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Licensing, Relicensing and License Surrender Proposed Federal Power Act Revisions

16 U.S.C. § 796 § 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

- (1) “public lands” means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include “reservations”, as hereinafter defined;
- (2) “reservations” means national forests, ~~tribal lands embraced within Indian reservations~~, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands held in legal title by the United States in trust for the use of Indian Tribes; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;
- (3) “corporation” means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include “municipalities” as hereinafter defined;
- (4) “person” means an individual or a corporation;
- (5) “licensee” means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;
- (6) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;
- (7) “municipality” means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;
- (8) “navigable waters” means those parts of 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, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

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(9) “municipal purposes” means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) “Government dam” means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) “project” means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) “project works” means the physical structures of a project;

(13) “net investment” in a project means the actual legitimate original cost thereof, as defined and interpreted in the “classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission”, plus similar costs of additions thereto and betterments thereof, minus depreciation the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term “cost” shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) “Commission” and “Commissioner” means the Federal Power Commission, and a member thereof, respectively;

(15) “State commission” means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) “security” means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) “small power production facility” means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which--

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste,

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renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) “primary energy source” means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy--

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent--

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) “qualifying small power production facility” means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) “qualifying small power producer” means the owner or operator of a qualifying small power production facility;

(E) “eligible solar, wind, waste or geothermal facility” means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if--

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.¹

(18)(A) “cogeneration facility” means a facility which produces--

(i) electric energy, and

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(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) “qualifying cogeneration facility” means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) “qualifying cogenerator” means the owner or operator of a qualifying cogeneration facility;

(19) “Federal power marketing agency” means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) “evidentiary hearings” and “evidentiary proceeding” mean a proceeding conducted as provided in sections 554, 556, and 557 of Title 5;

(21) “State regulatory authority” has the same meaning as the term “State commission”, except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) Electric utility.—

(A) The term “electric utility” means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.¹

(B) The term “electric utility” includes the Tennessee Valley Authority and each Federal power marketing administration.¹

(23) Transmitting utility.--The term “transmitting utility” means an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy--

(A) in interstate commerce;

(B) for the sale of electric energy at wholesale.¹

(24) Wholesale transmission services.--The term “wholesale transmission services” means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.¹

(25) Exempt wholesale generator.--The term “exempt wholesale generator” shall have the meaning provided by section 79z-5a² of Title 15.

(26) Electric cooperative.--The term “electric cooperative” means a cooperatively owned electric utility.¹

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(27) RTO.--The term “Regional Transmission Organization” or “RTO” means an entity of sufficient regional scope approved by the Commission--

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.¹

(28) ISO.--The term “Independent System Operator” or “ISO” means an entity approved by the Commission--

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.³

(29) Transmission organization.--The term “Transmission Organization” means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(30) “Indian Tribe” means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published annually pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

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16 U.S.C. § 797
§ 797. General powers of Commission

The Commission is authorized and empowered--

(a) Investigations and data

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

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

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

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

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

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

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

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(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 Indian Tribe, or 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,*

(1) 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, or Indian Tribe as provided in section 823h of this title, shall deem: (A) necessary for the adequate protection and utilization of such reservation; and (B) reasonably related to project effects on the reservation and its utilization.¹ The license applicant and any party to the proceeding shall be entitled to a determination on the record, after notice and 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, including alternative conditions submitted under section 823d(a) of this title, as applicable. 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 ~~180~~90 days of ~~[enactment]~~ August 8, 2005, the Secretaries of the Interior, ~~Army,~~ Commerce, and Agriculture shall ~~update establish~~ jointly, by rule, and following consultation with the Federal Energy Regulatory Commission and notice and opportunity for public comment, the procedures for such expedited trial-type hearing, including: (A) the opportunity to undertake discovery and cross-examine witnesses; (B) providing a forum for conditions submitted under section 823h of this title to obtain a hearing; (C) a requirement that the party raising a disputed issue, or the proponent of an alternative, bears the burden of proof by a preponderance of the evidence; and (D) opportunities for all parties to a trial-type hearing to participate in settlement negotiations before and after the hearing, in consultation with the Federal Energy Regulatory Commission.²

(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.

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~~(3) *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.

~~(4) *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.

~~(5) *That i*~~n deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, addressing the effects of climate change, 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, Indian Tribe, 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.

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16 U.S.C. § 797d

§ 797d. ~~Third party contracting by FERC~~ Approach to environmental review

(a) THIRD PARTY CONTRACTING BY THE FEDERAL ENERGY REGULATORY COMMISSION~~FERC~~—

(i) Environmental impact statements—

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

(bii) Environmental assessments—

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

(eiii) Effective date—

This section shall take effect with respect to license applications filed after October 24, 1992.

(b) APPROACH TO COOPERATION WITH OTHER AGENCIES—

The Commission shall request that other federal, State, and local agencies, and Indian Tribes with a responsibility under the National Environmental Policy Act or comparable state or tribal law requirement with respect to the licensing of the project, each cooperate in the preparation of the environmental assessment or impact statement to be a record basis for their respective decisions on the application. Such cooperation shall not impair the right of a cooperating entity to participate as a party in the proceeding, subject to appropriate protections against ex parte communications.

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(c) ENVIRONMENTAL EFFECTS

In discharging their authorities and responsibilities under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] for resources affected by the project, the Commission and other agencies and Indian Tribes shall—

(1) consider ongoing and reasonably foreseeable effects of any existing dam and other appurtenant project works included as part of an application under Part I of the Federal Power Act [16 U.S.C. 791a et seq.], and shall not consider past effects of such dam and other appurtenant works. For purposes of meeting this and other requirements under Part I of the Federal Power Act—

(A) The term “past effect” means an environmental effect that may have been caused by the original construction or development of an existing project, or by prior operations of such project, but which has no ongoing material effect on environmental resources.

(B) The term “ongoing effect” means a material environmental effect that would not occur or that would be different but for the continued existence, operation, or maintenance of an existing project.

(C) The term “reasonably foreseeable effect” means a material future environmental effect that would not occur or that would be different but for the construction (in the case of new construction), existence, operation, or maintenance of the project, and which the Commission or other agency or Indian Tribe determines, based on substantial evidence: (i) is not speculative, remote, or indefinite; and (ii) is supported by monitoring, modeling or other scientific analysis that is generally accepted in the scientific community.

(D) The term “project effects” means the ongoing effects and reasonably foreseeable effects of the project.

(2) consider whether the project has an adverse effect on any fish species, and if so whether—

(A) providing or improving access to habitat upstream or downstream of the project’s dam(s) and other appurtenant works would reasonably mitigate, as appropriate, any such adverse effect; and

(B) maintaining or improving downstream habitat conditions or providing off-site mitigation as provided in section 823j of this subchapter would reasonably mitigate, as appropriate, any such adverse effect, while avoiding potential risks and costs of fish passage.

(3) evaluate reasonably foreseeable project effects on hydrologic patterns, other aspects of environmental quality, and developmental uses, over the license term; such evaluations may be based on fieldwork investigations, literature reviews, resource monitoring, technical models, or

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other appropriate methodologies consistent with generally accepted scientific practices.

