No. 09-1134

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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HOOPA VALLEY TRIBE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

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On Petition for Review of Orders
of the Federal Energy Regulatory Commission

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# PETITIONER HOOPA VALLEY TRIBE'S INITIAL BRIEF

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THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Tel: (206) 386-5200
Fax: (206) 386-7322
Counsel for Petitioner Hoopa Valley Tribe

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Corporate Disclaimer. The Hoopa Valley Tribe is a federally recognized Indian tribe. It has issued no shares of stock to the public and has no parent company, subsidiary or affiliate that has done so.

Parties and Amici. Petitioner is the Hoopa Valley Tribe. Respondent is the Federal Energy Regulatory Commission. The licensee, PacifiCorp, has intervened.

Rulings Under Review

1. FERC Order Denying Hoopa Valley Tribe's Motion for Interim License Conditions, 125 FERC ¶ 61,196 (November 20, 2008), FERC Docket P-2082-049. *See* Joint Appendix 521-528.

2. FERC Order Denying Hoopa Valley Tribe's Request For Rehearing, 126 FERC ¶ 61,236 (March 19, 2009), FERC Docket P-2082-053. *See* Joint Appendix 608-618.

Related Cases. This Court previously reviewed a FERC Order relating to the re-licensing of the Klamath Hydroelectric Project (P-2082) in *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008) (Case No. 06-1212). The Hoopa Valley Tribe intervened in that proceeding.

Dated this 15th day of January, 2010

*/s/ Thomas P. Schlosser*
Thomas P. Schlosser
Morisset, Schlosser & Jozwiak
Counsel for Petitioner Hoopa Valley Tribe

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**



NOTE: *Authorities upon which we chiefly rely are marked with asterisks.*

**Statutes**



**Other Authorities**

## I. STATEMENT OF JURISDICTION

On November 20, 2008, FERC issued an Order Denying the Hoopa Valley Tribe's Motion for Interim License Conditions. A521.[1] FERC had jurisdiction under the Federal Power Act, 16 U.S.C. § 791, *et seq*. The Tribe requested rehearing under 16 U.S.C. § 825l on December 19, 2008, which FERC denied by order dated March 19, 2009. A608. The Tribe petitioned for review in this Court on May 11, 2009. A621. This Court has jurisdiction under 16 U.S.C. § 825l(b).

## II. STATEMENT OF THE ISSUES

1. Whether FERC erred by adjudicating the Hoopa Valley Tribe's motion for interim license conditions under an incorrect legal standard?

2. Whether FERC erred by requiring the Tribe to provide evidence of potential irreversible environmental damage to support the Tribe's motion for interim license conditions?

3. Whether FERC's denial of the Tribe's motion for interim license conditions, and subsequent denial of the Tribe's request for rehearing, was an arbitrary and capricious exercise of Commission discretion?

4. Whether FERC's factual determinations regarding the health of the affected fish and aquatic resources, and the need for interim conditions, are supported by substantial evidence in the record?

[1] References to pages contained in the Appendix are cited as "A___" herein.

## III. STATEMENT OF THE CASE

In 1954, the Federal Power Commission issued a fifty-year license to operate the Klamath Hydroelectric Project for hydroelectric power generation on the Klamath River. A67-69.[2] That license, currently held by PacifiCorp, expired on March 1, 2006. A464. Since license expiration, PacifiCorp has continued to operate the Project on the same terms of the 1954 license under the authority of annual licenses issued by FERC. *Id.*; 16 U.S.C. § 808(a)(1). PacifiCorp's application to re-license the Project (filed in 2004) remains pending before FERC.

Nearly three years ago, on February 23, 2007, the Hoopa Valley Tribe requested that FERC impose specific interim conditions on PacifiCorp's annual license for the protection of fish and aquatic organisms that are adversely affected by ongoing Project operations. A420. Specifically, the Tribe seeks conditions that would require a minimum instream flow to be released from the J.C. Boyle component of the Project and that would limit the "ramping rate" at J.C. Boyle Dam. A440.[3] The FERC record contains substantial evidence regarding the impacts resulting from existing Project operations and the benefits that would

[2] The FPC subsequently changed the effective date of the license to March 1, 1956. A73.

[3] A "ramping rate" is the rate at which the water level rises or falls in the river downstream of a hydroelectric project following commencement or cessation of power operations. *See* A141; A209.

result from the interim flow conditions sought by the Tribe. *See* Sections VIII(C) and VIII(D) *infra*.

The interim measures sought by the Tribe (A440) are taken directly from flow conditions developed and approved by the Department of Interior, Bureau of Land Management, in 2007 pursuant to Interior's mandatory conditioning authority under Section 4(e) of the Federal Power Act. 16 U.S.C. § 797(e); A368-371. Pursuant to Section 4(e), the flow conditions developed and prescribed by Interior and now sought by the Tribe must be included in any new license that is ultimately issued for the Project by FERC. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding FERC has no discretion to reject 4(e) conditions imposed by Interior); *City of Tacoma v. FERC*, 460 F.3d 53, 66-67 (D.C. Cir. 2006) (same). Although Interior's 4(e) flow conditions were finalized as mandatory prescriptions three years ago, the conditions are not currently in effect due to the delay of the FERC re-licensing process combined with FERC's refusal to impose the protective measures in the interim.

On November 20, 2008, FERC denied the Tribe's motion to impose the interim flow conditions on the grounds that the Tribe failed to show that the interim conditions were needed to prevent "irreversible environmental damage" pending the conclusion of the re-licensing. A521-528, ¶ 11, 13, 16, 18. The Tribe

petitioned for rehearing, arguing that FERC had imposed an incorrect and unduly burdensome legal standard on the Tribe's request, and that FERC had also based its decision on erroneous factual determinations regarding the health of the affected fishery. A529-548. FERC denied re-hearing on March 19, 2009. A608. The Tribe petitioned for review in this Court on May 11, 2009. A621. The Tribe requests that this Court vacate FERC's order denying the Tribe's motion for interim conditions and remand with a direction to impose the Tribe's requested conditions or, at minimum, remand for further consideration by FERC under the proper legal standard and based on a complete review of the evidence in the record.

## IV. STATEMENT OF RELEVANT FACTS

On February 25, 2004, PacifiCorp filed an application with FERC for a new operating license for its Klamath Hydroelectric Project. A464. PacifiCorp's fifty-year license to operate the Project expired on March 1, 2006. *Id*. Since March 1, 2006, PacifiCorp has continued to operate the Project pursuant to annual licenses issued by FERC, and will continue to do so until conclusion of the re-licensing process. *Id.*; 16 U.S.C. § 808(a)(1).

The Klamath Project is located on the Klamath River upstream from the Hoopa Valley Reservation. A116; A464. The Project consists of eight independent developments that span approximately 64 river miles within northern California and southern Oregon. A465. This case involves only the operations of

the J.C. Boyle component of the Klamath Project. The J.C. Boyle development includes a reservoir, dam, and powerhouse, and is partially located on federal lands under the jurisdiction of the Bureau of Land Management. A468-69.

A. Flow Fluctuations Resulting from Operations at J.C. Boyle Adversely Impact Fish and Aquatic Organisms.

Power production at J.C. Boyle is managed as a "peaking" operation with daily flow fluctuations ranging from 1,000 cubic feet per second (cfs) to 2,600 cfs for most of the year. A96. When daily power generation operations begin, water is sent through the J.C. Boyle powerhouse and discharged downstream into a reach of the Klamath River known as the J.C. Boyle "peaking reach."[4] *Id.* The discharge of water through the powerhouse rapidly increases the flow and water level in the peaking reach. *Id*. Conversely, when power operations cease for the day, water is no longer sent through the powerhouse and flow and water levels in the peaking reach decrease significantly. *Id*. Substantial evidence in the FERC record shows that these dramatic and unnatural flow fluctuations adversely affect fish and other aquatic species that fish rely on for food in the reaches below J.C. Boyle. *See* Section VIII(C) *infra*; *see also* A331-336; A345 (Findings 16 and 17).

The rate at which the water level in the peaking reach below the powerhouse is allowed to change is known as a "ramping rate." A96. The 1954 license provides for a maximum "ramping rate" of nine inches per hour. *Id.* PacifiCorp's

[4] Maps of the relevant project area are found at A92, A402 and A467.

current operations, under the ramping rate condition in the 1954 license, can raise or lower the river stage downstream of J.C. Boyle powerhouse by as much as 2.2 feet in a period of several hours. *Id*. Naturally flowing rivers rarely, if ever, see a natural "ramping" event of two inches per hour, let alone nine inches per hour. A209-210, at ¶ 7-8. Thus, the nine-inch-per-hour ramping rate results in a change in the water level that is more than four times greater than what would occur naturally in a rare, intense storm event in comparable river systems. *Id*.

The adverse impacts to fish and aquatic resources from these extreme flow fluctuations are well-documented by evidence in the FERC record submitted by Interior, state fish and wildlife agencies and interested Indian tribes. *See* Sections VIII(C) and VIII(D) *infra*. Impacts include stranding of macroinvertebrates and fish, increased energetic demands on fish, lack of food availability, downstream displacement of fish and macroinvertebrates, and reduced habitat areas. *Id.* A prior FERC EIS, prepared in 1990 for a proposed Klamath River hydroelectric project, also documented impacts resulting from the flow fluctuations associated with PacifiCorp's current operations. A202-203.

### B. Interior has Prescribed a Mandatory 2-Inch Per Hour Ramping Limitation for J.C. Boyle.

In 2006, the Department of Interior submitted a preliminary license condition to FERC that limits the "ramping rate" at J.C. Boyle to no more than 2-inches-per-hour. A108. Interior submitted this condition pursuant to its Section

4(e) mandatory conditioning authority for the protection of the aquatic resources within the federal (BLM) reservation located downstream of J.C. Boyle. A100-103; 108-109. PacifiCorp challenged the factual basis for Interior's 2-inch-per-hour ramping condition in a "trial-type" evidentiary hearing held under the Energy Policy Act of 2005. Public Law 109-58, § 241. A136.

Experts from federal, tribal, state, and non-governmental entities submitted extensive testimony and exhibits to support the factual basis for Interior's 4(e) conditions, specifically including the 2-inch-per-hour ramping limitation. *See generally* A140-A303. At the conclusion of the 5-day hearing, ALJ Parlen McKenna ruled against PacifiCorp and in favor of Interior on the ramping rate issue, finding that PacifiCorp's current flow operations adversely affect fish and other aquatic resources below J.C. Boyle, and that Interior's ramping condition will provide substantial benefit to those affected resources. A331-336; *see also* A347-367. Judge McKenna found that "the current peaking operations and their unnatural upramp rates create several conditions that are harmful to the trout fishery" and that the unnatural flow fluctuations adversely impact food availability, resulting in impaired growth and overall health. A339-341. PacifiCorp's studies filed in opposition to the ramping rate prescription were deemed unreliable. A340.

Following PacifiCorp's unsuccessful challenge, Interior issued its final Section 4(e) prescriptions, which included the 2-inch-per-hour ramping rate

limitation. A368-371. The need for the ramping rate limitation is supported by overwhelming evidence in the FERC record. *See, e.g.*, A100-103; A108; A127-131; A140-303; A331-342; A347-367; A391-397. However, the condition is not currently in effect because the FERC re-licensing remains pending, as it has since 2004, and because of FERC's unwillingness to impose the condition in the interim.

C. Lack of Adequate Minimum Flows Below J.C. Boyle Dam Adversely Affect the Fishery and Aquatic Resources Below the Dam.

Under current operations, PacifiCorp releases 100 cubic feet per second (cfs) of water from the J.C. Boyle Dam into the J.C. Boyle "bypassed reach." A493.[5] Studies by the Oregon Department of Fish and Wildlife ("ODFW") confirm that the 100 cfs flow does not "adequately provide for a healthy productive fish community with reduced growth, low relative weights, and low persistence of fish over the age of 4." A384-85. Other studies conducted or cited by Interior and the Hoopa Valley Tribe confirm the need for increased instream flows. *See e.g.*, A384-85; A413-414; A118-126.

To address the inadequate instream flows and associated impacts, the Department of Interior prescribed increased instream flows under Section 4(e).

[5] The "bypassed reach" is the reach of the Klamath River located directly downstream from the J.C. Boyle Dam. Nearly all of the flow of the Klamath River is diverted at the J.C. Boyle Dam and then sent through a two-mile canal to the J.C. Boyle powerhouse. A94; A469. Once water is sent through the powerhouse, it flows downstream into the "peaking reach." Water that is not diverted to the powerhouse is released directly from the dam into the "bypassed reach," which ultimately reconnects with the "peaking reach" downstream. A92.

