

**In the United States Court of Appeals
for the First Circuit**

UNITED STATES DEPARTMENT OF THE INTERIOR,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BOOTT HYDROPOWER, INC., AND ELDRED L. FIELD
HYDROELECTRIC FACILITY TRUST,
Intervenors.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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GLOSSARY

Add.	Addendum to the Brief of Petitioner United States Department of Interior
Advisory Council	Advisory Council on Historic Preservation
Am. Br.	Brief of the National Trust for Historic Preservation In The United States and Preservation Mass Inc.
Amendment Order	<i>Boott Hydropower, Inc.</i> , 143 FERC ¶ 61,048 (2013), Add. 1
App.	Joint Appendix
Boott	Boott Hydropower, Inc. and Eldred L. Field Hydroelectric Facility Trust
Br.	Brief of Petitioner United States Department of Interior
Commission or FERC	Federal Energy Regulatory Commission
EA	Final Environmental Assessment
Interior	United States Department of Interior
Park	Lowell National Historic Park
Preservation Standards	Department of Interior, Lowell Historic Preservation Commission, <i>Notice of Standards for Rehabilitation and Construction</i> , 46 Fed. Reg. 24,000 (Apr. 29, 1981)
Park Service	National Park Service, a bureau of the United States Department of Interior
Preservation District	Lowell Historic Preservation District
Project	Lowell Hydroelectric Project
Rehearing Order	<i>Boott Hydropower, Inc.</i> , 144 FERC ¶ 61,211 (2013), Add. 62

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STATEMENT OF THE ISSUE

In the orders under review, the Federal Energy Regulatory Commission (“FERC” or “Commission”) approved an application filed by Boott Hydropower, Inc. and Eldred L. Field Hydroelectric Facility Trust (collectively “Boott”) to amend the license of the Lowell Hydroelectric Project. In the application, to reduce upstream flooding and to provide additional benefits, Boott sought

authorization to replace the Pawtucket Dam’s wooden flashboard crest control system with a pneumatic crest gate system. The question presented for review is:

Whether the Commission reasonably exercised its statutory discretion in determining that installation of the pneumatic crest gate system, coupled with the prescribed mitigation measures, would not adversely affect the resources of the Lowell National Historical Park or Lowell Historic Preservation District, and would be accomplished in a manner consistent with the preservation standards established pursuant to the Lowell Act, 16 U.S.C. § 410cc, *et seq.*

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Lowell Hydroelectric Project (“Project”) is located on the Merrimack River in Lowell, Massachusetts. Because it is situated on a navigable waterway of the United States, the Project is subject to regulation by the Commission. *See* 16 U.S.C. § 817(1) (non-federal hydroelectric projects must be licensed if, *inter alia*, located on a navigable waterway of the United States).

A. The Federal Power Act

Part I of the Federal Power Act constitutes “a complete scheme of national regulation” to “promote the comprehensive development of the water resources of

the Nation.” *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946).

Section 4(e) of the Act authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters and to oversee those licenses. 16 U.S.C. § 797(e). Hydropower licenses may be amended upon the mutual agreement of the licensee and the Commission. *Id.* § 799.

In determining whether to issue a hydroelectric license, and in developing the terms of any such license, the Commission must carefully balance developmental benefits, such as power generation, and environmental and recreational values. Specifically, Section 4(e) of the Act provides:

[T]he Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Id. § 797(e). Similarly, section 10(a)(1) of the Act requires the Commission “to shape the license so that the project is best adapted, among other things, for the improvement and utilization of water-power development and for ‘other beneficial public uses, including recreational purposes.’” *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, 466 U.S. 765, 784 (1984) (quoting 16 U.S.C. § 803(a)).

Given the many statutory factors to be analyzed and balanced, the Commission is afforded “wide latitude and discretion in the performance of its licensing ... functions.” *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (internal quotations omitted).

B. Historic Preservation Statutes

The Project is located within the boundaries of the Lowell National Historic Park (“Park”) and Lowell Historic Preservation District (“Preservation District”). The proposed license amendment thus implicates two historic preservation statutes: the National Historic Preservation Act and the Lowell Act. *See Boott Hydropower, Inc.*, 143 FERC ¶ 61,048, P 75 (2013) (“Amendment Order”), Add. 21.

1. The National Historic Preservation Act

Section 106 of the National Historic Preservation Act requires a federal agency to “take into account the effect” of its actions on the historic properties included in, or eligible for inclusion in, the National Register of Historic Places. 16 U.S.C. § 470f. *See also Neighborhood Ass’n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 59-60 (1st Cir. 2006) (same). When a project will adversely affect a National Historic Landmark, section 110f of the Act requires that an agency, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to

comment on the undertaking.” 16 U.S.C. § 470h-2(f).

Petitioner Department of Interior (“Interior”) does not contend that the Commission violated the National Historic Preservation Act.¹

2. The Lowell Act

The Park and the Preservation District were established by the Lowell Act in 1978. 16 U.S.C. § 410cc-11(a)(1). They encompass historically and culturally significant sites that “symbolize in physical form the Industrial Revolution.” *Id.* § 410cc(a)(1). Under section 102(b) of the Act, a federal agency may not license an activity “within the park or preservation district unless such entity determines that the proposed activity will be conducted in a manner consistent with the standards and criteria established pursuant to” the Act “and will not have an adverse effect on the resources of the park or preservation district.” *Id.* § 410cc-12(b). The “standards and criteria” referenced in section 102(b) were published in 1981 and set forth guidelines “for building materials and design elements for existing buildings and for new construction” in the Park or Preservation District.

¹ The amici’s claim (at 15 n.8) that the Commission violated the National Historic Preservation Act is not properly before the Court. There is “no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.” *Lane v. First Nat’l Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989). Nor did the amici seek rehearing before the Commission. *See* 16 U.S.C. § 825l(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing”).

See Dep't of Interior, Lowell Historic Preservation Commission, *Notice of Standards for Rehabilitation and Construction*, 46 Fed. Reg. 24,000 (Apr. 29, 1981) ("Preservation Standards").

II. THE LOWELL HYDROELECTRIC PROJECT

In April 1983, the Commission issued a license to Boott Mills and Proprietors of the Locks and Canals on Merrimack River for the construction and operation of the Lowell Hydroelectric Project. See *Boott Mills and Proprietors of the Locks and Canals on Merrimack River*, 23 FERC ¶ 62,043 (1983). The Commission approved a transfer of the license to the current licensees on April 1, 2005. Amendment Order P 3, Add. 2. The Project consists of (a) the 1093-foot-long stone-masonry Pawtucket Dam and associated reservoir; (b) the Northern and Pawtucket Canal Systems, comprising several small dams and gatehouses; (c) a primary powerhouse built in the 1980s and four smaller plants built in the early 1900s; (d) a fish lift system at the main powerhouse; and (e) a fish ladder adjacent to the Pawtucket Dam. *Id.* P 4, Add. 2.

The Pawtucket Dam is a masonry dam that was constructed in sections between 1847 and 1875, replacing the earlier masonry and wood dams of 1826 and 1833. *Id.* P 73, Add. 20. The dam was listed as a contributing element to the Lowell Locks and Canals Historic District when the district was nominated for inclusion in the National Register of Historic Places (in 1976) and as a National

Historic Landmark (in 1977). *Id.* P 74, Add. 20. *See also* National Register Nomination Forms, App. 894, 925. The dam is also within the boundaries of the Park and the Preservation District, which are listed on the National Register of Historic Places. Amendment Order P 74, Add. 20. Historic Lowell represents one of America's first great industrial cities, exemplified by its canal systems, remaining major mill complexes, and the central business district's 19th century commercial buildings. *Id.* PP 91-92, 95, Add. 26, 27. The Park and the Preservation District are administered by the National Park Service ("Park Service"), a bureau of Interior.

A. The Wooden Flashboard System

A flashboard crest control system is attached to the Pawtucket Dam. The system consists of wooden boards supported by steel pins drilled into the dam's granite capstones. Flashboards are intended to increase the dam's capacity to hold water, which permits more generation than would otherwise be possible. *Id.* P 50, Add. 13. Pictured below is the flashboard system (as of 2010) when the water level is below the top of the dam.



See Final Environmental Assessment for Lowell Hydroelectric Project (“EA”) at 62 (Figure 14), App. 1286.

The flashboard system is designed to fail – with the pins bending or breaking and the boards being washed away – when water levels in the reservoir overtop the flashboards by a sufficient amount of water. *See, e.g.*, EA at 6, App. 1230. In theory, the collapse of the flashboards allows additional water to spill over the dam, reducing pressure on the dam and minimizing upstream flooding.

Amendment Order P 4, Add. 2. In practice, however, flashboard systems fail incompletely and unpredictably in response to high flows. *See id.* P 63, Add. 17; *Boott Hydropower, Inc.*, 144 FERC ¶ 61,211, P 33 (2013) (“Rehearing Order”), Add. 74.

Throughout its history, the Pawtucket Dam has had no flashboards (1826-1838), 2-foot flashboards (1838-1883), 3-foot flashboards (1883-1896), and 5-foot flashboards (1896-present). Rehearing Order P 31, Add. 74. Since its acquisition of the Project, Boott operated the flashboard system with 4-foot-high, 8-foot-long plywood sheets, with an additional 1-foot-high top board nailed on top of the plywood sheets. This “4+1” configuration was supported by steel pins with an effective height of 4.5 feet (*i.e.*, 5-foot pins embedded 6 inches into the capstones of the dam crest). It was expected that the top 1-foot panel would fail during spring high flows when overtopped by a foot of water. If the water levels continued to rise, the pins were supposed to bend or fail once overtopped by 2 feet of water (a flow of 10,000 cubic feet per second (cfs)), leading to the collapse of the 4-foot panels. Amendment Order P 7, Add. 3. Once river flows dropped to a controllable level, the flashboards would be re-installed or repaired as necessary. EA at 6, App. 1230.

B. Flooding Complaints

Flooding attributed to the operation of the Pawtucket Dam has long been a concern of local residents. The Commission first received complaints about flooding in the area in December 2003. Amendment Order P 5 n.4, Add. 2. The volume of complaints increased after significant floods that occurred in 2006 and 2007. *Id.* P 153, Add. 42. In particular, in August 2007, the Commission received

a number of complaints from upstream residents regarding flooding which they believed was caused by the dam's flashboard system. *Id.* P 5, Add. 2.

In response, the Commission began an investigation which determined that the 4+1 flashboard system did not fail as designed with river flows in the range of 20,000 cfs to 37,000 cfs.² Amendment Order P 8, Add. 3.³ FERC ordered Boott to remove the flashboards and provide a new design for supporting pins that would fail as originally designed. *See* ltr. from W. Guey-Lee to K. Webb at 2 (May 28, 2008), App. 186. Boott was subsequently authorized to reinstall a modified flashboard system that included the use of pins with an effective height of 5 feet, which were expected to allow the flashboards to fail properly. Amendment Order P 9, Add. 3.

The new flashboard system failed more frequently, but those failures “never [resulted in] a complete collapse of the boards.” Rehearing Order P 85, Add. 95. *See also id.* P 102, Add. 103. Indeed, some evidence indicated that the system may have been prone to early failure. *See* Spillway Crest Control Alternatives Technical Assessment at 4, App. 428. Frequent failure of flashboard systems

² The estimated mean monthly flows at the Pawtucket Dam range from 2,726 cfs (September) to 17,316 cfs (April), with maximum flows between 26,949 cfs (August) and 86,560 (May) cfs. EA at 29 (Table 2), App. 1253.

³ The investigation found a discrepancy between Boott's 4+1 flashboard configuration and the flashboard system authorized in the FERC license, which called for the use of steel pins with an effective height of 5 feet. Amendment Order P 7, Add. 3.

results in lower than normal water levels for extended periods, which adversely affects power generation, municipal water supplies, and recreational activities.

Technical Assessment at 12-15, Add. 436-39. *See also* EA at 33, App. 1275 (discussing water supply issues).

In August 2008, in response to the Commission’s directive, Boott filed a backwater analysis, which examined the effect of the flashboard system – both the 4+1 configuration and as modified – on upstream flooding. Amendment Order P 11, Add. 4. *See also* Revised Backwater Analysis Report (Aug. 13, 2008), App. 280-325.⁴ FERC Staff’s review of the report found that the system can contribute to upstream flooding, as the boards do not fail in a consistent and predictable manner. *See* ltr. from J. Morgan to K. Webb (Sept. 25, 2008), at 6, App. 336. The Commission directed Boott to discuss the backwater study with the Park Service and other stakeholders “to determine options for implementing a flashboard system that can be ensured to be completely down during high flows in the Merrimack River.” *Id.* *See also* Rehearing Order P 74, Add. 91.

C. The Pneumatic Crest Gate Proposal

Beginning in November 2008, Boott held a series of meetings with various stakeholders, including the City of Lowell, the Park Service, Congressional

⁴ A backwater analysis is “a standard method of conducting hydrologic and hydraulic analyses” that examines “the amount the depth of flow has been increased by an obstruction such as a dam.” Rehearing Order P 4 n.4, Add. 63.

representatives, and citizens of the affected areas, to determine crest control options to alleviate flooding. Amendment Order P 12, Add. 4. In September 2009, Boott filed a report evaluating the three most likely crest control options: (a) the original 4+1 configuration; (b) the modified flashboard system; and (c) a pneumatic crest gate system consisting of a rubber membrane that can be raised and lowered mechanically by inflating it with pressurized air. *See* Technical Assessment at 5, Add. 429. The report concluded that the “crest gate system would not only enhance project operational control and generation, but would also provide significant advantages for other water level dependent resource concerns including flood control, fish passage, recreational use and riverine habitat.” *Id.* at 2, App. 426; *see also* Amendment Order PP 12-14, Add. 4.

During further consultations with stakeholders, the Massachusetts Division of Fisheries and Wildlife and the National Marine Fisheries Service expressed their strong support for the crest gate system. The Park Service opposed the proposal, claiming that the crest gate would adversely affect the appearance of the dam. Amendment Order P 15, Add. 5.

III. THE PROPOSED CREST GATE AMENDMENT

On July 6, 2010, Boott filed an application to amend its license to replace the flashboard system with a pneumatic crest gate control system. *See* July 6, 2010 Application for Non-Capacity Amendment, App. 508-27. The system would

consist of a series of 20-foot long steel crest gates, supported by tubular rubber air bladders. It would be mechanically controlled, and could be programmed to deflate when a particular flow is reached, and quickly raised or lowered as conditions dictate. *Id.* at 3-4, Add. 512-13.

Pneumatic crest gates have been installed on a number of historic hydropower dams, including the Essex dam (built between 1845-48) located downstream from the Pawtucket Dam on the Merrimack River. *Id.* at 14, App. 523. Crest gate systems provide “the most reliable and complete attenuation” of upstream flooding and are “the preferred technology where there is a need for precise control of reservoir elevations.” Amendment Order P 50, Add. 14. An artist’s rendering of the crest gate system as originally proposed is set forth below:



See EA at 64 (Figure 16), App. 1288.