(4) when deploying a model, encourage the preferential use of open-sourced technical models; provided, however, that this paragraph shall not be construed as prohibiting the use of a proprietary model or proprietary data. The Commission or other agency or Indian Tribe using or otherwise relying upon any model or data shall: (A) ensure the validity of the model or data through validation analysis entered in the record; (B) provide for the model, including data and other modeling inputs and outputs, to be reasonably available for evaluation, operation, reporting, and review by licensing participants. Such availability shall be subject to appropriate protections against duplication or public disclosure of intellectual property associated with the model, such as software code or algorithms; and further subject to appropriate protections against the public disclosure of proprietary or other data that would reveal trade secrets, other information that is competitively sensitive, or critical energy infrastructure information.

(5) Consider reasonably foreseeable effects of climate change on water resources in the region in which the project is located, including any change in project effects due to climate change and the project's potential to contribute to the protection and enhancement of the beneficial public uses identified in Sections 4(e)(5) and 10(a)(1) of the Federal Power Act [16 U.S.C. 797(e)(4), 803(a)(1)] in a changing climate. Within 180 days following enactment, and periodically thereafter at a time to be determined by the Commission, the Commission in consultation with the Department of Energy shall convene a technical conference to consider new technologies and methodologies that may be available and generally accepted in the scientific community, or by agencies that manage water resources for power production, water supply, or flood control in the applicable region, to quantify the climate considerations required under this paragraph within an acceptable calculated range in future licensing proceedings under Part I of the Federal Power Act [16 U.S.C. 791a et seq.].

(6) meet federal requirements applicable in the project area under any effective federal treaty with an Indian Tribe as determined by a court of competent jurisdiction.

(7) consider innovative solutions and emerging technologies as a means of meeting responsibilities and authorities under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] in a cost-effective manner.

(d) CITATIONS TO RECORD

In discharging their authorities and responsibilities under the National Environmental Policy Act [42 U.S.C. 4321] and sections 4(e), 10, 18, 33, and 37 of the Federal Power Act [16 U.S.C. 797(e), 803, 823d, 823h], the Commission and other agencies and Indian Tribes shall cite to the specific parts of documents and other evidence which are the basis for their respective findings on issues of material fact for which the record contains inconsistent or conflicting information. Each such agency or Indian Tribe shall state the basis for its reliance on the cited evidence for the purpose of making such findings.

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16 U.S.C. § 799

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

(a) Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

(b) Within one year of [date of enactment], the Commission following public notice and opportunity to comment shall adopt regulations that establish procedures governing licensee-initiated license surrender proceedings. Such regulations shall include: (1) a requirement for a licensee seeking a license surrender to prepare an initial public report describing and analyzing the surrender proposal, together with alternatives considered for the disposition of project works; (2) opportunities for the public to comment on the initial public report and the surrender application, to propose other alternatives for the disposition of project works for consideration by the Commission and licensee, and to otherwise participate in the surrender proceeding; (3) requirements for the licensee to engage in consultation with applicable federal and State resource agencies, Indian Tribes, and interested members of the public prior to filing the surrender application with the Commission; (4) procedures to develop a schedule for each surrender proceeding, and (5) opportunities to expedite the surrender process for a license that does not present complex resource issues, involve significant controversy or public opposition, or require other major regulatory approvals.

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16 U.S.C. § 803
§ 803. Conditions of license generally

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

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

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title¹ if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

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

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

- (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
- (ii) the State in which the facility is or will be located.

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

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric 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.

(D) Current and reasonably foreseeable future economic conditions material to the project's value in providing revenues from sales of power, generation capacity, and ancillary services, along with its

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value for other uses, over the license term; and

(E) Methods to collect and, as appropriate, publicly report hydrologic data related to the project's operations on a time interval appropriate for effective management of the affected waters.

(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

(1) 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.

(2) Within two years of [date of enactment] and every five years thereafter, the Commission shall submit to the U.S. Senate Committee on Energy and Natural Resources and U.S. House of Representatives Committee on Energy and Commerce a report, prepared in consultation with each affected licensee or exemptee under this subchapter, which: (1) identifies all projects licensed under, or exempted from the license requirements contained in, this subchapter, or developments within said projects, which have been continually out-of-service for at least 5 years preceding the report; (2) explains the reason why each project or development has been out-of-service; and (3) identifies any plans of the licensee and Commission for the rehabilitation or other disposition of the project or development; and (4) describes the Commission's anticipated timelines and requirements for the rehabilitation or other final disposition of each project or development.

(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

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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 as provided in paragraph (5); for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 5123 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such

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licensee that meets each of the following requirements:

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

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

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

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

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

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

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

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 ½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f), such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to--

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which--

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

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(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(5) In fixing reasonable annual charges under paragraph (1) for the United States' administration of this part, the Commission shall—

(A) ensure that all administrative costs of the United States, other than the Commission's administrative costs, do not exceed the direct costs incurred by any department, or any agency, bureau, office or other subdivision thereof, in its participation in license proceedings under this part, notwithstanding section 501 of the Independent Offices Appropriations Acts of 1952 (31 U.S.C. 9701), section 3401 of the Omnibus Budget Reconciliation Act of 1986 (42 U.S.C. 7178), or any other provision of federal law pertaining to annual charges fixed under paragraph (1);

(B) exclude all costs of any department, or any agency, bureau, office or other subdivision thereof that are reimbursed directly to such department or subdivision thereof, funded directly by the licensee or license applicant;

(C) include costs of a third-party contractor retained by any department, or any agency, bureau, office or other subdivision thereof that are incurred in supporting such agencies in administering their responsibilities under this subchapter, so long as such costs: (1) are not otherwise reimbursed directly to such department or subdivision thereof, as provided in subparagraph (B); and (2) meet the requirements of subparagraph (D);

(D) provide a reasonable opportunity for public review and comment on the Commission's determinations under subparagraphs (A) through (C), prior to issuing any annual charges bills for the United States' administration of this part under subsection (1); and

(E) respond to all comments received under subparagraph (D) prior to issuing any annual charges bills for the United States' administration of this part under subsection (1), and make any adjustments to its billing determinations in response to such comments, as appropriate.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission

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shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and

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management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies. For any project that may affect fish and wildlife resources protected under any effective federal treaty with an Indian Tribe as determined by a court of competent jurisdiction, conditions under this subsection also shall be based on recommendations received from such Indian Tribe.

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

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

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

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

(k) Supporting Statement for Certain License Conditions

In any case in which a Secretary exercises authority to submit a license condition to the Commission for inclusion in the license under section 797(e)(1), 811, 823d, or 823h of this title, or through authority reserved in the license under these sections, the Secretary shall include with its submitted condition or prescription a written statement providing a scientific and technical rationale for the condition, identifying specific facts relied upon in the record. The Secretary shall base this written statement on such information, and shall consider such alternatives, as are available to the Secretary in the record of the proceeding. The Secretary shall also submit, together with the aforementioned written statement, studies, data, and other factual information relied on by the Secretary and relevant to the Secretary's decision.

(l) Use of existing studies

(1) IN GENERAL.—To the extent reasonably practicable, the Commission and other Federal and State agencies with responsibilities under this part shall—

(A) use relevant existing studies, monitoring information, and data; and

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(B) avoid duplicating current, existing studies that are applicable to the relevant project.

(2) WRITTEN STATEMENT.—When requiring any new study or collection of information, the Commission and other federal and State agencies and Indian Tribes with responsibilities under this part shall prepare a written statement that—

(A) explains how the new study or other information is necessary to support the agency’s decision making relative to its responsibilities under this part;

(B) identifies how existing information reasonably available to the agency, including any monitoring information collected by the licensee during the existing license term, is inadequate to support the agency’s decision making; and

(C) explains how the information produced by the required new study or other information supports the cost of producing it.