A105-107. Interior's finalized instream flow prescription requires PacifiCorp to release: (1) no less than 40% of inflow to the J.C. Boyle Bypassed Reach when inflow is 1,175 cfs or greater; (2) 470 cfs when inflow is less than 1,175 cfs; and (3) an amount equal to inflow when inflow is less than 470 cfs. A370-371.

PacifiCorp also challenged Interior's minimum flow prescriptions in the 2006 EPAct trial-type hearing. A133. After reviewing the testimony, exhibits, and hearing cross-examination of witnesses, Judge McKenna found that the current flow regime does adversely affect fish species and that Interior's minimum flow conditions will provide substantial benefit to those affected species. A345 (Finding of Fact 16); *see also* A331-366. Interior issued its final mandatory instream flow prescription in January 2007, but at this time, three years later, PacifiCorp continues to release only 100 cfs into the river due to the delay in re-licensing and FERC's refusal to impose the minimum flow condition as an interim protective measure. A368-71; A383.

D. The Re-Licensing Remains in a State of Perpetual Delay.

PacifiCorp continues to operate its Project under the terms of a license first issued in 1954 and which expired almost four years ago. PacifiCorp's application for a new operating license was filed six years ago. A464. Although FERC has completed its environmental review under NEPA, and the Departments of Interior and Commerce have finalized their Section 4(e) prescriptions and Section 18

fishway conditions, issuance of a new license (with new protective terms and conditions) is currently delayed by the inability of the States of Oregon and California to complete the water quality certification process pursuant to Section 401 of the Clean Water Act. 33 U.S.C. § 1341 (stating no license shall be granted until Section 401 certification is obtained or waived); A549-550 (noting that water quality certification remains pending).

An agreement signed by PacifiCorp, the States, and the United States in late 2008 (the "AIP") prevents Oregon and California resource agencies from imposing any costs on PacifiCorp (absent PacifiCorp's consent) relating to water quality certification studies while settlement negotiations relating to potential dam removal proceed. A556. Based on the AIP, PacifiCorp has negotiated a draft settlement agreement that would put the Section 401 certification process (and thus, the entire FERC re-licensing) in abeyance for years to come.[6] As a result of the AIP, and its restrictions on completing the Section 401 certification process, the licensing is suspended in a perpetual state of delay. During the inaction, the Project continues

[6] The latest version of the draft settlement, released for public review on January 8, 2010, is available at: http://www.edsheets.com/Klamathdocs.html. Under the draft hydroelectric settlement, which requires enactment of new federal legislation to become fully effective, PacifiCorp would continue to operate the Project under annual licenses through at least 2020 and perhaps longer. Significantly, the Agreement does not (and cannot) divest FERC of its statutory authority over the re-licensing. FERC retains authority to impose appropriate interim measures to protect the resources pending full implementation of the settlement or conclusion of the re-licensing, whichever happens first. *Platte River I*, 876 F.2d 109, 114 (D.C. Cir. 1989); 18 C.F.R. § 16.18(d).

to operate and the resources continue to suffer impacts identified in the administrative record and the trial-type hearing.

There is no indication from FERC, and no independent reason to believe, that a licensing decision will occur in the foreseeable future. Although concerned, the Tribe does not challenge the delay in re-licensing in this proceeding. Instead, the Tribe challenges and seeks reversal of FERC's refusal to impose appropriate interim conditions pending completion of re-licensing, whenever that occurs.

### E. The Hoopa Tribe Seeks Narrowly Tailored Interim Measures to Protect Affected Resources Pending Re-licensing.

In February 2007, the Tribe moved FERC to impose two components of Interior's mandatory Section 4(e) conditions as interim measures pending conclusion of the re-licensing. A420, A440. The Tribe's request was narrowly focused on the ramping rate and minimum flow conditions because: (1) they are purely operational measures that can be implemented immediately without any capital expenditure by the licensee; and (2) those flow measures, and the associated benefits, have been challenged, evaluated, and affirmed by an ALJ in a comprehensive evidentiary hearing sought by the licensee in 2006. A420-23. There is no reasonable basis to delay implementing these conditions, especially since FERC will have no discretion but to adopt these conditions once a license is ultimately issued. *Escondido*, 466 U.S. at 777; *City of Tacoma v. FERC*, 460 F.3d

53, 67 (D.C. Cir. 2006). However, FERC declined the Tribe's request, approving status quo operations until conclusion of the re-licensing. A521.

## V. SUMMARY OF ARGUMENT

PacifiCorp's fifty-year license to operate the Klamath Project expired in early 2006. Yet, the private utility continues to operate the Project under license terms imposed in the 1950's, decades before passage of the federal environmental laws that now govern protection of rivers and aquatic resources from hydroelectric projects. The licensing remains in a perpetual state of delay for multiple reasons. However, in this proceeding, the Tribe does not seek to force FERC to conclude the re-licensing process. Instead, the Tribe has simply asked FERC to impose reasonable interim conditions to protect fish and aquatic resources until the conclusion of the pending re-licensing process, whenever that may be.

The conditions requested by the Tribe are identical to mandatory conditions developed and affirmatively prescribed by the Department of Interior under Federal Power Act Section 4(e). A368-371; A440. The conditions at issue are narrowly tailored and purely operational in nature – flow measures that can be implemented without capital expenditures by the licensee. The factual basis for the conditions has been tested and affirmed by an ALJ in an extensive evidentiary trial-type hearing. A330-A367. Following the hearing, the ALJ determined the conditions were necessary for the protection of fish and aquatic resources being

harmed by Project operations. A331-345. FERC is legally required to include these mandatory conditions in any new license ultimately issued for the project. *Escondido*, 466 U.S. at 777. There is no reasonable justification to delay the interim conditions sought by the Tribe.

FERC denied the Tribe's motion for interim conditions because, according to FERC, the Tribe failed to establish that the conditions were necessary to prevent "irreversible environmental damage" to the fishery pending re-licensing. A521-528, ¶ 11, 13, 16, 18. Applicable law does not require a petitioner to meet such a burdensome (perhaps impossible) standard to justify interim measures. Nor does the law require a species to be on the brink of extinction before FERC may impose interim measures. FERC regulations and the license at issue authorize interim measures if "necessary" to limit impacts to affected species. 18 C.F.R. § 16.18(d); A80-81 (Article 58). FERC itself has previously rejected the argument that "irreversible environmental harm" is a legal prerequisite to imposition of interim conditions. *In re City of Tacoma*, 110 FERC ¶ 61,140, at 61,548, fn. 34 (2005). Here, it arbitrarily switched positions and applied an "irreversible harm" standard as a basis for denying relief to the Tribe.

FERC also supports its order denying interim conditions with an erroneous factual determination that the fishery below J.C. Boyle is "thriving" and "healthy," making interim relief unnecessary. A525-26, ¶ 13, 16. These findings required

FERC to turn a blind eye to the extensive evidence submitted in the re-licensing by federal, state, and tribal biologists that Project operations have significant impacts on the fishery that can be mitigated by imposing Interior's prescriptions for increased instream flows and ramping limitations. *See* Sections VIII(C) and (D) *infra*. FERC's sole basis for its determination of the "health" of the fishery is that recreational fishermen reportedly catch large numbers of fish in the river. A526, ¶ 14, 15. This is not science, nor a reasonable basis for determining whether resource protection measures are necessary. FERC's reliance on unreliable "catch rate" data as a basis for denying the Tribe's request, in light of the substantial contrary scientific evidence documenting biological impacts to the fishery, is arbitrary and capricious. Substantial evidence in the record, ignored by FERC, supports the need for the interim conditions sought by the Tribe.

The Tribe requests that this Court vacate FERC's order denying the Tribe's motion for interim conditions and remand with a direction to impose the Tribe's requested conditions or, at minimum, remand for further consideration under the proper legal standard and based on a complete review of the evidence in the record.

## VI. STANDING OF PETITIONER

The Federal Power Act provides that "any party to a proceeding under this chapter aggrieved by an order issued by the Commission may obtain [judicial] review . . . ." 16 U.S.C. § 825l(b). A party is "aggrieved" under the FPA if it

satisfies the traditional constitutional and prudential requirements for standing. *Louisiana Energy and Power Auth. v. FERC,* 141 F.3d 364, 366 (D.C. Cir. 1998); *but see Federal Election Comm'n v. Akins*, 524 U.S. 11, 17 (1998) (associating "the word 'aggrieved' with a congressional intent to cast the standing net broadly").

The Tribe is injured by the ongoing and continuing damage to the Klamath fishery that results from PacifiCorp's hydropower operations, as authorized by FERC.[7] The FERC record amply documents the injury to the fishery resource that results from operations under the 9-inch-per-hour ramping rate and the 100 cfs minimum flow. *See* Section VIII(C) *infra*. Though the license expired in 2006, the injury to the resource continues to occur at this time.

FERC has express legal authority to order increased minimum flows and more protective ramping rates. *See* A525, ¶ 12. The FERC record shows that the conditions sought by the Tribe would substantially mitigate, and perhaps eliminate, the current and ongoing injury to the resource. *See* Section VIII(D) *infra*. The ongoing injury to the fishery resource is directly traceable to FERC's refusal to impose protective interim measures affirmatively requested by the Tribe in this proceeding. The injury resulting from FERC's denial of the Tribe's motion for interim conditions is redressable through an order vacating FERC's rulings and

[7] Declarations of Leonard E. Masten, Jr., and Grett L. Hurley are attached in the Addendum in further support of the Tribe's standing.

remanding for imposition of the conditions or for re-consideration under the appropriate legal standard. *See Akins*, 524 U.S. at 23-24 (challenge to agency action satisfies the "fairly traceable" and "redressability" requirements "even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason"). The Tribe's interests fall within the zone protected by the FPA. *See* 16 U.S.C. § 803(a), (j) (protecting fish and wildlife).

The Tribe has a sovereign, legal, economic, and cultural interest in the Klamath River and its fishery resources. *See* Addendum (Masten, Hurley Declarations). The United States set aside the Hoopa Valley Reservation within the Klamath River Basin as a permanent homeland for the Hoopa people. Hurley, ¶ 4. The Klamath River flows through the Hoopa Reservation. Masten, ¶ 6. The Tribe has relied upon the fishery resources of the Klamath River since time immemorial and tribal subsistence, culture, and economy is dependent upon continued health of the fishery. Masten, ¶ 8, 9, 18, 24. The Tribe also holds federally-recognized reserved fishing rights in the Klamath River, and a federal reserved water right to support the Klamath fishery. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Adair*, 723 F.2d 1394, 1411 (1984); Hurley, ¶ 4-6.[8] Adverse impacts to the Klamath River and its fishery resource that result

[8] PacifiCorp argued to FERC that its Project operations in the J.C. Boyle reaches can have no impact on the Tribe's federal reserved rights because the existence of its dams currently prevent migration to the Hoopa Reservation. A452.

from the upstream operations of the FERC-licensed Klamath Project directly impair and injure the Tribe and its sovereign, legal, economic, and cultural interests. *See Scenic Hudson Pres. Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d. Cir. 1965) (affirming standing under Federal Power Act to challenge license conditions where petitioners demonstrated a special interest in preserving the aesthetic, conservational, and recreational aspects of area).

The Tribe is a party-intervenor in the FERC re-licensing of the Klamath Project. Hurley, ¶ 8. For years, the Tribe has actively worked, and expended large amounts of tribal capital, to remedy the impacts on the Klamath fishery associated with the Klamath Project, including advocating for volitional fish passage and/or dam removal to allow movement of fish upstream, downstream, and within the

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FERC did not address this argument in its orders and the Tribe's standing does not rely solely on its federal reserved rights. The argument is also factually incorrect. The so-called "resident" trout populations in the J.C. Boyle reaches are descendants, and retain characteristics of, anadromous steelhead trapped by the construction of PacifiCorp's dams. *See* A285, ¶ 7; A328-329, p. 182, line 18 through p. 184, line 22; p. 196, lines 12-24. The Tribe's reserved rights in the Klamath fishery pre-date construction of the dams. The fact that project dams currently (and temporarily) prevent these fish populations from migrating to tribal waters does not lessen the Tribe's interests in the fish in any respect. Once fish passage is provided either through dam removal (as may be provided by settlement agreement) or construction of volitional fishways through the dams (as prescribed by NMFS as a mandatory license condition under Section 18 of the FPA), the fish that are the subject of this action will resume their natural migratory life histories through tribal waters. *Id.* Immediate restoration of flows to the J.C. Boyle reaches will also protect and prepare habitats for use by anadromous fish once passage is restored. The Tribe has a significant, direct interest in preventing the ongoing injury to, and preserving the health of, these fish populations and their habitat.

