No. 13-2439

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES DEPARTMENT OF THE INTERIOR,
Petitioner,

CITY OF LOWELL, MASSACHUSETTS,
Intervenor,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

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

Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AND PRESERVATION MASS INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER IN SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the National Trust for Historic Preservation in the United States and Preservation Mass Inc. state that they are nonprofit organizations and have no parent companies and have not issued any stock, so there is no publicly held corporation that owns 10% of any of their stock.

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INTERESTS OF AMICI CURIAE

This *amicus curiae* brief is submitted on behalf of the National Trust for Historic Preservation in the United States ("NTHP") and Preservation Mass Inc. ("Preservation Massachusetts").[1] At issue in this case are the impacts on historic resources arising from orders by the Federal Energy Regulatory Commission ("FERC") approving a license amendment to permit the replacement of a historic wooden flashboard system with a steel and concrete pneumatic crest gate system on the Pawtucket Dam (the "Dam") in Lowell, Massachusetts (the "Project").[2] Altering the Dam's architecture by installing a historically incompatible system would remove and detract from the characteristics that make the Dam a valuable historic resource and would harm the historic integrity of the Dam and Lowell's national

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[1] Pursuant to Fed. R. App. P. 29(a), counsel for *amici* advised counsel for parties and intervenors of NTHP's interest in filing this brief and received their consent. Subsequently, counsel for *amici* informed said counsel of Preservation Massachusetts' interest in joining the brief and received no objections.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that their counsel authored this brief in its entirety. No person or entity other than *amici*, their members, or counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] FERC issued an Order Amendment License (Apr. 18, 2013) and an Order Denying Rehearing (Sept. 19, 2013).

historical park and historic districts. As nonprofit historic preservation organizations with decades of experience, *amici* are well positioned to lend their expertise to the Court's consideration of historic preservation issues in this case.

The NTHP was chartered by Congress in 1949 as a private nonprofit organization to further the historic preservation policies of the United States. 16 U.S.C. §§ 468-468d. With the strong support of nearly 175,000 members, including over 7,000 in Massachusetts, and a field office in Boston, the NTHP works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The NTHP provided comments during FERC's review of the Project expressing concerns about its impact on the Dam and other historic resources. *See, e.g.*, App. 763, 1117.[3] Based on the imminent threat to the Dam's irreplaceable national historic significance and integrity if FERC's decision is allowed to stand, the NTHP designated the Dam a "National Treasure," in 2013, one of only thirty-seven such sites in the country.

[3] Citations to "App." are to the joint appendix filed with the Department of the Interior's ("DOI") brief. Citations to "Pet. Brief" and "Pet. Add." are to DOI's brief and addendum, respectively.

Preservation Massachusetts is a nonprofit historic preservation organization dedicated to preserving Massachusetts' historic and cultural heritage as a force for economic development and retention of community character. The organization's education, outreach, and advocacy work includes its "Most Endangered Historic Resources Program," which highlights resources with historical, architectural, archaeological, engineering, and cultural significance that are in need of protection. The Dam was added to Preservation Massachusetts' "Most Endangered Properties List" in 2010. *See* App. 773-74. Preservation Massachusetts submitted comments during FERC's review of the Project expressing concerns about its impact on the Dam and Lowell's historic areas. *See* App. 766-67, 1108-09.

ARGUMENT

I. The Pawtucket Dam is an Integral Part of Historic Lowell, Massachusetts.

The historic construction, engineering, and operation of the Pawtucket Dam is essential to understanding and interpreting how Lowell, Massachusetts became the first planned industrial city in the United States and the birthplace of the American Industrial Revolution. The 19th-century Dam, which harnesses water flowing through a 1,093

foot-wide section of the Merrimack River, is the keystone of the innovative hydropower system that fueled Lowell's development. By 1850, Lowell was the largest textile producer in the country, the site of cutting-edge technological progress, and home to a society shaped by its labor force of "mill girls" and immigrants. *See, e.g.*, Lowell Historic Canal District Commission, *Report of the Lowell Historic Canal Commission to the 95th Congress* 13 (1977) [hereinafter "Report"]. Today, over 500,000 people visit the Lowell National Historical Park (the "Park") annually to see its well-preserved historic landscape and waterpower system, explore its mills, and learn about the innovations that distinguished Lowell.