In modifying or denying a request by another agency with responsibilities under this part, the Commission shall include in its written statement an explanation how it deems that action to be consistent with the requestor’s responsibilities to compile a record under applicable law, as well as the obligation of the Commission and other agencies to undertake to develop a joint study plan pursuant to Section 823i(c) of this part.

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16 U.S.C. § 810

§ 810. Disposition of charges arising from licenses

(a) Receipts from charges

All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this subchapter, shall be paid into the Treasury of the United States, subject to the following distribution: 12 ½ per centum thereof is hereby appropriated to be paid to the fund under subsection (b) ~~into the Treasury of the United States and credited to "Miscellaneous receipts"~~; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37 ½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 37 ½ per centum of the charges arising from all other licenses hereunder is reserved and appropriated to be paid to the fund under subsection (b); and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter shall be paid to the department, or any agency, bureau, office or other subdivision thereof, in the amounts as fixed by the Commission in section 803(e)(5) of this subchapter for such department, or agency, bureau, office or other subdivision thereof ~~into the Treasury of the United States and credited to miscellaneous receipts.~~

(b) Licensing Administration reimbursement fund

(1) IN GENERAL.—There is established within the Commission a fund, to be known as the Licensing Administration Reimbursement Fund. The fund shall be administered by the Commission and used to reimburse Indian Tribes and State fish and wildlife agencies and other State natural and cultural resource agencies for reimbursement of administrative costs of carrying out responsibilities under this subchapter.

(A) AVAILABILITY.—The fund shall be available only to Indian Tribes and State and fish and wildlife agencies and other State natural and cultural resource agencies that document their participation in license proceedings for purposes of carrying out their responsibilities under this subchapter.

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(B) EXCLUSION.—The fund shall not be available for any costs that are otherwise reimbursable to an Indian Tribe, State fish and wildlife agency, or State natural and cultural agency.

(2) COMMISSION ADMINISTRATION.—The Commission shall determine standards governing the application for, and distribution of, funding by the fund.

(3) FUNDING SOURCES.—Sources of funding for the fund consist of—

(A) annual charges deposited under subsection (a);

(B) \$ _____ that are hereby authorized for appropriation for each of fiscal years 2023 through 2033; and

(C) amounts that may be further authorized and allocated by appropriations.

(4) RULEMAKING.—Within 90 days from the effective date of this section, the Commission shall promulgate regulations, after public notice and opportunity for comment, that establish the standards and process for the availability of the fund.

(c) Delinquent payments

In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law.

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16 U.S.C. § 811

§ 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate to address project effects and other relevant factors. The license applicant and any party to the proceeding shall be entitled to a determination on the record, after notice and opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways, including alternative prescriptions submitted under section 823d(b) of this title, as applicable. 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 ~~180~~90 days of ~~[enactment]~~ August 8, 2005, the Secretaries of the Interior, Army, Commerce, and Agriculture shall update ~~establish~~ jointly, by rule, and following consultation with the Federal Energy Regulatory Commission and notice and opportunity for public comment, the procedures for such expedited trial-type hearing, including: (A) the opportunity to undertake discovery and cross-examine witnesses; (B) providing a forum for conditions submitted under section 823h of this title to obtain a hearing; (C) a requirement that the party raising a disputed issue, or the proponent of an alternative, bears the burden of proof by a preponderance of the evidence; and (D) opportunities for all parties to a trial-type hearing to participate in settlement negotiations before and after the hearing, ~~in consultation with the Federal Energy Regulatory Commission~~. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825o of this title.

16 U.S.C. § 823a

§ 823a. Conduit hydroelectric facilities

(a) Qualifying conduit hydropower facilities

- (1) A qualifying conduit hydropower facility shall not be required to be licensed under this subchapter.
- (2)(A) Any person, State, or municipality proposing to construct a qualifying conduit hydropower facility shall file with the Commission a notice of intent to construct such facility. The notice shall include

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sufficient information to demonstrate that the facility meets the qualifying criteria.

(B) Not later than 15 days after receipt of a notice of intent filed under subparagraph (A), the Commission shall--

(i) make an initial determination as to whether the facility meets the qualifying criteria; and

(ii) if the Commission makes an initial determination, pursuant to clause (i), that the facility meets the qualifying criteria, publish public notice of the notice of intent filed under subparagraph (A).

(C) If, not later than 30 days after the date of publication of the public notice described in subparagraph (B)(ii)--

(i) an entity contests whether the facility meets the qualifying criteria, the Commission shall promptly issue a written determination as to whether the facility meets such criteria; or

(ii) no entity contests whether the facility meets the qualifying criteria, the facility shall be deemed to meet such criteria.

(3) For purposes of this section:

(A) The term “conduit” means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(B) The term “qualifying conduit hydropower facility” means a facility (not including any dam or other impoundment) that is determined or deemed under paragraph (2)(C) to meet the qualifying criteria.

(C) The term “qualifying criteria” means, with respect to a facility--

(i) the facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit;

(ii) the facility has an installed capacity that does not exceed 40 megawatts; and

(iii) on or before August 9, 2013, the facility is not licensed under, or exempted from the license requirements contained in, this subchapter.

(b) Exemption qualifications

Subject to subsection (c), the Commission may grant an exemption in whole or in part from the requirements of this subchapter, including any license requirements contained in this subchapter, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rule or order--

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- (1) utilizes for such generation only the hydroelectric potential of a conduit; and
- (2) has an installed capacity that does not exceed 40 megawatts.

(c) Consultation with Federal and State agencies and Indian Tribes

In making the determination under subsection (b) the Commission shall consult with the United States Fish and Wildlife Service, National Marine Fisheries Service,¹ affected Indian Tribes, and the State agency exercising administration over the fish and wildlife resources of the State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.), and shall include in any such exemption--

- (1) such terms and conditions as the Fish and Wildlife Service¹ National Marine Fisheries Service¹ and the State agency each determine are appropriate to prevent loss of, or damage to, such resources and to otherwise carry out the purposes of such Act, and
- (2) such terms and conditions as the Commission deems appropriate to insure that such facility continues to comply with the provisions of this section and terms and conditions included in any such exemption.

(d) Violation of terms of exemption

Any violation of a term or condition of any exemption granted under subsection (b) shall be treated as a violation of a rule or order of the Commission under this chapter.

(e) Fees for studies

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

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16 U.S.C. § 823d
§ 823d. Alternative conditions and prescriptions

(a) Alternative conditions

(1) Whenever any person applies for a license for any project works within any reservation of the United States, and the Secretary of the department under whose supervision such reservation falls (referred to in this subsection as the “Secretary”) or an Indian Tribe as provided in section 823h of this title (referred to in this section as the “Tribe”) deems a condition to such license to be necessary ~~under the first proviso of section 797(e)(1) of this title,~~ the license applicant or any other party to the license proceeding may propose an alternative condition.