Project, increased instream flows to improve fish health and habitat, and improvements to water quality. Hurley, ¶ 8-12; Masten, ¶ 14-16. Because the Tribe's culture, economy, and mere existence depends on the sustenance of the fishery resource, it is also actively involved in other comprehensive basin-wide resource preservation efforts. *Id.* FERC's refusal to exercise its legal authority to impose protective interim conditions on the Project causes direct injury to the Tribe and its substantial interests and investment in the protection of Klamath River resources. Masten, ¶ 24; Hurley, ¶ 15.

## VII. STANDARD OF REVIEW

This Court must vacate and set aside FERC action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001); 5 U.S.C. § 706(2). An agency's decision can be upheld only on the basis of the reasoning contained within that decision. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

In applying the arbitrary and capricious standard of review, the Court reviews whether FERC examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 968

(D.C. Cir. 2005); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663, fn. 3 (D.C. Cir. 1996).

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has 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." *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission must engage in "reasoned decision-making." *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000).

Issues of law are reviewed de novo. *Chevron v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984). If Congressional intent as expressed in a statute is ambiguous, the Court will defer to a permissible construction by FERC, but only if it is reasonable in light of the statutory text, legislative history and purpose. *Id*. at 843-44. Pure legal errors require no deference. *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004).

As to factual findings made by FERC, they are conclusive if supported by substantial evidence in the record. 16 U.S.C. § 825l(b). Substantial evidence means "such relevant evidence as a reasonable person may accept as proof of a conclusion." *DTE Energy Co. v. FERC*, 394 F.3d 954, 962 (D.C. Cir. 2005). In

determining whether a finding is supported by substantial evidence, the Court must examine the entire record, including the evidence that supports the finding and the contradictory evidence. *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951). The Court may set aside a finding if it "cannot conscientiously find that the evidence supporting the decision is substantial, when viewing in a light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Id*; *Penick Corp., Inc. v. Drug Enforcement Admin.*, 491 F.3d 483, 488 (D.C. Cir. 2007) (citing *Universal Camera* for proposition that court must view record in its entirety when determining whether findings of fact are supported by substantial evidence); *Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 201 (D.C. Cir. 1996) (citing *Universal Camera* for proposition that court must consider any evidence that 'fairly detracts' from the agency's findings and conclusion).

## VIII. ARGUMENT

### A. FERC Erred By Applying An Incorrect Legal Standard: A Showing of "Irreversible Environmental Damage" Is Not Required To Impose Interim Conditions On The Klamath Project's Annual License.

FERC denied the Tribe's motion for interim conditions on grounds that "the Tribe has not shown that there is a need for interim conditions in the annual license to prevent irreversible environmental damage to the fishery pending relicensing." A527, ¶ 18. *See also* A525, ¶ 13 ("the record did not demonstrate either that

project operations were causing 'irreversible environmental damage' to resident trout or that imposition of those conditions was necessary to prevent such [irreversible environmental] damage pending relicensing"); A527, ¶ 16 ("this factor does not diminish the need for a showing that proposed interim conditions are necessary to prevent irreversible environmental damage"). FERC erred by requiring the Tribe to prove potential "irreversible environmental damage" pending re-licensing in order to support its request for interim conditions.

FERC erroneously relies on this Court's *Platte River* rulings as support for its application of an "irreversible environmental damage" standard. *Platte River Whooping Crane Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) (*Platte II*); *Platte River Whooping Crane Habitat Maint. Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (*Platte I*). In *Platte River*, this Court was not asked to (and did not) establish or affirm any specific legal standard by which FERC must analyze motions for interim conditions in re-licensing proceedings. Rather, this Court stated that "Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary." *Platte I*, 876 F.2d at 118.

The legal authority, and proper legal standard for evaluating motions for interim conditions, is found in the FERC license and in FERC's regulations implementing the Federal Power Act. 18 C.F.R. § 16.18(d). PacifiCorp's license

authorizes FERC to impose interim conditions without any prerequisite showing of "irreversible environmental damage." Article 58 of the license authorizes interim conditions on a showing that such measures are "necessary and desirable" for the conservation and development of fish and wildlife resources. A80-81. Likewise, 18 C.F.R. § 16.18(d) authorizes FERC to impose interim conditions in annual licenses "if necessary and practical to limit adverse impacts to the environment" and does not require a showing of "irreversible environmental damage." Here, FERC ignored the legal standards contained in the Klamath license and in its own regulations.

FERC has previously rejected a licensee's argument that "irreversible damage" is a prerequisite to imposition of interim conditions. *In re City of Tacoma*, 110 FERC ¶ 61,140, at p. 61,548, fn. 34 (2005) (declining licensee's argument that a showing of "irreversible damage" is a prerequisite to imposition of interim conditions). In the *City of Tacoma* order, FERC found "nothing" in the *Platte River* cases requiring a finding of "irreversible damage" prior to imposition of interim conditions. *Id.* Instead, in *City of Tacoma*, FERC simply evaluated whether there was "a need for interim conditions, not whether there is a need to prevent irreversible damage to listed species." *Id*. Here, in this proceeding, FERC failed to explain its arbitrary 180 degree shift in reasoning and its new restrictive reading of *Platte River*.

FERC erred by analyzing and rejecting the Tribe's motion under an arbitrary, incorrect, and unduly burdensome legal standard. Instead of determining whether conditions were "necessary" and "practical" to limit adverse impacts on the resources, FERC required the Tribe to produce evidence of potential irreversible environmental damage. Nothing in the Federal Power Act, FERC regulations, case law, or the Klamath Project license requires the Tribe to meet such a burdensome standard in order to justify its request for interim conditions.

Substantial evidence in the record supports imposition of interim conditions under the applicable legal standard; that is, substantial evidence in the record shows that the Tribe's narrowly tailored request for interim conditions is "necessary" and "practical" to limit adverse impacts on aquatic resources pending re-licensing. The Court should vacate FERC's order.

1. FERC Erroneously Interprets This Court's *Platte River* Decisions as a Judicial Constraint on FERC's Authority to Impose Interim Conditions on the Klamath Project License.

FERC's order denying interim conditions erroneously relies on this Court's rulings in *Platte River* for the proposition that FERC need not impose interim conditions unless such conditions are necessary to prevent "irreversible environmental damage" pending re-licensing.[9] *See* A527, ¶ 16 (stating "this is not

[9] In *Platte I*, this Court held that FERC abused its discretion by refusing to undertake any assessment of the need for interim protective conditions in annual licenses. *Platte I*, 876 F.2d at 111. Following remand to FERC, the licensee

the standard established by the court in *Platte I* for imposing conditions on an annual license"). In *Platte River*, this Court did not limit FERC's authority to impose interim conditions to only those situations where there is a potential for "irreversible environmental damage." Nor do the *Platte River* rulings require or permit FERC to ignore the standards contained in the Klamath license and in FERC's own regulations, which authorize interim conditions on a showing far less burdensome than "irreversible environmental damage."

The legal standard for imposing interim conditions was not at issue in *Platte I* and the Court did not purport to develop a standard that governs imposition of interim conditions in all cases. The question addressed in *Platte I* was whether FERC abused its discretion by refusing to undertake any assessment of the need for interim conditions pending re-licensing. *Platte I*, 876 F.2d at 113 (stating "we limit our review to . . . the question of whether FERC abused its discretion in refusing to undertake any inquiry into the need for environmental protective conditions in the annual licenses.") This Court did not rule that FERC must deny a petition for interim conditions if the petitioner fails to prove that "irreversible environmental damage" will occur pending re-licensing.

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challenged FERC's decision to impose interim license conditions. This Court held, in *Platte II*, that FERC's decision to impose interim conditions was supported by substantial evidence in the record. *Platte II*, 962 F.2d at 36-37. However, the Court did not establish or affirm any particular legal standard by which FERC is required to evaluate a petition for interim license conditions.

On remand from *Platte I*, FERC determined that interim conditions were justified in that re-licensing. Following remand, the *licensee unsuccessfully* argued on appeal that: (1) interim conditions could only be imposed upon a showing of "irreversible damage"; and (2) the evidence in the FERC record failed to meet that standard. *Platte II*, 962 F.2d at 35-37.

In *Platte II*, this Court did not address the licensee's argument regarding the applicable legal standard. Instead, the Court determined that, even under the "irreversible environmental damage" standard advocated by the licensee, FERC's findings and decision to impose interim conditions were supported by substantial evidence in the record. *Id.* at 36-37. This Court did not rule that FERC's authority to impose interim conditions on a project license is limited to those situations where there is a potential for "irreversible environmental damage" pending re-licensing. *See City of Tacoma*, 110 FERC 61,140, at p. 61,548, fn. 34 (2005) (finding "nothing in [Platte River] to suggest that [FERC] may not require interim protective conditions unless we first find that there is a need to prevent irreversible environmental damage in the interim period").

This Court's *Platte River* rulings do not require the Tribe to prove that its proposed interim conditions are necessary to prevent potential "irreversible environmental damage" pending re-licensing. This Court has not required or affirmed such a burdensome, perhaps impossible, legal standard as a prerequisite

for interim conditions. The appropriate standard to evaluate the Tribe's motion is found in the Klamath license and in FERC's own regulations. When evaluated under the correct legal standard, the evidence in the record strongly supports imposition of the interim measures sought here by the Tribe.

2. FERC has Previously Determined That it May Impose Interim Conditions Absent a Showing of Potential "Irreversible" Damage.

The legal standard applied by FERC in this proceeding, and its current interpretation of *Platte River*, conflicts with its prior decisions. As stated by this Court, "where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001); *see also Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1151 (D.C. Cir. 2000) (stating that "FERC must interpret the Act consistently with its own precedent or explain its reasons for departure therefrom").

In *City of Tacoma*, 110 FERC ¶ 61,140, 61,547 (2005), the licensee argued that, under *Platte River*, interim conditions were inappropriate absent a finding of "irreparable harm to listed species." FERC correctly rejected the licensee's argument, explaining as follows:

> Tacoma's reference to the need to avoid irreparable harm to listed species comes from the first *Platte River* case, which directed the Commission to consider the need for "temporary, 'rough and ready' measures to prevent irreversible damage pending relicensing." (citations omitted). The court

> subsequently upheld the Commission's decision to require interim protective measures in one of the two licenses at issue. *We find nothing in these cases to suggest that we may not require interim protective measures unless we first find that there is a need to prevent irreversible damage during the interim period*. . . . Since our purpose here is to determine whether to partially lift a stay of the new license to provide interim protection to listed species pending judicial review, we believe that the appropriate standard is whether there is a need for interim conditions, not whether there is a need to prevent irreversible damage to listed species.

*City of Tacoma*, 110 FERC ¶ 61,140, at p. 61,548, fn. 34 (2005) (emphasis added).

In contrast to FERC's analysis in *City of Tacoma*, FERC, in this case, rejected the Tribe's motion because "the Tribe has not shown that there is a need for interim conditions to prevent irreversible environmental damage to the fishery pending relicensing." A527, ¶ 18. No intervening change in law or regulations justifies FERC's 180-degree shift in reasoning. Requiring the Tribe to prove its requested interim conditions are necessary to prevent potential "irreversible environmental damage" is both an error of law and arbitrary and capricious. *Wisconsin Valley Improvement Co.*, 236 F.3d at 748.

3. The Klamath License Authorizes Interim Conditions if Such Conditions are "Necessary and Desirable" for the Conservation and Development of Fish and Wildlife Resources; No Showing of Irreversible Environmental Damage is Required.

FERC has correctly determined that it has authority to impose interim conditions in this proceeding:

> In the present case, there is no question that the annual license, whose terms have been carried over from the original license, contains reopener provisions that would enable us to impose interim conditions to protect fisheries and aquatic resources if a need for such conditions were demonstrated. The issue is whether the record demonstrates a need for imposing the conditions proposed by the Tribe.

A525, ¶ 12.