A. Revisions To The Crest Gate Proposal

Throughout the application review process, FERC Staff, Boott, the Park Service, the Massachusetts State Historic Preservation Officer, the Advisory Council on Historic Preservation (“Advisory Council”), and the City of Lowell engaged in extensive consultations regarding historic preservation issues. *See, e.g.*, Rehearing Order P 88, Add. 94 (noting nearly two years of consultations). The design of the crest gate system evolved throughout that process.

In response to the Park Service’s contention that certain concrete piers included in the original design were not compatible with the historic dam, Boott modified the design to eliminate the piers. When the Park Service took issue with the visual impact of the crest gates, Boott designed aesthetic changes to mimic the appearance of the wooden flashboard system. *See, e.g.*, Boott Mitigation Proposal at 1 (Mar. 21, 2011), App. 956; Amendment Order PP 18-19, Add. 6. An alternative installation process was also developed to minimize impacts upon the Park Service’s boat tours and to respond to the Service’s objection to covering the dam’s capstones with concrete. *See* Boott Additional Proposed Mitigation at 1 (Feb. 2, 2012), App. 1348; Amendment Order P 28, Add. 9.

B. FERC Staff's Historic Preservation Analysis

In December 2011, after an extensive public outreach process, FERC Staff issued a final Environmental Assessment. The Environmental Assessment examined three alternatives: (a) Boott's proposed crest gate system; (b) Boott's proposal with additional Staff-recommended mitigation measures; and (c) retaining the existing flashboard system. EA at 17-22, App. 1241-46. FERC Staff concluded that the pneumatic crest gate system "is a reasonable approach for controlling water levels upstream of the project while protecting the project's environmental, recreational, historic, and scenic values of providing increased opportunities for public access to project lands and waters." *Id.* at 77, App. 1301.

FERC Staff also considered whether installation of the pneumatic crest gate system would adversely affect historic properties. FERC Staff determined that crest gates would not have an adverse effect on the Park or the Preservation District. Structural changes to the dam would not "compromise [historic Lowell's] importance as the birth place of the industrial revolution ... and/or its association with ... early industrialists." *Id.* at 72, App. 1296.

With respect to historic qualities of the dam itself, FERC Staff noted that rock-filled dams are not unique. *Id.* at 71, App. 1295. Moreover, the Pawtucket Dam had been continually modified throughout the nineteenth century. And following the issuance of the FERC license in 1983, the dam and its surrounding

areas have been modified to include a “modern fishway/ladder on the west end of the dam ... [and] other modern structures and features within the District ... that have affected the historic setting of the dam, including the four-lane highway adjacent to the dam.” *Id.* at 71-72, App. 1295-96. But, because the Keeper of the National Register of Historic Places determined that Pawtucket Dam qualified as a historic property, FERC Staff found that installation of the crest gate, standing alone, would necessarily have an adverse effect on a historic property, as it would alter the dam’s architecture. *Id.* at 70, App. 1294.

C. Conclusion Of Historic Preservation Consultations

In order to resolve this effect, FERC Staff circulated a draft Memorandum of Agreement to the pertinent state and federal historic resource agencies which outlined mitigation measures. *See* Dec. 8, 2011 ltr. from R. Fletcher to J. Eddins (Dec. 8, 2011), App. 1199. Those measures included (a) interpretive exhibits, including a replica of the original flashboard system, (b) aesthetic modifications to the crest gate system that would mimic the existing dam’s appearance, and (c) the design and construction of associated buildings in a manner compatible with the historic nature of the adjacent architecture. *See id.* at App. 1203; *see also* Amendment Order P 24, Add. 7.

For more than a year, the parties discussed various design modifications – including a hybrid crest gate/flashboard system – but were unable to resolve their

differences. Amendment Order PP 29-38, Add. 9-11. On January 8, 2013, FERC Staff determined that further consultation would not be productive, terminated consultations, and requested final comments from the Advisory Council. *See id.* P 38, Add. 11; 36 CFR § 800.7(a)(1) (agency may terminate consultations when further discussions will not be productive). On February 26, 2013, the Advisory Council filed its final comments, which continued to object to the proposed amendment. Amendment Order P 41, Add. 12.

IV. THE CHALLENGED ORDERS

A. The Amendment Order

In an order issued on April 18, 2013, the Commission granted Boott's application to replace the Pawtucket Dam's wooden flashboards with a pneumatic crest gate system. The Commission found that the system would provide a host of important benefits, "without unacceptably altering the dam or adversely affecting the park and historic districts." *Id.* P 2, Add. 1.

In particular, the Commission found that the pneumatic crest gates would provide the following benefits over the wooden flashboard system:

Flood Control: "[F]lashboard systems under actual conditions are uncontrollable, react unpredictably under water pressure, and may not fail as designed." *Id.* P 63, Add. 17. By contrast, "[a]n inflatable crest gate is mechanically controlled ... [and] provides the most reliable and complete

attenuation of the backwater effect that results from high flows.” *Id.* P 50, Add. 14. As a result, “[o]peration of the pneumatic crest gates would likely attenuate flooding as compared to the wooden flashboard system.” *Id.* P 62, Add. 17.⁵

Worker Safety: “[I]n order to replace flashboards, the licensee must draw down the reservoir or wait for water levels to recede sufficiently. Workers must approach the dam in boats, often during high flow periods, a relatively dangerous operation. An inflatable crest gate can be controlled remotely, with no worker risk.” *Id.* P 51, Add. 14.

Fish Passage: “The leaking flashboards and extended drawdowns of the reservoir [that are necessary to replace failed flashboards] can present problems for fish passage, and both [National Marine Fisheries Service] and Massachusetts [Department of Fish and Wildlife] support the crest gate system because it will improve fish passage.” *Id.* P 83, Add. 24.

Dam Safety: “While the dam is currently safe, continued use of a flashboard system presents a risk of increased damage to the granite capstones over time, and replacing all or a major portion of the capstones is prohibitively expensive.” *Id.*, Add. 23.

⁵ The Commission acknowledged that, “while a crest gate system provides the maximum attenuation of the dam’s backwater effect during high flows, no system, whether flashboards or a crest gate, can provide any meaningful flood relief during major flood events.” Amendment Order P 154, Add. 42.

Water Supply: “The proposed pneumatic crest gate system would” help maintain “a consistent impoundment level [that] would benefit two utilities that use the impoundment as a source for water supply, the Pennichuck Water Works and Lowell Regional Water Utility.” *Id.* P 62, Add. 17.

Power Generation: “Operation of an inflatable crest gate system instead of flashboards could enable the project to generate more power, because the gates could be reinflated relatively soon after high flows. In contrast, the flashboards would be washed out for an estimated three months.” *Id.* P 48, Add. 13.

“Maintaining a more consistent reservoir elevation will allow the project to generate more clean energy.” *Id.* P 83, Add. 24.

Recreation: “[T]he proposed crest gate system ... would also benefit recreation ... by providing a more stable reservoir elevation.” *Id.* P 153, Add. 42.

The Commission “acknowledge[d] and appreciate[d] the national significance of the historic properties at issue,” but also noted that the “Pawtucket Dam is an essential part of a licensed, operating hydroelectric project.” *Id.* P 81, Add. 23. The Commission found that the “pneumatic crest control system would not alter or destroy all or part of the dam, would not change the character of the dam’s use, and would not introduce visual or audible elements that would diminish the integrity of the dam’s significant historic features.” *Id.* P 86, Add. 25. “The dam’s significance” to the Park and Preservation District “stems from its

association with the power system and canals that drove the waterwheels of the mill buildings.” *Id.* P 96, Add. 27. Altering the dam’s crest control system “would have no effect on this historic association.” *Id.*

The Commission acknowledged that the crest gate system would have a minor adverse effect because it would alter the dam’s architecture. *Id.* PP 87, 119, Add. 25, 32. In order to resolve that effect, the Commission ordered Boott to implement various mitigation measures, including:

- the “design and install[ation of] two interpretative exhibits, one featuring a replica of the original flashboard system and one featuring the new crest gate system ... in consultation with the National Park Service” *id.*, Ordering Para. (H)(a), Add. 57-58;
- the “design [of] the compressor house with materials and colors that are compatible with the historic fabric of the adjacent architecture,” *id.*, Ordering Para. (H)(b), Add. 58; and
- the “use [of] a brown-colored bladder, [and] paint[ing] the downstream side of the crest gate panels brown,” in order “[t]o mimic the existing dam’s appearance,” and “install[ation of] black retaining straps an average of 20 inches on center, to ensure that the crest gate system is similar in appearance to the existing wooden flashboards.” *Id.*, Ordering Para. H(c), Add. 58.

B. The Rehearing Order

In the Rehearing Order, issued September 19, 2013, the Commission “reaffirm[ed] that the crest gate system can be installed without unacceptably altering the dam or adversely affecting the park and historic districts.” Rehearing Order P 2, Add. 62. The Commission explained that it had “consider[ed] the landmark status of the dam and Historic District, consulting for more than two

years on ways to avoid, minimize, or mitigate any adverse effects, and requiring measures to resolve adverse effects so that that the proposed action would not adversely affect the dam and the Historic District.” *Id.* P 45, Add. 80.

The mitigation measures required by the Amendment Order would appropriately resolve any visual impacts created by the crest gates. *Id.* P 25, Add. 71. Similarly, the necessary interpretive exhibits would “enhance visitors’ understanding of the history of the dam and the Lowell Project,” and would minimize the effects of installing the crest gate system. *Id.* P 26, Add. 71.

SUMMARY OF ARGUMENT

The Pawtucket Dam is not a museum piece that has been preserved to assist the Park Service in its administration of the Park and Preservation District. The dam is a privately-owned structure that plays a vital, ongoing role in a federally-licensed hydroelectric project. While the Pawtucket Dam certainly has historic importance, its operation has present-day consequences for the area’s residents and environment. And because it is an essential part of a licensed hydroelectric project, the Commission has a statutory obligation to ensure that dam is operated in a manner that serves the public interest.

Here, the Commission found that the proposed crest gate system would best serve the public interest by helping to alleviate upstream flooding, while providing important benefits to recreation, fish passage, dam and worker safety, and clean

energy generation, without adversely affecting the historic attributes of the dam, the Park, or the Preservation District. That determination was fully consistent with the Lowell Act.

The Lowell Act expressly vests the Commission with the authority to determine whether the crest gate system will adversely affect “resources of the Park or Preservation District.” The claim that the Commission must defer to, or obtain the concurrence of, Interior would effectively amend the Act. All that is required – and the fundamental issue before the Court – is that such determination be based on substantial evidence.

Here, there are questions whether the Lowell Act applies at all because it is not apparent that the Pawtucket Dam – which is not mentioned in the Act and is privately-owned – is a “resource” of the Park or Preservation District. The lack of public ownership is highly relevant since the ordinary meaning of “resource” connotes ownership and control, as does the definition of “park system resource” in the Park System Resource Protection Act, which excludes privately-owned resources.

Second, even if the dam is a “resource,” the Lowell Act instructs the Commission to broadly consider the crest gate system’s impact on “*the resources of the park or preservation district*” – *i.e.*, on the Park or Preservation District as whole. Interior focuses exclusively on the purported impacts to the dam. It does

not contend that the system will hinder the ability of the Park or Preservation District to tell the story of the Industrial Revolution in North America.

Third, even if the Act requires a singular focus on the impacts to any one resource, the Commission reasonably determined that the crest gate system, coupled with the required mitigation measures, would not have an adverse effect on the Pawtucket Dam. Installation of the system would not alter the dam's architecture and engineering; it would simply replace a temporary crest control structure placed on top of the dam. And the required aesthetic mitigation measures will help the crest gate system mimic the appearance of the existing flashboards. The Commission reasonably found that any minor adverse effect of replacing the flashboards would be adequately minimized by the interpretative exhibits and other measures required by the Commission, which will enhance visitors' understanding of the history of the Pawtucket Dam and the Project, and would be outweighed by reduced upstream flooding and other significant public benefits.

Interior's contention that mitigation measures cannot reduce or resolve adverse effects is inconsistent with the National Historic Preservation Act regulations, upon which Interior bases its interpretation of the term "adverse effect." It is also inconsistent with Interior's past interpretation of the Act, which acknowledged that the effects of modern alterations to historic properties could be appropriately minimized through mitigation measures.

Interior’s claim that installation of the proposed crest gate would violate the Preservation Standards is similarly misguided. Those standards are aimed at historic “buildings,” which – as Interior’s own regulations recognize – are distinct from engineering “structures,” like the dam. In any event, substantial evidence supports the Commission’s determination that installation of the crest gate system would be conducted in a manner consistent with the Preservation Standards.

ARGUMENT

I. STANDARD OF REVIEW

The Court “review[s] FERC orders under the Administrative Procedure Act, 5 U.S.C. § 551,” and only “reverse[s] an agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004) (quoting *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001)). The Court thus “look[s] to see whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986).

Moreover, the Court “‘defer[s] to the agency’s expertise ... so long as its decision is supported by ‘substantial evidence’ in the record and reached by ‘reasoned decisionmaking,’ including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and

the choice made.” *Knott*, 386 F.3d at 372 (quoting *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 944 (1st Cir. 1993)). The Commission’s findings of fact, if supported by substantial evidence, are conclusive. *See L.S. Starrett Co. v. FERC*, 650 F.3d 19, 23 (1st Cir. 2011); 16 U.S.C. § 825l(b). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Safeguarding the Historic Hanscom Area’s Irreplaceable Res., Inc. v. FAA*, 651 F.3d 202, 207 (1st Cir. 2011) (internal quotations omitted)

The narrow scope of review generally applied to Commission orders is particularly appropriate when those orders reflect “determination[s] that a submitted plan sufficiently minimizes the likely harms to historic properties.” *Id.* at 213. Such determinations “must be treated respectfully by a reviewing court” and accorded “great deference.” *Id.* (internal quotations omitted).

II. THE COMMISSION REASONABLY APPROVED THE PROPOSED CREST GATE SYSTEM.

The Commission is obligated to ensure that hydroelectric projects are adapted to make use of the Nation’s waterways in a manner that best serves all beneficial public uses – uses that “might well be contradictory rather than harmonious.” *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). In doing so, the Commission must bring its expertise to bear on the intricate tasks of striking the appropriate balance among the wide-ranging and competing public interest factors. *Scenic Hudson Pres. Conf. v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965).

Here, the Commission was confronted with claims that a licensed hydroelectric project was exacerbating upstream flooding. In response to the Commission's investigation, Boott proposed a pneumatic crest gate system to remedy that public harm. The Commission found that the proposed system would attenuate upstream flooding to the maximum extent possible, while also providing important benefits to recreation, fish passage, public water supplies, dam and worker safety, and clean power generation. *See, e.g.*, Amendment Order PP 64, 156, 160, Add. 18, 43, 44; Rehearing Order P 81, Add. 94.

Removal of the dam's historic flashboard system was the sole factor weighing against Boott's proposal. Rehearing Order P 81, Add. 94. The Commission found, however, that the effects of such removal would be adequately minimized through (a) design changes to the crest gate system aimed at mimicking the appearance of the flashboard system, and (b) interpretive exhibits that will preserve, display, and explain the dam's historic crest control system. *See* Amendment Order PP 119, 160, Add. 32, 44; Rehearing Order PP 80, 81, Add. 94. The proposed crest gate system thus "represent[ed] the best balance on competing resources for the Lowell Hydroelectric Project." Amendment Order P 162, Add. 44.