(2) Notwithstanding ~~the first proviso of section 797(e)(1) of this title,~~ the Secretary or Tribe shall accept the proposed alternative condition referred to in paragraph (1), and the Commission shall include in the license such alternative condition, if the Secretary or Tribe determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary or Tribe, that such alternative condition--

(A) will result in improved protection or utilization of the reservation at no additional cost to the project, including the value of foregone power or energy as compared to the condition initially deemed to be necessary by the Secretary or Tribe; or

(B) will—

(i) be no less protective provides for the adequate protection and utilization of the reservation than the condition initially deemed to be necessary by the Secretary or Tribe; and

(ii) (B) will either, as compared to the condition initially deemed to be necessary by the Secretary or Tribe--

(Ii) cost significantly less to implement; or

(IIii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary or Tribe shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary or Tribe, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary or Tribe ~~concerned~~ shall submit into the public record of the Commission proceeding with any condition under section 797(e) of this title or alternative condition it accepts under this section, ~~a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section. The written statement must: a detailed~~

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analysis establishing and explaining how the condition adopted by the Secretary or Tribe meets the criteria under paragraph (2), as compared to: (i) the condition initially determined to be necessary by the Secretary or Tribe; and (ii) each alternative condition proposed by the license applicant or any other party to the license proceeding as provided in paragraph (1) and not adopted by the Secretary or Tribe.; and

(5)(B) Any analysis filed by a Secretary under paragraph (4) also shall include a written statement demonstrating that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; climate change; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(65) If the Commission finds that the Secretary's or Tribe's final condition would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary or Tribe and the Commission and issue a non-binding advisory within 90 days. The Secretary or Tribe may accept the Dispute Resolution Service advisory unless the Secretary or Tribe finds that the recommendation will not adequately protect the reservation. The Secretary or Tribe shall submit the advisory and the Secretary's or Tribe's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative--

(A) will result in improved protection for fish at no additional cost to the project, including the value of foregone power or energy, as compared to the fishway initially prescribed by the Secretary; or

(B) will—

(i) be no less protective than the fishway initially prescribed by the Secretary; and

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~~(ii)(B)~~ will either, as compared to the fishway initially prescribed by the Secretary--

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, ~~a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must include a detailed analysis establishing and explaining how the prescription adopted by the Secretary meets the criteria under paragraph (2), as compared to: (i) the prescription initially prescribed by the Secretary; and (ii) each alternative prescription proposed by the license applicant or any other party to the license proceeding as provided in paragraph (1) and not adopted by the Secretary;~~ and

~~(5)(B)~~ Any analysis filed by a Secretary under paragraph (4) also shall include a written statement demonstrating that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; climate change; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

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16 U.S.C. § 823e

Promoting hydropower development at existing nonpowered dams

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

(1) IN GENERAL

As provided in this section, the Commission may issue ~~and amend~~ licenses, as appropriate, for any facility the Commission determines is a qualifying facility under this section.

(2) RULE

Not later than 180 days after ~~October 23, 2018~~[enactment], and after consultation with the task force as described in paragraph (3) and public notice and comment, the Commission shall ~~issue a rule establishing an expedited process~~ update its regulations for issuing and ~~amending~~ licenses for qualifying facilities under this section.

(3) INTERAGENCY TASK FORCE

(A) In ~~establishing~~ updating the expedited process under this section, the Commission shall convene an interagency task force, with appropriate Federal and State agencies ~~and, Indian Tribes, and the public~~ represented, to coordinate the regulatory processes associated with the authorizations required to construct and operate a qualifying facility.

(B)~~The~~ Prior to issuing a proposed rule for public comment under paragraph (2), the Commission shall hold workshops and other meetings with the task force shall to develop procedures that ~~are, consistent with subsection (e)(1)(E) to seek to ensure that,~~ allows the Commission and appropriate Federal and State agencies ~~and Indian tribes shall~~ Tribes to exercise their authorities consistent with subsection (c) in a manner that, to the extent practicable, will not result in any material change to the storage, release, or flow operations of the associated ~~nonpowered dam existing at the time an applicant files its license application.~~

(4) LENGTH OF PROCESS

The Commission shall ~~seek to ensure that the expedited process under this section will result in a~~ issue its final decision on an application for a license ~~by not later than for a~~ qualifying facility under this section within 2 years after ~~receipt of it determines a completed application for the license.~~ proposed hydroelectric project is a qualifying facility under subsection (d)(2).

(b) DAM SAFETY

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(1) IN GENERAL

The Commission's rules and regulations for the protection of life, health, and property shall apply to any qualifying facility licensed under this section for the licensed project works and their potential effects on the safety of the dam. For any qualifying facility licensed at a non-Federal, non-powered dam, applicable state rules and regulations for dam safety shall continue to apply to the existing dam and all other infrastructure associated therewith that are not licensed project works.

(2) ASSESSMENT

Before issuing any license for a qualifying facility, the Commission shall assess the safety of existing non-Federal dams and other non-Federal structures related to the qualifying facility (including possible consequences associated with failure of such structures).

(~~3~~) REQUIREMENTS

~~In~~ Before issuing any license for a qualifying facility at a non-Federal dam, the Commission shall —

(A) ensure that the Commission's dam safety requirements apply to such qualifying facility, dam and the other structures related to the associated with qualifying nonpowered dam, over the term of such license. the qualifying facility are is or will be consistent with the Commission's applicable dam safety standards; and

(B) consult with the applicable dam regulator in the state in which the qualifying facility is located to ensure appropriate continued oversight of the dam and associated structures over the term of the license.

(~~e~~) INTERAGENCY COMMUNICATIONS

~~Interagency cooperation in the preparation of environmental documents under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to an application for a license for a qualifying facility under this section, and interagency communications relating to licensing process coordination pursuant to this section, shall not —~~

~~(1) be considered to be ex parte communications under Commission rules; or~~

~~(2) preclude an agency from participating in a licensing proceeding under this subchapter, providing that any agency participating as a party in a licensing proceeding under this subchapter shall, to the extent practicable, demonstrate a separation of staff cooperating with the Commission under the National Environmental Policy Act [1] (42 U.S.C. 4321 et seq.) and staff participating in the applicable proceeding under this subchapter.~~

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(c) STORAGE, RELEASE, AND FLOW OPERATIONS

(1) Notwithstanding any other legal requirement pertaining to a qualifying facility licensed under this section, the Commission, federal and state agencies, and Indian Tribes will not impose any obligation in the licensing of the qualifying facility that would interfere with or materially change or affect in any way the storage, release, or flow operations of the associated nonpowered dam. The Commission's licensing of a qualifying facility under this section shall not interfere with or materially change or affect in any way any other federal, state, or Indian Tribal authority pertaining to the storage, release, or flow operations applicable to the associated nonpowered dam.

(2) The Commission shall include in any license issued in this section a condition prohibiting the licensee from materially changing the storage, release, and flow operations of the dam for the sole purpose of improving the power value of the project.

(d) EXPEDITED LICENSING PROCESS

(1) NOTIFICATION OF INTENT AND SUPPORTING INFORMATION

The applicant for any qualifying facility shall commence the licensing process by filing a notification of intent and supporting information with the Commission, which shall inform the Commission's determination under paragraph (2).

(2) COMMISSION DETERMINATION OF QUALIFYING FACILITY

Within 90 days of the applicant's filing of a notification of intent under paragraph (1), the Commission, after notice and an opportunity for public comment, shall determine whether the proposed hydroelectric project is a qualifying facility under this section and provide information, including analysis supported by information in the public record, of the factual basis for the position taken. The Commission shall consult with Federal and State agencies and Indian Tribes with authorities over the proposed project regarding any qualifying criteria under paragraph (f)(1) that may disqualify a project from the expedited process described in this section. If any qualifying criteria potentially disqualify the project from the expedited process under this section, the Commission shall resolve such issues in advance of issuing a determination on whether that the proposed project is a qualifying facility under this paragraph and provide information on any resolution as part of the determination.

