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SENATE

{ REPORT
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FEDERAL POWER ACT AMENDMENTS

OCTOBER 15, 1997.—Ordered to be printed

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Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 439]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 439) to provide for Alaska State jurisdiction over small hydroelectric projects, to address voluntary licensing of hydroelectric projects on fresh waters in the State of Hawaii, to provide an exemption for a portion of a hydroelectric project located in the State of New Mexico, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

The amendments are as follows:

1. On page 2, strike line 1 and all that follows through page 4, line 6 and insert the following:

SECTION 1. ALASKA STATE JURISDICTION OVER SMALL HYDROELECTRIC PROJECTS.

Part I of the Federal Power Act (16 U.S.C. 792 et seq.) is amended by adding at the end the following:

“SEC. 32. ALASKA STATE JURISDICTION OVER SMALL HYDROELECTRIC PROJECTS.

“(a) DISCONTINUANCE OF REGULATION BY THE COMMISSION.—Notwithstanding sections 4(e) and 23(b), the Commission shall discontinue exercising licensing and regulatory authority under this Part over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

“(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same ex-

tent provided by licensing and regulation by the Commission under this Part and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

“(2) gives equal consideration to the purposes of—

“(A) energy conservation,

“(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat),

“(C) the protection of recreational opportunities,

“(D) the preservation of other aspects of environmental quality,

“(E) the interests of Alaska Natives, and

“(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

“(3) requires, as a condition of a license for any project works—

“(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate,

“(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army, and

“(C) conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

“(b) DEFINITION OF ‘QUALIFYING PROJECT WORKS’.—For purposes of this section, the term “qualifying project works” means project works—

“(I) that are not part of a project licensed under this Part or exempted from licensing under this Part or section 405 of the Public Utility Regulatory Policies Act of 1978 prior to the date of enactment of this section;

“(2) for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to the date of enactment of subsection (c) (unless such application is withdrawn at the election of the applicant);

“(3) that are part of a project that has a power production capacity of 5,000 kilowatts or less;

“(4) that are located entirely within the boundaries of the State of Alaska; and

“(5) that are not located in whole or in part on any Indian reservation, a conservation system unit (as defined in section 102(4) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(4))), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.

“(c) ELECTION OF STATE LICENSING.—In the case of non-qualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to the enactment of this section, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.

“(d) PROJECT WORKS ON FEDERAL LANDS.—With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to—

“(1) the approval of the Secretary having jurisdiction over such lands, and

“(2) such conditions as the Secretary may prescribe.

“(e) CONSULTATION WITH AFFECTED AGENCIES.—The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska’s regulatory program.

“(f) APPLICATION OF FEDERAL LAWS.—Nothing in this section shall preempt the application of Federal environmental, natural resources, or cultural resources protection laws according to their terms.

“(g) OVERSIGHT BY THE COMMISSION.—The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State’s program to ensure compliance with the provisions of this section.

“(h) RESUMPTION OF COMMISSION AUTHORITY.—Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this Part if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.

“(i) DETERMINATION BY THE COMMISSION.—

“(1) Upon application by the Governor of the State of Alaska, the Commission shall within 30 days commence a review of the State of Alaska’s regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).

“(2) The Commission’s review required by paragraph (1) shall be completed within one year of initiation, and the Commission shall within 30 days thereafter issue a final order determining whether or not the

State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).

"(3) If the Commission fails to issue a final order in accordance with paragraph (2), the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a)."

2. At the end of the bill, add the following:

SEC. 5. TECHNICAL CORRECTION.

Section 6 of the Federal Power Act (16 U.S.C. 799) is amended by adding at the end the following:

"Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

PURPOSE OF THE MEASURE

S. 439, as reported, has five purposes. Section 1 authorizes the State of Alaska to assume jurisdiction to license hydroelectric projects 5 megawatts or smaller. Section 2 precludes the voluntary licensing of hydroelectric projects on fresh waters in the State of Hawaii. Section 3 provides an exemption from licensing for the transmission line facilities associated with the El Vado hydroelectric project located in the State of New Mexico. Section 4 gives the FERC the authority to extend for up to ten years the deadline for commencement of construction of hydroelectric projects. Section 5 corrects an inadvertent deletion of a sentence from the Federal Power Act.

BACKGROUND AND NEED

CURRENT LAW

Part I of the Federal Power Act was enacted in 1920 to establish a "complete scheme of national regulation which would promote 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 Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for hydroelectric projects that (1) are located on waters over which Congress has jurisdiction under the Commerce Clause, (2) are located on public land or a federal reservation, or (3) use surplus water or power from a federal dam. Section 23(b) of the Act requires anyone building or operating a hydroelectric project to obtain a FERC license if the project (1) is located on navigable water, (2) is located on public land or a federal reservation, (3) uses surplus water or power from a federal dam, or (4) is located on a body of water over which Congress has jurisdiction under the Commerce Clause, was built after 1935, and affects interstate or foreign commerce.

Although Congress' power to regulate interstate and foreign commerce includes the power to regulate navigation, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824), Federal Commerce Clause jurisdiction is broader than the concept of navigability. *United States v.*

Appalachian Power Co., 311 U.S. 377, 426–427 (1940). Thus, the circumstances in which the FERC may issue licenses under section 4(e) of the Federal Power Act are broader than the circumstances in which developers of hydroelectric projects must obtain a FERC license. As a result, the FERC has the power to issue a license for a hydroelectric project in response to a voluntary application under section 4(e) of the Federal Power Act, even though the applicant is not required to obtain a license under section 23(b) of the Act. *Cooley v. FERC*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

Current law also gives the FERC the discretion to exempt small hydroelectric projects from the licensing requirements of section 23(b) of the Federal Power Act. Section 30 of the Federal Power Act permits the FERC to exempt hydroelectric projects of up to 40 megawatts located on certain types of conduits and on non-Federal land. Section 405 of the Public Utility Regulatory Policies Act of 1978 permits the FERC to exempt certain projects with a capacity of 5 megawatts or less located at non-Federal dams built before 1977.