FERC erred by ignoring the legal standards contained in the Project license and by requiring the Tribe to meet a more burdensome "irreversible environmental damage" standard as a prerequisite to interim conditions. Article 58 of the Project license authorizes FERC to impose interim conditions:

> The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior, Oregon State Game Commission, or California Department of Fish and Game, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act.

A80-81.

Article 58 authorizes FERC to impose interim modifications that are: (1) necessary and desirable [for the conservation and development of fish and wildlife resources]; (2) reasonably consistent with the primary purpose of the project; and (3) consistent with the provisions of the Federal Power Act. *Id.* Nothing in Article

58 demands proof of "irreversible environmental damage" as a prerequisite for FERC's imposition of interim conditions.

By requiring the Tribe to establish proof of "irreversible environmental damage" as a prerequisite to interim conditions, FERC improperly imposed a burden on the Tribe that goes beyond the requirements of the license. The applicable license article does not require FERC to wait until a species is on the brink of extinction before taking action to impose interim conditions pending re-licensing. Instead, the license article expressly authorizes FERC to impose interim modifications pending re-licensing if they are "necessary and desirable" for the conservation and development of fish and wildlife. The evidence presented by the Tribe, and contained in the FERC record, meets that applicable standard. *See* Sections VIII(C) and (D) *infra*.

As this Court stated in *Platte River*, "Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary." *Platte I*, 876 F.2d at 118. Here, instead of utilizing the authority it has, FERC required the Tribe to meet an artificially burdensome standard that conflicts with the express terms of the license, and as described below, the authority of its own regulations.

4. FERC Regulations Authorize Imposition of Interim Conditions Without Proof of Potential "Irreversible Environmental Damage."

FERC's regulations expressly authorize FERC to impose interim conditions in annual licenses "if necessary and practical to limit adverse impacts on the environment." 18 C.F.R. § 16.18(d). The regulation does not predicate interim conditions on a showing of potential "irreversible environmental damage" pending re-licensing. *Id.* Where a license contains an express re-opener clause, as here, the only showing necessary to support interim conditions under FERC's regulations is that the conditions are: (1) necessary, and (2) practical to (3) limit adverse impacts on the environment. *Id.* The Tribe's proposed conditions satisfy these elements. *See* Sections VIII(C) and (D) *infra*. FERC erred by requiring the Tribe to satisfy a standard that is more restrictive than its own regulations.

5. Requiring Proof of "Irreversible Environmental Damage" is Unreasonable, Imposes an Impossible Burden, and Conflicts with Congressional Intent.

FERC's unreasonably restrictive interpretation of its authority to impose interim conditions in this proceeding is inconsistent with Section 4(e) of the Federal Power Act, as amended by the Electric Consumers Protection Act of 1986 (ECPA). 16 U.S.C. § 797(e). The 1986 Federal Power Act amendments, contained in ECPA, were intended to even the playing field between power production and associated impacts on environmental resources. *Platte I*, 876 F.2d at 117-118. In addition to requiring FERC to provide equal consideration to

environmental resources in re-licensing proceedings, Congress also intended FERC to ensure that annual licenses provide interim protection pending re-licensing. *Id.* at 117-118 (noting "Congress' explicit endorsement of the view that the Commission should consider environmental issues when granting annual licenses" and that "FERC can and presumably should promote the environmental objectives of the ECPA by amending annual licenses to include protective conditions").[10]

FERC-licensed projects often operate on annual licenses for years, or even decades, after license expiration. *See City of Tacoma v. FERC*, 460 F.3d 53, 59-60 (D.C. Cir. 2006) (noting that license expired in 1974 and project operated under annual licenses for next twenty-four years).[11] A standard that requires a species to be on the brink of extinction before interim conditions can occur is unreasonable and inconsistent with the environmental values expressed in ECPA. *Rainsong Co.*

[10] This does not mean that FERC must balance all power and non-power values in the same manner that it does in the final re-licensing. FERC can meet its obligations through imposition of "rough and ready measures." *Platte I*, 876 F.2d at 116. Here, the narrowly tailored measures proposed by the Tribe are purely operational in nature – *i.e.*, the conditions can be implemented with no capital expenditure by the licensee and by merely adjusting the amount and rate of flow that comes through the powerhouse. The measures proposed by the Tribe, and taken directly from mandatory Section 4(e) conditions developed by Interior, qualify as "rough and ready measures" appropriate for interim implementation.

[11] Here, even if the draft settlement agreement is executed and implemented, the Project will operate on annual licenses, beyond the date of license expiration, for at least fourteen years. A565 (stating target date for commencement of dam removal is 2020). If the settlement fails, license issuance will await resumption and completion of the States' water quality certification process.

*v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997) ("Courts must, however, reject administrative orders that are contrary to congressional intent"); *see also Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (stating "in order for an agency interpretation to be granted deference, it must be consistent with congressional purpose"). FERC's failure to impose necessary and practical interim conditions on annual licenses when it has the authority to do so, and where substantial evidence supports the conditions, undermines Congressional intent.

Permitting a licensee to operate for years under annual licenses also undermines the mandatory conditioning authority that Congress vested in the Departments of Interior and Commerce in Federal Power Act Sections 4(e) and 18. In this case, the Departments prescribed final mandatory conditions three years ago. However, due to the perpetual delay of this relicensing, the conditions have yet to be implemented even though they are mandatory and must be included in any new license issued for operation of the Klamath Project in this proceeding. *Escondido*, 466 U.S. at 777; *City of Tacoma*, 460 F.3d at 67. Permitting a licensee to operate on annual licenses pursuant to historic terms and conditions for years after license expiration allows the licensee to avoid application of the mandatory statutory authorities of the Federal Power Act.

FERC is unjustifiably reluctant to impose the narrowly tailored interim measures requested by the Tribe in this proceeding. In its orders, FERC repeatedly

characterizes interim conditions as an "extraordinary remedy." A527, ¶ 16. However, the legislative history behind ECPA, relied on by this Court in *Platte River*, shows that Congress expects FERC to affirmatively protect affected resources through imposition of interim measures. *Platte I*, 876 F.2d at 117 (noting Congress' "explicit endorsement . . . that the Commission should consider environmental issues when granting annual licenses"); *Id.* at 119 ("Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary"). What the Tribe finds "extraordinary" is FERC's willingness to undermine Congressional intent by allowing a licensee to use public resources for years on a long-expired license without affording some limited, reasonable, and necessary interim protection to the affected resources when substantial evidence supports imposition of such conditions.

In this specific case, where the license contains an express re-opener, where certain mandatory conditions can be imposed immediately for protection of the resources without any costly structural modifications to project facilities, and where the evidentiary basis of those conditions has already been tested and affirmed by an ALJ in a trial-type hearing, Congress expects FERC to exercise its authority to impose those conditions. *Platte I*, 876 F.2d at 119 (stating "FERC can and presumably should promote the environmental objectives of ECPA by

amending annual licenses to include protective conditions"). FERC's failure to impose the mandatory flow and ramping conditions prescribed by Interior and requested by the Tribe is inconsistent with, and undermines, Congressional intent.

### B. FERC Violated the Administrative Procedures Act by Engaging in Arbitrary and Capricious, and Standardless Decision-making.

In its initial order, dated November 20, 2008, FERC denied the Tribe's petition for interim license conditions on the basis that the Tribe failed to prove that interim conditions were necessary to prevent potential "irreversible environmental damage." A525-27. In its Order on Rehearing, dated March 19, 2009, FERC retreated from the "irreversible environmental damage" standard. A610-12, ¶ 9-11. However, at the same time, FERC rejected the Tribe's argument that the appropriate legal standard for evaluation of the Tribe's petition is found in either the Klamath Project license or FERC regulations. A612-13, ¶ 13 (stating license article 58 does not establish a legal standard); A614, ¶ 17 (stating Tribe misinterprets 18 C.F.R. § 16.18(d)). At this time, it is unclear what legal standard FERC applied, if any, when evaluating the Tribe's petition for interim license conditions on rehearing.

#### 1. FERC Engaged in Improper Standardless Decisionmaking.

On rehearing, FERC refused to explain what kind of showing a petitioner must make in order to successfully petition for interim license conditions. Instead, FERC simply said that it has "considerable discretion" to make the determination

and that the Tribe's evidence failed to hit the mark. A611-14, ¶ 11 (stating Commission has "considerable discretion" to adopt interim conditions); ¶ 13 (intent of license article 58 is simply to "preserve [Commission] discretion to modify project operations); ¶ 17 (stating that adoption of conditions under 18 C.F.R. § 16.18(d) "is a matter for the Commission's judgment in each particular situation"). FERC's position on rehearing is summarized in paragraph 16:

> [I]n this proceeding, we considered whether it was necessary to adopt the section 4(e) conditions as interim conditions, and we determined it was not. Undertaking this analysis fulfilled our obligations in respect to interim conditions.

A614.

This Court has repeatedly rejected this kind of standardless, *ipse dixit*, decision-making (in more than one case involving FERC) as arbitrary and capricious agency action in violation of the Administrative Procedures Act. *See Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (stating "a grant of discretion to an agency does not, of course, authorize it to make an unprincipled decision"); *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1209 (D.C. Cir. 1991) (stating "the notion of lawfulness requires insistence that the chosen framework not collapse in practice into a standardless exercise of Commission discretion resting on no more than an assertion of 'expertise'"); *City of Vernon v. FERC*, 845 F.2d 1042, 1049 (D.C. Cir. 1988) (stating "FERC's approach to resolving such a claim may not be standardless");

*Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366 (D.C. Cir. 1985) (stating "Congress never intended to authorize the standardless whatever-you-think-best analysis that [FERC] asserts is appropriate.").

FERC's error in this case resembles its error in *City of Vernon*, where FERC ruled that a petitioner failed to make out a prima facie case for anticompetitive conduct under Sections 205 and 206 of the Federal Power Act, but failed to sufficiently explain why the petitioner's filing was deficient. The Court reversed FERC's determination and remanded for further consideration, explaining:

> We cannot sanction an unexplained assertion that no prima facie case has been made. It is as if the agency in response to Vernon's claim had said 'We reject it because it is Tuesday rather than Wednesday.' . . . When FERC chooses to rely on the mechanism of a prima facie case, it must have a theory of what a prima facie case *is* before it rejects claims for failure to meet that standard. . . . FERC must say what elements are necessary *and sufficient* to make a prima facie case, instead of merely noting the absence of particular elements that may or may not be part of a prima facie case. Otherwise we must 'guess at the theory underlying the agency's action.'"

*City of Vernon*, 845 F.2d at 1048. Similarly here, FERC makes the conclusory statement that it "considered whether it was necessary to adopt the section 4(e) conditions as interim conditions, and . . . determined it was not." Yet, the Tribe, the licensee, and this Court are forced to guess at why FERC made its decision and what principles, standards, or factors FERC is using to guide its decision.

2. FERC has Discretion, but that Discretion is Not Unlimited; it is Framed by the Requirements of the Klamath License, FERC Regulations, the Federal Power Act, and the APA.

As discussed above, the applicable legal standards to guide FERC's determination are found in both the Klamath license and 18 C.F.R. § 16.18(d). The license authorizes interim conditions when "necessary" and "desirable" for the conservation and development of fish and wildlife resources. A80-81. 18 C.F.R. § 16.18(d) authorizes interim conditions where "necessary and practical to limit adverse impacts on the environment." These authorities do provide FERC with discretion; however, when presented with a petition for interim measures, FERC must examine and rationally explain in its orders whether or not the requested measures are necessary and practical to limit the alleged impacts to the environment. *State Farm*, 463 U.S. at 43. FERC's reasoning and justifications for granting or denying a petition must be expressed on the face of the order and must be based on substantial evidence in the record. *Id.;* 5 U.S.C. § 706(2) (E); 16 U.S.C. § 825l(b). FERC cannot simply assert in conclusory fashion that interim conditions are not, in its judgment, warranted.[12]

FERC's analysis of a petition for interim conditions, and its exercise of discretion, is also governed by the Federal Power Act, which imposes time limits

[12] Surely, when this Court ruled in *Platte I* that FERC abused its discretion by failing to assess the need for interim conditions, this Court expected FERC to do more on remand than simply make a summary, conclusory, and unsupported determination that such conditions were unnecessary.

on licenses (in this case, 50 years) and requires FERC to give equal consideration of power and non-power resources in the re-licensing process. 16 U.S.C. § 797(e). In *City of Tacoma*, this Court explained that Congress expected FERC to evaluate existing projects completely anew upon re-licensing, that FERC must impose conditions in accordance with existing laws and regulations, and that FERC has no obligation to issue a new license at the time of re-licensing if the Project cannot be operated consistently with current environmental laws. 460 F.3d at 73-74.