Interior alone challenges the Commission's analysis, and only with respect to a single statute. But the fact that Interior would have struck the public interest balance differently does not mean that the Commission violated the Lowell Act.

III. THE COMMISSION'S APPROVAL OF THE PROPOSED CREST GATE SYSTEM DID NOT VIOLATE THE LOWELL ACT.

A. The Act Vests The Commission With The Authority To Determine Whether The Proposed Crest Gate System Will Have An Adverse Effect On The Park Or Preservation District.

The proper interpretation of the Lowell Act presents an issue of first impression. Interior contends its interpretation – announced during the course of this proceeding – should be afforded *Chevron* deference because it administers the Park and Preservation District. Br. 38. *See also* Amici Br. 23-29. But courts deny deference where, as here, “agency litigating positions ... are wholly unsupported by regulations, rulings, or administrative practice.” *Smiley v. Citibank, N.A.*, 517 U.S. 735, 741 (1996) (internal quotations omitted). *See also Mass. v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995) (agency's litigation position not entitled to *Chevron* deference).

Interior suggests – and amici expressly claim – that Interior's views as to the factual question of whether the crest gate system adversely affects the Park or Preservation District are due deference because of its historic preservation experience. Br. 42. *See also* Am. Br. 23-29. Of course, in licensing hydroelectric and other energy projects, the Commission also possesses “extensive expertise

with historic preservation matters.” Rehearing Order P 20, Add. 69. And regardless of the parties’ respective expertise, Congress unambiguously authorized the federal licensing agency – here, FERC – to determine whether the proposed activity will result in an adverse effect on the Park or Preservation District:

No Federal entity may issue any license or permit to any person to conduct an activity within the park or preservation district *unless such entity determines* that the proposed activity will be conducted in a manner consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title and will not have an adverse effect on the resources of the park or preservation district.

16 U.S.C. § 410cc-12(b) (emphasis added).

It is thus the responsibility of the Commission, as the “federal entity” responsible for reviewing Boott’s proposed undertaking, to make the decision whether the license it issues will have an “adverse effect” on the Park or Preservation District. *See* Rehearing Order P 20, Add. 69 (“Under section 102(b) of the Lowell Act, the Commission is responsible for making the necessary findings”); *id.* P 28, Add. 73 (“Lowell Act ... does not require ... the concurrence of any other agency.”) If any federal entity is entitled to deference in interpreting the Act’s terms, it is the Commission – not Interior – given its role in carrying out the Lowell Act’s substantive requirements. At worst, in light of contrasting federal interpretations of “adverse effect,” no federal entity – not FERC, not Interior – is entitled to deference in its interpretation of the Act. *See, e.g., Salleh v. Christopher*, 85 F.3d 689, 691 (D.C. Cir. 1996) (where “two executive branch

entities ... claim conflicting administrative authority, it would be inappropriate to defer to either's statutory interpretation as to the issue of basic authority"); *Hunter v. FERC*, 711 F.3d 155, 157 (D.C. Cir. 2013) (same).

And regardless of the resolution to the statutory deference issue, the question before the Court ultimately reduces to a matter of judgment and balance – whether there is “more than a scintilla” of evidence supporting the Commission’s determination that the proposed crest gate system, coupled with the mandated mitigation measures, will not adversely affect the resources of the Park or Preservation District. *See Bath Iron Works Corp. v. Dep’t of Labor*, 336 F.3d 51, 56 (1st Cir. 2003) (defining substantial evidence test). As set forth below, the Commission’s findings are well-supported by the record.

B. The Commission Reasonably Found That It Was Unclear Whether The Pawtucket Dam Is A “Resource” Of The Park Or Preservation District.

The Lowell Act prohibits the licensing of activities that will “have an adverse effect on the resources of the park or preservation district.” 16 U.S.C. § 410cc-12(b). Because Interior’s sole claim is that the crest gate system will adversely affect the Pawtucket Dam (*see* Br. 30-35), it must be established that the dam is a “resource” of the Park or Preservation District. The Commission found

that the answer to this question – and thus the applicability of the Lowell Act – was uncertain. *See* Amendment Order P 131, Add. 36.⁶

Interior contends the dam is “plainly a resource of the Park and Preservation District,” because it is “located within their boundaries and ... an important historical resource of both.” Br. 26, 27. But the Lowell Act does not define the term “resource.” And the statute indicates that “resources” have characteristics beyond simply having historic significance and being located within the boundaries of the Park or Preservation District.

When broadly discussing all historic structures within the Park or Preservation District, the Act repeatedly uses the generic phrase “properties.” *See* 16 U.S.C. §§ 410cc-32(e) (authorizing the establishment of preservation standards for “all properties” within the Preservation District or Park), -22(b) (authorizing the acquisition of “any property within the park or preservation district” that meets enumerated criteria); -32(d) (requiring the indexing of “any property in the park or preservation district which should be preserved ... or acquired ... because of its national historic or cultural significance”). Conversely, Congress did not extend requirements of section 102(b) to all “properties,” but rather “the resources of the

⁶ In addition, the Commission initially found that the record was unclear as to whether the Pawtucket Dam was located within the boundaries of the Preservation District. Amendment Order P 130, Add. 35. On rehearing, the Commission accepted parties’ clarification that the dam was located within both the Park and the Preservation District. Rehearing Order P 22, Add. 70.

park or preservation district.” *Id.* § 410cc-12(b). “Resources” thus appear to be a subset of the historic structures within the Park and Preservation District.

In attempting to discern whether the Pawtucket Dam is within that subset, the Commission noted that when Interior sought to have the Park and Preservation District listed on the National Register of Historic Places, it made no reference to the dam when discussing the area’s historic significance. *See* Amendment Order PP 95-96, Add. 27.⁷ More important, Congress did not reference the dam anywhere in the Lowell Act. *Id.* P 131, Add 36. It is not among the “historical resources” referenced in the Act (16 U.S.C. § 410cc(a)(3)),⁸ nor among the enumerated properties authorized for federal acquisition (*id.* § 410cc-22(a)). Nor did Interior exercise its discretionary authority under the Act (*id.* § 410cc-22(b)) “to acquire the dam between 1978, when Lowell Park was established, and 1983, when the Commission issued a license for the Lowell Hydroelectric Project.”

⁷ Before passage of the Lowell Act in 1978, the Lowell Locks and Canals Historic District was nominated for inclusion on the National Register of Historic Preservation and as a National Landmark. The dam was described in the relevant nomination forms, but there was no discussion of “the historic significance of the Pawtucket Dam in relation to the other components” of the District. *See* Amendment Order PP 91-94, Add. 26.

⁸ Then-Congressman Tsongas’ Senate testimony in support of the Act noted that “Lowell’s nationally significant resources include the 5.6-mile power canal system; seven original mill complexes; 19th century commercial and municipal buildings; social, labor, and educational institutions; mill residences; and early transportation facilities.” *Hearing on S. 2817 before Subcomm. on Energy and Natural Resources U.S. Senate, 95th Cong. 66 (1978).*

Amendment Order P 131, Add. 36. The absence of any authorization or effort to acquire the Pawtucket Dam is highly relevant since the ordinary meaning of “resource” connotes ownership or control. *See United States v. Knott*, 256 F.3d 20, 28-29 (1st Cir. 2001) (“courts typically read statutory terms to convey their ordinary meaning”).

For instance, Black’s Law dictionary defines “resources” as “[m]oney or any property that can be converted to meet needs.” BLACK’S LAW DICTIONARY 1311 (6th ed. 1991). Webster’s similarly defines “resource” as “something that a country has and can use to increase its wealth” or “a supply of something (such as money) that someone has and can use when it is needed.” Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/resource>. Congress also incorporated the concept of ownership when it defined the term “park system resource” in the Park System Resource Protection Act, 16 U.S.C. § 19jj *et seq.*, as “any living or non-living resource that is located within the boundaries of a unit of the National Park System, *except for resources owned by a non-Federal entity.*” 16 U.S.C. § 19jj(d) (emphasis added). *See also Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 959 n.16 (11th Cir. 2001) (Black, J., concurring) (Park System Resource Protection Act “does not extend” to private property).

The Commission thus reasonably found that it was unclear whether the privately-owned Pawtucket Dam is a “resource” within the meaning of the Lowell

Act. Amendment Order P 131, Add. 36. Interior’s failure to establish this fundamental element undermines any claim that the Commission violated the Act.

C. The Commission Reasonably Found That The Proposed Crest Gate System Would Not Have An Adverse Effect On “The Resources Of The Park Or Preservation District.”

Even if the Pawtucket Dam is a “resource,” the Lowell Act contemplates a broader adverse impact analysis than that advocated by Interior, which focuses exclusively on the potential impact to the dam. The Act instructs federal licensing entities to consider a potential activity’s effect on “*the resources of the park or preservation district.*” 16 U.S.C. § 410cc-12(b). Consistent with this directive, the Commission considered whether the proposed crest gate system would have an adverse effect on the Park or Preservation District as a whole – *i.e.*, the collective “resources of the park or preservation district.” *See* Amendment Order PP 2, 148, Add. 1, 40; Rehearing Order PP 22, Add. 70. In conducting this analysis, the Commission considered whether the crest gate system would impair the ability of the Park or Preservation District to convey Lowell’s significance to the industrial and engineering history of America.

Historic Lowell “is nationally significant as it represents one of America’s first great industrial cities.” Amendment Order P 80, Add. 22. The most significant elements that convey the story of the industrial revolution in North America are Lowell’s “canal system, the remaining major mill complexes, and the

central business district nineteenth century commercial buildings.” *Id.* P 95, Add. 27 (discussing Interior’s historic listing nomination forms). The dam’s historic significance stems not from its design, or its crest control measures, but “from its association with the power system and canals that drove the waterwheels of the mill buildings.” *Id.* P 96, Add. 27. *See also id.* PP 89, 102, Add. 25, 28. Changing the dam’s crest control system “would have no effect on this historic association.” *Id.* P 96, Add. 27. Moreover, installation of the crest gate system would modify a dam that has undergone numerous improvements since its original construction. *Id.* P 25, Add. 8 (quoting EA at vii-viii, App. 1221-22). And the mandatory interpretative exhibits would preserve information about the dam’s historic crest control system. *Id.* PP 104, 166, Add. 29, 45.

The record firmly supports the Commission’s finding that installation of the crest gate, coupled with the required mitigation measures, would not compromise the ability of the Park or the Preservation District as a whole to convey Lowell’s historic importance as one of America’s first great industrial cities. *See, e.g.,* Amendment Order PP 96, 102, 104, Add. 27, 28, 29; EA at 70-72, App. 1294-96.

D. The Commission Reasonably Found That Mitigation Measures Can Reduce An Undertaking’s Adverse Effects.

Even if the Lowell Act mandated a circumscribed analysis of a proposed activity’s impact upon any single resource, and even if the Pawtucket Dam were such a resource, the Commission reasonably found that the effects of installing the

crest gate system would be adequately minimized by the mitigation measures required in the Amendment Order. *See, e.g.*, Amendment Order P 134, Add. 36; Rehearing Order P 18, Add. 68. That conclusion was consistent with the terms of the Lowell Act and supported by substantial evidence.

1. Mitigation measures can reduce a proposed activity's adverse effect.

The Lowell Act does not define the term “adverse effect.” Interior asserts that the term should be interpreted “consistent with how the term was and is defined” in the Advisory Council’s National Historic Preservation Act regulations. *See* Br. 38. Those regulations provide examples of how a proposed undertaking may adversely affect historic properties. *See* 36 C.F.R. § 800.5(a). They also make clear that such undertaking may be accompanied by mitigation measures that would reduce the effects below the “adverse” threshold. *See id.* § 800.6(a) (discussing process to develop “modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties”). So, as the Commission explained, if the term “adverse effect” is to have the same meaning in the Lowell Act as it is understood to have under the National Historic Preservation Act, an initial adverse effect finding “would not bar a proposed action from going forward ... if it included appropriate treatment measures.” Rehearing Order P 23, Add. 70. *See also N. Idaho Cmty. Action Network v. Dep’t of Transp.*, 545 F.3d 1147, 1156 n.5 (9th Cir. 2008) (“In determining whether the potential construction

effects would likely be significant [under the National Historic Preservation Act], the Agencies are permitted to take into account mitigation measures which reduce the impact of construction”).

2. Interior’s interpretation conflicts with the National Historic Preservation Act regulations.

Interior suggests, without any support, that avoidance or minimization modifications can reduce effects below an adverse level, but mitigation measures – such as interpretative exhibits or the documentation of historic features – cannot. Br. 39-43. *See also* Am. Br. 18-21; Rehearing Order P 24, Add. 71 (recounting Interior’s interpretation). That interpretation is flatly inconsistent with the Advisory Council’s regulations, which expressly provide that adverse effects may be “resolved” through “modifications to the undertaking that ... avoid, minimize, or mitigate” those effects. 36 C.F.R. § 800.6(a). *See also id.* § 800.6(b).

When first promulgating the regulations, the Advisory Council explained that modifications could “*satisfactorily mitigate* the adverse effect of the undertaking” and set forth procedures for the consulting parties to “execute a Memorandum of Agreement acknowledging *satisfactory mitigation* of [the] adverse effect.” Advisory Council on Historic Preservation, Part 800, *Procedures For The Protection Of Historic And Cultural Properties*, 39 Fed. Reg. 3366, 3368 (§ 800.5(f)) (Jan. 25, 1974) (emphasis added). In 2000, when the regulations were revised, the Advisory Council reiterated that it is “permissible” to use mitigation

“to reduce the [project’s] effects to No Adverse Effect.” Advisory Council on Historic Preservation, 36 C.F.R. Part 800, *Protection of Historic Properties*, Final Rule, 65 Fed. Reg. 77,698, 77,709 (Dec. 12, 2000). *See also* Rehearing Order P 26, Add. 72 (discussing same).

Consistent with these pronouncements, the Commission explained that “whether adverse effects are avoided, minimized, or mitigated, it is possible for some effects to remain, although they might no longer be considered adverse.” Rehearing Order P 27, Add. 72.

3. Interior’s current interpretation conflicts with its prior interpretation.

This is not the first time the public interest required modifications to the Pawtucket Dam. In 1983, a modern, concrete and steel fishway was appended to the dam, replacing a “natural pass” fishway designed and constructed by James Francis. *See* App. 1533-54. In order to resolve the adverse effects created by this alteration – including physical and visual changes to the dam – FERC, Boott, the Park Service and others developed mitigation measures, including recording the historic and engineering features of the dam. *See Boott Mills*, 23 FERC ¶ 62,043, at 63,063. The Park Service concurred in the determination that “the project as modified, with the mitigative measures agreed to ... will result in no adverse effect.” *Id.* at 63,064. *See also* Rehearing Order P 27, Add. 72 (noting that fishway mitigation measures did not “avoid ... the physical and visual changes to

the dam,” but permitted a “no adverse effect” determination with which the “Park Service ... concurred”); Amendment Order P 133, Add. 36 (same).