THE ALASKAN EXEMPTION

In 1991, the Bush administration proposed a National Energy Strategy designed to reduce our nation's dependence on foreign oil and increase domestic energy security. Among other things, the President's strategy called for legislation "exempting from FERC regulation non-Federal hydropower projects with a capacity of 5 MW or less." The Bush administration asserted that a nationwide 5 MW exemption was "appropriate because the issues raised by small hydropower projects are local and ought not to require a FERC decision; and small projects have little or no impact on navigation and interstate commerce, the motivation for FERC jurisdiction over many projects." *National Energy Strategy*, p. 123 (1991).

The Committee on Energy and Natural Resources included a nationwide 5 megawatt exemption in the energy policy bill (S. 1220) it reported in 1991. S. Rept. 102–72, pp. 51–52, 243–244. The Senate adopted an amendment to strike the exemption, however, and the Energy Policy Act of 1992 became law without the 5 megawatt exemption.

In both the 103rd and 104th Congresses, the Committee included 5 megawatt exemptions for projects in Alaska only in hydroelectric bills (S. 2384 in the 103rd Congress; S. 737 in the 104th Congress). These provisions would have given the State of Alaska the option of assuming licensing authority over hydroelectric projects in Alaska that have a capacity of 5 megawatts or less. Although the Senate passed both bills, neither was enacted into law.

Section 1 of S. 439, like the two earlier provisions, is premised on the belief that Alaska presents special circumstances that favor local control over projects that would otherwise be subject to FERC licensing. Unlike the lower 48 states, Alaska is not connected to the interstate electric grid. Small hydro is especially important in remote sections of Alaska, where the availability of energy sources is limited and the resulting cost of producing electricity is high. Over 150 villages in Alaska are not interconnected into any larger electrical grid, and each is supplied with power almost exclusively from its own diesel generators—the most expensive type of electric

power producer. As a result, the cost of power in these communities is the highest in the United States. Residential rates are between 40 and 45 cents per kilowatt-hour, for to five times the average residential rate in the United States. In the absence of hydroelectric power, the only practical source of electric power is small-scale diesel generation, which is not only very expensive but also can have undesirable environmental impacts. FERC testified at the hearing on S. 439 that, while they would object to a generic 5 MW exemption for projects located in the lower 48 States, they would not object to an Alaska exemption, based on Alaska's unique circumstances, provided an Alaska program would adequately evaluate project impacts.

THE HAWAIIAN EXEMPTION

The State of Hawaii has also made a case for a limited exemption from FERC licensing based on Hawaii's unique circumstances. Hawaii's streams are isolated on individual islands and run quickly down steep volcanic slopes. There are no interstate rivers in Hawaii, few if any streams crossing Federal land, and no Federal dams. Hawaii's streams are generally not navigable. Hawaii has a unique body of water law that has evolved from Native Hawaiian custom and a comprehensive regulatory program that protects water resources.

In short, none of the bases for FERC's licensing jurisdiction under section 23(b) of the Federal Power Act appear to exist in Hawaii. Indeed, FERC has never licensed a hydroelectric project in Hawaii and has no applications to license one pending.

Nonetheless, as explained under "Current law" above, section 4(e) of the Federal Power Act gives FERC the discretion to license hydroelectric projects in response to voluntary applications even though the project is not required to be licensed under section 23(b) of the Act. The Attorney General of Hawaii has testified that FERC's voluntary licensing authority "can lead to: (1) claim jumping by business competitors; and (2) attempts to use FERC's claimed preemptive authority to override state stream regulation" to the detriment of Hawaii's waters. S. Hrg. 103-924, p. 14 (1994).

In 1991, the Committee on Energy and Natural Resources favorably reported legislation to eliminate the FERC's voluntary licensing authority over hydroelectric projects on fresh waters in Hawaii as part of its energy policy bill (S. 1220) in the 102nd Congress. S. Rept. 102-72, p. 245. The Senate passed an energy bill (S. 2166) with the Hawaiian exemption in it in 1992, but the provision was substantially rewritten in conference. As ultimately enacted, the provision did not eliminate the FERC's voluntary licensing authority over projects in Hawaii, though it did direct the FERC to study hydroelectric licensing in Hawaii and report to Congress on whether projects in Hawaii should be exempt from FERC licensing.

The FERC submitted its report in 1994. The report did not reach any overall conclusion as to whether the Federal Power Act should be amended to exempt projects on the fresh waters of Hawaii from the FERC's jurisdiction, though it did note that the FERC had never licensed a hydroelectric project in Hawaii.

THE EL VADO EXEMPTION

In 1985, the FERC granted a license to the County of Los Alamos, New Mexico for the El Vado Hydroelectric Project, an 8 megawatt project on the Rio Chama, a tributary of the Rio Grande. The licensed project includes a 12-mile-long transmission line, which is essential to the project's operation. The transmission line is, however, owned and operated by a separate entity, the Arriba Electric Cooperative.

Because the transmission line is critical to the operation of the licensed project, the FERC required the County of Los Alamos to obtain control over the line, either by purchase or contract. Alternatively, FERC said that Arriba could join Los Alamos as a co-licensee of the project or obtain a separate license for the transmission line. Twelve years after FERC licensed the project, Los Alamos still has not complied with this licensing requirement.

Legislation is needed to exempt the transmission line from FERC's licensing requirement or FERC will be compelled to initiate enforcement action against Los Alamos.

EXTENSION OF THE COMMENCEMENT OF CONSTRUCTION DEADLINE

Section 13 of the Federal Power Act requires a licensee to commence construction of its hydroelectric project within two years. Failing that, section 13 allows the FERC to issue a single, two-year extension. If the licensee does not commence construction by the end of that time, it loses its license. By law, FERC can grant no more extensions.

In the current electric market, a number of licensees are not able to obtain the power sales contracts necessary to secure financing to permit them to commence construction. If the license is lost, the licensees's substantial time and monetary investment in obtaining a FERC license are likely to be lost. Subsequently, if the licensee tries to resume the project, it must begin the FERC licensing process anew.