The equal consideration mandate extends to annual licensing. *Platte I*, 876 F.2d at 118. Congress, when amending the FPA in 1986, expected FERC to exercise whatever authority it had to impose appropriate interim conditions in annual licenses. *Id*. Thus, under the Federal Power Act, FERC cannot reject a petition for interim measures simply because the conditions would result in some financial expenditure by the licensee, or reduce power generation to some degree. *City of Tacoma*, 460 F.3d at 74 (noting that the obligation to give "equal consideration" means that in some cases, "environmental concerns will prevail"). FERC has a legal, Congressionally mandated, obligation to protect public resources from project impacts – and that duty applies in the annual licensing process pending conclusion of re-licensing. *Platte I*, 876 F.2d at 118.

FERC's discretion is also framed and governed by the Administrative Procedures Act, which bars agency action that is arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. The APA requires FERC to engage in reasoned decision-making. *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000). FERC must show its work and articulate a rational connection between the facts found, the applicable legal standard, and the decision made. *State Farm*, 463 U.S. at 43. If FERC fails to do so, the Court must at minimum remand for further proceedings so that FERC can re-evaluate and/or further explain its reasoning. *City of Vernon*, 845 F.2d at 1048-1049.

3. The Court Should Vacate FERC's Order Denying Interim Conditions.

Here, FERC failed to clearly articulate the legal standard that ultimately applied, failed to address or acknowledge the substantial evidence in the record supporting interim conditions, relied on unscientific and unreliable evidence, and failed to supply a reasoned explanation for denying the Tribe's motion. This Court should vacate and set aside FERC's order and remand with a mandate to impose the requested interim conditions (A440) on the Project license. At minimum, FERC's order should be vacated and this proceeding should be remanded to FERC for a reasoned determination of whether the Tribe's evidence satisfies the applicable legal standard. *City of Vernon*, 845 F.2d at 1049 (remanding to FERC "so that it may provide a reasoned explanation of its resolution of this case").

### C. FERC's Factual Determination Regarding the Health of the Affected Fishery Is Not Supported by Substantial Evidence.

In its Order Denying Interim Conditions and its Order on Rehearing, FERC substantially relied upon its factual determination that the status of the affected fishery is "healthy" and "thriving." A525, ¶ 13 ("the record . . . presents a picture of a healthy trout fishery . . . "); A526, ¶ 16 ( "that fishery is nevertheless thriving"). FERC's only stated basis for its determination of the health of the trout fishery is a discussion of "catch rates" contained in the FERC EIS. A526, ¶ 14-15. In direct conflict to the scientific research of state, federal, and tribal agencies that have determined the Project is taking a significant adverse toll on the health of the fishery, and the ruling of ALJ McKenna that affirmed that expert analysis, FERC based its decision primarily (if not solely) on anecdotal evidence that recreational fishermen are reportedly catching lots of fish in the river (regardless of the actual health of the fish themselves) ("catch rates"). *Id*. Substantial evidence in the record shows that "catch rate" evidence is unreliable and that the fishery is not healthy, not thriving, and is in need of interim protection.

#### 1. FERC's Factual Determination is Based on Unreliable Evidence.

FERC's factual findings regarding the health of the Klamath fishery rely solely on the analysis of "catch rates" contained in its Final Environmental Impact Statement (FEIS) published in November 2007. A526, ¶ 14-15 (citing to the

following FEIS sections); *see* A494 (FEIS, at 3-252) ("catch records indicate good angler success, although fish in this reach are typically smaller than fish caught in the Keno reach and rarely exceed 16 inches"; A499 (FEIS, at 3-257) ("furthermore, the bypassed and peaking reaches currently support high quality trout fisheries, as reflected by angler catch rates reported by [ODFW] and PacifiCorp"); A505 (FEIS, at 3-263) ("available information indicates that the rainbow trout population in this river reach is highly productive [and then discussing catch rate data in support]").

Catch rates are an unreliable and unscientific method to assess the health of an affected fishery. In the 2006 EPAct hearing, PacifiCorp introduced evidence of catch rates in an unsuccessful effort to support its argument that existing Project operations supported "a sustainable high-quality redband trout fishery." A133; A171-177. In rebuttal, biologists for the Klamath Tribes explained that the data on catch rates is misleading and uninformative:

> Despite comparisons based on catch rates to renowned trout fisheries like the Williamson, Deschutes, and Metolius rivers, the fishery in the Boyle peaking reach is far from outstanding. First, fisheries in the other rivers named here are renowned for producing large fish, a reflection of the high quality habitats provided by these other river systems. In contrast, the peaking reach only rarely produces fish larger than 12 inches, and these tend to be in poor condition during late summer and fall.

A296. The biologists' rebuttal testimony explained that the anecdotal evidence of catch rates was far outweighed by the actual scientific studies conducted on the

health of the fish themselves. A295-303. The fact that fishermen are allegedly catching relatively large numbers of small, hungry, and tired fish is not evidence that the fish are in a healthy or thriving condition. *Id*.

Klamath Tribes' biologist F. Al Espinosa also discounted the catch rates:

> The foundation of [PacifiCorp's] argument that current operations are adequately supporting the existing redband trout fishery is his subjective description of the fishery as *outstanding* – offering high catch rates of wild trout. He attempts to bolster his contention with a comparison of trout catch data from various Oregon and California streams. [PacifiCorp's] foundations and argument are without merit or substance.

A287. Espinosa noted that the data used by PacifiCorp's expert was between 24 to 38 years old. A288. He also noted that catch rate data is obtained by voluntary angler survey boxes placed near rivers, which "kind of data does not pass the litmus test for scientific or management credibility." A288. "This type of data is easily biased and does not represent the entire spectrum of anglers . . . [and] . . . the placement of volunteer survey boxes is not equivalent to conducting a systematic, randomized, and statistically valid creel census." A288.

Significantly, Espinosa noted that recent studies by the Oregon Department of Fish and Wildlife that actually studied the fish (rather than the anecdotal and unverified evidence of the rate at which fishermen caught them) found that:

> redband trout in the peaking reach are smaller in size and have significantly lower condition factors compared to the Keno reach of the Klamath River. . . . The Authors stated that the lack

> of large and older redbands in the peaking reach is likely associated with conditions of temperature, flow regime, and rearing habitat that do not appear to favor growth in the peaking reach.

A289. Espinosa concluded, at A290:

> The ODFW study does not support [PacifiCorp's] description of an 'outstanding fishery' in the peaking reach. The Oregon study is based upon real, current data and site-specific evaluation, not old data and incomplete, biased information from California volunteers.

Substantial evidence in the record shows that "catch rates" are an unreliable basis to judge the health of the affected fishery. FERC relied exclusively on unreliable "catch rate" data to support its factual determination. A526, ¶ 14, 15. At minimum, FERC's orders should be reversed and remanded for further consideration of the need for interim conditions. *Darrell Andrews Trucking v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002) (remanding for further consideration based on showing that evidence relied upon by the agency was unreliable).

2. Federal, State, Tribal, and NGO Scientists Agree that the Fishery Is Not Healthy or Thriving, and that Protective Conditions are Necessary.

Other evidence in the FERC record, presented by a broad spectrum of state, federal, tribal, and NGO scientists directly and substantially contradicts FERC's conclusion that the fish are "healthy" and "thriving." The Department of the Interior submitted evidence that:

- "The Project directly impacts redband trout survival through entrainment and stranding during down-ramping and indirectly affects their habitat through changes in hydrology, geomorphology, water quality, and riparian resources." A89.

- "Existing flow conditions limit both habitat availability and forage productivity, thus affecting redband trout growth and productivity." A99.

- "The impact of peaking could explain the limited availability of larger forage prey for redband in the Peaking reach, as redband in this reach do not appear to convert to larger prey items as they mature. . . . This issue of impacts to other native fish species is of particular importance in protecting and enhancing the redband trout fishery in the Klamath River as the lack of reproduction of forage species could impair growth and feeding of trout in the project area which could in part explain the differences in growth of older fish noted between the Keno, bypassed, and Peaking reach. A149-150.

The Oregon Department of Fish and Wildlife submitted evidence that:

- "Studies have documented that rainbow trout collected in the bypassed and peaking reaches are smaller in size and have significantly lower condition factors (relative weights) compared to fish from the Keno Reach." A191.

Tribal Fisheries Experts testified that:

- "A different interpretation by federal and state agencies including Hoopa Fisheries is that fish populations are severely impacted by flow fluctuations since chronic stranding, and desiccation, predator and thermal mortality occur as well. The low abundance of fry in the JC Boyle peaking reach, that have a limited swimming ability, appears to be directly related to flow fluctuations that dramatically change available habitat by the hour." A129.

- "Evidence provided in PacifiCorp studies supports the conclusion that Project operations have negative impacts on fish habitat in the bypass reach. Specifically, the redband trout fishery and habitat, including food availability, fish production, and overall fish size are impacted by Project operations." A221; *see also* A223-24.

- "The Klamath Hydroelectric Project has imposed a completely un-natural hydrologic regime on many miles of the Klamath River, a regime that simple common sense would lead a reasonable person to expect that fish attempting to live there would be challenged. In addition to common sense, however, there is significant evidence that current Project operations are a detriment to the redband trout fishery." A226.

- "This report documents catastrophic mortality of fish, crayfish, and aquatic insects as a result of peaking below the J.C. Boyle powerhouse." A235.

Expert witnesses of non-governmental organizations testified that:

- "Redband trout depend on macroinvertebrates, such as stoneflies, caddisflies, and mayflies, as food. . . . PacifiCorp's sampling results underestimate Project impact on macroinvertebrate communities." A264.

- "Studies that Oregon Department of Fish and Wildlife and Oregon State University have conducted determined that populations of redband trout in the mainstem Klamath River and tributary streams have declined substantially as a result of project conditions. There are two main reasons for the decline. First, the Project has structurally changed the river itself. Second, the Project has degraded habitat." A271.

- "ODFW also reports that the Peaking Reach sub-population has been extirpated and that the Bypass Reach population has been reduced to less than 10% of historic numbers." A273.

- "Existing project operations have been highly detrimental to native redband trout, resulting in the impairment of their population numbers, life history expression, and genetic diversity." A277.

- "Since [construction of the dam], . . . the fish below Boyle dam have gotten smaller and smaller, with seldom a fish over 14 inches being taken." A168.

This is merely a sampling of the evidence in the FERC record supporting the Tribe's petition, which FERC failed to acknowledge in its orders. FERC failed to explain any basis for discounting this evidence or for its unreasonable exclusive

reliance on unscientific catch rate data. *State Farm*, 463 U.S. at 43 (stating agency acts in arbitrary and capricious manner where it offers explanation for its decision that runs counter to the evidence before the agency); *Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 167 (D.C. Cir. 2005) (vacating order because agency failed "to consider contradictory record evidence where such evidence is precisely on point");*Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (remanding due to FERC's failure to adequately address relevant evidence). FERC's order should be vacated and remanded.

3. The State of Oregon has Listed the Klamath Redband Trout as a Sensitive Species Under Oregon Law.

Other evidence in the record undermines FERC's determination of a "healthy" and "thriving" fishery. The State of Oregon has designated the Oregon Basin redband trout, which includes the Klamath Basin populations in the affected river reaches, as a state sensitive species. *See* A89; A205. Under Oregon law, designated "sensitive" species are those wildlife species, subspecies, or populations that are subject to a decline in number of sufficient magnitude to qualify their listing as threatened due to loss in quantity or quality of habitat or other factors. OAR 635-100-0001; 635-100-040. Federal agencies also recognize redband trout as a species of special concern. A205. Thus, contrary to FERC's analysis based on unscientific catch rate data, the State of Oregon, who has primary responsibility for managing this species, has determined it warrants listing as a threatened

species. Common sense dictates that a species cannot both be threatened with extinction and "thriving" at the same time. FERC did not address this evidence.

4. FERC Previously Concluded that Project Operations at J.C. Boyle Do Harm the Fishery.

FERC has previously concluded that flow fluctuations at J.C. Boyle cause "chronic stress" on the trout and result in the stranding of eggs. A100. The 1990 Salt Caves EIS prepared by FERC for a proposed hydroelectric project on the Klamath River noted that large flow fluctuations resulting from J.C. Boyle operations cause high mortality to small fish such as young trout through stranding. A202-03. The Salt Caves EIS also reported that trout in the upper peaking reach, where peaking impacts would be most visible, had relatively low growth rates and that large trout were under represented in the age structure. A128; A202-03; *see also* A153-164. Here, FERC ignored its prior analysis and the entire body of scientific analysis contained in the FERC record in favor of anecdotal, unscientific, and unreliable catch rate data. This is arbitrary and capricious action.