Interior’s prior interpretation of “adverse effect” – which acknowledged that such effects could be reduced through mitigation measures – is highly relevant to the proper construction of that term. *Cf. N. Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259, 282 (Fed. Cl. 1993) (“The practical interpretation of a contract by the parties, before the dispute arises, is an incomparable indicator of the parties’ true intentions.”).

4. Interior’s interpretation leads to unreasonable results.

Interior’s interpretation, which elevates historic preservation above all else, may be appropriate with respect to buildings that simply house businesses or residents. But it fails when applied to structures, like the Pawtucket Dam, that actually perform ongoing commercial operations.

Interior’s current interpretation would effectively bar any modern alterations to historic properties, since it flatly prohibits the use of mitigation measures to minimize the adverse effects of such alterations. *See* Br. 36-37 (asserting that “alteration of all or part of a property” results in an “adverse effect”); Rehearing Order P 24, Add. 71 (noting Interior’s argument that “an action cannot proceed if its effects have been resolved ... by ‘compensatory mitigation’”). It would prohibit, for instance, the use of modern steel and cement to shore up a potentially

unsafe historic dam – and thus protect life and property – because such materials are “out of character” with the property. Br. 38. And in claiming that its adverse effect determinations are entitled to deference, Interior positions itself as the final authority with respect to federally-licensed activities in the Park or Preservation District – even when its views conflict with the primary licensing agency. Given Interior’s relative lack of expertise with respect to dam operation and safety measures, in comparison with the Commission’s licensing expertise in this regard, it cannot be reasonably argued that Congress intended such a result.

E. The Commission Reasonably Determined That Installation Of The Crest Gate System, Coupled With The Mandatory Mitigation Measures, Would Not Adversely Affect The Dam, Park Or Preservation District.

In analyzing the impact of Boott’s proposed crest control measure upon the Pawtucket Dam, the Commission explained that flashboard systems are not integral parts of dams. Rather, they are separate, temporary, crest control structures placed on the top of dams to increase their reservoir level. *See* Amendment Order PP 86, 100, Add. 24, 28; Rehearing Order PP 31, 61, Add. 74, 87. Indeed, the record indicated that the Pawtucket Dam’s flashboard system was “washed out for an estimated three months” per year. Amendment Order P 48, Add. 13; *see also* EA at 18, App. 1242 (discussing project operations). As a result, “[r]eplacing the flashboards ... would not alter or destroy all or part of the dam, would not change the character of the dam’s use, and would not introduce visual or

audible elements that would diminish the integrity of the dam’s significant historic features.” Amendment Order P 86, Add. 25.

“[A]ny minor adverse effect of replacing the flashboards on [the] Pawtucket Dam with a crest control system can be adequately minimized and mitigated” by the interpretative exhibits and other measures required by the Commission. *Id.* P 119, Add. 32. *See also id.* PP 87, 104, 134, Add. 25, 29, 37. The exhibits – which will display and explain the operation of the original flashboard system and the pneumatic crest gate system – will “enhance visitors’ understanding of the history of the dam and the Lowell Project.” Rehearing Order P 26, Add. 71. *See also id.* P 40, Add. 77 (“the Park Service can ... use ... the interpretive exhibits ... as part of its interpretation of the history of Lowell”). In recognition of the value of such displays, the Lowell Act itself encourages Interior to enter into agreements “with any owner of property with national historic or cultural significance within the park to provide for interpretive exhibits.” 16 U.S.C. § 410cc-23(a).

As to Interior’s complaints regarding alterations to the dam’s visual appearance (Br. 31), the Commission acknowledged that the crest gate system would change the appearance of the dam crest. Amendment Order P 98, Add. 27. But the aesthetic mitigation measures required by the Commission would “mimic the appearance of the existing flashboards.” *Id.* P 141, Add. 32. And “[t]he distinctive materials and physical appearance of the dam itself will not be altered.”

Id. P 100, Add. 28. Moreover, the predominant factors in the view of the dam – “(1) the long, horizontal line of the dam across the river; (2) impounded water above the dam; and (3) flowing water through the dam and into the rocky channel”⁹ – would generally be unchanged. EA at 65-66, App. 1289-90.



See id. at 62, 64 (Fig. 15, 16), App. 1286, 1288.

Interior also claims that anchoring the crest gate system to the dam would “require significant physical changes to the dam structure.” Br. 32. But “the original materials, design, and use of the masonry dam would not be altered.”

Amendment Order P 143, Add. 39. The anchorage assembly would simply use rock anchors to pass through the dam and into the underlying bedrock. *Id.* P 189,

⁹ Under both the flashboard and crest gate systems, water would not flow through the dam when the water level is below the dam masonry. And under both systems, in times of high flows, water would flow over the dam crest on to the rocks below. When the water level is above the dam masonry but below the crest, the crest gate system would eliminate the sight and sound of the water passing through gaps in the flashboard. Amendment Order P 98, Add. 27; EA at 66, App. 1290.

Add. 49. *See also* Boott’s Additional Proposed Mitigation Filing, Feb. 2, 2012, App. 1350 (diagram of anchorage assembly); Rehearing Order P 47, Add. 80 (discussing design and safety review that will be applied to final designs). The existing granite capstone would not be altered and would still be visible from the downstream side of the dam. Amendment Order P 141, App. 38.

Rather than adversely affecting the dam, the record indicates that the crest gate system could assist in preserving the dam. “While the dam is currently safe, continued use of a flashboard system presents a risk of increased damage to the granite capstones over time.” *Id.* P 83, Add. 23-24.

Citing a 1976 National Register nomination form, Interior asserts that the “flashboards are recognized as historically important” (Br. 34) and argues that the crest gate system would affect the historical functioning of the dam. Br. 32. But that nomination form lacks any discussion of the flashboards’ historical importance. Indeed, that 22-page document mentions the flashboard system in a single sentence, which simply observes that, “[w]ith its flashboards in place, the dam is capable of ponding the river for a distance of about 18 miles.” App. 894.

Interior similarly overreaches by claiming that “[t]he historic functioning of the dam is why it is protected for its place in engineering history: the dam is listed in the National Register ‘for its historic and engineering significance.’” Br. 33 (quoting App. 1197). The Pawtucket Dam is not listed in the National Register for

its own historic and engineering significance. Rather, the dam’s significance stems from its association with the “larger nationally important historic resource” – *i.e.*, the Lowell Locks and Canals Historic District – consisting of Lowell’s “dams, canals, gates, locks, mill yards, machine shops, and managers and workers housing.” Determination of Eligibility Notification at 2 (Oct. 26, 2011), App. 1198. *See also* Amendment Order P 89, Add. 25 (same). And Interior nowhere disputes the Commission’s conclusion that “changing the dam’s crest control system would have no effect on [its] historic association” with “the power system and canals that drove the waterwheels of the mill buildings.” Amendment Order P 96, Add. 27.

IV. THE COMMISSION REASONABLY CONCLUDED THAT INSTALLATION OF THE CREST GATE SYSTEM WOULD NOT VIOLATE THE LOWELL ACT’S PRESERVATION STANDARDS.

Section 102(b) of the Lowell Act requires the Commission to determine whether installation and operation of the crest gate system “will be conducted in a manner consistent with” the Preservation Standards. 16 U.S.C. § 410cc-12.

Interior contends that installation of the crest gate system would violate Standard E-2 (Historic Architectural Features) and E-3 (Historic Materials). Br. 48-51. But those assertions cannot be squared with the language of the Preservation Standards or the record.

The Preservation Standards are aimed at historic buildings, rather than functioning structures like the Pawtucket Dam. The Standards “do not contain any specific reference to dams in general or to [the] Pawtucket Dam in particular.” Amendment Order P 138, Add. 37. Rather, they generally “concern mill buildings,” or “features of buildings not present on the dam.” *Id.*; *see also* Rehearing Order P 29, Add. 73 (same). Indeed, Standards E-2 and E-3 expressly apply to “buildings,” which Interior has distinguished from engineering “structures,” like the Pawtucket Dam. Interior’s National Register of Historic Places regulations explain that “[a] building is a structure created to shelter any form of human activity, such as house, barn, church, hotel, or similar structure.” 36 C.F.R. § 60.3(a). A “structure,” on the other hand, is “a work made up of interdependent and interrelated parts in a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.” *Id.* § 60.3(p). The Park Service’s National Register Bulletin – cited by amici at 6 n.4 – likewise explains that the “term ‘structure’ is used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter,” and that a “dam” is an example of a “structure.” *See* National Register Bulletin: *How to Prepare National Historic Landmark Nominations*, available at <http://www.nps.gov/nr/publications/bulletins/nhl/text2.htm>.

Interior's current contention that the Preservation Standards are applicable to the Pawtucket Dam is thus inconsistent with its own regulations. *Cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997) (no deference due to agency interpretations that are plainly erroneous or inconsistent with regulations). In any event, the Commission reasonably determined that the crest gate system could be installed and operated in a manner consistent with the Preservation Standards.

A. Installation Of The Proposed Crest Gate System Does Not Conflict With Preservation Standard E-2.

Preservation Standard E-2 provides that “[h]istoric buildings owe their character to the particular blend of their architectural features” and thus “[o]riginal building features should whenever feasible be preserved rather than replaced.” *Preservation Standards*, 46 Fed. Reg. at 24,001. Interior contends that the crest gate system “would alter the masonry structure of the dam and damage the granite capstones.” Br. 49. But Standard E-2 is inapplicable because the current flashboard system is not an “original building feature” of the Pawtucket Dam. Flashboard systems “are a temporary crest control structure placed on top of a dam ... [and] not part of the dam’s architecture.” Rehearing Order P 31, Add. 74. This is exemplified by the Pawtucket Dam, which has had “no flashboards (1826-1838), 2-foot flashboards (1838-1883), 3-foot flashboards (1883-1896), and 5-foot flashboards (1896-present).” *Id.* Accordingly, while “flashboards were an early crest control feature, they were not an original feature.” *Id.*

Moreover, the Commission found that preservation of the existing flashboard system was not feasible. Amendment Order P 140, Add. 38; Rehearing Order PP 32-33, Add. 74-75. The crest gate proposal arose out of concerns expressed by area residents about flooding relating to the operation of the dam. Rehearing Order P 72, Add. 91. “[B]y their very nature flashboard systems fail incompletely and unpredictably in response to high flows.” *Id.* P 33, Add. 74. And the record demonstrated that the dam’s existing flashboard systems “can contribute to flooding during high flows if the boards do not fail completely.” *Id.* The Commission therefore concluded that “it was not feasible to preserve the flashboards because only an inflatable crest gate system can attenuate the backwater effect of the dam during high flows to the maximum extent practicable.” *Id.* Interior’s only response is a footnote noting the historical use of the flashboards. Br. 44 n.9. That is not enough to challenge the Commission’s finding. *See Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) (“We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived.”).

As to alterations to the dam’s masonry and granite capstones, the Commission explained that “the existing granite capstones would not be altered, and would still be visible from the downstream side of the dam.” Amendment Order P 141, Add. 38. Nor would the crest anchoring system be visible upstream

of the dam because it would be below the ordinary low water line. *Id.* And while the new anchoring system would require drilling into the dam, that would not violate the Preservation Standard since “[m]aintaining the existing flashboard system requires similar actions of drilling into the granite capstones and installing steel bars to support them.” Rehearing Order P 35, Add. 75. Finally, the crest gate system itself will use “colors, paint, and materials to help ensure that it is similar in appearance to the existing wooden flashboards.” *Id.*

B. Installation Of The Proposed Crest Gate System Does Not Conflict With Preservation Standard E-3.

Preservation Standard E-3, which addresses historic construction materials, sets forth three substantive “standards”: (a) the observation that technical assistance can be used to determine “the original materials used in a building, the technical process of repair or replacement required”; (b) an exhortation for the protection of deteriorating materials if immediate restoration cannot be accomplished; and (c) a list of building materials commonly found in Lowell and appropriate substitutes. *Preservation Standards*, 46 Fed. Reg. at 24,001. Interior observes that the crest gate system “consists of entirely different materials from the historic wooden flashboards” (Br. 51), but fails to explain how installation of the modern system would violate the substantive standards in E-3.

In any event, the Commission explained that the “original materials, design, and use of the masonry dam would not be altered.” Amendment Order P 143,

Add. 39. While the wood and metal flashboard system would be replaced, “these materials are not original and have been continually replaced over the years.”

Rehearing Order P 37, Add. 76. In light of the need to reduce flooding associated with operation of the dam, “there is a need for a limited but necessary change in the materials used for crest control at the dam.” *Id.* Such change does not violate the standards set forth in Preservation Standard E-3. *Id;* *see also* Amendment Order P 143, Add. 39.

V. INTERIOR’S MISCELLANEOUS COMPLAINTS ABOUT THE CREST GATE SYSTEM DO NOT UNDERMINE THE COMMISSION’S FINDINGS.

Interior raises various objections to the Commission’s conclusions regarding the efficacy of the crest gate system and the benefits it would provide. Those objections are contradicted by the record and fail to demonstrate that the Commission violated the Lowell Act or otherwise acted arbitrarily.

A. Substantial Evidence Supports The Commission’s Finding That The Crest Gate System Will Reduce Flooding.

Interior asserts that the “City of Lowell and the property owners directly affected by the flooding favor the flashboard system over the crest.” Br. 45. The Commission repeatedly explained, however, that the property owners’ concerns regarding the crest gate system were unsupported and unfounded. *See, e.g.,* Rehearing Order PP 84-113, Add. 95-107. And, in fact, the City of Lowell “asserted that the flashboards were causing or exacerbating flooding” upstream of

the dam. EA at 16, App. 1240. The City has withdrawn its intervention in this appeal, and now acknowledges that “the crest-gate system provides an opportunity for flooding mitigation not possible with the flashboard system.” Lyle Maron, *Lowell Officials Strike Deal on Pawtucket Dam Gate*, LOWELL SUN, April 24, 2014, http://www.lowellsun.com/todaysheadlines/ci_25620047/lowell-officials-strike-deal-pawtucket-dam-gate.

Interior also asserts that the “record ... does not justify FERC’s conclusion that the steel-and-concrete crest in fact would reduce flooding.” Br. 45-46. But the Commission’s finding was based on detailed analyses performed by Boott, Boott’s outside engineering firm, and FERC Staff.¹⁰ Those analyses consistently demonstrated that during high flow events (*e.g.*, 30,000 to 60,000 cfs) water levels upstream of the Pawtucket Dam would be significantly lower with the crest gate system in place as compared to the flashboard system. *See* Amendment Order P 61 (Table 1), Add. 17. *See also* Rehearing Order P 85, Add. 95 (revised backwater analysis “shows that a crest gate system would be capable of achieving the greatest and quickest level of relief from floodwaters as levels rise”).