Over two dozen bills were introduced in the House and Senate during the 104th Congress to extend the commencement of construction deadline for individual projects on a case-by-case basis. Congress ultimately passed legislation to extend all of the projects, but not before some licenses had terminated by operation of law. Additional extension bills have been introduced and are now pending before the Committee on Energy and Natural Resources in this Congress. Legislation is needed to give the FERC general authority to extend the commencement of construction deadline administratively to avoid the need for Congress to act on individual extensions on a case-by-case basis.

LEGISLATIVE HISTORY

The first three sections of S. 439 were reported from the Committee on Energy and Natural Resources and passed by the Senate as part of S. 2384 in the 103rd Congress and S. 737 in the 104th Congress, Section 2, the Hawaiian exemption, also passed the Senate separately as S. 2115 in the 103rd Congress. Section 2 is also being separately reported as S. 846 in this Congress.

S. 439 was introduced by Mr. Murkowski, along with Senators Akaka, Domenici and Kyl on March 13, 1997. A hearing was held by the Subcommittee on Water and Power on June 10, 1997. At the Committee's September 24, 1997, business meeting, the Committee adopted an amendment offered by Senator Bumpers in the form of a full substitute to section 1, as further amended by an amendment offered by Senator Murkowski. The Committee also adopted a joint-staff recommended amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on September 24, 1997, by a unanimous vote of a quorum present, recommends that the Senate pass S. 439 as amended.

The rollcall vote on reporting the measure was 20 yeas, 0 nays, as follows:

YEAS	NAYS
Mr. Murkowski	
Mr. Domenici	
Mr. Nickles ¹	
Mr. Craig	
Mr. Campbell	
Mr. Thomas ¹	
Mr. Kyl	
Mr. Grams	
Mr. Smith	
Mr. Gorton	
Mr. Burns ¹	
Mr. Bumpers	
Mr. Ford	
Mr. Bingaman ¹	
Mr. Akaka	
Mr. Dorgan	
Mr. Graham ¹	
Mr. Wyden ¹	
Mr. Johnson	
Ms. Landrieu	

¹ Indicates vote by proxy.

COMMITTEE AMENDMENTS

The Committee adopted an amendment in the nature of a substitute to section 1. As introduced, section 1 transferred licensing and regulatory authority over qualifying hydroelectric projects in Alaska from the FERC to the State of Alaska by purporting to grant the State "exclusive authority to authorize such project works under State law." The Committee amendment accomplishes the transfer by directing the FERC to discontinue exercising its licensing and regulatory authority, notwithstanding sections 4(e) and 23(b) of the Federal Power Act.

Section 1 as introduced made the transfer of authority effective when the Governor of Alaska notified the Secretary of Energy that the State had an adequate regulatory program in place. The Committee amendment requires the Federal Energy Regulatory Com-

mission, in consultation with the Secretaries of the Interior, Agriculture, and Commerce, to certify that the State's program is adequate.

The Committee amendment to section 1 defines in greater detail the tests the State's regulatory program must meet for certification. First, it must protect the public interest, certain enumerated interests, and the environment to the same extent provided by licensing and regulation by the FERC under federal law. Second, consistent with the last sentence of section 4(e) of the Federal Power Act, the State program must, in addition to the power and development purposes for which licenses are issued, give equal consideration to the purposes listed in section 4(e) of the Federal Power Act, the interests of Alaska Natives, and other beneficial public uses, including irrigation, flood control, water supply, and navigation. Third, the State must condition licenses upon the navigation and fish and wildlife conditions set forth in sections 4(e), 10(j), and 18 of the Federal Power Act.

The Committee amendment to section 1 also requires the State of Alaska to notify the FERC not later than 30 days after making any significant modification to its regulatory program and it requires the FERC to review the State's program periodically to ensure compliance. If the FERC finds that the State of Alaska has not complied with one or more requirements, the Committee amendment requires the FERC to reassert its licensing and regulatory authority under section 4(e) and 23(b) of the Federal Power Act.

Finally, the Committee amendment to section 1 requires the FERC to commence its review of the State's regulatory program no later than 30 days after the Governor of Alaska requests the FERC to certify its program. The FERC must complete its review within one year and issue a final order approving or disapproving the State's plan within 30 days after completing its review. If the Commission fails to issue a final order within the allotted time, the State's program shall be deemed to be in compliance.

In addition, the Committee adopted a second amendment adding a new section 5 to the bill. Section 5 restores language mistakenly deleted from section 6 of the Federal Power Act in 1996. Section 6 of the Federal Power Act originally consisted of four sentences. Both the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106, sec. 4321(i)(6)) and the General Accounting Office Act of 1996 (Public Law 104-316, sec. 108(a)) struck the "last sentence" of section 6, which required the FERC to file copies of licenses with the General Accounting Office. By the time the General Accounting Office Act became law on October 19, 1996, however, the "last sentence" was the third sentence since the fourth sentence had already been repealed by the Defense Authorization Act when it became law in February 1996. As a result, the General Accounting Office Act repealed the third sentence, which governed license revocation and which the FERC testified is "highly significant." The second Committee amendment restores the original text of the third sentence to section 6 of the Federal Power Act.

SECTION-BY-SECTION ANALYSIS

Section I directs the FERC to discontinue exercising its licensing and regulatory authority over qualifying project works in the State of Alaska upon certifying that the State has in place a regulatory program for such projects that provide the same level of protection to the public interest and the environment as Federal regulation, gives certain non-power interests equal consideration with power development interests, and requires licensees to observe the same conditions for navigation and fish and wildlife protection that are now required by Federal law.

Section 2 eliminates the FERC's authority to issue voluntarily requested licenses for hydroelectric projects located on fresh waters in the State of Hawaii.

Section 3 exempts from FERC licensing a transmission line associated with the El Vado hydroelectric project in New Mexico.

Section 4 amends section 13 of the Federal Power Act to give the FERC the authority to extend for up to 10 years the deadline for the commencement of construction of a hydroelectric project.