(3) APPLICATION FILING

The applicant for any qualifying facility under this section shall submit its application no later than the later of: (1) 30 days after the close of a single season of studies conducted in support of the application; or (2) one year after filing the Commission's determination

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under paragraph (2). The applicant shall propose any protection, mitigation and enhancement measures for the project to be licensed by the Commission, in order to support the requirements of subsection (e) below.

(e) REQUIREMENTS

In meeting the licensing timeline under subsection (a)(4), the Commission and all federal and state resource agencies and Indian Tribes with regulatory responsibilities for the project shall—

(1) use relevant existing studies, monitoring information, and data, and avoid duplicating current, existing studies that are applicable to the relevant project consistent with section 803(I) of this subchapter, and design any new studies or information requirements to be consistent with the Commission’s ability to meet the licensing timeline under subsection (a)(4);

(2) consider whether obligations under the National Environmental Policy Act of 1969, (42 U.S.C. 4321 et seq.) may be met through preparation of an environmental assessment or through supplementing a previously prepared environmental assessment or environmental impact statement;

(3) develop a licensing process that reduces administrative burdens on resource agencies, Indian tribes, the applicant, and the public by avoiding unnecessary paperwork, meetings, and other process obligations; *provided, however,* that nothing in this paragraph is intended or shall be interpreted as eliminating applicable consultation requirements under federal or state statute or regulation;

(4) exercise authorities commensurate with the limited unit of development and improvement for a qualifying facility under subsection (g)(2), recognizing the existence of existing infrastructure at the time of the license application and that ongoing operations of existing infrastructure, including water releases, will be materially unchanged as a result of the development and operation of the qualified facility, as required under subsection (c); and

(5) consider a set of standard license terms and conditions that generally would apply to every project licensed under this section, based on technical considerations and environmental effects that typically apply at qualifying facilities under this section; *provided,* that the development of standard license terms and conditions that generally apply shall not limit the imposition of project-specific conditions for any particular project.

(df) IDENTIFICATION OF NONPOWERED DAMS FOR HYDROPOWER DEVELOPMENT

(1) IN GENERAL

Not later than 12 months after October 23, 2018, the Commission, with the Secretary of the Army, the Secretary of the Interior, and the Secretary of Agriculture, shall jointly develop a list of existing nonpowered Federal dams that the Commission and the

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Secretaries agree have the greatest potential for non-Federal hydropower development.

(2) CONSIDERATIONS

In developing the list under paragraph (1), the Commission and the Secretaries may consider the following:

- (A) The compatibility of hydropower generation with existing purposes of the dam.
- (B) The proximity of the dam to existing transmission resources.
- (C) The existence of studies to characterize environmental, cultural, and historic resources relating to the dam.
- (D) The effects of hydropower development on release or flow operations of the dam.

(3) AVAILABILITY

The Commission shall—

- (A) provide the list developed under paragraph (1) to—
 - (i) the Committee on Energy and Commerce, the Committee on Transportation and Infrastructure, and the Committee on Natural Resources, of the House of Representatives; and
 - (ii) the Committee on Environment and Public Works, and the Committee on Energy and Natural Resources, of the Senate; and
- (B) make such list available to the public.

(eg) DEFINITIONS

For purposes of this section:

(1) QUALIFYING CRITERIA

- The term “qualifying criteria” means, with respect to a facility—
- (A) as of October 23, 2018, the facility is not licensed under, or exempted from the license requirements contained in, this subchapter;
 - (B) the facility will be associated with a qualifying nonpowered dam;

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(C) the facility will be constructed, operated, and maintained for the generation of electric power;

(D) the facility will use for such generation any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; ~~and~~

(E) the operation of the facility will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam; and

(F) the Commission determines, after considering the applicant's notification of intent, supporting information, and comments received under paragraph (c)(2), and completing any consultation under paragraph (c)(2), that an expeditious licensing decision under this section is reasonably possible, by considering the following factors, as appropriate—

- (i) whether environmental or dam safety considerations demonstrate that the qualifying nonpowered dam is likely to be removed within a license term;
- (ii) whether existing information establishes that, ~~independent of hydropower generation,~~ the dam will no longer serve its existing public purpose over the course of a license term;
- (iii) whether adverse resource effects associated with the existing facility, including lack of fish passage at the qualifying nonpowered dam, are presently unmitigated, and whether such adverse effects are likely to remain unmitigated under future operation;
- (iv) whether the Commission's licensing of the qualifying facility has the potential to mitigate or enhance environmental conditions associated with the qualifying nonpowered dam, including any preliminary protection, mitigation, and enhancement measures identified by the applicant;
- (v) whether the resource issues likely to be involved in the licensing process are unusual or complex; and
- (vi) whether a sufficient amount of information is available at the time of the notification of intent to help support the development of the license application.

(2) QUALIFYING FACILITY

The term “qualifying facility” means a facility that is determined under this section to meet the qualifying criteria. Notwithstanding section 3(11) of this part (16 U.S.C. 796(11)), the complete unit of improvement or development for any qualifying facility licensed under

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this section shall include only the power house, the power tunnel, penstocks, tailrace, other water conveyance infrastructure connected directly to the powerhouse, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, and any other new miscellaneous structures used and useful in connection with the qualifying facility. The complete unit of improvement or development shall not include any dam or appurtenant works or structures (including navigation structures), dike, other water retention or diversion infrastructure, impoundment, shoreline, access roads, or recreational and other infrastructure associated with the existing nonpowered dam and impoundment.

(3) QUALIFYING NONPOWERED DAM

The term “qualifying nonpowered dam” means any federal or non-federal dam, dike, embankment, or other barrier—

(A) the construction of which was completed on or before October 23, 2018;

(B) that is or was operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes; ~~and~~

(C) that, ~~as of October 23, 2018~~ for any non-federal dam—

(i), is not generating electricity with hydropower generating works that are licensed under, or exempted from the license requirements contained in, this subchapter: as of October 23, 2018; and

(ii) is regulated by an established dam safety program of the State in which the non-federal dam is located; and

(D) that, for any federal dam, is available for non-federal power development and is either not equipped with power generating equipment or has available incremental generation potential for non-federal power development.

(fh) SAVINGS CLAUSES

Nothing in this section affects—

(1) any authority of the Commission to license a facility at a nonpowered dam under this subchapter; and

(2) any authority of the Commission to issue an exemption to a small hydroelectric power project under the Public Utility Regulatory Policies Act of 1978; and

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(3) any applicable laws of the respective States relating to the qualifying nonpowered dam, dike, conduit, impoundment, shoreline, or other land, or any other lands or infrastructure associated with such dam that are not licensed project works under this section, including dam safety and the control, property ownership and control, public access and safety, and the appropriation, use, or distribution of water at such dam.

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16 U.S.C. § 823f
Closed-loop and off-stream pumped storage projects

(a) EXPEDITED LICENSING PROCESS FOR CERTAIN CLOSED-LOOP AND OFF-STREAM PUMPED STORAGE PROJECTS

(1) IN GENERAL

As provided in this section, the Commission may issue ~~and amend~~ licenses, as appropriate, for any closed-loop and off-stream pumped storage projects the Commission determines to meet the qualifying criteria under this section.

(2) RULE

Not later than 180 days after [~~enactment~~] ~~October 23, 2018,~~ and after consultation with the task force as described in paragraph (3) and public notice and comment, the Commission shall update its regulations issue a rule establishing an expedited process for issuing ~~and amending~~ licenses for closed-loop and off-stream pumped storage projects meeting the qualifying criteria under this section.