Interior now asserts that those analyses should not have studied the operation of “unbent” flashboards. Br. 45. But Interior did not raise that issue on rehearing

¹⁰ *See* Technical Assessment (App. 424-70); Amendment Application (App. 508-60); Revised Backwater Analysis Report (App. 280-325); Pneumatic Crest Gate Backwater Analysis (App. 830-69); Draft Environmental Assessment (App. 1009-1101); and Final Environmental Assessment (App. 1214-1325).

and the Court therefore lacks jurisdiction to consider it. *See* 16 U.S.C. § 825l(b); Rehearing Request, App. 1657-75. In any event, as the Commission explained, the analyses used unbent flashboards as a worst-case scenario. Amendment Order P 60, Add. 16. Moreover, the studies assumed that the unbent flashboard would fail completely when the specified water levels were reached. In fact, such systems “react unpredictably under water pressure” and generally “fail locally at a weaker section,” thereby “requir[ing] a greater load or higher reservoir elevation before the remainder of the system fails.” *Id.* P 63, Add. 17.

Interior also quotes (Br. 45) the Commission’s observation that one analysis indicated that the flashboard system had “only a minor effect on flooding in the Clay Pit Brook neighborhood.” Amendment Order P 60, Add. 16. That study found that water levels in the Clay Pit Brook area are largely determined by local conditions, rather than dam impoundment levels. *Id.* Nonetheless, the record established that “water levels along the Clay Pit Brook neighborhood during 100-year flows in the brook would be considerably lower with the proposed crest gate system in place as compared to unbent 5-foot high flashboards.” *Id.* P 61, Add. 16.

Rather than cite to any contradictory evidence, Interior simply notes that the flashboard system has been used for 175 years. Br. 22, 34, 38, 44 n.9. Of course, in those 175 years, there has been significant development in the area upstream of the Pawtucket Dam, thereby increasing the public interest in flood control. *See,*

e.g., Technical Assessment at 10, App. 434. And the record established that the flashboard systems did not fail as designed. *See, e.g.*, Amendment Order PP 8, 72, Add. 3, 20 (discussing the 4+1 configuration); Rehearing Order P 85, Add. 95 (finding that modified design never resulted “in a complete collapse of the boards”). The Commission identified “a present-day need for a more effective means of crest control to alleviate backwater effects during high flows” (Rehearing Order P 40, Add. 77), and reasonably found that only “a crest gate system would provide the most reliable and complete attenuation of th[at] backwater effect.” Amendment Order P 50, Add. 14. “An agency’s expert judgments are entitled to deference, especially where safety concerns are on one side of the balance, as they are here.” *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 44 (1st Cir. 2001).

B. Substantial Evidence Supports The Commission’s Finding That The Crest Gate System Will Provide Fish Passage Benefits.

The Commission found that the crest gate would improve upstream fish passage at the Pawtucket Dam’s fish lift and fish ladder. Amendment Order PP 83, 204, Add. 24, 53. Interior asserts that this finding is based on “speculation” alone, because there were no fish counts at the fish ladder. Br. 46. While facility upgrades prevented fish counts from being taken at the ladder in 2010 (EA at 35, App. 1259), the Environmental Assessment discussed fish migration studies and fish passage counts at the dam’s fish lift system. *Id.* at 48, App. 1272. FERC Staff

also conducted site visits and reviewed aerial photography to confirm that the leakage or partial failure of the flashboard system “creat[es] false attraction for upstream migrating fish away from the fish ladder approach channel.” *Id.* at 50, App. 1273.

Federal and state resource agencies uniformly expressed the view that the crest gate system would “enhance upstream anadromous fish passage at the Lowell Project.” *Id.* at 49, App. 1273. *See also* Amendment Order P 204, Add. 53. In fact, Interior itself – through its Fish and Wildlife Service – found that fish passage is “compromised” by the flashboard system, and stated that the crest gate system could “improve the efficiency of upstream fish passage at the dam.” Dep’t of Interior Comments at 7 (Sept. 10, 2010), App. 761. The Service also explained that crest gate systems at other dams in the area “have met with success in improving conditions for the upstream passage of migratory fish.” *Id.* Real-world results observed by a resource agency do not constitute speculation. *See, e.g., United States v. Cumberland Farms*, 826 F.2d 1151, 1165 (1st Cir. 1987) (not speculative to project environmental benefits based on prior experience with similar efforts).

C. Substantial Evidence Supports The Commission’s Finding That The Crest Gate System Will Provide Safety Benefits

Interior claims that there is no record support for the Commission’s finding that the crest gate system would pose a lower risk to worker safety than the

flashboard system. Br. 46-47. But as the Commission explained, when replacing flashboards, workers engage in “a relatively dangerous operation” by “approach[ing] the dam in boats, often during high flow periods,” a process that must be repeated multiple times per year. Amendment Order P 51, Add. 14. *See also id.* P 83, Add. 24; Amendment Application at 7, App. 516 (describing the “inherently difficult” task of flashboard replacement). By contrast, “[a]n inflatable crest gate can be controlled remotely, with no worker risk.” Amendment Order P 51, Add. 14. The worker safety benefits associated with the crest gate system are self-evident and there was no need for further evidence regarding “a general matter of worker safety at a hydroelectric project.” Rehearing Order P 94, Add. 99 (rejecting call for expert testimony from Occupational Health and Safety Administration).

In a final attempt to cast doubt on the Commission’s well-supported conclusions, Interior points to a near tragic drowning incident and asserts that crest gate systems constitute a “public safety risk.” Br. 47 (citing App. 676). But Interior is wrong on the facts. The incident occurred at the Pawtucket Dam – which, of course, currently employs flashboards – and involved a release of water from a sluice gate, not a crest control system. Comment of S. Moses (Sept. 7, 2010) (attaching Robert Mills, *Teens rescued from fast-rising Merrimack River after dam releases surge*, LOWELL SUN, (Aug. 29, 2010)), App. 676.

* * *

The Commission gave close consideration to historic preservation issues throughout this proceeding. It determined, however, that the public interest would not be served by elevating preservation considerations above all other factors, given the flooding concerns associated with operation of the flashboards and the many benefits provided by the crest gate system. That determination was reasonable, supported by the record, and fully consistent with the Lowell Act.

CONCLUSION

For the foregoing reasons, the petition should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

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May 7, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 12,077 words, not including the tables of contents and authorities, the glossary, the addendum, the certificate of counsel and this certificate.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

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May 7, 2014

ADDENDUM

STATUTES AND REGULATIONS

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

TERMINATION OF FEDERAL POWER COMMISSION;
TRANSFER OF FUNCTIONS

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

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND
TRANSFER OF FUNCTIONS

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

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

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

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

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

of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

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

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

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

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

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

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

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

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

(f) Preliminary permits; notice of application

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

any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

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

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

AMENDMENTS

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

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

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

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

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

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

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

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

part I of the Federal Power Act [16 U.S.C. 791a et seq.], 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.

(c) Effective date

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

(Pub. L. 102-486, title XXIV, §2403, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a) and (b), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Power Act, referred to in subsecs. (a) and (b), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, § 5, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 203, 212, 49 Stat. 841, 847.)

AMENDMENTS

1935—Act Aug. 26, 1935, §203, amended section generally, striking out “and a license issued” at end of second sentence and inserting “or for other good cause shown after notice and opportunity for hearing” in last sentence.

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

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.

(June 10, 1920, ch. 285, pt. I, § 6, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 204, 212, 49 Stat. 841, 847; Pub. L. 104-106, div. D, title XLIII, §4321(i)(6), Feb. 10, 1996, 110 Stat. 676; Pub. L. 104-316, title I, §108(a), Oct. 19, 1996, 110 Stat. 3832; Pub. L. 105-192, §2, July 14, 1998, 112 Stat. 625.)

AMENDMENTS

1998—Pub. L. 105-192 inserted at end “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.”

1996—Pub. L. 104-316 struck out at end “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.”

Pub. L. 104-106 struck out at end “Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.”

1935—Act Aug. 26, 1935, §204, amended section generally, substituting “thirty days” for “ninety days” in third sentence and inserting last sentence.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of Title 10, Armed Forces.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United

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

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

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 801. Transfer of license; obligations of transferee

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

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

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

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

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

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

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

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

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

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

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

CODIFICATION

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

AMENDMENTS

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 803. Conditions of license generally

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

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

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

¹ See Codification note below.

in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this 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.

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

(b) Alterations in project works

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

emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

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

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

(d) Amortization reserves

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

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

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

¹ So in original. Probably should be followed by “; and”.

AMENDMENTS

1992—Pub. L. 102-486 substituted final proviso and sentence for period at end.

§ 815. Contract to furnish power extending beyond period of license; obligations of new licensee

Whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

(June 10, 1920, ch. 285, pt. I, § 22, 41 Stat. 1074; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 816. Preservation of rights vested prior to June 10, 1920

The provisions of this subchapter shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this subchapter and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this subchapter and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, § 23(a), 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 210, 212, 49 Stat. 846, 847.)

CODIFICATION

Section consists of subsec. (a) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (b) of section 23 of act June 10, 1920, is set out as section 817 of this title.

AMENDMENTS

1935—Act Aug. 26, 1935, § 210, amended section generally, substituting “part” for “chapter” wherever appearing, substituting “heretofore” for “then”, and sub-

stituting the last sentence for “Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they cannot agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.”

§ 817. Projects not affecting navigable waters; necessity for Federal license, permit or right-of-way; unauthorized activities

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

(2) No person may commence any significant modification of any project licensed under, or exempted from, this chapter unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this subchapter. As used in this paragraph, the term “commence” refers to the beginning of physical on-site activity other than surveys or testing.

(June 10, 1920, ch. 285, pt. I, § 23(b), 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 210, 212, 49 Stat. 846, 847; Pub. L. 99-495, § 6, Oct. 16, 1986, 100 Stat. 1248.)

CODIFICATION

Section consists of subsec. (b) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (a) of section 23 of act June 10, 1920, is set out as section 816 of this title.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

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

§ 825I. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall

be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon

SUBCHAPTER LIX—A—LOWELL NATIONAL HISTORICAL PARK

PART A—ESTABLISHMENT OF PARK AND PRESERVATION DISTRICT

§ 410cc. Congressional statement of findings and purpose

(a) The Congress finds that—

(1) certain sites and structures in Lowell, Massachusetts, historically and culturally the most significant planned industrial city in the United States, symbolize in physical form the Industrial Revolution;

(2) the cultural heritage of many of the ethnic groups that immigrated to the United States during the late nineteenth and early twentieth centuries is still preserved in Lowell's neighborhoods;

(3) a very large proportion of the buildings, other structures, and districts in Lowell date to the period of the Industrial Revolution and are nationally significant historical resources, including the five-and-six-tenths-mile power canal system, seven original mill complexes, and significant examples of early housing, commercial structures, transportation facilities, and buildings associated with labor and social institutions; and

(4) despite the expenditure of substantial amounts of money by the city of Lowell and the Commonwealth of Massachusetts for historical and cultural preservation and interpretation in Lowell, the early buildings and other structures in Lowell may be lost without the assistance of the Federal Government.

(b) It is the purpose of this subchapter to preserve and interpret the nationally significant historical and cultural sites, structures, and districts in Lowell, Massachusetts, for the benefit and inspiration of present and future generations by implementing to the extent practicable the recommendations in the report of the Lowell Historic Canal District Commission.

(Pub. L. 95–290, § 1, June 5, 1978, 92 Stat. 290.)

SHORT TITLE OF 2012 AMENDMENT

Pub. L. 112–182, § 1, Oct. 5, 2012, 126 Stat. 1420, provided that: “This Act [amending section 410cc–22 of this title] may be cited as the ‘Lowell National Historical Park Land Exchange Act of 2012.’”

§ 410cc–1. Definitions

For purposes of this subchapter—

(1) the term “park” means the Lowell National Historical Park, established by section 410cc–11(a)(1) of this title;

(2) the term “preservation district” means the Lowell Historic Preservation District, established by section 410cc–11(a)(1) of this title;

(3) the term “Commission” means the Lowell Historic Preservation Commission established by section 410cc–31(a) of this title;

(4) the term “Secretary” means the Secretary of the Interior; and

(5) the term “report of the Lowell Historic Canal District Commission” means the report submitted to the Congress by the Lowell Historic Canal District Commission pursuant to an Act entitled “An Act to provide for a plan

for the preservation, interpretation development and use of the historic, cultural, and architectural resources of the Lowell Historic Canal District in Lowell, Massachusetts, and for other purposes”, approved January 4, 1975 (88 Stat. 2330).

(Pub. L. 95–290, § 2, June 5, 1978, 92 Stat. 290.)

REFERENCES IN TEXT

An Act entitled “An Act to provide for a plan for the preservation, interpretation development and use of the historic, cultural, and architectural resources of the Lowell Historic Canal District in Lowell, Massachusetts, and for other purposes”, approved January 4, 1975 (88 Stat. 2330), referred to in par. (5), is Pub. L. 93–645, Jan. 4, 1975, 88 Stat. 2330, which is set out as a note under section 461 of this title.

§ 410cc–11. Establishment of Lowell National Historical Park

(a) Establishment and administration of Lowell Historic Preservation District

(1) To carry out the purpose of this subchapter, there is established as a unit of the National Park System in the city of Lowell, Massachusetts, the Lowell National Historical Park. There is further established in an area adjacent to the park the Lowell Historic Preservation District, which will be administered by the Secretary and by the Commission in accordance with this subchapter. The boundaries of the park and preservation district shall be the boundaries depicted on the map entitled “Lowell National Historical Park, Massachusetts”, dated March 1978, and numbered “Lowe—80,008A”. Such map shall be on file and available for inspection in the office of the National Park Service, Department of the Interior, and in the office of the city clerk, city of Lowell.

(2) The Secretary shall publish in the Federal Register, as soon as practicable after June 5, 1978, a detailed description and map of the boundaries established under paragraph (1) of this subsection.

(3) The boundaries of the park are modified to include five parcels of land identified on the map entitled “Boundary Adjustment, Lowell National Historical Park,” numbered 475/81,424B and dated September 2004, and as delineated in section 410cc–22(a)(2)(G) of this title.

(b) Boundary revisions; publication

The Secretary may make minor revisions of the park and preservation district boundaries established under subsection (a)(1) of this section, after consulting with the Commission and the city manager of Lowell, by publication of a revised drawing or other boundary description in the Federal Register; but no waters, lands, or other property outside of the park or preservation district boundaries established under such subsection may be added to the park or preservation district without the consent of the city manager of Lowell and the city council of Lowell. A boundary revision made under this subsection shall be effective only after timely notice in writing is given to the Congress.

(Pub. L. 95–290, title I, § 101, June 5, 1978, 92 Stat. 291; Pub. L. 110–229, title III, § 312(1), May 8, 2008, 122 Stat. 769.)

AMENDMENTS

2008—Subsec. (a)(3). Pub. L. 110–229 added par. (3).

§ 410cc-12. Consultations, cooperation, and conduct of activities by Federal entities; issuance of licenses or permits by Federal entities

(a) Activities directly affecting park

Any Federal entity conducting or supporting activities directly affecting the park or preservation district shall—

(1) consult with, cooperate with, and to the maximum extent practicable, coordinate its activities with the Secretary and with the Commission; and

(2) conduct or support such activities in a manner which (A) to the maximum extent practicable is consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title, and (B) will not have an adverse effect on the resources of the park or preservation district.

