of the information it needed to base its decision on substantial evidence. *See Greene Cnty. Planning Bd. v. FPC*, 559 F.2d 1227, 1233 (2d Cir. 1976) (declining to reopen a record even where information would undercut the Commission's findings). At some point, to properly function, the administrative process must come to a close. *Friends of the River*, 720 F.2d at 99.

III. THE COMMISSION PROPERLY CONSIDERED IMPACTS TO FEDERALLY LISTED SPECIES CONSISTENT WITH THE ENDANGERED SPECIES ACT

The Association argues generally that the Commission violated the Endangered Species Act by not initiating a formal consultation with the Fish and

Wildlife Service, claiming "there is evidence in the record that the new license will adversely impact both listed species and designated critical habitat over the 30-year term of the license." Br. 58; *see also* Alabama Rivers Alliance Br. 34-35 (same). Section 7(a)(2) of the Endangered Species Act requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally-listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2).

If the Commission had found that the proposed action would be likely to adversely affect a listed species (i.e., jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the species' critical habitat), then the Commission was required to engage in formal consultation, and consider the factors proffered by the Association. If on the other hand the Commission found, as it did here, that the proposed action was not likely to adversely affect the listed species, and if the Fish and Wildlife Service concurs in this finding, as it did here (three times), then no further action is necessary. *See* regulations implementing the provisions of the Endangered Species Act, 50 C.F.R. § 402.14(b)(1) ("A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action

is not likely to adversely affect any listed species or critical habitat."). Contrary to the Association's arguments, there is no requirement in the statute or the implementing regulations to undertake formal consultation under the circumstances in this case.

In the course of its review, Commission staff identified 13 threatened, endangered, or candidate species (a bird, two plants, an amphibian, a reptile, a fish, and seven mussels) as occurring, or having the potential to occur, within the project boundary. *See* EA 69-81, JA 883-895. In addition, Fish and Wildlife Service has designated 91 miles of Sipsey Fork and its tributaries as critical habitat (Sipsey Fork Unit 10) for five of the listed mussel species. A portion of Sipsey Fork Unit 10 is located within the project boundary near the upstream limits of Smith Lake. After careful examination of the potential effects of the Warrior Project, as proposed by Alabama Power with FERC staff's additional recommended measures, the Environmental Assessment concluded that relicensing the Warrior River Project would not be likely to adversely affect any listed species or their critical habitat. *See* Draft Environmental Assessment, R. 350, JA 518; EA at 69-81, JA 883-895.

On three separate occasions, the Fish and Wildlife Service concurred with the Commission's findings. "Comments of Fish and Wildlife Service" (Apr. 11, 2008), R. 397, JA 666 (finding that the flattened musk turtle is the only listed

species known to occur within the project boundary, and that project areas included in this designation "are currently unoccupied by any of the . . . 5 mussel species"); "United States Department of Interior comments" (Apr. 21, 2009), R. 467 at 1, JA 1037 (finding that the Alabama streak-sorus fern and the flattened musk turtle are the only species known to occur within the project boundaries and that their population appears "healthy and stable"); "Letter from Fish and Wildlife Service" (Oct. 8, 2009), R. 522 at 2, JA 1110 ("continu[ing] to concur with FERC's determination that the flattened musk turtle and Alabama streak-sorus fern will not be adversely affected by the proposed operation of the project, and that the proposed operation will not affect critical habitat for the mussels within the boundaries of the project").

In light of the evidence developed by Commission staff and the Fish and Wildlife Service's repeated concurrence with the Commission finding that the proposed action is not likely to adversely affect the listed species, no further action was necessary.

IV. THE COMMISSION SATISFIED ITS OBLIGATIONS TO CONSIDER THE PROJECT'S CONSISTENCY WITH FEDERAL LANDS UNDER SECTION 4(e) OF THE FEDERAL POWER ACT

The Warrior Project occupies almost 2,700 acres of the Bankhead National Forest. Section 4(e) of the Federal Power Act provides that the Commission may issue a license for a project located within any forest reservation (such as the

Bankhead National Forest) only if it finds that the license will not interfere or be inconsistent with the purposes for which the reservation was created or acquired. 16 U.S.C. § 797(e). Section 4(e) of the Act also requires that the Commission include in licenses for projects located within a federal reservation any conditions that the Secretary of the department under whose supervision the reservation falls deems necessary for the adequate protection and utilization of such reservation.

The Association asserts that the Commission had an obligation to prove that the Warrior Project would not be inconsistent with the purpose of the Bankhead National Forest, and that it could not rely on a lack of evidence in the record to the contrary. Br. 65. Contrary to the Association's simplistic understanding, the Commission fully satisfied its obligations under the statute.