5. ALJ McKenna Determined the Project Operations Adversely Impact the Fishery.

The findings of ALJ Parlen McKenna in the 2006 EPAct Hearing also directly conflict with FERC's determination here. In the hearing, PacifiCorp asked Judge McKenna to rule on the question of whether "conditions in the JC Boyle project reaches including current and proposed Project operations are adequate to

support a sustainable high-quality redband trout fishery." A133. After review of the evidence, McKenna ruled:

> Current Project operations, particularly sediment blockage at the J.C. Boyle Dam, the flow regime, and peaking operations, negatively affect the redband trout fishery. The proposed River Corridor Management Conditions would improve fishery resources [and]
>
> The BLM's proposed upramp rate will improve conditions for fish resources and other aquatic organisms by reducing adverse effects caused by the existing nine inch/hour upramp rate.

A345 (Findings 16 and 17). These findings are supported by numerous subsidiary findings 16-1 through 17-9. A331-336; *see also* A337-342. McKenna rejected PacifiCorp's proposed finding that current operations support a "high-quality recreational fishery" (A347, at (D-14, #59)) and accepted the Tribes' finding that "relatively high catch rates . . . do not mean the fishery is not negatively affected by Project operations." A366, at (D-132, #16.7). *See generally* A347-367.

This Court has reversed FERC decisions that arbitrarily conflict with a well-reasoned decision of an administrative law judge. *East Tennessee Natural Gas Co. v. FERC*, 953 F.2d 675, 681 (D.C. Cir. 1992) (finding no basis to accept FERC decision in conflict with ALJ determination); *see also Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1116 (D.C. Cir. 1989) (stating "an agency's 'departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision.'"). Here, ALJ McKenna reviewed

substantial evidence and testimony and rendered a well-reasoned opinion on issues identical to those presented in the Tribe's motion. FERC ignored the ALJ opinion and instead relied solely on unreliable catch rate data.

6. Despite the Substantial Scientific Evidence Supporting the Tribe's Conditions, FERC Exclusively Relies on Unscientific and Unreliable Catch Rate Data.

In summary, the analysis adopted by FERC in its rulings on the Tribe's motion is woefully inadequate. First, it fails to address the substantial evidence supplied by every other involved state, federal, tribal, and NGO entity in the Klamath re-licensing, which shows the existing project operations have negative impacts on the fishery. Second, it fails to address the findings of the ALJ in the EPAct hearing, which directly conflict with FERC's conclusory statement that the fishery is of "high-quality." Third, it bases its determination of the health of the fishery primarily, if not exclusively, on the unreliable and unscientific catch rate data. Fourth, its analysis conflicts with FERC's own prior analysis in the 1990 Salt Caves EIS which analyzed this exact same project and stretch of river. In its order, FERC ignored the substantial body of evidence that shows the affected fish are not healthy, not thriving, and are in substantial and immediate need of protection after fifty plus years of impacts from this Project.

FERC's determination that the affected fishery is "healthy" and "thriving," based exclusively on unreliable and unscientific catch rate data, is arbitrary and

capricious and not supported by substantial evidence, when viewing the record in its entirety. FERC's determination should be vacated and remanded.

D. Substantial Evidence in the Record Affirmatively Supports the Need for the Flow Conditions.

In addition to the substantial evidence regarding impacts to the fishery, the FERC record also contains substantial evidence that the conditions sought by the Tribe (at A440) are necessary to limit adverse impacts on the affected species.

1. The Need for Ramping Limitations Is Supported by Substantial Evidence.

The Department of Interior extensively documented the impacts of hydroelectric ramping in excess of two inches per hour. A108-109; A391-97. "The [two-inch-per hour] ramp rates provided in the Condition, . . . are designed to reduce but not eliminate stranding and displacement of trout and other aquatic organisms." A109. Ramping rates of two-inches-per-hour are also consistent with FERC conditions at other hydroelectric projects in the region. A131.

In the EPAct hearing, federal, state, and tribal experts testified in support of Interior's ramping limitation:

> The use of a 2 inch per hour upramp rate is not unusual for projects in the Pacific Northwest. The Hunter report states that most rivers in the Pacific Northwest do not naturally experience ramp rates in excess of 2 inches per hour, except during or immediately after floods. FERC has stated that Hunters recommendations are widely accepted in the Pacific Northwest as being protective or fish resources from ramping.

A146; *see also* A209 (agreeing that a prescribed ramp rate of two inches (or less) per hour is necessary to protect Klamath fish resources affected by the J.C. Boyle project); A233 (agreeing that "the prescribed ramp rate limit of 2 in/hr should minimize mortality of young fish"); A197 (agreeing that "more gradual" ramping would "improve fish health and abundance of aquatic invertebrates").

PacifiCorp directly challenged Interior's two-inch-per-hour ramping rate prescription in the EPAct hearing, asking ALJ McKenna to determine "whether BLM has established that BLM's two-inch-per-hour upramp restriction for the J.C. Boyle Project is necessary to protect fish populations in the J.C. Boyle reaches." A136. The ALJ rejected PacifiCorp's evidentiary challenge, ruling, at A345:

> The BLM's proposed upramp rate will improve conditions for fish resources and other aquatic organisms by reducing adverse effects caused by the existing nine inch/hour upramp rate.

ALJ McKenna determined that PacifiCorp's studies on the ramping rate issue (which are largely the same studies submitted by PacifiCorp in the FERC re-licensing proceeding) were unreliable and flawed. A340 (finding that "[PacifiCorp's] study is inconclusive as to the effects higher ramp rates have on fry" and noting flaws in other PacifiCorp studies); *see also* A353-55 (rejecting PacifiCorp's proposed findings on ramping); A223-24 (testifying that "PacifiCorp's picture is not as 'rosy' and complete as it appears" and that "PacifiCorp failed to include or analyze results from other pertinent studies" and

presented a "one-sided view"); A264 (noting that "PacifiCorp's sampling results underestimate Project impact on macroinvertebrate communities").

In this proceeding, FERC discounted the ALJ's rulings and the evidence submitted at the EPAct hearing on the grounds that the hearing only evaluated the value of the conditions after re-licensing, not as interim measures. A525, ¶ 13. This is an absurd and irrelevant distinction, especially since FERC has no discretion but to adopt these exact conditions upon re-licensing. FERC does not dispute the substance of the ALJ's findings, the evidence submitted at the hearing, or that Interior's conditions must be implemented upon re-licensing. The conditions are no less valuable now than in years from now, whenever licensing is complete. FERC simply concludes without reasoned analysis that there is no need for the conditions at this time. A614, ¶ 16. However, FERC fails to provide any reasonable justification for delaying implementation of the conditions.

The ramping conditions are supported by substantial evidence prepared, submitted, and cited by numerous federal, state, tribal, and non-governmental experts. In rejecting the interim conditions, FERC ignored this body of evidence and instead relied on anecdotal and self-reported catch rate data supplied by recreational fishermen. FERC's rejection of the 2-inch per hour ramping rate is arbitrary, capricious, and not supported by substantial evidence in the record.

2. The Need for Increased Minimum Instream Flows Is Supported by Substantial Evidence.

The Department of Interior's prescribed instream flow condition is also based on extensive scientific analysis and review, ignored by FERC. A104-115; A380-391. As with the ramping rates, the studies relied upon by PacifiCorp to support the status quo were deemed unreliable by Interior and other experts. A387 (noting "several inadequacies in [PacifiCorp's] model that were never fully addressed by PacifiCorp . . . . These inadequacies result in [PacifiCorp's] study not being reliable for use in isolation from the other studies."); A259-260 (noting flaws in PacifiCorp methodology).

With regard to instream flows, the EPAct hearing documented the impacts of the current 100 cfs minimum flow. A331-342. The EPAct hearing and FERC record also contains substantial evidence provided from federal, state, tribal, and non-governmental experts in support of Interior's flow condition. Klamath Tribes expert Larry Dunsmoor testified that "the BLM condition would keep a significant portion of the channel inundated, and thereby increase production of aquatic invertebrates." A233; *see also* A225 (testifying that "the management prescriptions proposed by BLM for the river corridor could restore some valuable connections and functions – and initiate a sustainable rate of recovery"); A277 (concluding that the flow regime change will help the channel, substrate, and riparian conditions of the fishery).

Upon considering this evidence, ALJ McKenna found that: "the proposed conditions would substantially alter the current flows by providing an overall increase in base flows. Higher base flows allow for greater inundation of habitat suitable for spawning." A338. Regarding the proposed flow conditions, McKenna determined that "the proposed River Corridor Management Conditions would improve fishery resources." A345.

As with the ramping rates, FERC failed to address the body of evidence documenting impacts to the fishery and the benefits that increased instream flows would provide. FERC relied on unreliable and unscientific catch rate data to support its decision to not impose the interim measures. FERC's action is arbitrary, capricious, and not supported by substantial evidence.

### E. FERC Made Additional Errors and Relied on Other Irrelevant or Incorrect Factors to Support its Denial of the Tribe's Petition.

In addition to the reasons addressed above, FERC's order is arbitrary and capricious and subject to reversal for the following reasons:

#### 1. Listing Under the Endangered Species Act Is Not a Prerequisite to Interim Conditions.

In its order on rehearing, FERC relies on the fact that "the Tribe does not argue that continued project operations would impede the recovery of endangered species or their habitat in the absence of interim measures." A615-16, ¶ 22. However, FERC has previously recognized that its authority to impose interim

measures is not limited to protection of ESA-listed species. *In re Public Utility Dist. No. 2 of Grant County, Washington*, 67 FERC ¶ 61,225, at p. 61,684, fn. 19 (1994); *In re Central Nebraska Pub. Power and Irrigation Dist.*, 50 FERC ¶ 61,180, at p. 61,351, fn. 34 (1990). Moreover, although not listed under the ESA, the redband trout is listed as a state sensitive species under Oregon law and clearly in need of protection from the adverse Project impacts.

2. FERC Favored Status Quo Power Production Over Interim Resource Protection in Violation of the Federal Power Act.

FERC states in its Order on Rehearing that:

> the evidence depicts environmental conditions that are less than ideal for resident trout, but it does not support a conclusion that the resource is declining or its habitat deteriorating. In the absence of such evidence, there is not now a more urgent need for interim conditions to protect resident trout simply because more time may pass before action is taken on the relicense application.

A617. This statement exemplifies the shifting legal standard. It also conflicts with substantial evidence in the record showing that Project operations have resulted in a decline in the physical condition of the fish and habitat in project reaches.

This statement also evidences FERC's willingness to allow the licensee to continue operating the project without conditions well after the license term has expired despite Congressional intent to the contrary. *Platte I*, 876 F.2d at 117. Existing Project operations continue to impact the species day after day, presenting an urgent and immediate need to impose "rough and ready" measures that are

supported by substantial evidence. *Id.* (stating that it was not sufficient for FERC to promise to address the issue on relicensing). Instead of exercising "whatever authority it has" to impose protective conditions as Congress expects, FERC is using every excuse it can to allow unregulated status quo Project operations.

3. FERC Erroneously Rejected the Tribe's Petition on Grounds that it Might Require FERC to Commence a License Amendment Proceeding.

In its order denying interim conditions, FERC states that it would need to institute a separate license amendment proceeding in order to impose the Tribe's conditions. A527, ¶ 17. FERC concluded there would be no advantage to commencing such an amendment proceeding on the erroneous assumption that the re-licensing might be over with before completing a license amendment proceeding on the interim measures. *Id.* On rehearing, the Tribe cited the November 2008 AIP in which Oregon and California have agreed to indefinitely suspend their Clean Water Act certification process. A530-32. As water quality certification is the last necessary component of the FERC re-licensing, the AIP (and proposed settlement document) means that there is no end in sight to the re-licensing and that an amendment proceeding on interim conditions would conclude well in advance of final license issuance.

On rehearing, FERC said that its statements regarding the license amendment proceeding were merely "incidental." A617, ¶ 28. While FERC may

no longer rely on this point, it again illustrates how reluctant FERC is to disrupt status quo power production and impose reasonable interim measures pending the conclusion of re-licensing. If FERC is unwilling to impose the interim measures requested here, which require no structural modifications, no capital expenditures, no further evidentiary hearing, and simply involve the release of additional flow through an existing project downstream for the protection of affected resources, it is unclear when FERC would ever impose interim conditions.