(b) Determination as to proposed activities

No Federal entity may issue any license or permit to any person to conduct an activity within the park or preservation district unless such entity determines that the proposed activity will be conducted in a manner consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title and will not have an adverse effect on the resources of the park or preservation district.

(Pub. L. 95-290, title I, § 102, June 5, 1978, 92 Stat. 291.)

§ 410cc-13. Authorization of appropriations

(a) General authority; maximum amounts

There are authorized to be appropriated such sums as may be necessary to carry out this subchapter, except that—

(1) the total of the amounts authorized to be appropriated for the purpose of acquisition and development under the park management plan established pursuant to section 410cc-21(b) of this title and emergency assistance under section 410cc-25(a)(1) of this title shall not exceed \$19,800,000; and

(2) the total of the amounts authorized to be appropriated for the purpose of carrying out section 410cc-32(b)(2) of this title, for the payment of grants and loans under section 410cc-33 of this title, for the acquisition of property under section 410cc-34 of this title, and for carrying out any transportation program and any educational and cultural program described in section 410cc-32(c) of this title shall not exceed \$33,600,000.

(b) Commencement date

No funds shall be authorized pursuant to this section prior to October 1, 1978.

(c) Availability of appropriations

Funds appropriated under subsection (a) of this section shall remain available until expended.

(d) Aggregate amount of money expended; certifying statement to Congress as limiting availability of appropriated amounts

(1) Within 60 days after June 5, 1978, and on each subsequent October 1 and March 1, the Sec-

retary shall submit to the Congress a statement certifying the aggregate amount of money expended by the Commonwealth of Massachusetts, the city of Lowell, and by any nonprofit entity for activities in the city of Lowell consistent with the purpose of this subchapter during the period beginning on January 1, 1974, and ending on the date such statement is submitted.

(2) The aggregate amount of funds made available by the Secretary to the Commission from funds appropriated under subsection (a)(2) of this section may not exceed the amount certified by the Secretary in the most recent statement submitted to the Congress under paragraph (1) of this subsection.

(Pub. L. 95-290, title I, § 103, June 5, 1978, 92 Stat. 292; Pub. L. 100-134, § 1(1), Oct. 16, 1987, 101 Stat. 810.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-134 substituted “\$19,800,000” for “\$18,500,000” in par. (1), and “\$33,600,000” for “\$21,500,000” in par. (2).

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100-134, § 2, Oct. 16, 1987, 101 Stat. 810, provided that:

“(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by section 1 [amending sections 410cc-13 and 410cc-31 of this title] shall take effect on the date of the enactment of this Act [Oct. 16, 1987].

“(b) EFFECTIVE DATE OF AUTHORIZATION OF APPROPRIATION.—The amendments made by section 1(1) [amending section 410cc-13 of this title] shall take effect on October 1, 1987.”

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which a report required under subsec. (d)(1) of this section is listed on page 108), see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

§ 410cc-14. Funding limitations

Notwithstanding any other provision of this subchapter, no authority to enter into agreements or to make payments under this subchapter shall be effective except to the extent, or in such amounts, as may be provided in advance in appropriation Acts.

(Pub. L. 95-290, title I, § 104, June 5, 1978, 92 Stat. 292.)

PART B—POWERS AND DUTIES OF SECRETARY

§ 410cc-21. Park management plan

(a) Submission date and contents of preparatory statement to Congress

The Secretary shall submit a statement to the Congress, within two years after the date on which funds are made available to carry out this subchapter, which—

(1) reports on the progress that the Secretary has made in acquiring the properties identified under section 410cc-22 of this title, and describes the way the Secretary intends to use these properties;

(2) identifies the properties within the park and preservation district respecting which the

Secretary has entered into or intends to enter into agreements relating to interpretive exhibits or programs under section 410cc-23(a) of this title;

(3)(A) reports on the progress of the Secretary in leasing a portion of the Lowell Manufacturing Company, located on Market Street, for the purpose of establishing a visitors' center in close proximity to parking and other transportation facilities, and (B) identifies any other property within the park which the Secretary has leased or intends to lease for purposes of the park;

(4) reports any other activities which the Secretary has taken or intends to take to carry out the purpose of this subchapter; and

(5) contains a tentative budget for the park and preservation district for the subsequent five fiscal years.

(b) Establishment, submission date, contents, etc., of plan

(1) Not later than three years after the date on which funds are made available to carry out this subchapter, the Secretary shall establish and submit to the Congress a park management plan containing the information described in subsection (a) of this section. Such plan shall, upon request, be available to the public.

(2) After consulting with the Commission, the city manager of Lowell, and the Commonwealth of Massachusetts, the Secretary may make revisions in the park management plan established pursuant to paragraph (1) of this subsection by publication of such revisions in the Federal Register. A revision made under this paragraph shall be effective 90 days after written notice of the revision is submitted to the Congress.

(Pub. L. 95-290, title II, §201, June 5, 1978, 92 Stat. 292.)

§ 410cc-22. Acquisition of property

(a) Specified property; manner of acquisition

(1) The Secretary is authorized to acquire the properties designated in paragraph (2) of this subsection, or any interest therein, by donation, purchase with donated or appropriated funds, condemnation, or otherwise. Any property or interest therein owned by the Commonwealth of Massachusetts or any political subdivision thereof may be acquired only by donation. The Secretary may initiate condemnation proceedings under this paragraph only after making every reasonable effort to acquire property through negotiations and purchase, and consulting with the Commission (if established) and the city council of Lowell.

(2) The properties referred to in paragraph (1) of this subsection are the following:

(A) The Linus Childs House, 63 Kirk Street.

(B) The H and H Paper Company (commonly referred to as Boott Mill Boarding House), 42 French Street.

(C) Old City Hall, 226 Merrimack Street.

(D) Merrimack Gatehouse, 269 Merrimack Street.

(E) The Wannalancit Textile Company, 562 Suffolk Street.

(F) The structures containing the Jade Pagoda and Solomon's Yard Goods, 210 and 200 Merrimack Street.

(G) The properties shown on the map identified in section 410cc-11(a)(3)¹ of this title as follows:

(i) 91 Pevey Street.

(ii) The portion of 607 Middlesex Place.

(iii) Eagle Court.

(iv) The portion of 50 Payne Street.

(v) 726 Broadway.

(b) Other property; criteria for acquisition; manner of acquisition

Until the date on which the Commission conducts its first meeting, the Secretary may acquire any property within the park or preservation district not designated in subsection (a)(2) of this section, or any interest therein, if such property—

(1) is identified in the report of the Lowell Historical Canal District Commission as a property which should be preserved, restored, managed, developed, or maintained in a manner consistent with the purpose of this subchapter;

(2) is listed in the National Register of Historic Places, as maintained by the Secretary pursuant to section 470a(a) of this title, and section 462(b) of this title; or

(3) is determined by the Secretary to be of national significance;

and would be subject to demolition or major alteration in a manner inconsistent with the purposes of this subchapter unless acquired by the Secretary. Such property may be acquired only as provided in subsection (a)(1) of this section.

(c) Easements; manner of acquisition

The Secretary may acquire easements within the park for the purpose of carrying out this subchapter. Such easements may be acquired only as provided in subsection (a)(1) of this section.

(d) Exchange of land or interest in land

(1) The Secretary may exchange any land or interest in land within the boundaries of the park for any land or interest in land owned by the Commonwealth of Massachusetts, the city of Lowell, or the University of Massachusetts Building Authority.

(2) Except as provided in paragraph (3), an exchange under this subsection shall be subject to the laws, regulations, and policies applicable to exchanges of land administered by the National Park Service and any other terms and conditions that the Secretary determines to be necessary to protect the interests of the United States.

(3) Where facilities or infrastructure required for the management and operation of the Lowell National Historical Park exists on the Federal land to be exchanged, and the non-Federal land or interest in land to be exchanged is not of equal value, the values shall be equalized by the payment of cash to the Secretary. The Secretary shall not be required to equalize the values of any exchange conducted under this subsection if the land or interest in land received by the Federal Government exceeds the value of the Federal land or interest in land exchanged.

¹ See References in Text note below.

(Pub. L. 95-290, title II, §202, June 5, 1978, 92 Stat. 293; Pub. L. 110-229, title III, §312(2), May 8, 2008, 122 Stat. 769; Pub. L. 112-182, §2, Oct. 5, 2012, 126 Stat. 1420.)

REFERENCES IN TEXT

Section 410cc-11(a)(3) of this title, referred to in subsec. (a)(2)(G), was in the original “subsection (101)(a)(3)” and was translated as meaning section 101(a)(3) of Pub. L. 95-290, which is classified to section 410cc-11(a)(3) of this title, to reflect the probable intent of Congress.

AMENDMENTS

2012—Subsec. (d), Pub. L. 112-182 added subsec. (d).
2008—Subsec. (a)(2)(G), Pub. L. 110-229 added subpar. (G).

§ 410cc-23. Agreements and technical assistance**(a) Interpretative exhibits or programs**

The Secretary may enter into agreements with any owner of property with national historic or cultural significance within the park to provide for interpretive exhibits or programs. Such agreements shall provide, whenever appropriate, that—

- (1) the public may have access to such property at specified, reasonable times for purposes of viewing such property or the exhibits or attending the programs established by the Secretary under this subsection; and
- (2) the Secretary may make such minor improvements to such property as the Secretary deems necessary to enhance the public use and enjoyment of such property, exhibits, and programs.

(b) Request for assistance

(1) The Secretary shall provide, upon request, technical assistance to—

- (A) the city of Lowell to assist the city in establishing regulations or laws consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title; and
- (B) the Commission to assist the Commission in establishing the index and the standards and criteria required by section 410cc-32 of this title.

(2) The Secretary may provide to any owner of property within the park or preservation district, the Commission, the Commonwealth of Massachusetts, the city of Lowell, and any other Federal entity or any institution such technical assistance as the Secretary considers appropriate to carry out the purpose of this subchapter.

(Pub. L. 95-290, title II, §203, June 5, 1978, 92 Stat. 294.)

§ 410cc-24. Withholding of funds; criteria

The Secretary may refuse to obligate or expend any money appropriated for the purposes described in section 410cc-13(a)(1) or section 410cc-13(a)(2) of this title if the Secretary determines that—

- (a) the city of Lowell has failed to establish regulations or laws consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title within one year after the date such standards and criteria have

been established, except that the Secretary may extend such one-year period for not more than six months if the Secretary determines that the city has made a good faith effort to establish such regulations or laws;

(b) the city of Lowell has failed to notify the Commission of (1) applications for building permits or zoning variances respecting any property which is included in the index established pursuant to section 410cc-32(d) of this title, or (2) any proposals of the city of Lowell to change the regulations or laws described in paragraph (c)(1) of this subsection;

(c)(1) during the period before the city of Lowell has established regulations or laws consistent with the standards and criteria established pursuant to section 410cc-32(e) of this title, the city of Lowell has granted any building permit or zoning variance or has taken any other action respecting any property within the park or preservation district, which either the Secretary or the Commission consider to be inconsistent with such standards and criteria;

(2) after the city of Lowell has established the regulations or laws described in subparagraph (1) of this paragraph, the city of Lowell has granted any building permit or zoning variance or has taken any other action respecting any property within the park or preservation district, which either the Secretary or the Commission consider to be inconsistent with such regulations or laws; or

(d) the Commission has not made good faith efforts to (1) provide for the preservation, restoration, management, development, or maintenance of property within the park and preservation district or (2) carry out the park preservation plan approved under section 410cc-32 of this title.

(Pub. L. 95-290, title II, §204, June 5, 1978, 92 Stat. 294.)

§ 410cc-25. Administrative functions**(a) Implementation of park management plan; emergency assistance for protection of property owners; availability of funds for Commission**

(1) The Secretary, acting through the National Park Service, shall take appropriate actions to implement to the extent practicable the park management plan established pursuant to section 410cc-21(b) of this title. In carrying out such plan, the Secretary shall administer the park in accordance with laws, rules, and regulations applicable to the national park system. Before the date on which the Commission conducts its first meeting, the Secretary may take any other action the Secretary deems necessary to provide owners of property with national historic or cultural significance within the park or preservation district with emergency assistance for the purpose of preserving and protecting their property in a manner consistent with the purpose of this subchapter.

(2) Subject to sections 410cc-24 and 410cc-32(b) of this title, the Secretary shall make available to the Commission any funds appropriated under section 410cc-13(a)(2) of this title for the purpose of carrying out part C of this subchapter.

each be entitled to receive \$100 for each day (including travel time) during which they are engaged in the performance of the duties of the Commission.

(2) Members of the Commission who are full-time officers or employees of the United States, the city of Lowell, or the Commonwealth of Massachusetts shall receive no additional pay on account of their service on the Commission.

(3) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(i) Termination

The Commission established pursuant to this subchapter shall cease to exist seventeen years from June 5, 1978.

(Pub. L. 95-290, title III, §301, June 5, 1978, 92 Stat. 295; Pub. L. 100-134, §1(2), (3), Oct. 16, 1987, 101 Stat. 810.)

AMENDMENTS

1987—Subsec. (e)(2). Pub. L. 100-134, §1(2), substituted “until his successor is appointed” for “for a period not longer than thirty days”.

Subsec. (i). Pub. L. 100-134, §1(3), substituted “seven-teen” for “ten”.

§ 410cc-32. Park preservation plan and index

(a) Submission by Commission and approval or disapproval by Secretary of draft and final plans; procedures applicable; revisions in approved plan

(1) Within one year after the date on which the Commission conducts its first meeting, the Commission shall submit to the Secretary a draft park preservation plan meeting the requirements of subsection (c) of this section. The Secretary shall review the draft park preservation plan and, within ninety days after the date on which such plan is submitted to the Secretary, suggest appropriate changes in such plan to the Commission.

(2) Within eighteen months after the date on which the Commission conducts its first meeting, the Commission shall submit to the Secretary a park preservation plan which meets the requirements of subsection (c) of this section. The Secretary shall, within ninety days after the date on which such plan is submitted to the Secretary, approve or disapprove such plan. The Secretary may not approve such plan unless the Secretary determines that such plan would adequately carry out the purpose of this subchapter.

(3) If the Secretary disapproves a park preservation plan, the Secretary shall advise the Commission of the reasons for such disapproval together with the recommendations of the Secretary for revision of such plan. Within such period as the Secretary may designate, the Commission shall submit a revised park preservation plan to the Secretary. The Secretary shall approve or disapprove any revised park preservation plan in the same manner as required in paragraph (2) of this subsection for the approval

or disapproval of the original park preservation plan.

(4) If the Secretary approves a park preservation plan, the Secretary shall publish notice of such approval in the Federal Register and shall forward copies of the approved plan to the Congress.

(5) Any park preservation plan or draft plan submitted to the Secretary under this subsection shall, upon request, be available to the public.

(6) No changes other than minor revisions may be made in the approved park preservation plan without the approval of the Secretary. The Secretary shall approve or disapprove any proposed change in the approved park preservation plan, except minor revisions in the same manner as required in paragraph (2) of this subsection for the approval or disapproval of the original park preservation plan.

(b) Funding availability and requirements for plan implementation, activities, etc.