Industrial Lowell dates to the 1820s, when developers bought the water rights at the thirty-foot Pawtucket Falls, *id*. at 44, where they built the Dam between 1826 and 1830. App. 1524. "Flashboards" were added to the Dam in 1832, two years after its completion, to increase its power capacity by better controlling the storage and flow of water. Patrick W. Malone, *Waterpower in Lowell: Engineering and Industry in Nineteenth-Century America* 64 (2009); App. 1525. These wooden planks supported by wrought iron pins anchored to the top of the Dam

(*i.e.*, its "crest") increase its height, which in turn increases the volume of water stored in the millpond behind it and the amount of power available from releasing that water. App. 1525-26. In 1833, a granite crest was added to the Dam; flashboard use resumed by 1837 or 1838 and has continued ever since. App. 1524-25, 1534.

Flashboards are designed to collapse when the water behind them rises too high; during floods, the iron pins bend and the flashboards give way, allowing the water to flow freely. App. 1525-26. The seasonal replacement of the pins-and-boards system is part of the history of the Dam. *Id.*

The hydropower produced by the Dam and canal system represented "state of the art of engineering in that era and [was] the wonder of the Eastern States." *Hearing on S. 2566, S. 2699, and S. 2817 Before the Subcomm. on Parks and Recreation of the S. Comm. on Energy and Natural Resources*, 95th Cong. 60 (Apr. 6, 1978) (statement of Sen. Edward Brooke). This energy source enabled the growth not only of Lowell, but also of the textile industry nationwide, as Lowell and its innovations became a model adopted by other manufacturing towns. *Report, supra*, at 15. As described by Massachusetts Congressman Paul

Tsongas, "[t]he energy supplied by [Lowell's] carefully controlled waterpower gave birth and enduring life to the industrial revolution in this country." 124 Cong. Rec. 9,645 (Apr. 11, 1978).

The historic and engineering significance of the Dam is reflected in both its eligibility for inclusion on the National Register of Historic Places (the "National Register"), and its inclusion as a contributing resource[4] to the Lowell Locks and Canals National Historic Landmark District (the "Landmark District"), as well as the Park and Lowell Historic Preservation District (the "Preservation District"), all of which are listed on the National Register. The canal system in Lowell, including the Dam, was also designated a Historic Civil Engineering Landmark by the American Society of Civil Engineers and a Historic Mechanical Engineering Landmark by the American Society of Mechanical Engineers.

[4] A contributing resource is a "structure, or object [that] adds to the historical associations, historic architectural qualities, or archeological values for which a property is nationally significant." National Park Service, *National Register Bulletin: How to Prepare National Historic Landmark Nominations*, http://www.nps.gov/nr/publications/bulletins/nhl/text2.htm.

A. The Dam is a Contributing Resource in the Lowell Locks and Canals National Historic Landmark District.

The Landmark District was designated a National Historic Landmark ("NHL") in 1977, one year before the creation of the Park. An NHL is the highest recognition for sites with "exceptional value or quality in illustrating or interpreting the heritage of the United States" and a "high degree of integrity of location, design, setting, materials, workmanship, feeling and association." 36 C.F.R. § 65.4. In 1980, Congress amended the National Historic Preservation Act ("NHPA")[5] to include a "higher standard of care" for Federal undertakings that adversely affect NHLs. 126 Cong. Rec. S14705 (daily ed. Nov. 19, 1980) (Statement of Sen. Dale Bumper).

The Landmark District was created in recognition of "what is probably the most historically significant extant aggragation [sic] of early 19th-century industrial structures and artifacts in the United States." App. 879. By its nature, a historic district encompasses multiple structures, and its significance lies in the aggregate value of its contributing resources. As the centerpiece of Lowell's historically

[5] The NHPA, first enacted in 1966, directs federal agencies to take into account the effects of their activities on historic resources, including via the procedural requirements of Section 106. 16 U.S.C. § 470f.

innovative hydropower system, the Dam contributes to the historic architectural, engineering, and aesthetic linkages that unite the elements of the Landmark District. The Dam, described as including its flashboards, is listed in the "Inventory-Nomination Form" for the Landmark District, App. 894, and is a contributing resource to the district. *See, e.g.*, App. 1197-98.