Section 5 reenacts the third sentence of section 6 of the Federal Power Act, which was inadvertently repealed by the General Accounting Office Act of 1996.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 30, 1997.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 439, a bill to provide for Alaska state jurisdiction over small hydroelectric projects, to address voluntary licensing of hydroelectric projects on fresh waters in the state of Hawaii, to provide an exemption for portion of a hydroelectric project located in the state of New Mexico, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Kim Cawley (for federal costs) and Pepper Santalucia (for the state and local impact).

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

Enclosure.

S. 439—A bill to provide for Alaska state jurisdiction over small hydroelectric projects, to address voluntary licensing of hydroelectric projects on fresh waters in the state of Hawaii, to provide an exemption for portion of a hydroelectric project located in the state of New Mexico, and for other purposes

The bill would provide exemptions for certain hydroelectric projects currently subject to licensing by the Federal Energy Regulatory Commission (FERC) in Alaska, Hawaii, and New Mexico. It also would allow FERC to extend the deadline for commencement of hydroelectric construction projects for up to ten years.

CBO estimates that enacting this bill would have no net effect on the federal budget. S. 439 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995. The bill would limit FERC's authority to issue licenses for hydroelectric projects in Hawaii, leaving the state with the authority to license any affected projects. Any increase in the state's workload would be the result of its own regulatory process. The bill would also allow the state of Alaska to apply to FERC for jurisdiction over certain small hydroelectric projects.

These provisions may have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enactment of this bill would not affect direct spending or receipts. Therefore, pay-as-you go procedures would not apply to the bill.

The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Pepper Santalucia (for the state and local impact). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out this measure.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the provisions of the bill. Therefore, there would be no impact on personal privacy.

Little if any additional paperwork would result from the enactment of this measure.

EXECUTIVE COMMUNICATIONS

The pertinent communications received by the Committee from the Federal Energy Regulatory Commission, the Department of the Interior and the Department of Commerce setting forth Executive agency views relating to this measure are set forth below:

PREPARED STATEMENT OF SUSAN TOMASKY, GENERAL
COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee: My name is Susan Tomasky, and I am General Counsel for the Federal Energy Regulatory Commission. I am appearing before you as a Commission staff witness and do not speak for individual members of the Commission.

Thank you for the opportunity to be here today to comment on S. 439, a bill affecting the Federal Energy Regulatory Commission's regulation of non-federal hydropower projects pursuant to Part I of the Federal Power Act and related statutes.

S. 439, SECTION 1: SMALL HYDROELECTRIC PROJECTS IN
ALASKA

Section 1 of S. 439 provides (with certain exceptions discussed below) that, at such time as the Governor of the State of Alaska notifies the Secretary of Energy that the State has in place a process for regulating hydropower project works having a power production capacity of 5,000 kilowatts (5 megawatts or MW) or less, according to specified public interest standards, Alaska shall have exclusive authority to authorize all such project works that are not under Commission license nor within an application for preliminary permit or license that has been accepted for filing as of the date of the provision's enactment. If such project works are under a Commission license as of the date of enactment, then the licensee may elect to transfer the project to state regulation.

The bill provides that project works are not removed or removable from Commission jurisdiction if they are located in whole or in part on any Indian reservation, unit of the National Park System, component of the Wild and Scenic Rivers System, or segment of a river designated for study for potential addition to such system. State authorizations for project works located in whole or in part on other Federal lands shall be subject to the approval of, and terms and conditions imposed by, the Secretary having jurisdiction with respect to such Federal lands. Finally, the transfer to the State of the above-described authority does not preempt the application of Federal environmental, natural, or cultural resources protection laws according to their terms.

FERC-REGULATED HYDROPOWER PROJECTS IN THE STATE OF
ALASKA

The Commission authorizes the construction, operation, and maintenance of hydropower projects under three different instruments: licenses issued pursuant to Part I of the Federal Power Act; exemptions from licensing, issued pursuant to Section 30 of the FPA for hydropower projects of up to 40 MW located on certain types of conduits and on non-federal land (conduit exemptions); and exemptions

from licensing, issued pursuant to Section 405 of the Public Utility Regulatory Policies Act of 1978 for certain projects with 5 MW capacity or less located at non-federal pre-1977 dams (5 MW exemptions). In addition, under Section 4(f) of the Federal Power Act the Commission issues preliminary permits under which permittees may study the feasibility of a project proposal while holding the right of priority to apply for a license or exemption.

There are currently 21 licensed projects in Alaska. Of these, 15 projects occupy National Forest lands administered by the U.S. Forest Service, and 6 projects occupy federal lands administered by the U.S. Bureau of Land Management (BLM). Of the total of 21 licensed projects, 11 projects are 5 MW or less, and 10 projects are larger than 5 MW.

There are 3 exempted projects in Alaska, all under 5 MW. One project occupies National Forest lands, and two occupy non-federal lands.

According to the Commission's computer data base, it appears that none of the licensed or exempted projects occupies an Indian reservation. One project occupies a National Moose Range; one project is at least partly within the Skagway-White Pass National Historic Landmark; one project occupies a segment of the Deer Mountain-John Mountain Trail, which is part of the National Recreation Trail System; and one project occupies the Kodiak National Wildlife Refuge. Effective with the passage of the Energy Policy Act of 1992, there are new criteria governing the Commission's power to authorize projects that would occupy a unit of the National Park System.

The data base does not indicate that there are any existing projects located on rivers that are now included, or being studied for inclusion, in the National Wild and Scenic Rivers System. I note that under Section 7(a) of the Wild and Scenic Rivers Act the Commission is barred from licensing (or exempting from licensing) the construction of hydropower project works on or directly affecting any river included, or being studied for inclusion, in the System.

There are currently pending before the Commission two Alaska license applications, both of which have been accepted for filing. The applications are for a 6 MW project, to be located on lands belonging to a Native corporation, and a 9.6 MW project, to be located on National Forest lands.