(1) Except as provided in paragraph (2) of this subsection, the Secretary shall not make any funds available to the Commission to carry out section 410cc-33 or 410cc-34 of this title until a park preservation plan has been approved under subsection (a) of this section.

(2) Before a park preservation plan is approved under subsection (a) of this section, the Secretary may make available to the Commission such funds as the Commission may request to carry out any activity specified in paragraph (3) of this section. However, no funds shall be made available under this paragraph unless a proposal describing such activity is reviewed and approved by the Secretary.

(3) The Commission may request funds from the Secretary to—

(A) carry out activities to preserve, restore, manage, develop, or maintain any property identified in subsection (c)(1) of this section;

(B) take any action the Commission considers necessary to provide owners of property with national historical or cultural significance within the park or preservation district with emergency assistance for the purpose of preserving and protecting their property in a manner consistent with the purpose of this subchapter; or

(C) acquire in accordance with section 410cc-34 of this title, any property within the park which—

(i) is identified in the report of the Lowell Historic Canal District Commission as a property which should be preserved, restored, managed, developed, or maintained in a manner consistent with the purpose of this subchapter;

(ii) is listed in the National Register of Historic Places, as maintained by the Secretary pursuant to section 470a(a) of this title, and section 462(b) of this title; or

(iii) is determined by the Secretary to be of national significance;

and would be subject to demolition or major alteration in a manner inconsistent with the purpose of this subchapter unless acquired by the Commission.

(c) Requirements for plan

Any plan submitted to the Secretary under subsection (a) of this section shall—

(1) describe the manner in which the Commission, to the extent practicable in accordance with the recommendations in the report of the Lowell Historic Canal District Commission, proposes to provide for the preservation, restoration, management, development, or maintenance of—

(A) the Welles Block, 169 Merrimack Street;

(B) the Jordan Marsh Company Building, 153 Merrimack Street and 15 Kirk Street;

(C) the Yorick Club, 91 Dutton Street;

(D) the Lowell Gas Light Company, 22 Shattuck Street;

(E) St. Anne's Church and Rectory, 237 Merrimack Street;

(F) Lowell Institution for Savings, 18 Shattuck Street;

(G) the Ahepa Building, 31 Kirk Street;

(H) Boott Mill, Foot of John Street;

(I) Lowell Manufacturing Company on Market Street; and

(J) the structure commonly referred to as the Early Residence, 45, 47, and 49 Kirk Street;

(2) identify the properties included in the index established pursuant to subsection (d) of this section;

(3) identify the properties which the Commission intends to acquire under section 410cc-34 of this title and specify how such properties shall be used;

(4) include the standards and criteria established pursuant to subsection (e) of this section;

(5) provide a detailed description of the manner in which the Commission intends to implement the grant and loan programs under section 410cc-33 of this title, including information relating to the estimated amount of such grants and the manner in which such grants shall be awarded by the Commission;

(6) provide for a transportation program by which the Commission shall provide, directly or by agreement with any person or any public or private entity, transportation services and facilities for park and preservation district visitors, including barge equipment, docking facilities, and local rail facilities;

(7) provide for educational and cultural programs to encourage appreciation of the resources of the park and preservation district; and

(8) include a tentative budget for the subsequent five fiscal years.

(d) Establishment and contents of index; modification of index

The Commission shall establish, within one year after the date on which the Commission conducts its first meeting, an index which includes—

(1) any property in the park or preservation district (except for any property identified in section 410cc-21(a)(2) of this title) which should be preserved, restored, managed, developed, maintained, or acquired by the Commission because of its national historic or cultural significance; and

(2) any property which should be preserved, restored, managed, developed, or maintained in a manner compatible with the purpose of this subchapter because of its proximity to (A) any property referred to in paragraph (1) of this subsection, or (B) any property designated in section 410cc-21(a)(2) of this title.

The index may be modified only by a majority vote of the members of the Commission, taken when a quorum is present.

(e) Standards and criteria for construction, preservation, etc., of properties within preservation district and park; authorization; establishment; revisions; publication in Federal Register

(1) The Commission shall establish standards and criteria applicable to the construction, preservation, restoration, alteration, and use of all properties within the preservation district with the advice of the Commonwealth of Massachusetts and of the Secretary, and the consent of the city manager of Lowell.

(2) The Commission shall establish the standards and criteria described in paragraph (1) of this subsection for any property within the park with the advice of the Commonwealth of Massachusetts and the city manager of Lowell and subject to the review and approval of the Secretary.

(3) The Commission shall establish standards and criteria under paragraphs (1) and (2) of this subsection within one year after the date on which the Commission conducts its first meeting. Such standards and criteria may be revised in the same manner in which they were originally established.

(4) The Secretary shall publish the standards and criteria established under paragraphs (1) and (2) of this subsection, and any revisions thereof, in the Federal Register.

(Pub. L. 95-290, title III, §302, June 5, 1978, 92 Stat. 297.)

§ 410cc-33. Financial and technical assistance**(a) Loans to Lowell Development and Financial Corporation for loans for preservation, etc., of property; terms of loan agreement with corporation; determination of compliance by corporation with requirements for loans; repayment by corporation**

The Commission may make loans to the Lowell Development and Financial Corporation (established under chapter 844 of the Massachusetts General Laws and hereinafter referred to as the "corporation") to enable the corporation to provide low interest loans for the preservation, restoration, or development of any property described in section 410cc-32(d)(1) of this title. The Commission may make any such loan to the corporation only after entering into a loan agreement with the corporation which includes the following terms:

(1) The loan to the corporation shall have a maturity of thirty-five years. At the end of such period, the corporation shall repay to the Secretary of the Treasury (in a lump sum) for deposit in the general fund of the Treasury the full amount of the loan and any additional amounts accruing to the corporation pursuant

(2) Any funds obtained by the Secretary in connection with the conveyance of any property pursuant to paragraph (1) shall be covered into the historic preservation fund, in addition to the amounts covered into such fund pursuant to section 470h of this title and subsection (i)² of this section, and shall remain available in such fund until appropriated by the Congress to carry out the purposes of this subchapter.

(h) Assessment of fees in connection with loans

The Secretary may assess appropriate and reasonable fees in connection with insuring loans under this section. Any such fees shall be covered into the Historic Preservation Fund, in addition to the amounts covered into such fund pursuant to section 470h of this title and subsection (g) of this section, and shall remain available in such fund until appropriated by the Congress to carry out purposes of this subchapter.

(i) Treatment of loans as non-Federal funds

Notwithstanding any other provision of law, any loan insured under this section shall be treated as non-Federal funds for the purposes of satisfying any requirement of any other provision of law under which Federal funds to be used for any project or activity are conditioned upon the use of non-Federal funds by the recipient for payment of any portion of the costs of such project or activity.

(j) Authorization of appropriations for payment of losses

Effective after the fiscal year 1981 there are authorized to be appropriated, such sums as may be necessary to cover payments incurred pursuant to subsection (e) of this section.

(k) Eligibility of debt obligation for purchase, etc., by Federal Financing Bank

No debt obligation which is made or committed to be made, or which is insured or committed to be insured, by the Secretary under this section shall be eligible for purchase by, or commitment to purchase by, or sale or issuance to, the Federal Financing Bank.

(Pub. L. 89-665, title I, §104, Oct. 15, 1966, 80 Stat. 917; Pub. L. 96-515, title II, §204, Dec. 12, 1980, 94 Stat. 2994.)

CODIFICATION

In subsec. (c), “December 12, 1980” substituted for “the date of enactment of this Act”. “This Act” probably meant the National Historic Preservation Act Amendments of 1980 (Pub. L. 96-515) rather than the National Historic Preservation Act of 1966 (Pub. L. 89-665).

AMENDMENTS

1980—Subsec. (a). Pub. L. 96-515 substituted provision authorizing the Secretary to establish and maintain a program by which he, upon application of a private lender, insure loans made by such lender to finance any project for the preservation of a property included on the National Register for provision prohibiting grants to surveys or projects receiving assistance from any other Federal program or activity.

Subsec. (b). Pub. L. 96-515 substituted provision prescribing loan qualifications for provision authorizing the President, in order to assure consistency in policies and actions and coordination of planning, acquisition,

and development assistance to States with other related Federal programs, to issue regulations as deemed desirable.

Subsecs. (c) to (k). Pub. L. 96-515 added subsecs. (c) to (k).

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior and such functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with historic preservation under sections 470 to 470a, 470b, and 470c to 470w-6 of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 470e. Recordkeeping; recipients of assistance; audit

The beneficiary of assistance under this subchapter shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(Pub. L. 89-665, title I, §105, Oct. 15, 1966, 80 Stat. 917.)

§ 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

(Pub. L. 89-665, title I, §106, Oct. 15, 1966, 80 Stat. 917; Pub. L. 94-422, title II, §201(3), Sept. 28, 1976, 90 Stat. 1320.)

² So in original. Probably should be “subsection (h)”.

out the provisions of sections 470 to 470b, and 470c to 470n of this title.

REVIEW OF OPERATION OF HISTORIC PRESERVATION FUND AND NATIONAL HISTORIC PRESERVATION PROGRAM; REPORT TO PRESIDENT AND CONGRESS

Pub. L. 96-515, title V, §504, Dec. 12, 1980, 94 Stat. 3005, provided that: "The Secretary shall submit a report directly to the President and the Congress on or before June 1, 1986, reviewing the operation of the Historic Preservation Fund and the national historic preservation program since the enactment of this Act [Dec. 12, 1980] and recommending appropriate funding levels, the time period for the reauthorization for appropriations from the fund, and other appropriate legislative action to be undertaken upon the expiration of the current fund authorization."

§ 470h-1. Acceptance of privately donated funds by Secretary

(a) Authorization; use of funds

In furtherance of the purposes of this subchapter, the Secretary may accept the donation of funds which may be expended by him for projects to acquire, restore, preserve, or recover data from any district, building, structure, site, or object which is listed on the National Register of Historic Places established pursuant to section 470a of this title, so long as the project is owned by a State, any unit of local government, or any nonprofit entity.

(b) Consideration of factors respecting expenditure of funds

In expending said funds, the Secretary shall give due consideration to the following factors: the national significance of the project; its historical value to the community; the imminence of its destruction or loss; and the expressed intentions of the donor. Funds expended under this subsection shall be made available without regard to the matching requirements established by section 470b of this title but the recipient of such funds shall be permitted to utilize them to match any grants from the Historic Preservation Fund established by section 470h of this title.

(c) Transfer of unobligated funds

The Secretary is hereby authorized to transfer unobligated funds previously donated to the Secretary for the purposes of the National Park Service, with the consent of the donor, and any funds so transferred shall be used or expended in accordance with the provisions of this subchapter.

(Pub. L. 89-665, title I, §109, as added Pub. L. 96-244, §1, May 19, 1980, 94 Stat. 346.)

§ 470h-2. Historic properties owned or controlled by Federal agencies

(a) Responsibilities of Federal agencies; program for identification, evaluation, nomination, and protection

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency, in ac-

cordance with Executive Order No. 13006, issued May 21, 1996 (61 Fed. Reg. 26071). Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 470a(g)¹ of this title, any preservation, as may be necessary to carry out this section.

(2) Each Federal agency shall establish (unless exempted pursuant to section 470v of this title), in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure—

(A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;

(B) that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 470f of this title and gives special consideration to the preservation of such values in the case of properties designated as having National significance;

(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;

(D) that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector; and

(E) that the agency's procedures for compliance with section 470f of this title—

(i) are consistent with regulations issued by the Council pursuant to section 470s of this title;

(ii) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered; and

(iii) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3002(c) of title 25.

(b) Records on historic properties to be altered or demolished; deposit in Library of Congress or other appropriate agency

Each Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, an historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such

¹ So in original. Probably should be 470a(h).

records then be deposited, in accordance with section 470a(a) of this title, in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference.

(c) Agency Preservation Officer; responsibilities; qualifications

The head of each Federal agency shall, unless exempted under section 470v of this title, designate a qualified official to be known as the agency's "preservation officer" who shall be responsible for coordinating that agency's activities under this subchapter. Each Preservation Officer may, in order to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 470a(h)² of this title.

(d) Agency programs and projects

Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this subchapter and, give consideration to programs and projects which will further the purposes of this subchapter.

(e) Review of plans of transferees of surplus federally owned historic properties

The Secretary shall review and approve the plans of transferees of surplus federally owned historic properties not later than ninety days after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

(f) Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

(g) Costs of preservation as eligible project costs

Each Federal agency may include the costs of preservation activities of such agency under this subchapter as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this subchapter, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

(h) Annual preservation awards program

The Secretary shall establish an annual preservation awards program under which he may make monetary awards in amounts of not to ex-

ceed \$1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic resources. Such program may include the issuance of annual awards by the President of the United States to any citizen of the United States recommended for such award by the Secretary.

(i) Environmental impact statement

Nothing in this subchapter shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], and nothing in this subchapter shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.

(j) Waiver of provisions in event of natural disaster or imminent threat to national security

The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.

(k) Assistance for adversely affected historic property

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 470f of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

(l) Documentation of decisions respecting undertakings

With respect to any undertaking subject to section 470f of this title which adversely affects any property included in or eligible for inclusion in the National Register, and for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of such agency shall document any decision made pursuant to section 470f of this title. The head of such agency may not delegate his or her responsibilities pursuant to such section. Where a section 106 [16 U.S.C. 470f] memorandum of agreement has been executed with respect to an undertaking, such memorandum shall govern the undertaking and all of its parts.

(Pub. L. 89-665, title I, §110, as added Pub. L. 96-515, title II, §206, Dec. 12, 1980, 94 Stat. 2996; amended Pub. L. 102-575, title XL, §§4006(b), 4012, Oct. 30, 1992, 106 Stat. 4757, 4760; Pub. L. 106-208, §§4, 5(a)(8), May 26, 2000, 114 Stat. 318, 319; Pub. L. 108-352, §13, Oct. 21, 2004, 118 Stat. 1397.)

REFERENCES IN TEXT

Executive Order No. 13006, referred to in subsec. (a)(1), is set out as a note under section 3306 of Title 40, Public Buildings, Property, and Works.

²So in original. Probably should be 470a(i).

sible management of a local nonprofit support organization for support of a national park unit;

(2) standard and legally tenable bylaws and recommended money-handling procedures that can easily be adapted as applied to individual national park units; and

(3) a standard training curriculum to orient and expand the operating expertise of personnel employed by local nonprofit support organizations.

(e) Annual report

The Foundation shall report the progress of the program under subsection (a) of this section in the annual report of the Foundation.

(f) Affiliations

(1) Charter or corporate bylaws

Nothing in this section requires—

(A) a nonprofit support organization or friends group to modify current practices or to affiliate with the Foundation; or

(B) a local nonprofit support organization, established as a result of this section, to be bound through its charter or corporate bylaws to be permanently affiliated with the Foundation.

(2) Establishment

An affiliation with the Foundation shall be established only at the discretion of the governing board of a nonprofit organization.

(Pub. L. 90-209, §11, as added Pub. L. 105-391, title VII, §701, Nov. 13, 1998, 112 Stat. 3520.)