B. The Dam is a Resource of the Park and Preservation District.

In creating the Park and Preservation District, Congress took unprecedented measures in the Lowell National Historical Park Act (the "Act") to commemorate and preserve the national historic significance of Lowell. 16 U.S.C. § 410cc. One of the first urban-based national parks in the United States, the Park remains one of few in the national system that celebrates industry, the working class, and engineering. The Act established a novel partnership-based management structure and created strong protections for the historic elements of the Park and Preservation District. Since its passage in 1978, the Federal government has committed over $78 million to protecting the Park and Preservation District as historical resources.

Even before passage of the Act, Congress recognized the historical significance of the Dam. The Report, which was commissioned by Congress, referenced the Dam multiple times, including on several maps in the "Inventory Data Base," *see, e.g., Report*, *supra*, at 139, 154, 159, and a photograph of the Dam was featured in the inventory section of the Report, *id*. at 152. The Report formed the basis of a bill championed by Congressman Paul Tsongas.

During Congressional proceedings, the Dam was described as a "critical part of the history [that] will be a part of the interpretation" of the Park,[6] and Congressman Tsongas identified the waterpower system as the "raison d'etre of Lowell in the first place." *Mark-Up Session: H.R. 11662, a Bill to Provide for the Establishment of the Lowell National Historical Park in the Commonwealth of Massachusetts Before the H. Comm. on Interior and Insular Affairs*, 95th Cong. 12 (1978). Once the Act was passed, an index was prepared of property in the Park or Preservation District that should be "preserved, restored, managed, developed, [or] maintained" either "because of its national historic or

[6] *Hearing on H.R. 6230 before the Subcomm. on National Parks and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 33 (1978) (statement of Jack Benjamin, Office of Legislation, National Park Service).

cultural significance," or its proximity to such locations. 16 U.S.C. § 410cc-32. The Dam is listed in the index. Lowell Historic Preservation Commission, *Details of the Preservation Plan* 30 (1980) (Item 1513) [hereinafter "Details of the Preservation Plan"]. The Dam is also included on the index's "Cultural Resource Inventory" maps, *id.* at 31, 36, and is featured in a photograph on the second page of the Details of the Preservation Plan.

As Congressman Tsongas described the Park, "[t]he physical nature of the resource is . . . unique—without precedent for the National Park Service. . . . [T]raditional fee acquisition approaches to preservation are not well-suited for an urban area." 124 Cong. Rec. 9,646 (Apr. 11, 1978). The Act's unique management structure addressed the difficulty of creating a park within an existing urban setting where the city as a whole, not just its individual sites, is central to portraying its story. *Id.* Thus, the federal government owns only nineteen acres of the 141-acre Park and 385-acre Preservation District. Private parties retain ownership of the majority of historic structures, including, for instance, the Dam and the building in which the National Park Service's ("NPS") visitor center is located.

To protect and encourage rehabilitation of the property that remained in private ownership, the Act established partnerships between federal, state, and local governments, and private owners and mandated the development of historic preservation standards (the "Standards") applicable to all properties and federal permitting activities in the Park and Preservation District. *Report*, *supra*, at 9; 16 U.S.C. § 410cc-12(b), 32(e). For instance, the Act created incentives for the City of Lowell to implement the Standards through its land-use regulations, and private owners received federal grants and low-interest loans for preservation or restoration work that complied with the Standards. *Id*. §§ 410cc-24, 33.

The Act gave the Department of the Interior ("DOI") authority to: (i) create and implement a Park management plan, *id.* § 410cc-25(a); (ii) provide assistance to other federal entities as DOI considers appropriate to carry out the Act's purposes, *id*. § 410cc-23(b)(2); and (iii) review and approve a preservation plan and standards for the Park,[7] *id*. § 410cc-32(a), (e).

[7] Drafts of the preservation plan and standards were prepared by the Lowell Historic Preservation Commission (the "Lowell Commission"), a body established within DOI. 16 U.S.C. § 410cc-31-33.