Finally, there are a number of potential Alaska projects at the pre-development application stage. Eight project proposals are currently being studied under issued preliminary permits. Of these, two would be projects over 5 MW, both to occupy National Forest lands. Six would be projects 5 MW or less, of which three would occupy National Forest lands, one would occupy BLM lands, and two would occupy non-federal lands. There are also pending three Alaska permit applications, to study a 2.5 MW, 1.7 MW, and 0.8 MW project, all on National Forest lands.

COMMENTS

As a general matter, we do not support legislation removing non-federal hydropower projects from the Commission's jurisdiction based on the size of the project. A project with a small capacity can have a very significant impact both at the project site and far beyond its immediate environs. That impact must be evaluated. Pursuant to the mandates of the Federal Power Act, the Commission performs that evaluation, and in doing so gives equal consideration to development interests and environmental resources in determining whether, and with what requirements, to authorize hydropower development.

The underlying premise of the legislation is that Alaska presents the Congress with a special case that favors local control over projects that would otherwise be subject to the Commission's jurisdiction. Inasmuch as Alaska is not interconnected with the interstate electric grid in the Lower 48 states, we do not object to the legislation, provided that the state program will adequately evaluate project impacts. However, we would object to a generic 5 MW exemption for projects located in the Lower 48 states. Because some 70 percent of the projects the Commission regulates are 5 MW or smaller, such an exemption would have a deleterious effect on the Commission's ability to address the cumulative environmental effects of all non-federal hydropower projects in a river basin or watershed.

There are a number of technical issues associated with Section 1 of S. 439. I will address these next.

The bill requires the Governor of the State of Alaska to notify the Secretary of Energy that the State has a regulatory program in place. Under the Department of Energy Organization Act, the Secretary is not charged with responsibility for administering the hydropower development program. Rather, that responsibility resides with the Commission. I would respectfully suggest that the notification be addressed to the Chair of the Commission rather than to the Secretary. We would, in turn, notify the Secretary of Energy, the Secretary of the Interior, the Secretary of Commerce, and the Secretary of Agriculture, as required according to the jurisdiction of federal lands affected.

The bill provides for the transfer to the State of Alaska of the Commission's jurisdiction over the hydroelectric "project works" of certain categories of projects. Section 3(12) of the Federal Power Act defines "project works" as "the physical structures of a project." Pursuant to Section 3(11) of the Act, these include all powerhouses, water conduits, dams and appurtenant works and structures (including navigation structures) which are a part of a complete hydropower unit of development; all associated storage, diverting, or forebay reservoirs, the primary transmission lines carrying projects power to the distribution system, and all miscellaneous structures used and useful in connection with the hydropower unit; and all ditches, dams,

or reservoirs that are necessary or appropriate in the maintenance and operation of such unit.

The bill provides no standard for defining “project works having a power production capability of 5,000 kilowatts (5 megawatts) or less.” Absent statutory criteria to the contrary, there is the potential for abuse in “packaging” proposed project works in a manner that artificially segregates into 5-megawatt groupings the power production components of what is in fact a single unit of development, in order to evade Commission jurisdiction. Or a developer may deliberately underutilize the water power potential of a stream in order to evade Commission jurisdiction. Creating these incentives would not in our view foster public interest objectives. We therefore recommend that the bill specify that the power production capacity of a project be determined in accord with the Federal Power Act’s definition of a project.

The bill does not address the Commission’s exemption authority. As I described above, the Commission has two sources of statutory authority to issue exemptions from licensing for qualifying projects. An exemption is not tantamount to federal deregulation; rather, it is a form of lesser regulation designed for projects which by their nature should not ordinarily entail a significant impact on the environment. Exempted projects are subject to mandatory fish and wildlife conditions imposed by state and federal fish and wildlife agencies. Inasmuch as the bill does not mention exemptions, projects exempted as of the date of the bill’s enactment would not be subject to transfer to State regulation.

Any future development proposal of 5 megawatts or less (and not located on expected federal lands), whether or not it would have qualified for an exemption, apparently comes under State, not Commission, jurisdiction. This would appear to be the intent, even though the bill states that, as to qualifying project works, “the State of Alaska shall have the exclusive authority to authorize such project works under State law, in lieu of licensing by the Commission under otherwise applicable provisions of this part [Part I of the FPA].” Assuming I am correctly understanding the intent, the bill should provide for the State’s exclusive authority, “in lieu of licensing and exemption from licensing by the Commission under otherwise applicable provisions of this part and of Section 405 of the Public Utility Regulatory Policies Act of 1978.”

As noted, the State’s “exclusive” authority over qualifying project works is in lieu of the Commission’s authority. However, the bill provides that no transfer of authority to the State “shall preempt the application of Federal environment, natural, or cultural resources protection laws according to their terms.” In addition, with the removal of the Commission’s authority, other Federal agencies may have jurisdiction over certain projects. For example, removal of the Commission’s jurisdiction leaves intact the ju-

jurisdiction of the U.S. Army Corps of Engineers under the Rivers and Harbors Act of 1899, which requires a Corps permit for new construction in navigable waters. Presumably, any Corps action under the 1899 Act would be a federal action subject to applicable federal procedural and resource protection laws, such as the National Environmental Policy Act, the Clean Water Act, the Historic Preservation Act, the Endangered Species Act, and so forth.

S. 439, SECTION 2: VOLUNTARY LICENSING OF HYDROELECTRIC PROJECTS IN THE STATE OF HAWAII

Section 2 of S. 439 would amend Section 4(e) of the Federal Power Act by inserting the following parenthetical limitation: “(except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act)”. These words would modify the reference to “several States,” so as to partially limit the authority of the Commission to issue licenses under Section 4(e) with respect to proposed hydropower projects in Hawaii.

Section 4(e) of the Act contains the Commission’s authority to issue licenses for hydropower projects. Section 23(b)(1) sets forth the circumstances under which a project cannot be constructed, operated, or maintained without a license. In certain circumstances, the Commission has authority to issue a license for a hydropower project in response to a voluntary application under Section 4(e), even though licensing is not required under Section 23(b)(1). See *Cooley v. Federal Energy Regulatory Commission*, 843 F.2d 1464, 1469 (D.C. Air. 1988).