(3) INTERAGENCY TASK FORCE

(A) In ~~establishing~~ updating the expedited process under this section, the Commission shall convene an interagency task force, with appropriate Federal and State agencies, ~~and~~ Indian tribes, and the public represented, to coordinate the regulatory processes associated with the authorizations required to construct and operate closed-loop and off-stream pumped storage projects meeting the qualifying criteria.

(B) Prior to issuing a proposed rule for public comment under paragraph (2), the Commission shall hold workshops and other meetings with the task force to develop procedures that, consistent with this section, allows the Commission and appropriate Federal and State agencies and Indian Tribes to exercise their authorities in a manner consistent with this section and other requirements of this subchapter.

(4) LENGTH OF PROCESS

The Commission shall ~~issue its~~ seek to ensure that the expedited process under this section will result in final decision on an application for a license under this section within three years after it determines a proposed hydroelectric project is a closed-loop or off-stream pumped storage project meeting the qualifying criteria under subsection (g)(2). ~~by not later than 2 years after receipt of a completed application for such license.~~

(b) DAM SAFETY

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Before issuing any license for a closed-loop or off-stream pumped storage project meeting the qualifying criteria, the Commission shall assess the safety of existing dams and other structures related to the project (including possible consequences associated with failure of such structures). project works. The Commission shall have jurisdiction over the safety of all project works once the project is licensed.

~~(e) EXCEPTIONS FROM OTHER REQUIREMENTS~~

~~(1) IN GENERAL~~

~~In issuing or amending a license for a closed-loop pumped storage project pursuant to the expedited process established under this section, the Commission may grant an exception from any other requirement of this subchapter with respect to any part of the closed-loop pumped storage project (not including any dam or other impoundment).~~

~~(2) CONSULTATION~~

~~In granting an exception under paragraph (1), the Commission shall consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the State agency exercising administration over the fish and wildlife resources of the State in which the closed-loop pumped storage project is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).~~

~~(3) TERMS AND CONDITIONS~~

~~In granting an exception under paragraph (1), the Commission shall include in any such exception—~~

~~(A) such terms and conditions as the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the State agency described in paragraph (2) each determine are appropriate to prevent loss of, or damage to, fish and wildlife resources and to otherwise carry out the purposes of the Fish and Wildlife Coordination Act; and~~

~~(B) such terms and conditions as the Commission deems appropriate to ensure that such closed-loop pumped storage project continues to comply with the provisions of this section and terms and conditions included in any such exception.~~

~~—(4) FEES~~

~~The Commission, in addition to the requirements of section 803(e) of this title, shall establish fees which shall be paid by an applicant for a license for a closed-loop pumped storage project that is required to meet terms and conditions set by fish and wildlife~~

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~~agencies under paragraph (3). Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in paragraph (3) for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.~~

(c) EXPEDITED LICENSING PROCESS

(1) NOTIFICATION OF INTENT AND SUPPORTING INFORMATION

The applicant for a closed-loop or off-stream pumped storage project meeting the qualifying criteria shall commence the licensing process by filing a notification of intent and supporting information with the Commission, which shall inform the Commission's determination under paragraph (2).

(2) COMMISSION DETERMINATION OF QUALIFYING CLOSED-LOOP OR OFF-STREAM PUMPED STORAGE PROJECTS

Within 90 days of the applicant's filing of a notification of intent under paragraph (1), the Commission, after notice and an opportunity for public comment, shall determine whether the project is a qualifying closed-loop or off-stream pumped storage project meeting the qualifying criteria under this section. The Commission shall consult with Federal and State agencies and Indian Tribes with authorities over the project regarding any qualifying criteria under subsection (g)(2), or any environmental or technical information needs that cannot be met within the period established under paragraph (3), that may disqualify a project from the expedited process described in this section. If any qualifying criteria potentially disqualify the project from the expedited process under this section, the Commission shall resolve such issues in advance of issuing a determination that the project is a qualifying closed-loop or off-stream pumped storage project under this paragraph and provide information on the resolution as part of the determination.

(3) APPLICATION FILING

The applicant for any closed-loop or off-stream pumped storage project meeting the qualifying criteria under this section shall submit its application no later than one year after the Commission's determination under paragraph (2) that the project is a qualifying closed-loop or off-stream pumped storage project. The applicant shall propose any protection, mitigation, and enhancement measures for the project to be licensed by the Commission.

(d) REQUIREMENTS

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In meeting the licensing timeline under subsection (a)(4), the Commission and all federal and state resource agencies and Indian Tribes with regulatory responsibilities for the project shall—

(1) use relevant existing studies, monitoring information, and data, and avoid duplicating current, existing studies that are applicable to the relevant project consistent with section 803(l) of this subchapter, and design any new studies or information requirements to be consistent with the Commission’s ability to meet the licensing timeline under subsection (a)(4);

(2) consider whether obligations under the National Environmental Policy Act of 1969, (42 U.S.C. 4321 et seq.) may be met through preparation of an environmental assessment or supplementing a previously prepared environmental assessment or environmental impact statement;

(3) develop a licensing process that reduces administrative burdens on resource agencies, Indian tribes, the Applicant, and the public by avoiding unnecessary paperwork, meetings, and other process obligations; *provided, however,* that nothing in this paragraph is intended or shall be interpreted as eliminating applicable consultation requirements under federal or state statute or regulation; and

(4) consider a set of standard license terms and conditions that generally would apply to every project licensed under this section, based on technical considerations and environmental effects that typically apply at closed-loop or off-stream pumped storage projects; *provided,* that the development of standard license terms and conditions that generally apply shall not limit the imposition of project-specific conditions for any particular project.

(ed) TRANSFERS

Notwithstanding section 798 of this title, and regardless of whether the holder of a preliminary permit for a closed-loop or off-stream pumped storage project claimed municipal preference under section 800(a) of this title when obtaining the permit, on request by a municipality, the Commission may, to facilitate development of a closed-loop or off-stream pumped storage project—

(1) add entities as joint permittees following issuance of a preliminary permit; and

(2) transfer a license in part to one or more nonmunicipal entities as co-licensees with a municipality, if the municipality retains majority ownership of the project for which the license was issued.

(e) INTERAGENCY COMMUNICATIONS

~~Interagency cooperation in the preparation of environmental documents under the National~~

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~~Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to an application for a license for a closed-loop pumped storage project submitted pursuant to this section, and interagency communications relating to licensing process coordination pursuant to this section, shall not—~~

~~(1) be considered to be ex parte communications under Commission rules; or~~

~~(2) preclude an agency from participating in a licensing proceeding under this subchapter, providing that any agency participating as a party in a licensing proceeding under this subchapter shall, to the extent practicable, demonstrate a separation of staff cooperating with the Commission under the National Environmental Policy Act [1] (42 U.S.C. 4321 et seq.) and staff participating in the applicable proceeding under this subchapter.~~

(f) DEVELOPING ABANDONED MINES FOR PUMPED STORAGE

(1) WORKSHOP

Not later than 6 months after October 23, 2018, the Commission shall hold a workshop to explore potential opportunities for development of closed-loop pumped storage projects at abandoned mine sites.

(2) GUIDANCE

Not later than 1 year after October 23, 2018, the Commission shall issue guidance to assist applicants for licenses or preliminary permits for closed-loop pumped storage projects at abandoned mine sites.