II. The Act Prohibits Projects that Would Adversely Affect Resources of the Park or Preservation District.

The plain language of the Act prohibits federal agencies from permitting or licensing projects that will have an "adverse effect" on a "resource" of the Park or Preservation District. The Dam, which is a "resource," would be adversely affected by the Project, as would the Park and Preservation District themselves. The Act's ban on adverse effects means that adverse effects cannot merely be reduced or mitigated, but must be avoided or eliminated completely. In this case, the mitigation proposed for the Project does not avoid or eliminate the adverse effects arising from the changes to the Dam's architecture. Because the Project would adversely affect a resource of the Park, notwithstanding the proposed mitigation efforts, the Project cannot go forward under the Act.

A. The Plain Language of the Act Prohibits Adverse Effects on Resources of the Park or Preservation District.

When Congress passed the Act, it explicitly provided that:

> 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 not have an adverse effect on the resources of the park or preservation district.

16 U.S.C. § 410cc-12(b). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citations and internal quotation marks omitted). The plain meaning of "adverse" is "causing harm," while an "effect" is "something that inevitably follows an antecedent." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2004). An adverse effect, therefore, occurs when, following federal licensing or permitting, harm will occur to a resource of the Park or Preservation District. Considering the Act's historic preservation objectives, 16 U.S.C. § 410cc(b), the adverse effects analysis must focus on impacts to historic characteristics of the resource at issue.

The protection that the Act provides goes above and beyond that provided by the NHPA either to NHLs, under Section 110(f), or to other structures eligible for or listed on the National Register, under Section 106. While the NHPA directs Federal agencies to "minimize harm" from adverse effects or "take into account" the effects of their proposed undertakings, the Act establishes an absolute bar to adverse effects. In passing the Act, Congress took specific action to protect Lowell,

choosing not to rely solely on the NHPA. If Congress had simply wanted to give Lowell the same level of protection as that afforded by the NHPA, it would have referenced that statute's provisions or used identical language. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Vieira Garcia v. I.N.S.*, 239 F.3d 409, 413-14 (1st Cir. 2001) ("The plain language of the statute forbids us from adopting such a standard. If Congress had wanted the INS to follow [another statute] at all times, it would have so stated.").

Not only is the Act more protective than the NHPA, but its provisions are also more protective than those applicable to most other national historical parks. Of the forty-six national historical parks in the United States, the enabling statutes of only three include similar limitations on federal agencies' authority to license or permit projects with adverse effects. The rarity of such limiting language highlights the significance of Congress' decision to include such language in the Lowell Act. Of these three statutes, only the enabling statute for the Keweenaw National Historical Park also flatly prohibits agency

activities that will adversely affect park resources. 16 U.S.C. § 410yy-4. The statutes governing the Dayton Aviation Heritage National Historical Park and Cedar Creek and Belle Grove National Historical Park, in contrast to the Lowell Act, only prohibit "to the maximum extent practicable" adverse effects or likely adverse effects on park resources. *Id.* §§ 410ww-5, 410iii-8. These acts further illustrate that Congress knew how to limit the "no adverse effects" mandate when it so desired.

B. The Project Would Adversely Affect the Dam, the Park, and the Preservation District.

In FERC's own words, the Project "would have an adverse effect on Pawtucket Dam, because it would alter the dam's architecture." Pet. Add. 7 (¶ 24). (FERC later determined that, because of the proposed mitigation, there would be no adverse effect, but, as discussed *infra,* such a conclusion is inconsistent with the Act.)[8] Altering the Dam's

[8] FERC's initial finding of an adverse effect also triggered procedural and substantive requirements under NHPA Section 110(f) that were not satisfied. Section 110(f) requires agencies to "minimize harm" to NHLs to "the maximum extent possible." 16 U.S.C. § 470h-2(f). This mandates more than the Section 106 directive that agencies "take into account" the effects of their undertakings on National Register properties. *Id.* § 470f; *see, e.g., Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 63 (1st Cir. 2006). DOI has

architecture by installing a historically incompatible system would remove and detract from the characteristics that make the Dam a valuable resource of the Park and Preservation District and eligible for inclusion on the National Register, and would detract from the multi-decade Congressional effort to preserve Lowell's historic integrity. The Dam's historic and engineering significance is illustrated by its "integrity of location, design, setting, materials, workmanship, feeling, and association," and its role as an "element of an integrated historic industrial process." App. 1197-98. The Dam's flashboards exemplify a