Under S. 439, the Commission would continue to have jurisdiction to issue licenses to construct, operate, and maintain hydropower projects in Hawaii whenever Section 23(b)(1) would require a license for such activities. However, the Commission would be precluded from issuing a license for a project in Hawaii if Section 23(b)(1) did not require a license for such activities.

COMMENTS

Pursuant to Section 2408 of the Energy Policy Act of 1992, the Commission on April 13, 1994, submitted to the Senate and House Committees a study of regulation of hydropower projects in Hawaii. The study noted that the Commission has never licensed a hydropower project in Hawaii, and is thus not currently regulating any project in Hawaii. Our data bases currently do not show any pending or outstanding preliminary permits, license, or exemptions in the State of Hawaii. Therefore, Section 2 of S. 439 would not disrupt the Commission’s current operations, and we would not object to its enactment.

S. 439, SECTION 3: EL VADO PROJECT TRANSMISSION LINE

Section 3 of S. 439 would exempt from regulation under Part I of the Federal Power Act a 12-mile transmission

line which is a project work of the licensed El Vado Hydroelectric Project, FERC No. 5226.

In 1985, the Commission issued a license to the County of Los Alamos, New Mexico, for the 8-megawatt El Vado Hydroelectric Project, on the Rio Chama, a tributary of the Rio Grande, in Rio Arriba County, New Mexico. The licensed project includes a 12-mile-long, 69-Kilovolt primary transmission line, which is necessary to the operation of the project. The transmission line is, however, owned and operated by a separate entity, Arriba Electric Cooperative. The license gave Los Alamos five years to acquire the necessary title or contractual operational control over the transmission line. Alternatively, the Cooperative could have joined Los Alamos as co-licensee, or could have obtained a separate license for the transmission line. The Cooperative apparently did not wish to pursue either course. Twelve years after the license was issued, the licensee has still failed to comply with the requirement that it obtain necessary property rights over the line, despite repeated letters and compliance orders from the Commission staff.

The transmission line has been constructed and is in operation, and we are not aware of any problems associated with it. We are also not aware of any aspect of this particular primary transmission line that would distinguish it from other hydroelectric project primary transmission lines. In addition, this licensee's years-long lack of compliance with a fundamental license requirement is a troubling factor. Consequently, we do not support Section 3 of S. 439.

Whatever course of action the Congress ultimately chooses, we do urge prompt resolution of this matter. We have had pending a compliance action regarding this line for three years. We have held the action in abeyance because of congressional interest in addressing the matter legislatively.

S. 439, SECTION 4: EXTENSION OF STATUTORY DEADLINE FOR COMMENCEMENT OF PROJECT CONSTRUCTION

Section 4 of S. 439 would amend Section 13 of the Federal Power Act to authorize the Commission to extend the period for the commencement of project construction to not longer than ten years from the issuance date of the license, when not incompatible with the public interest.

As a general matter, we believe the four-year period provided under existing law is long enough for licensees to determine if a project is viable and to begin construction. Sometimes four years is not adequate due to externalities such as lack of a dredge and fill permit under Section 404 of the Clean Water Act, the need to await modifications to the Federal dam at which the project is to be located, or the pendency of Endangered Species Act issues. In such cases, the Commission will generally stay the construction deadline until the obstacle is removed. However, the most common reason for failure to commence project construc-

tion is the licensee's lack of a power sales contract or other form of financing. The Commission has declined to stay construction deadlines for this reason, and we do not believe a generic amendment to the statutory deadline is warranted. However, because the bill permits the Commission to refuse an extension if it is incompatible with the public interest, we do not object to enactment of this amendment.

THE SECRETARY OF THE INTERIOR,
Washington, September 19, 1997.

Hon. FRANK MURKOWSKI,
*Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department with respect to a bill, S. 439, to Provide for Alaska State jurisdiction over small hydroelectric projects, and for other purposes.

The Department is strongly opposed to S. 439.

The proposed legislation would make several amendments to the Federal Power Act (FPA) (16 U.S.C. 179a et seq.). Section 1 would amend section 23 of the FPA to transfer jurisdiction over hydroelectric projects of 5,000 kilowatts or less from the Federal Energy Regulatory Commission (FERC) to the State of Alaska. Section 2 would provide for voluntary licensing of hydroelectric projects in fresh waters in the State of Hawaii. Section 3 would exempt from licensing the transmission line portion of a hydroelectric project located in New Mexico. Section 4 extends the period for the commencement of construction for hydroelectric projects.

Section 1 of S. 439 would amend section 23 of the FPA by adding new subsections (c), (d), (e), and (f). Subsection (c) would transfer to the State of Alaska hydroelectric projects in the State that are not part of a project already licensed, that are not part of a project for which an application for license has been received, that have a production capacity of 5,000 kilowatts or less, and that are not located on any Indian reservation, unit of the National Park System, component of the Wild and Scenic Rivers System or segment of a river designated for study for potential addition to the system. Subsection (d) allows licensees already licensed by FERC to transfer jurisdiction to the State.

In general, the Department objects to the focus of this legislation, which seeks to remove certain hydroelectric projects from Federal jurisdiction. The Department opposed similar amendments in 1994, and we continue to oppose the effort to remove hydroelectric projects from Federal jurisdiction. Allowing Alaska or Hawaii to assert jurisdiction over certain hydroelectric projects contradicts the intent of the FPA, which was enacted to establish a uniform system of licensing over hydroelectric projects in the United States. The FPA already includes provisions for ex-

empting small projects and excludes from its jurisdiction certain projects which fail to meet the mandatory licensing criteria in section 23. Allowing one or two States to begin exercising independent jurisdiction will very likely lead to similar provisions for other States and a patchwork of regulatory programs and of related environmental review and enforcement, thereby defeating the intent of Congress in enacting the FPA in 1920 and subsequent Federal laws.

The transfer would take effect upon the Governor's notification to the Secretary of Energy that the State has in place a comprehensive process for regulating the facilities. The State process is to give appropriate consideration to the improvement or development of the State's waterways for the user or benefit of commerce, for the improvement and use of water power development, for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds), for Indian rights, and for other beneficial public uses, including irrigation, flood control, water supply, recreational and other purposes.