(g) DEFINITIONS ~~QUALIFYING CRITERIA FOR CLOSED-LOOP PUMPED STORAGE PROJECTS~~

For purposes of this section—

(1) CLOSED-LOOP PUMPED STORAGE PROJECT

The term “closed-loop pumped storage project” means a project that—

(A) is configured to use two or more natural or artificial reservoirs or other water bodies at different elevations that can generate power as water moves down through a turbine and recharge by pumping water to the upper reservoir; and

(B) is designed for construction and operation such that the upper and lower reservoirs or other water bodies do not impound any stream channel of a natural surface waterway, except any such stream channel that has flowing water only during, and for a short duration after, precipitation events in a typical year; and

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(C) if a project reservoir is connected to a natural surface waterway, it is connected for the sole purpose of initial fill and periodic recharge of the reservoirs needed for project operation.

(2) OFF-STREAM PUMPED STORAGE PROJECT

The term “off-stream pumped storage project” means a project that—

(A) is configured to use two or more natural or artificial reservoirs or other water bodies at different elevations that can generate power as water moves down through a turbine and recharge by pumping water to the upper reservoir; and

(B) is designed for construction and operation such that the upper and lower reservoirs or other water bodies do not impound any stream channel of a natural surface waterway, except under either or both of the following conditions—

(i) one or both reservoirs are located on or connected to a stream channel of a natural waterway that has flowing water only during, and for a short duration after, precipitation events in a typical year; or

(ii) no more than one project reservoir is located on or directly connected to a natural surface watercourse if such reservoir—

(I) exists as of the date [of the adoption of this measure]; and

(II) receives the vast majority of its water by surface waters from a different natural watershed via an existing pipeline, aqueduct or other conveyance infrastructure, or by groundwater; and

(III) obtains no more than 10 percent of the volume of its average annual inflow of surface waters from the natural watershed in which it is located; and

(C) Except for reservoirs described in subparagraph (B)(ii), if a project reservoir is connected to a natural surface waterway, it is connected for the sole purpose of initial fill and periodic recharge of the reservoirs needed for project operation.

(2) QUALIFYING CRITERIA

The term “qualifying criteria” means criteria that a closed-loop or off-stream pumped storage project must meet in order to qualify for the expedited process established under this section. These criteria require that the closed-loop or off-stream pumped storage

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project:

(A) is unlikely to involve fish or wildlife species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973 [16 U.S.C. 15331 et seq.], unless the applicant identifies in its notice of intent proposed measures to protect or mitigate damages to involved listed species and critical habitat;

(B) is unlikely to involve resource issues that are unusual or complex in the licensing process and associated environmental review;

(C) is supported by a sufficient amount of information and proposed environmental study plans at the time the notification of intent, to help support the expedited environmental review and consideration of the application;

(D) proposes construction, development, and operation the environmental effects of which are likely capable of protection, mitigation, and enhancement through the licensing provisions of this subchapter; and

(E) is not located within any lands or interests in lands held in legal title by the United States in trust for the use of an Indian Tribe, unless the Indian Tribe for which such legal title is held in trust is a project proponent or consents, in writing, to such location.

(h) SAVINGS CLAUSE

Nothing in this section affects any authority of the Commission to license a closed-loop or off-stream pumped storage project under this subchapter.

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16 U.S.C. § 823h

§ 823h. Federal reservation conditions to protect Indian tribal resources

(a) MANDATORY CONDITIONS FOR INDIAN RESERVATIONS.—

(1) IN GENERAL.—For any license issued within any lands or interests in lands held in legal title by the United States in trust for the use of an Indian Tribe, the Indian Tribe for which such legal title is held in trust shall have exclusive authority to deem ~~determine~~ a condition to such license to be necessary under section 797(e)(1) of this title, regardless of whether the Indian Tribe is a licensee or applicant for the project.

(2) WRITTEN STATEMENT.—When deeming a condition necessary under section 797(e)(1), an Indian Tribe shall include with its submitted condition a written statement providing a scientific and technical rationale for the condition, identifying specific facts relied upon in developing the condition. The Indian Tribe shall base this written statement on such information, and shall consider such alternatives, as are available to the Indian Tribe in the record of the proceeding. The Indian Tribe shall also submit, together with the aforementioned written statement, studies, data, and other factual information relied upon by the Indian Tribe in rendering its decision.

(b) OTHER RESERVATIONS.—For any license issued within any reservation other than a reservation identified in subsection (a), the Secretary in deeming conditions of such license to be necessary under section 797(e)(1) of this title shall consult with the Secretary of the Interior and any potentially affected Indian Tribes regarding the responsibilities of the United States that apply in the project area under any effective federal treaty with an Indian Tribe as determined by a court of competent jurisdiction.

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16 U.S.C. § 823i

§ 823i. Coordination of the Commission and other Agencies issuing Federal Authorizations

(a) DEFINITIONS OF FEDERAL AUTHORIZATION.—In this section—

(1) The term “Federal authorization” means any authorization required under Federal law (including any license, condition of any license by a Secretary or Tribe under section 4(e), prescription submitted by a Secretary under section 18, permit, special use authorization, certification, opinion, consultation, determination, or other approval) with respect to an application for a license.

(2) The term “conditioning agency” means a federal agency other than the Commission, or a state agency, or an Indian tribe, with authority to issue a Federal authorization.

(b) COORDINATION OF SCHEDULE.—Within 90 days of the applicant’s filing of a notification of intent to apply for a license, the Commission, following consultation with conditioning agencies, shall convene a technical conference with a transcript taken by the Commission and submitted to the public record to coordinate their respective efforts and schedules related to studies, other information, consultation, environmental review, and decision making. To the extent reasonably practicable, the Commission and conditioning agencies shall establish a joint schedule that will permit the timely completion of federal authorization decisions required of the Commission and conditioning agencies, as well as the record supporting the basis for their respective decisions. The Commission and conditioning agencies shall consider waivers or modifications of the requirements of their respective rules, within statutory limits, as appropriate to establish a joint schedule for the proceeding and ensure timely decision making. The Commission, following consultation with conditioning agencies, shall thereafter convene another technical conference, also with a transcript taken by the Commission and submitted to the public record, as appropriate to address changed circumstances that may threaten the ability of the Commission or any conditioning agency to maintain the joint schedule. If the Commission and conditioning agencies are unable to establish or maintain a joint schedule, they shall submit to the public record maintained by the Commission, within 30 days after the conclusion of the technical conference, a statement that identifies the inconsistency or conflict, explains the position taken by each agency causing the inconsistency or conflict, and provides an analysis, supported by information in the public record, of the factual basis for the inconsistent or conflicting position taken by each agency.

(c) COORDINATION OF INFORMATION AND STUDIES.—As early as practicable following the applicant’s filing of a notification of intent, the Commission, following consultation with conditioning agencies, shall convene a technical conference to address existing information and potential new studies relevant to the development of the record that would support their respective decisions. To the extent reasonably practicable, the Commission and other conditioning agencies shall establish a joint study plan. If the agencies are unable to establish or maintain a joint study plan, they shall submit to the public record maintained by the Commission, within 30 days after the conclusion of the technical conference, a statement that

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identifies the inconsistency or conflict, explains the position taken by each agency causing the inconsistency or conflict, and provides an analysis, supported by information in the public record, of the factual basis for the inconsistent or conflicting position taken by each agency.

(d) TRIAL-TYPE HEARING.—

For any trial-type hearing conducted under section 4(e)(1) or 18 of this subchapter [16 U.S.C. 797(e)(1), 811], the Commission—

(1) may participate as a party, for purposes of advocating the factual analyses of its staff on any disputed issues of material fact; and

(2) shall give due weight to ~~consider~~ the findings of fact resulting from the trial-type hearing when preparing its environmental analysis under the National Environmental Policy Act [42 U.S.C. 4321 et seq.].