SUBCHAPTER III-A—NATIONAL PARK SYSTEM VISITOR FACILITY

§§ 19aa to 19gg. Omitted

CODIFICATION

Sections 19aa to 19gg were omitted pursuant to section 19gg which provided that all authorities contained in this subchapter expired Sept. 30, 1989.

Section 19aa, Pub. L. 97-433, §2, Jan. 8, 1983, 96 Stat. 2277, defined terms for purposes of this subchapter.

Section 19bb, Pub. L. 97-433, §3, Jan. 8, 1983, 96 Stat. 2277, established in United States Treasury the National Park System Visitor Facilities Fund and provided for funds to be credited to that Fund.

Section 19cc, Pub. L. 97-433, §4, Jan. 8, 1983, 96 Stat. 2277, authorized appropriations to be made available to National Park Foundation to carry out its functions under this subchapter.

Section 19dd, Pub. L. 97-433, §5, Jan. 8, 1983, 96 Stat. 2278, related to administration of Fund projects and required Foundation to include in its annual report a description of projects undertaken and accomplishments made under this subchapter.

Section 19ee, Pub. L. 97-433, §6, Jan. 8, 1983, 96 Stat. 2278, related to authority of National Park Foundation.

Section 19ff, Pub. L. 97-433, §7, Jan. 8, 1983, 96 Stat. 2279, provided that nothing in this subchapter affect responsibilities of Secretary of the Interior under other provisions of law.

Section 19gg, Pub. L. 97-433, §8, Jan. 8, 1983, 96 Stat. 2279, provided that authorities contained in this subchapter expire Sept. 30, 1989, and that any moneys credited to Fund not appropriated, expended, or obligated be transferred to miscellaneous receipts of the Treasury.

SHORT TITLE

Section 1 of Pub. L. 97-433 provided that this subchapter be cited as the “National Park System Visitor Facilities Fund Act”.

SUBCHAPTER III-B—PARK SYSTEM RESOURCE PROTECTION

§ 19jj. Definitions

As used in this subchapter the term:

(a) “Attorney General” means the Attorney General of the United States.

(b) “Damages” includes the following:

(1) Compensation for—

(A)(i) the cost of replacing, restoring, or acquiring the equivalent of a park system resource; and

(ii) the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource; or

(B) the value of the park system resource in the event the resource cannot be replaced or restored.

(2) The cost of damage assessments under section 19jj-2(b) of this title.

(c) “Response costs” means the costs of actions taken by the Secretary of the Interior to prevent or minimize destruction or loss of or injury to park system resources; or to abate or minimize the imminent risk of such destruction, loss, or injury; or to monitor ongoing effects of incidents causing such destruction, loss, or injury.

(d) “Park system resource” means any living or non-living resource that is located within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.

(e) “Regimen” means a water column and submerged lands, up to the high-tide or high-water line.

(f) “Secretary” means the Secretary of the Interior.

(g) “Marine or aquatic park system resource” means any living or non-living part of a marine or aquatic regimen within or is a living part of a marine or aquatic regimen within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.

(Pub. L. 101-337, §1, July 27, 1990, 104 Stat. 379; Pub. L. 104-333, div. I, title VIII, §814(h)(1), (2), Nov. 12, 1996, 110 Stat. 4199.)

AMENDMENTS

1996—Subsec. (d). Pub. L. 104-333, §804(h)(1), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: “‘Park system resource’ means any living or nonliving resource that is located within or is a living part of a marine regimen or a Great Lakes aquatic regimen (including an aquatic regimen within Voyageurs National Park) within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.”

Subsec. (g). Pub. L. 104-333, §814(h)(2), added subsec. (g).

§ 19jj-1. Liability

(a) In general

Subject to subsection (c) of this section, any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.

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issuance of a surface coal mining permit.

§ 60.3 Definitions.

(a) *Building*. A building is a structure created to shelter any form of human activity, such as a house, barn, church, hotel, or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.

Examples

Molly Brown House (Denver, CO)
Meek Mansion and Carriage House (Hayward, CA)
Huron County Courthouse and Jail (Norwalk, OH)
Fairtosh Plantation (Durham vicinity, NC)

(b) *Chief elected local official*. Chief elected local official means the mayor, county judge, county executive or otherwise titled chief elected administrative official who is the elected head of the local political jurisdiction in which the property is located.

(c) *Determination of eligibility*. A determination of eligibility is a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register. A determination of eligibility does not make the property eligible for such benefits as grants, loans, or tax incentives that have listing on the National Register as a prerequisite.

(d) *District*. A district is a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

Examples

Georgetown Historic District (Washington, DC)
Martin Luther King Historic District (Atlanta, GA)
Durango-Silverton Narrow-Gauge Railroad (right-of-way between Durango and Silverton, CO)

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(e) *Federal Preservation Officer*. The Federal Preservation Officer is the official designated by the head of each Federal agency responsible for coordinating that agency's activities under the National Historic Preservation Act of 1966, as amended, and Executive Order 11593 including nominating properties under that agency's ownership or control to the National Register.

(f) *Keeper of the National Register of Historic Places*. The Keeper is the individual who has been delegated the authority by NPS to list properties and determine their eligibility for the National Register. The Keeper may further delegate this authority as he or she deems appropriate.

(g) *Multiple Resource Format submission*. A Multiple Resource Format submission for nominating properties to the National Register is one which includes all or a defined portion of the cultural resources identified in a specified geographical area.

(h) *National Park Service (NPS)*. The National Park Service is the bureau of the Department of Interior to which the Secretary of Interior has delegated the authority and responsibility for administering the National Register program.

(i) *National Register Nomination Form*. National Register Nomination Form means (1) National Register Nomination Form NPS 10-900, with accompanying continuation sheets (where necessary) Form NPS 10-900a, maps and photographs or (2) for Federal nominations, Form No. 10-306, with continuation sheets (where necessary) Form No. 10-300A, maps and photographs. Such nomination forms must be "adequately documented" and "technically and professionally correct and sufficient." To meet these requirements the forms and accompanying maps and photographs must be completed in accord with requirements and guidance in the NPS publication, "How to Complete National Register Forms" and other NPS technical publications on this subject. Descriptions and statements of significance must be prepared in accord with standards generally accepted by academic historians, architectural historians and archeologists.

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The nomination form is a legal document and reference for historical, architectural, and archeological data upon which the protections for listed and eligible properties are founded. The nominating authority certifies that the nomination is adequately documented and technically and professionally correct and sufficient upon nomination.

(j) *Object.* An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

Examples

Delta Queen Steamboat (Cincinnati, OH)
Adams Memorial (Rock Creek Cemetery, Washington, DC)
Sumpter Valley Gold Dredge (Sumpter, OR)

(k) *Owner or owners.* The term owner or owners means those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.

(l) *Site.* A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure.

Examples

Cabin Creek Battlefield (Pensacola vicinity, OK)
Mound Cemetery Mound (Chester vicinity, OH)
Mud Springs Pony Express Station Site (Dalton vicinity, NE)

(m) *State Historic Preservation Officer.* The State Historic Preservation Officer is the person who has been designated by the Governor or chief executive or by State statute in each State to administer the State Historic Preservation Program, including identifying and nominating eligible properties to the National Register and otherwise administering applications for listing historic properties in the National Register.

(n) *State Historic Preservation Program.* The State Historic Preservation Program is the program established by each State and approved by the Secretary of Interior for the purpose of carrying out the provisions of the National Historic Preservation Act of 1966, as amended, and related laws and regulations. Such program shall be approved by the Secretary before the State may nominate properties to the National Register. Any State Historic Preservation Program in effect under prior authority of law before December 12, 1980, shall be treated as an approved program until the Secretary approves a program submitted by the State for purposes of the Amendments or December 12, 1983, unless the Secretary chooses to rescind such approval because of program deficiencies.

(o) *State Review Board.* The State Review Board is a body whose members represent the professional fields of American history, architectural history, historic architecture, prehistoric and historic archeology, and other professional disciplines and may include citizen members. In States with approved State historic preservation programs the State Review Board reviews and approves National Register nominations concerning whether or not they meet the criteria for evaluation prior to their submittal to the NPS.

(p) *Structure.* A structure is a work made up of interdependent and inter-related parts in a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.

Examples

Swanton Covered Railroad Bridge (Swanton vicinity, VT)
Old Point Loma Lighthouse (San Diego, CA)
North Point Water Tower (Milwaukee, WI)
Reber Radio Telescope (Green Bay vicinity, WI)

(q) *Thematic Group Format submission.* A Thematic Group Format submission for nominating properties to the National Register is one which includes a finite group of resources related to one another in a clearly distinguishable way. They may be related to a single historic person, event, or developmental force; of one building type or use, or designed by a single architect;

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for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

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(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a

historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a

phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to paragraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) *Disagreement with finding.* (i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that

contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment*—(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of §800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to §800.6.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

Advisory Council on Historic Preservation

§ 800.6

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be devel-

oped during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects—(1) Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of

the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memo-

randum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory

to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and com-

ment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council—(1) Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

46 FR 24000-03
NOTICES
DEPARTMENT OF THE INTERIOR
Lowell Historic Preservation Commission

Lowell Historic Preservation District and Park; Notice of Standards for Rehabilitation and Construction

Wednesday, April 29, 1981

***24000** AGENCY: Lowell Historic Preservation Commission, Interior.

ACTION: Notice of Standards for Rehabilitation and Construction.

SUMMARY: This notice sets forth the standards established according to [16 U.S.C. 410cc-32\(e\)](#). These standards are applicable to the construction, preservation, restoration, alteration and use of all properties in the Lowell Historic Preservation District and Park in order to protect their historic integrity. The Preservation District is a 500 acre area adjacent to the Lowell National Historical Park; the Park and District contain over 750 buildings, 383 of which are nationally significant.

The City of Lowell is responsible for establishing and enforcing regulations consistent with these standards. The Commission will provide the City with technical assistance to carry out this responsibility.

This notice describes the standards for building materials and design elements for existing buildings and for new construction. Each standard is introduced by a statement of the concern it addresses.

DATE: The standards were approved January 19, 1981 by the Secretary of the Interior.

FOR FURTHER INFORMATION CONTACT:

Sarah Peskin, Planning Director, Lowell Historic Preservation Commission, 204 Middle Street, Lowell, MA 01852.

SUPPLEMENTARY INFORMATION: The development of these standards is one of the Lowell Historic Preservation Commission's major responsibilities as mandated in [16 U.S.C. 410cc-410cc-36](#). These standards were designed specifically to protect the buildings in Lowell and are consistent with the Secretary of the Interior's "Standards *24001 for Rehabilitation." Comprehensive inventories of historic properties in the Preservation District provided background research for the standards. A complete discussion of the standards as they apply to the Preservation District is found in the "Preservation Plan" and "Details of the Plan." Both volumes are available from the Commission's offices at 204 Middle Street, Lowell, MA 01852.

The Standards

I. Preservation of Existing Buildings

1. E-1 Preservation vs. Demolition—General Principles.

(a) Concern: The historical richness of the District is reduced when significant buildings are fully or partially demolished. Owners may believe demolition is the only alternative.

(b) Standards:

New development and reuse programs should be planned so that full or partial demolition of buildings in the District is not necessary.

An incompatible use that would require demolition should be shifted to another site or portion of the site.

Technical assistance can help owners to secure buildings against vandalism and introduce measures to prevent further physical deterioration while a reuse program is being developed

Soundness and reuse potential of a building should not be judged by its present appearance for this may be deceptive. Practical reuse opportunities can be determined through technical assistance.

The retention and repair of historical elements such as woodwork, masonry and metal details (see E-4, E-5, E-6) can be more feasible than it may appear. Technical assistance should be sought before removing any building elements.

If demolition does occur, historic building materials and details should be salvaged for possible future use in buildings of the same style and type.

2. E-2 Historic Architectural Features—General Principles.

(a) Concern: Historic buildings owe their character to the particular blend of their architectural features: scale, rhythm, form, massing and proportion. Rehabilitation should be sympathetic to these design elements.

(b) Standards:

Original building features should whenever feasible be preserved rather than replaced.

If features have been or must be removed, technical assistance can help ascertain the original design of the building and determine the most appropriate techniques for replacement.

Building complexes constructed over time, such as most of the mills, when rehabilitated, should retain the appropriate historic design characteristics of each of their components. The imposition of historically unsympathetic architectural treatments should be avoided.

Recent remodelling that altered the appearance of an historical structure with applied veneers, or the addition of isolated building features (doors, windows, roof or cornice changes, etc.) should be corrected wherever possible to restore or approximate the original design character.

3. E-3 Historic Materials—General Principles.

(a) Concern: Historic character also comes from the use and design of construction materials. It is often thought that appropriate techniques to retard deterioration are unavailable or too expensive.

(b) Standards:

The original materials used in a building, the technical process of repair or replacement required and the availability and cost of appropriate restoration techniques can be determined through technical assistance.

If immediate complete restoration cannot be accomplished, the preservation of deteriorating materials should be assured through partial or temporary measures to stabilize and protect them.

Standards for materials most commonly found in Lowell, as well as for appropriate substitute materials are listed on the following pages, covering:

Masonry: brick, stone, mortar, stucco.

Wood: siding, trim and replacement materials.

Metals: iron and steel, sheet metals, contemporary metal replacements.

Roofing Materials: membrane and built-up roofing, slate, composition shingles, sheet metal.

4. E-4 Masonry.

(a) Concern: Brick and stone masonry are easily damaged by improper cleaning and repair methods. Since these materials are common in Lowell, special care must be taken to preserve them.

(b) Standards:

Do not abrasively blast masonry to clean and/or remove paint. Instead, clean using the gentlest means possible generally by means of an aqueous system which does not damage either the masonry unit or the mortar joints.

Test all cleaning or paint removal methods before proceeding with the full job to determine the gentlest means of producing acceptable results without immediate or long term negative consequences.

Use cleaning methods which are based on these procedures: low pressure water presoaking (less than 60 psi); soft bristle brush or low pressure spray application of mild, highly diluted alkaline or acidic cleaners properly matched to the type of masonry; thorough medium pressure (less than 800 psi) rinsing of cleaning solution after a short time (usually no more than 5 minutes). Some masonry may be adequately cleaned using only the rinsing process, possibly in conjunction with soft fiber brushing.

Remove paint with water rinsable alkali and/or solvent-based chemicals applied by brush and removed with medium pressure spray. As determined by testing, allow paint remover to remain on masonry only long enough to dissolve paint but before soaking into masonry.

Apply coatings to stabilize deteriorated masonry only if they have been proven neither to cause more deterioration or soiling that accelerates over time nor to block the water vapor permeability of the masonry.

Replace missing masonry units by matching the original in size, color, and texture; make new mortar joints or repair existing joints by matching the original in width and tooling.

In the application of new mortar approximate the original in porosity, strength, elasticity, color, and texture.

Request technical assistance if necessary to evaluate the appropriate techniques for a particular building.

On principal facades do not coat masonry with stucco.

Do not paint masonry that historically was not painted unless it can be proven that only such a coating will preserve the masonry.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have, this 7th day of May, 2014, served the foregoing upon the counsel listed in the Service Preference Report via email or via U.S. Mail, as indicated below:

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