We object to the Governor's unilateral determination and notification. Under this proposal the determination that the State's regulations give appropriate consideration to a variety of factors and circumstances is made unilaterally by the State. The State merely notifies the Secretary of Energy when it has regulations in place. There is no provision for approval or even review or consultation in the development of the State process by the Secretary of Energy or by any other Federal agency with an interest in the many purposes specified to be covered by the plan to be proposed by the Governor.

We also object to the limited exceptions provided in subsection (c). Exceptions include Indian reservations, National Parks, and wild and scenic rivers systems lands, but not National Wildlife Refuge System units and other conservation units, components of the National Wilderness Preservation System, wilderness study areas, other areas of critical environmental concern, and lands provided to Alaska Natives pursuant to the Alaska Native Claims Settlement Act.

Subsection (e) requires that State authorizations for project works located in whole or in part on Federal lands be subject to the approval of the Secretary having jurisdiction with respect to such lands, and subject to such terms and conditions as the Secretary may prescribe. Subsection (f) States that Federal environmental, natural and cultural resource protection laws continue to apply to the lands transferred under subsection (c). These provisions, while potentially helpful, leave many questions unanswered.

Would the State enforce compliance of federally-identified terms and conditions under the State authorization? What mechanism or procedure would be available if the Secretary with jurisdiction did not agree with the State's enforcement actions?

Applications for license filed with FERC under Sec. 24 of the FPA withdraw public land from the operation of public land laws. The issuance of a license by FERC further withdraws the land from mining. Would applications and authorizations filed with and granted by the State of Alaska also segregate the public lands Section 24 of the FPA also controls the opening of withdrawn lands. What would the State's role and authority be with regard to opening Federal lands?

Since enactment of Federal Land Policy and Management Act (43 U.S.C. 1701 et seq.) (FLPMA), power projects involving Bureau of Land Management (BLM) lands require both a FERC license (or an exemption from licensing) and a FLPMA right-of-way. Does this section include Federal land use authorization with the issuance of the State authorization, or would there be a separate FLPMA right of way?

This bill would remove small projects in Alaska from the Commission's evaluation under the National Environmental Policy Act (NEPA). How would NEPA be applied to the State process?

In the absence of a current State capability, the Department cannot predict which role and authority we would have in an as yet undisclosed State process. This legislation could seriously impair or eliminate our review and mitigation formulation roles under the Federal Power Act and the Fish & Wildlife Coordination Act and the mandatory conditioning authority now exercised by the Federal fishery agencies to prescribe conditions for fish passage. Our mission requires us to exercise trust responsibility for migratory birds, resident and anadromous fish, endangered species, and certain marine mammals. If we do not have authority under this bill at least as strong as under the FPA, we will be unable to undertake our trust responsibilities and the Nation's and Alaska's fish and wildlife resources will suffer.

The references included in the bill to "Federal lands" and to "any Indian reservation" do not adequately address the rights of Alaska Natives afforded under the Alaska Native Claims Settlement Act, and the Alaska National Interest Conservation Lands Act and thus may fail to provide adequate protection of Alaska Natives, their lands, and their traditional way of life. The bill is silent on Alaska Native corporations, their lands and their selections. Moreover, the Department objects to any provision in the bill which may be construed to assign to a State authority to delineate Indian rights.

There is no provision in the proposed legislation to assure that State promulgated regulations would provide appropriate consideration of responsibilities under the subsistence provisions of section VIII of ANILCA.

Section 2 of the bill amends section 4(e) of the FPA to "except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act." The ap-

plicability of this provision is unclear. Apparently, it seeks to exclude projects on fresh waters in Hawaii from Federal licensing, but limits that exclusion to those projects which do not require licensing under section 23 and which would be exempt from Federal licensing even without this proposal. In any case this provision will likely fragment Federal licensing authority.

Section 3 would exempt from FERC jurisdiction a 12-mile transmission line extending from the El Vado Project switchyard. FERC issued a compliance order in 1993, finding the Project Licensee in violation of its license, in that the transmission line was not located within the project boundaries. Apparently, through this exemption, the Licensee seeks to remove itself from FERC's enforcement and penalty authority, even though when accepting the license, it accepted the condition requiring location of the transmission line within the project boundaries. We oppose this exception. FERC's enforcement authority, and the various reviews and conditions attendant to the license, will be meaningless if licensees can seek legislative exemption from the license conditions to which they originally agreed.

Section 4 amends section 13 of the FPA, which currently provides for a two year period in which to commence construction of a project, to extend the commencement of construction period up to 10 years. Currently, section 13 allows the Commission to grant an extension of two years for commencement, and additional extensions for the completion of construction. Numerous licensees now obtain legislative extensions, a practice about which the Department expressed concerns on the 1994 amendments, which contained several project-specific extensions. This proposal for a general extension is new.

The Department's concerns about the specific legislative extensions are even more applicable to this long general extension. Extending the time for commencement of construction up to 10 years will render the environmental evaluation, and other evaluations performed in the licensing proceeding, stale. Conditions can change drastically in 10 years. Protections afforded by license reviews may be rendered meaningless. Licenses should not be granted if projects are not ripe for development and construction is to be delayed for such an extended period. Extensions are much better handled administratively and on a case-specific basis.

For all of the above reasons, the Department is strongly opposed to S. 439.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

BRUCE BABBITT.

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, DC, September 22, 1997.

Hon. FRANK H. MURKOWSKI,
*Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This letter responds to your request for the views of the Department of Commerce on S. 439, a bill to amend the Federal Power Act (FPA). The Department is strongly opposed to S. 439, because it would eliminate certain important marine resource protections provided under the FPA. Specifically, by removing small hydropower projects in Alaska and all freshwater hydropower projects in Hawaii from the jurisdiction of the Federal Energy Regulatory Commission (Commission), the bill would eliminate the ability of the Federal Government to provide adequate protection of anadromous fish and other federally protected and managed resources.