(e) CONSULTATION ON INCONSISTENT OR CONFLICTING LICENSE TERMS.—If a term or condition of a Federal authorization submitted or recommended for inclusion in the license under this part conflicts or is otherwise inconsistent with another such term or condition in a Federal authorization, the Commission shall initiate and facilitate consultation with the conditioning agencies submitting conflicting or inconsistent terms or conditions, to attempt to resolve the inconsistency or conflict. The consultation period under this subsection shall extend up to 90 days and shall include at least one technical conference or similar meeting. If the Commission and conditioning agencies submitting the terms or conditions resolve the inconsistency or conflict, the Commission and conditioning agencies shall set a reasonable schedule and deadline, that is not later than 90 days after the conclusion of the consultation, to amend and reissue their Federal authorizations to reflect the resolution, as appropriate. If the Commission and conditioning agencies are unable to resolve the inconsistency or conflict, they shall submit to the public record maintained by the Commission, within 30 days after the conclusion of the consultation, a statement that identifies the inconsistency or conflict and explains the reason for the inconsistency or conflict, supported by information in the public record.

(f) PUBLIC NOTICE AND PARTICIPATION.—The Commission shall issue public notice of the technical conferences between the Commission and conditioning agencies, as required in subsections (b), (c), and (e), and all such conferences shall be open to participation by the license applicant and other licensing participants.

(g) RULEMAKING.—Within one year of [date of enactment], the Commission following public notice and opportunity to comment shall adopt regulations to implement the requirements of this section.

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16 U.S.C. § 823j
§ 823j. Off-site considerations in hydropower licensing

(a) DEFINITIONS.—In this section—

(1) The term “federal authorization” has the same meaning as provided in 16 U.S.C. § 823i.

(2) The term “conditioning agency” has the same meaning as provided in 16 U.S.C. § 823i.

(3) The term “off-site measure” means any activity that is intended to mitigate for project effects by replacing or providing substitute resources or habitat at a different location than the project area.

(4) The term “non-jurisdictional dam” means:

(A) any non-federal dam, dike, embankment, or other barrier constructed to hold back or divert water; and

(B) is not licensed under, or exempted from the license requirements contained in, this subchapter.

(b) OFF-SITE MEASURES.—

(1) IN GENERAL.—In discharging their responsibilities under any federal authorization for the protection, mitigation of damage to, and enhancement of resources affected by a project, the Commission and conditioning agencies shall consider off-site measures recommended by any licensing participant, but shall not require any such measure that is not proposed by the applicant. Such measures may include coordination with other projects in the basin. Within one year of [date of enactment], the Commission, following public notice and opportunity to comment, shall adopt regulations to implement the requirements of this section.

(2) EFFECT ON REGULATORY RESPONSIBILITIES.—Adoption by the Commission or any conditioning agency of any off-site measure proposed by the applicant shall satisfy requirements of a federal authorization that otherwise would be necessary or appropriate to address a project effect associated with the project site; *provided*, that the Commission and conditioning agencies shall give preference to on-site measures for the purpose of such mitigation.

(3) PROJECT EXTENT.—Notwithstanding section 796(11) of this subchapter, the lands, infrastructure, improvements, and waters associated with any off-site mitigation measure under this section shall not be required to be included as part of a project; *provided*, that any off-site measure adopted under this section shall be included,

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implemented, and enforced as a license condition issued by the Commission under this part.

(4) NON-JURISDICTIONAL DAM REMOVAL.—For any off-site measure that includes a non-jurisdictional dam removal proposed by the applicant and approved under this subsection by the Commission or a conditioning agency under a federal authorization—

(A) LIABILITY PROTECTION.—

(i) IN GENERAL.—Notwithstanding any other federal, state, tribal, local, or common law, the licensee shall not be liable for any harm, loss, or other damages to an individual or entity, property, natural resource, or the environment, or any damages resulting from dam removal arising from, relating to, or triggered by actions associated with non-jurisdictional dam removal under this section, including but not limited to any damage caused by the release of any material or substance (including a hazardous substance); provided that the licensee and the owner of such dam or a third party have entered into a legally enforceable agreement assuring that the owner, ~~or~~ its assignee, or other third party retains such liability.

(ii) FUNDING.—Notwithstanding any other federal, state, local, or common law, no individual or entity contributing funds for non-jurisdictional dam removal under this section shall be held liable, solely by virtue of that funding, for any harm, loss, or other damages to an individual or entity, property, or the environment, or damages arising from facilities removal or facility operations arising from, relating to, or triggered by actions associated with non-jurisdictional dam removal, including but not limited to any damage caused by the release of any material or substance (including a hazardous substance).

(B) PREEMPTION.—Notwithstanding section 803(c)(1) of this subchapter, protection from liability pursuant to this paragraph shall preempt the laws of any state or tribe to the extent the laws are inconsistent with this subsection, except that this paragraph shall not limit any otherwise-available immunity, privilege, or defense under any other provision of law.

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16 U.S.C. § 823k
§ 823k. Micro hydropower facilities

(a) IN GENERAL.—To improve the regulatory process and reduce delays and costs for new development of micro hydropower facilities (which, for purposes of this section, are defined as hydropower facilities with an installed capacity of 1,000 kilowatts or less), the Commission shall investigate—

(1) Opportunities to expand micro hydropower in the United States for purposes of—

(A) Capturing the electric generating potential of existing hydraulic processes without requiring the construction of any new dam or similar infrastructure;

(B) Reducing the nation’s dependence on fossil fuel resources for power and energy;

(C) Serving rural, underserved, or isolated communities; and

(2) Regulatory processes and administration of micro hydropower facilities, including—

(A) The protection, protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), as well as other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e)(4) of this title;

(B) Achieving cost-effective and administratively efficient regulation of micro hydropower facilities that are commensurate with the size, expanse, and environmental effects of micro hydropower facilities; and

(C) Protecting public safety and structural integrity of project works.

(b) INFORMATION GATHERING.—In meeting its obligation under subsection (a), the Commission shall consult with the U.S. Department of Energy, federal and state resource agencies, Native American Tribes, and the public. At a minimum, the Commission shall—

(1) Solicit relevant technical, scientific, and regulatory information, as well as an opportunity for the submittal of public comments; and

(2) Convene regional technical conferences to address the investigation subjects identified in subsection (a), as well as an opportunity for the submittal of public comments following the technical conferences.

(c) REPORT.—

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(1) IN GENERAL.—Within one year after enactment, the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

(A) Analyzes each of the investigation subjects identified in subsection (a), including a quantitative assessment of the amount of energy that could likely be produced by such a program and the environmental and economic feasibility of such projects, and including specific recommendations on how Congress may address or remedy each identified issue; and

(B) Describes the processes adopted and comments received under subsection (b), including the Commission’s response to comments received from the U.S. Department of Energy, federal and state resource agencies, Native American Tribes, and the public.

(2) DRAFT REPORT.—Prior to submitting the report as provided in paragraph (1), the Commission shall provide a draft report to the U.S. Department of Energy, federal and state resource agencies, Native American Tribes, and the public for review and comment for a period that shall be no less than 60 days. The report submitted by the Commission in accordance with paragraph (1) shall identify all recommendations received and explain the Commission’s reasons for not adopting any submitted recommendation, supported by information produced during information gathered under subsection (b).