First, the Commission solicited input from appropriate resource agencies, Indian tribes, and other interested entities to participate in, and contribute to, the development of the record in this proceeding. EA 9, JA 823. After compiling this extensive record, the Commission staff reviewed all relevant documents and concluded, based on such review, that there is no evidence in this proceeding to indicate that relicensing the Warrior Project would interfere with the purposes (i.e., water flows and timber production) of the Bankhead National Forest. License Order P 29, JA 1120-21; Rehearing Order P 69, JA 1420. Additionally, the Forest Service submitted conditions under Federal Power Act section 4(e) for inclusion in

the license, for the protection and utilization of the Bankhead National Forest. *See* License Order PP 30-40, JA 1121-24; Rehearing Order P 69, JA 1420.

The Association failed to point to any record evidence to refute the Commission's findings. Moreover, pursuant to the Forest Service conditions, Alabama Power will provide money and services to support a range of activities to monitor and improve environmental and recreation activities in the Bankhead National Forest. *See* Rehearing Order P 67, n.95, JA 1419; EA Exhibit A, JA 991-94; EA Exhibit B, JA 995-1002. In these circumstances, the Commission complied with its obligation to evaluate the Warrior Project's consistency with the purposes for which the Bankhead National Forest was created and appropriately included the conditions identified by the Forest Service deemed necessary for the Forest's adequate protection and use. No more is required.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be upheld in their entirety.

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Lisa B. Luftig
Lisa B. Luftig
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-6791
Fax: (202) 273-0901
Email: lisa.luftig@ferc.gov

January 2, 2014
FINAL BRIEF: February 21, 2014

Smith Lake Improvement and Stakeholders Association v. FERC, *et al.*
D.C. Cir. No. 13-1074

Docket No. P-2165

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 12,551 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

/s/ Lisa B. Luftig
Lisa B. Luftig
Attorney

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-6791
Fax: (202) 273-0901
Email: lisa.luftig@ferc.gov

February 21, 2014

ADDENDUM
STATUTES AND REGULATIONS

TABLE OF CONTENTS

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.

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

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

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 801. Transfer of license; obligations of transferee

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

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

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

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

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

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

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

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

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

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

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

CODIFICATION

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

AMENDMENTS

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 803. Conditions of license generally

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

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

(1) That the project adopted, including the maps, plans, and specifications, shall be such as

[1] See Codification note below.

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

(d) Amortization reserves

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

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

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to an-

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

shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

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

(e) Deposition of witness in a foreign country

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

(f) Deposition fees

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

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

AMENDMENTS

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

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

EFFECTIVE DATE OF 1970 AMENDMENT

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

§ 825g. Hearings; rules of procedure

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

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

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

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

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

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

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

an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) Appropriations

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 669b of this title, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out pro-

grams for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

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

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

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) *Incorporation by reference.* If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

[74 FR 20423, May 4, 2009]

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species

or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec 16, 2008; 74 FR 20423, May 4, 2009]

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Subpart C—Counterpart Regulations for Implementing the National Fire Plan

SOURCE: 68 FR 68264, Dec. 8, 2003, unless otherwise noted.

§ 402.30 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

Action Agency refers to the Department of Agriculture Forest Service (FS) or the Department of the Interior Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), or National Park Service (NPS).

Alternative Consultation Agreement (ACA) is the agreement described in § 402.33 of this subpart.

Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined in this section.

National Fire Plan (NFP) is the September 8, 2000, report to the President from the Departments of the Interior and Agriculture entitled ''Managing the Impact of Wildfire on Communities and the Environment'' outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto.

Service Director refers to the FWS Director or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

§ 402.31 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for

Smith Lake Improvement & Stakeholders, Inc. **Docket No. P-2165**
v. FERC
D.C. Cir. No. 13-1074

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of February 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

DOJ Appellate Counsel U.S. Department of Justice (DOJ) Civil Division, Appellate Staff 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	Email
Gregory S. Farris P.O. Box 1208 Double Springs, AL 35553	US Mail
Julie Gantenbein Water and Power Law Group PC 2140 Shattuck Avenue Suite 801 Berkeley, CA 94704	US Mail
Philip Stephen Gidiere III Balch & Bingham LLP 1901 Sixth Avenue North Suite 1500 Birmingham, AL 35203-4642 Email: sgidiere@balch.com	Email

Michael T. Gray U.S. Department of Justice c/o US Army Corps of Engineers, Office of Counsel 701 San Marco Boulevard Jacksonville, FL 32207	Email
James Hughes Hancock Jr. Balch & Bingham LLP 1901 Sixth Avenue North Suite 1500 Birmingham, AL 35203-4642	US Mail
Peter A. Harrison Waterkeeper Alliance, Inc. 17 Battery Place, Ste. 1329 New York, NY 10004	US Mail
Nicholas Tokiuki Niiro Water and Power Law Group PC 2140 Shattuck Avenue Suite 801 Berkeley, CA 94704	Email
Richard Roos-Collins Water and Power Law Group, PC 2140 Shattuck Avenue Suite 801 Berkeley, CA 94704	Email

Jason Tompkins
Balch & Bingham LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642

Email

/s/ *Lisa Luftig*
Lisa Luftig
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6791
Fax: (202) 273-0901