The Department, through the National Oceanic and Atmospheric Administration (NOAA), is responsible for ensuring the protection of anadromous and marine fishery resources and their habitats, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and other statutes. The National Marine Fisheries Service (NMFS) exercises this authority with respect to hydropower licensing on rivers pursuant to certain sections of the FPA, including sections 10(j) and 18, as well as the Fish and Wildlife Coordination Act.

In general, the FPA authorizes the Commission to require licensees of hydroelectric projects to undertake actions to protect fish and wildlife resources. These protections are imposed as conditions of operating licenses granted by the Commission. The Commission must, with certain exceptions, include the license NMFS recommendations for the protection of, mitigation of damages to, and enhancement of fish resources as required by section 10(j). The Commission must also include fishway prescriptions issued by NMFS pursuant to section 18. When a hydropower project qualifies for a license exemption, the Commission must include NMFS' conditions for fish protection.

We believe the current responsibilities under the FPA should continue, providing necessary fish protection at the state and Federal level. However, S. 439 would remove small hydropower projects in Alaska and all freshwater hydropower projects in Hawaii from the jurisdiction of the Commission.

Alaska has the last remaining healthy stocks of anadromous fish, and we have a statutory responsibility to protect them. We believe that the existing exemption requirement appropriately addresses the interests of states and the Federal Government. However, by making small projects subject to the exclusive authorizing authority of the state, S. 439 fails to ensure that fish protection measures determined to be necessary pursuant to Federal stat-

ute would be undertaken. Projects of 5,000 kilowatts or less may have significant environmental consequences. Damming an anadromous fish stream will have adverse impacts regardless of the project's size. Further, small hydroelectric projects in particular are often located near anadromous fish spawning habitat and can effectively block fish access to the upstream areas. We believe that such projects should remain subject to conditions for fish protection issued by Federal agencies such as NMFS.

In addition, S. 439 would limit the Department's ability to protect species listed under the Endangered Species Act (ESA). The ESA requires that Federal agencies undertaking an action that would potentially affect a listed species first consult with the appropriate Federal resource agency. However, S. 439 would eliminate Federal agency actions in connection with the licensing of hydropower projects, without imposing a corresponding requirement for the state to consult with the Federal resource agencies.

The Department also has concerns regarding hydropower projects located in whole or in part on Federal lands. S. 439 would require that the Secretary having jurisdiction with respect to such lands must approve the State of Alaska's authorization for the hydropower project. However, the bill fails to require any consultation with the Federal fish and wildlife resource agencies before such approval is provided. Federal trust resources may be affected, as well as Federal resource management plans.

The Department has similar concerns regarding the bill's exemption for all hydroelectric projects on fresh waters in the State of Hawaii from the jurisdiction of the Commission. The effect would be to free operators of hydroelectric projects in Hawaii from requirements needed to protect fish and wildlife resources that are imposed as conditions of operating licenses granted by the Commission. While the Department currently has not needed to become involved in hydropower licensing in Hawaii, we should not be precluded from doing so in the future, if appropriate.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ANDREW J. PINCUS.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 439, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

The Act of June 10, 1920, Chapter 285

PART I

* * * * *

SEC. 4. * * *

* * * * *

(e) 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] *several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), 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 *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 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 Part for any project, the Commission, in addition to the power and development purposes for which licenses are is-

sued, 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.

* * * * *

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, 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 Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.*

* * * * *

SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the Commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the Commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. **【The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests.】** *The period for the commencement of construction may be extended by the Commission for not longer than ten years from the issuance date of the license when not incompatible with the public interest, and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interest.* In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the Commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the Commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the

sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 thereof.

* * * * *

SEC. 32. ALASKA STATE JURISDICTION OVER SMALL HYDROELECTRIC PROJECTS.

(a) DISCONTINUANCE OF REGULATION BY THE COMMISSION.—Notwithstanding sections 4(e) and 23(b), the Commission shall discontinue exercising licensing and regulatory authority under this Part over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this Part and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

(A) energy conservation,

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat),

(C) the protection of recreational opportunities,

(D) the preservation of other aspects of environmental quality,

(E) the interests of Alaska Natives, and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works—

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate,

(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army, and

(C) conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(b) DEFINITION OF "QUALIFYING PROJECT WORKS".—For purposes of this section, the term "qualifying project works" means project works—

(1) that are not part of a project licensed under this Part or exempted from licensing under this Part or section 405 of the

Public Utility Regulatory Policies Act of 1978 prior to the date of enactment of this section;

(2) *for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to the date of enactment of subsection (c) (unless such application is withdrawn at the election of the applicant);*

(3) *that are part of a project that has a power production capacity of 5,000 kilowatts or less;*

(4) *that are located entirely within the boundaries of the State of Alaska; and*

(5) *that are not located in whole or in part on any Indian reservation, conservation system unit (as defined in section 102(4) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(4))), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.*

(c) *ELECTION OF STATE LICENSING.—In the case of nonqualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to the enactment of this section, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.*

(d) *PROJECT WORKS ON FEDERAL LANDS.—With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to—*

(1) *the approval of the Secretary having jurisdiction over such lands, and*

(2) *such conditions as the Secretary may prescribe.*

(e) *CONSULTATION WITH AFFECTED AGENCIES.—The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska's regulatory program.*

(f) *APPLICATION OF FEDERAL LAWS.—Nothing in this section shall preempt the application of Federal environmental, natural resources, or cultural resources protection laws according to their terms.*

(g) *OVERSIGHT BY THE COMMISSION.—The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State's program to ensure compliance with the provisions of this section.*

(h) *RESUMPTION OF COMMISSION AUTHORITY.—Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this Part if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.*

(i) *DETERMINATION BY THE COMMISSION.—*

(l) *Upon application by the Governor of the State of Alaska, the Commission shall within 30 days commence a review of the State of Alaska's regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).*

(2) The Commission's review required by paragraph (1) shall be completed within one year of initiation and the Commission shall within 30 days thereafter issue a final order determining whether or not the State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).

(3) If the Commission fails to issue a final order in accordance with paragraph (2), the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a).

* * * * *