FERC is not implementing the Federal Power Act as Congress intends. Rather than exercising whatever authority it has to impose reasonable interim protections, it is doing everything possible to continue unmitigated status quo power production, allowing PacifiCorp to operate well beyond its license term, while the resources continue to suffer as they have since commencement of the license term fifty-five years ago. *City of Tacoma*, 460 F.3d at 73 ("nothing in the FPA suggests that Congress intended to 'grandfather' existing projects so they could continue to operate indefinitely despite changes in national priorities"); *Platte I*, 876 F.2d at 117 (noting "Congress' explicit endorsement of the view that [FERC] should consider environmental issues when granting annual licenses").

The Tribe asks this Court to vacate FERC's order denying interim conditions and remand to FERC for further action based on the proper legal standard and a review of the complete evidentiary record.

## IX. CONCLUSION AND RELIEF REQUESTED

The Tribe requests that this Court vacate FERC's order denying the Tribe's motion for interim conditions and subsequent order on rehearing. The Tribe also requests that this Court remand with a direction to impose the Tribe's requested conditions (at A440) or, at minimum, remand for further consideration by FERC under the proper legal standard and based on a complete review of the relevant evidence in the record.

Respectfully submitted this 15th day of January 2010.

*/s/ Thomas P. Schlosser*
THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Tel: (206) 386-5200
Fax: (206) 386-7322
Counsel for Petitioner Hoopa Valley Tribe

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,996 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word (Office XP version) in 14 point Times New Roman font.

Dated this 15th day of January, 2010.

*/s/ Thomas P. Schlosser*
THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Tel: (206) 386-5200
Fax: (206) 386-7322
Counsel for Petitioner Hoopa Valley Tribe

# ADDENDUM TO PETITIONER'S INITIAL BRIEF

## TABLE OF CONTENTS

# DECLARATION OF LEONARD E. MASTEN, JR.

No. 09-1134

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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HOOPA VALLEY TRIBE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

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On Petition for Review of Orders
of the Federal Energy Regulatory Commission

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# DECLARATION OF LEONARD E. MASTEN, JR. IN SUPPORT OF PETITION FOR REVIEW

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THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104
Telephone: (206) 386-5200
Facsimile: (206) 386-7322

Counsel for Petitioner Hoopa Valley Tribe

DECLARATION OF LEONARD E. MASTEN, JR. IN SUPPORT OF HOOPA VALLEY TRIBE'S PETITION FOR REVIEW

I, Leonard E. Masten, Jr., pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am a member of the Hoopa Valley Tribe and currently serve as Chairman of the Hoopa Valley Tribal Council, the governing body of the Hoopa Valley Tribe.

2. I have served as Chairman since June 26, 2009.

3. Prior to serving as Chairman, I served as a council-member of the Hoopa Valley Tribal Council from 2008 to 2009, 2006 to 2007, and 1998 to 2000.

4. I am also an avid fisherman and have fished the waters of the Klamath and Trinity Rivers for many years.

5. I have personal knowledge of the facts stated in this declaration.

6. The Klamath River flows through the Hoopa Valley Reservation, which was set aside and reserved for the Hoopa Valley Tribe by the United States government in 1864.

7. The Hoopa Valley Reservation was located, reserved, and set aside within the Klamath River Basin as a permanent homeland for Hoopa people.

8. Since time immemorial, the fishery resources of the Klamath River and its tributary the Trinity River have been the mainstay of the life and culture of

the Hoopa Valley Tribe and its members. The subsistence, culture, and economy of the Hoopa Valley Tribe is dependent upon the continued health of the Klamath fishery resources.

9. Protection of resources of the Klamath River, which flows through its homeland, is a sovereign priority of the Hoopa Valley Tribal government.

10. Under federal law, the Hoopa Valley Tribe holds reserved fishing rights in the Klamath River, and a federal reserved water right to support the Klamath fishery.

11. The Hoopa Valley Tribe's reserved rights to fish and water pre-date the construction of the Klamath Hydroelectric Project, which sits upstream of the Hoopa Valley Reservation.

12. The Tribe has a substantial and direct interest in protection of the fishery resources of the Klamath River, including those fish currently located upstream of the Reservation within the boundaries of the Klamath Project.

13. Adverse impacts to the water and fishery resources of the Klamath River that result from the upstream operations of the FERC-licensed Klamath Project directly impair and injure the federally-protected rights of the downstream Hoopa Tribe and its members.

14. The Tribe has actively fought for increased instream flows and limitations on ramping rates below J.C. Boyle dam for many years for the purpose of protecting fish located in the river reaches below the dam.

15. For decades, the Hoopa Valley Tribe has actively worked, and expended substantial amounts of tribal capital (in the millions of dollars) to mitigate impacts and preserve, protect, and enhance the resources of the Klamath River and Trinity River (which also flows through the Hoopa Reservation as a tributary of the Klamath).

16. The Tribe has actively participated in the FERC-relicensing of the Klamath Hydroelectric Project and has advocated for volitional passage and/or dam removal to allow the movement of fish upstream, downstream, and within the Project.

17. The National Marine Fisheries Service has prescribed fish passage as a mandatory condition of the FERC license. Upon completion of fish passage facilities and/or dam removal, fish will be able to migrate upstream and the populations of fish currently located behind project dams will be able to migrate downstream towards and through the Hoopa Valley Reservation.

18. The Tribe and its members have a direct sovereign, legal, economic, and cultural interest in ensuring that the fish currently located in the Klamath River

within the project boundaries do not continue to suffer impacts due to project operations under a now-expired license.

19. Permitting continued decline and impairment of the Klamath fishery results in direct impairment and injury to the Hoopa Valley Tribe, its membership, and its federal reserved fishing rights.

20. Permitting continued decline and impairment of the Klamath fishery also directly impairs and injures the Hoopa Valley Tribe's substantial interests it has in protection of Klamath resources and impairs the substantial investment that the Tribe has made towards restoration of water quality, fish passage, habitat, etc., in the Klamath River system.

21. FERC has the legal authority to impose interim measures that will protect, mitigate, and enhance fish populations impacted by Klamath Project operations during the re-licensing proceeding.

22. The Tribe sought interim measures to protect the population of fish currently located within the Klamath Project boundaries in order to protect and sustain the resources of the Klamath River for the Hoopa people.

23. FERC's refusal to impose reasonable interim flow measures means that Klamath fish populations will continue to suffer impacts identified in the FERC administrative record. The continued impact to the fishery is directly related to FERC's inaction.

24. In summary, the Hoopa Valley Tribe and its members have a sovereign, legal, economic, and cultural interest in the Klamath fishery, including those fish populations that are currently located in the river upstream of the reservation. Injury to the Klamath fishery directly results in injury to the Tribe and its sovereign, legal, economic, and cultural interests. Injury to the Klamath fishery also directly results in injury and impairment to the substantial investment that the Tribe has made towards restoration of Klamath River resources. FERC's refusal to impose reasonable interim protective measures perpetuates this ongoing injury to the Tribe.

I certify under penalty of perjury that the foregoing is true and correct.

Signed this 4 day of Jan, 2010 at Hoopa, California.

Leonard E. Masten, Jr., Chairman

# DECLARATION OF GRETT L. HURLEY

No. 09-1134

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IN THE UNITED STATES COURT OF APPEALS
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THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104
Telephone: (206) 386-5200
Facsimile: (206) 386-7322

Counsel for Petitioner Hoopa Valley Tribe

# DECLARATION OF GRETT L. HURLEY IN SUPPORT OF HOOPA VALLEY TRIBE'S PETITION FOR REVIEW

I, Grett L. Hurley, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney for the Hoopa Valley Tribe. I have served as legal counsel to the Hoopa Valley Tribe since 2003.

2. I have represented, or assisted in the representation of, the Hoopa Valley Tribe in numerous matters and proceedings relating to the protection of the resources of the Klamath River, Trinity River, and the Hoopa Valley Reservation.

3. I have personal knowledge of the facts and statements contained in this declaration.

4. The United States established the Hoopa Valley Reservation in 1864 pursuant to a statute that required the reservation be "located as remote from white settlements as may be found practicable." Act of April 8, 1864, § 2, 13 Stat. 39, 40. The remote Hoopa Valley Reservation was determined to be a suitable homeland for two reasons. First, the reservation was established in the heart of the Tribe's aboriginal lands, lands the Tribe had occupied since time immemorial. Second, the reservation set aside sufficient resources of the Klamath and Trinity rivers for the Indians to be self sufficient and achieve a moderate living based on fish. *See* Memorandum from John D. Leshy, Solicitor of the Department of the

Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion), *cited with approval, Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995).

5. Under federal law, the Tribe has reserved fishing rights to take fish from the Klamath River. *See, e.g., United States v. Wilson*, 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), *rev'd on other grounds sub nom., United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986) (noting Hoopa Valley Reservation Indian fishing rights were secured by Congress when it authorized the President to create reservations for Indian purposes); *see also* 1993 Solicitor Opinion; *Parravano*, 70 F.3d at 542.

6. The Tribe's fishing right entitles them to take fish for ceremonial, subsistence, and commercial purposes, and includes certain conditions of water quality and flow to support all life stages of fish. *Eberhardt*, 789 F.2d at 1359; *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd on other grounds*, 736 F.2d 1358 (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty included an implied water right to as much water on reservation lands as was needed to protect fishing rights).

7. For many years, the Tribe has actively worked to protect the fishery resources of the Klamath River including, but not limited to, the fish that are

currently located upstream of the Hoopa Valley Reservation within the boundaries of the Klamath Hydroelectric Project.

8. The Tribe is a party-intervenor in the re-licensing of the Klamath Hydroelectric Project. As an intervenor, the Tribe has repeatedly advocated for increased instream flows and protection of fish residing within the Klamath Project: (a) On March 29, 2006, the Tribe submitted recommended terms and conditions for the Klamath Project pursuant to Section 10(a) of the Federal Power Act that recommended increased minimum flows and limitations on ramping rates at J.C. Boyle dam; (b) In August 2006, the Tribe submitted expert testimony in support of the ramping rate and minimum flow conditions prescribed by Interior and participated in the week-long EPAct trial-type hearing before ALJ Parlen McKenna; (c) On November 30, 2006, the Tribe submitted comments on FERC's Draft Environmental Impact Statement recommending that FERC staff approve increased minimum flows below J.C. Boyle dam for the protection of the resident fish species; and (d) On February 4, 2008, the Tribe submitted additional comments on FERC's Final EIS arguing that FERC improperly failed to adopt the recommendations of ALJ Parlen McKenna that affirmed the factual basis for increased minimum flows below J.C. Boyle.

9. The Tribe has a substantial and direct interest in protection of the so-called "resident" fish located within the boundaries of the Klamath Project and has

actively fought for increased instream flows and limitations on ramping rates below J.C. Boyle dam for years. In this proceeding, the Tribe has affirmatively petitioned FERC for increased instream flows and ramping rate limitations that were prescribed by Interior in their mandatory Section 4(e) prescriptions.

10. The Tribe has also intervened and successfully advocated for the water and fishery resources of the Klamath River, and its tributary Trinity River, in numerous other proceedings. *See e.g., Klamath Water Users Association v. FERC*, 534 F.3d 735 (D.C. Cir. 2008) (intervening successfully in defense of FERC decision to not extend contract providing for low power rates to irrigation interests in Klamath Basin); *Oregon Trollers Association v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006) (intervening successfully in defense of fishery management measures adopted by NMFS in 2005 for the Klamath Management Zone); *Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005) (intervening successfully in opposition to Biological Opinion prepared for operation of the Klamath Irrigation Project location upstream of the Hoopa Reservation); *Westlands Water District v. United States Department of Interior*, 376 F.3d 853 (9th Cir. 2004) (intervening successfully in defense of record of decision that mandated increased water flows in Trinity River); *Parravano v. Babbitt*, 70 F.3d 538 (9th Cir. 1995) (appearing successfully as amicus in defense of fishing management regulations regarding Klamath fishery).

11. The actions described above represent a significant investment of resources that the Tribe has devoted towards comprehensive protection of the waters and fishery of the Klamath and Trinity Rivers, including but not limited to protection of fish that currently are located in the Klamath River within the boundaries of the Klamath Hydroelectric Project.

12. The Tribe also has obtained treatment-as-state status under Section 518(e) of the Clean Water Act and has established enforceable water quality standards for the protection of the Klamath River, as it flows through the Hoopa Valley Reservation. The Tribe's standards are contained in an EPA-approved water quality management plan. A primary purpose of the water quality management plan is to ensure water quality adequate to maintain a fishery.

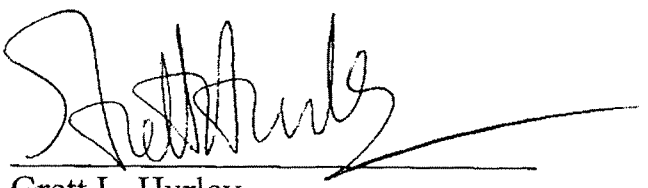
13. The Tribe has a sovereign, legal, economic, and cultural interest in the Klamath River and its fishery resources.

14. Protection of the resources of the Klamath River is a central focus of Hoopa government, culture, and economy, because the Klamath River and its resources are located within the Tribe's homeland, and because the River provides resources necessary for the subsistence and well-being of the Tribe and its members.

15. FERC's failure to exercise its legal authority to impose interim protective measures on the operations of the Klamath Project directly perpetuates injury to the Klamath fishery, and results in injury to the Tribe.

I certify under penalty of perjury that the foregoing is true and correct.

Signed this 30th day of December, 2009 at Hoopa, California.



Grett L. Hurley

16 U.S.C. § 797(e)

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

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

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

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

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

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

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

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

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

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 and among the several States" for "navigable waters of the United States" and "subsection (f)" for "subsection (e)". Former subsec. (e) redesignated (f).

Subsec. (f). Act Aug. 26, 1935, §202, redesignated subsec. (e) as (f) and substituted "once each week for four weeks" for "for eight weeks". Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was struck out by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935, §202, added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was struck out.

Subsec. (h). Act Aug. 26, 1935, §202, struck out subsec. (h) which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, inserted sentence respecting contents of report.

CHANGE OF NAME

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

EFFECTIVE DATE OF 1986 AMENDMENT

Section 18 of Pub. L. 99–495 provided that: "Except as otherwise provided in this Act, the amendments made by this Act [enacting section 823b of this title and amending this section and sections 800, 802, 803, 807, 808, 817, 823a, 824a–3, and 824j of this title] shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act [Oct. 16, 1986]. The amendments made by sections 6 and 12 of this Act [enacting section 823b of this title and amending section 817 of this title] shall apply to licenses, permits, and exemptions without regard to when issued."

SAVINGS PROVISION

Section 17(a) of Pub. L. 99–495 provided that: "Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

"(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;

16 U.S.C. § 803(a)

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 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 ca-

[1] See Codification note below.

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

pabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

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

**(b) Alterations in project works**

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

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

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

**(d) Amortization reserves**

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

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

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with

16 U.S.C. § 808(a)(1)

### § 807. Right of Government to take over project works

#### (a) Compensation; condemnation by Federal or State Government

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

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

In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its[1] does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

(June 10, 1920, ch. 285, pt. I, § 14, 41 Stat. 1071; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 207, 212, 49 Stat. 844, 847; Pub. L. 90–451, § 2, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, § 4(b)(2), Oct. 16, 1986, 100 Stat. 1248.)

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

### § 808. New licenses and renewals

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

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

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than

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

16 U.S.C. § 8251

REFERENCES IN TEXT

The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

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

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

### § 825k. Publication and sale of reports

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

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

CODIFICATION

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

### § 825*l*. Review of orders

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

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is

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

**(b) Judicial review**

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

**(c) Stay of Commission's order**

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

## § 825m. Enforcement provisions

**(a) Enjoining and restraining violations**

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

# 5 U.S.C. § 706

prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

### § 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

### § 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

### § 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

## CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

# 33 U.S.C. § 1341

"(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

"(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

"(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

"(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

"SEC. 1005. FUNDING SOURCES.

"Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities."

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Section 317(a) of Pub. L. 100–4 provided that:

"(1) FINDINGS.—Congress finds and declares that—

"(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

"(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

"(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

"(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

"(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

"(2) PURPOSES.—The purposes of this section [enacting this section] are to—

"(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

"(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

"(C) encourage the preparation of management plans for estuaries of national significance; and

"(D) enhance the coordination of estuarine research."

## SUBCHAPTER IV—PERMITS AND LICENSES

### § 1341. Certification

#### (a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to

certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

**(b) Compliance with other provisions of law setting applicable water quality requirements**

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

**(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees**

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

**(d) Limitations and monitoring requirements of certification**

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal

agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

### § 1342. National pollutant discharge elimination system

**(a) Permits for discharge of pollutants**

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

**(b) State permit programs**

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

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

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

(i) violation of any condition of the permit;

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

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

(D) control the disposal of pollutants into wells;

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

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

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

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

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

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal

Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, Sections 1-5

## ELECTRIC CONSUMERS PROTECTION ACT OF 1986

An Act to amend the Federal Power Act to provide for more protection to electric consumers. (Act of October 16, 1986, Public Law 99-495, 100 Stat. 1243)

**Section 1. [Short title and table of contents.]-(a) [Short title.]-** This Act may be cited as the "Electric Consumers Protection Act of 1986." (16 U.S.C. § 791a note.)

**(b) [Table of contents.]-**



**Sec. 2. [Amendments to section 7 of Federal Power Act.]-** Section 7(a) of the Federal Power Act (16 U.S.C.§ 791(a) et seq.) is amended as follows:

(1) Insert "original" after "hereunder or".

(2) Strike out "and in issuing licenses to new licensees under section 15 hereof" and substitute a comma. (100 Stat. 1243, 16 U.S.C. § 800.)

EXPLANATORY NOTE

**Reference in the Text.** The Federal Power Act, Part I, Act of June 10, 1920 (ch. 285, 41 Stat. 1063) appears in Volume I at page 262. Amendments and annotations appear in Supplement I at page S56 and in Supplement II at pages S814, S815.

**Sec. 3. [Environmental consideration in licensing.]-(a) [Purposes of license.]-** Section 4(e) of the Federal Power Act is amended by adding the following at the end thereof. "In deciding whether to issue any license under this Part 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.". (16 U.S.C. § 797.)

**(b) [Amendments to Section 10(a).]**- Section 10(a) of such Act is amended as follows: (1) After "waterpower development," insert "for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),". (16 U.S.C. § 803.)

(2) After "including", insert "irrigation, flood control, water supply, and".

(3) Strike "purposes; and" and insert after recreational" the following: "and other purposes referred to in section 4(e)". (16 U.S.C. 797.)

(4) insert "(1)" after "(a)" and insert the following new paragraphs at the end thereof: "(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 Commissions 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.".

**(c) [Fish and wildlife protection, mitigation, and enhancement.]**- Section 10 of the Federal Power Act is amended by adding the following at the end:

"(j)(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and

habitat) affected by the development, operation, and management of the project, each license issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

EXPLANATORY NOTE

**Reference in the Text.** The Fish and Wildlife Coordination Act appears in Volume II at page 839.

"(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

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

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

Subsection (i) shall not apply to the conditions required under this subsection.". (100 Stat.1244, 16 U.S.C. § 803.)

**Sec. 4. [Relicensing procedures.]- (a) [Relicensing process.]-** Section 15 of the Federal Power Act (16 U.S.C. § 808.) is amended by inserting "(1)" after "(a)", by redesignating subsection (b) as subsection (f), and by adding the following at the end of subsection (a):

"(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 10 of this Part, consider (and explain such consideration in writing) each of the following:

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

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

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

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

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

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

"(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 10, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

"(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

"(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

"(B) The actions taken by the existing licensee related to the project which affect the public.

"(b)(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

"(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably avail able to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

"(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

"(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this Part for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

"(c)(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection(b) and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

"(2) The time periods specified in this subsection and in subsection (b) shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

"(d)(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

"(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the

provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act (16 U.S.C. § 824d)) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission-

"(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

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

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

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

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

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

**(b) [Conforming amendments.]**- (1) Section 15(a) of the Federal Power Act is amended by striking out "original" each place it appears and substituting "existing". (16 U.S.C. § 808.)

(2) Section 14(b) of such Act is amended by striking out the first sentence. (16 U.S.C. § 807.)

**(c) [Commission review.]**- In order to ensure that the provisions of Part I of the Federal Power Act, as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act, review all provisions of that Act requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning "working days", rather than "calendar days" unless calendar days is specified in such Act for such action. (100 Stat.1245, 16 U.S.C. § 825h note.)

**Sec. 5. [License term on relicensing.]**- Section 15 of the Federal Power Act is amended by adding the following after subsection (d) (as added by section 4 of this Act):

"(e) Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.". (100 Stat. 1248)

**Sec. 6. [Unauthorized activities.]**- Section 23(b) of the Federal Power Act is amended by inserting "(1)" after "(b)" and by adding the following at the end thereof:

"(2) No person may commence any significant modification of any project licensed under, or exempted from, this Act unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this Part. As used in this paragraph, the term 'commence' refers to the beginning of physical on-site activity other than surveys or testing.". (100 Stat. 1248, 16 U.S.C. § 817.)

**Sec. 7. [Amendments to Section 30 of Federal Power Act.]**- **(a) [State or local conduits.]**- Section 30(b) of the Federal Power Act is amended by inserting after "15 megawatts" the following: "(40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes)". (16 U.S.C. § 823a.)

**(b) [NMFS.]**- Section 30(c) of the Federal Power Act is amended by inserting "National Marine Fisheries Service" after "the Fish and Wildlife Service" in both places such term appears.

**(c) [Fees for studies.]**- Section 30 of the Federal Power Act is amended by adding the following new subsection at the end thereof:

"(e) The Commission, in addition to the requirements of section 10(e), shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife

18 C.F.R. § 16.18(d)

of the authorization at least two years before the takeover occurs; and

(b) The licensee must present any claim for compensation to the Commission:

(1) Within six months of issuance of the notice of takeover; and

(2) As provided in section 14 of the Federal Power Act.

## Subpart D—Annual Licenses for Projects Subject to Sections 14 and 15 of the Federal Power Act

### § 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) This section applies to projects with licenses subject to sections 14 and 15 of the Federal Power Act.

(b) The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

(c) An annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise.

(d) In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 18, Jan. 2, 1990; Order 540, 57 FR 21738, May 22, 1992]

## Subpart E—Projects With Minor and Minor Part Licenses Not Subject to Sections 14 and 15 of the Federal Power Act

### § 16.19 Procedures for an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project with a license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project that is not subject to sections 14 and 15 of the Federal Power Act.

(b) *Notification procedures.* (1) An existing licensee with a minor license or a license for a minor part of a hydroelectric project must file a notice of intent pursuant to § 16.6(b).

(2) If the license of an existing licensee expires on or after October 17, 1994, the licensee must notify the Commission as required under § 16.6(b) at least five years before the expiration of the existing license.

(3) The Commission will give notice of a licensee's intent to file or not to file an application for a subsequent license in accordance with § 16.6(d).

(c) *Requirement to make information available.* (1) Except as provided in paragraph (c)(2) of this section, a licensee must make the information described in § 16.7 available to the public for inspection and reproduction when it gives notice to the Commission under paragraph (b).

(2) The requirement of paragraph (c)(1) of this section does not apply if an applicant filed an application for a subsequent license on or before July 3, 1989.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003; Order 699, 72 FR 45324, Aug. 14, 2007]

### § 16.20 Applications for subsequent license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an application for subsequent license for a project with an expiring license that is not subject to sections 14 and 15 of the Federal Power Act.

## CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2010, I filed the foregoing Petitioner Hoopa Valley Tribe's Initial Brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties in this matter.

In addition, I filed five paper copies of the Initial Brief with the Clerk of the Court via first class mail. I further certify that, in addition to electronic service described above, one paper copy of the Initial Brief was mailed USPS first class mail to:

Samuel Soopper
FERC Office of the Solicitor
888 First Street, NE
Washington, DC 20426

Michael Swiger
Van Ness Feldman
1050 Thomas Jefferson St., NW, 7th Floor
Washington, DC 20007-1891

Dated this 15th day of January, 2010.

*/s/ Thomas P. Schlosser*
Thomas P. Schlosser
Morisset, Schlosser & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Tel: (206) 386-5200
Fax: (206) 386-7322
Counsel for Petitioner Hoopa Valley Tribe

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