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clarified through guidelines that Section 110(f) requires consideration of "all prudent and feasible alternatives to avoid an adverse effect on [a] NHL." 63 Fed. Reg. 20,496, 20,503 (Apr. 24, 1998). Because an adverse effect on a contributing resource to a NHL district is also an adverse effect on the district, and the Dam is a contributing resource to the Landmark District, discussed *supra*, FERC's initial finding of an adverse effect on the Dam triggered its Section 110(f) obligations. Once an adverse effect is identified, efforts to minimize the harm must be governed by the mandate of Section 110(f)'s substantive and procedural protections. Throughout the consultation process for the Project, however, FERC only referenced fulfilling its Section 106 duties. *See, e.g.,* App. 1206. In its order amending the license, issued *after* the consultation process, FERC attempted to bootstrap its claimed Section 106 compliance onto the heightened requirements of Section 110(f), but the language FERC used to assert Section 110(f) compliance ("avoid, minimize, or mitigate" adverse effects), Pet. Add. 33 (¶ 122), only addresses the procedural requirements of Section 106, not Section 110(f). *See* 36 C.F.R. § 800.1(a). Even if FERC had complied with Section 106, that would not absolve FERC of its independent duty to comply with the more stringent mandate of Section 110(f).

historic innovation in the design, engineering, and operation of hydropower technology in America that enhanced energy capacity and control, and they are a significant aspect of the Dam's 19th-century architecture. Removing the flashboards would eliminate a feature that links the Dam to the history of the development of Lowell and the American Industrial Revolution. Because the Dam is a resource of the Park and Preservation District, discussed *supra,* the Project's adverse effect on the Dam means it cannot proceed under the Act.

Even if the Act were interpreted to prohibit only adverse effects on the Park or Preservation District, as opposed to individual resources within the Park or Preservation District, the Project still contravenes the Act because it would adversely affect the historical integrity of those areas. Lowell was built on the vision of a unique hydropower system, and the Dam "is significant as an element of [both] an integrated historic industrial process . . . [and] the most historically significant extant collection of 19th-century industrial buildings and structures in the country." App. 1198. Permanent removal of the flashboards would undercut the connection between, and weaken the ability to interpret,

19th-century industrial Lowell and the Dam, Park, and Preservation District.[9]

C. The Act Does Not Permit Projects Whose Adverse Effects Are Minimized or Mitigated but Not Eliminated.

Once a potential adverse effect is identified, the Act prohibits the activity from occurring unless the adverse effect can be avoided entirely; measures that compensate for or mitigate an adverse effect on an historic resource are not sufficient. 16 U.S.C. § 410cc-12(b). Even under the less protective standards of the NHPA, researching or documenting historic resources before they are adversely affected, often a form of mitigation in the historic preservation context, does not actually reduce or eliminate the adverse effect. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 808 (9th Cir. 1999) (finding that mitigation in the form of research and photographic documentation does not "negate[]" an adverse effect); *National Post*

[9] Relatedly, FERC must heed the directive of the Keeper of the National Register that the Dam "should not be evaluated individually apart from its functioning as a highly significant and integral component of a larger nationally important historic resource." App. 1198. *See, e.g., Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 264 (3d Cir. 2001) (vacating a lead agency order because the agency failed to adequately adopt the Keeper's historic eligibility determination).

Office Collaborative v. Donahoe, No. 3.13CV1406 (JBA), 2013 WL 5818889, at *10 (D. Conn. Oct. 28, 2013) (finding that a "Preservation Covenant" would "minimize or mitigate [an adverse effect], not eliminate it"). The adverse effects inquiry under the Act asks whether the proposed action will have an adverse effect on a resource of the Park or Preservation District; if it does, the Project is prohibited. Additional measures to soften the impact of an adverse effect, or to decrease the magnitude of the harm to a historic resource, are insufficient if the action remains, on the whole, harmful.

Even accounting for its proposed mitigation, the Project would still adversely affect the Dam. *See, e.g.,* App. 1502, 1661. The proffered mitigation (installing interpretive exhibits, painting the rubber bladder and gate panels brown, and adding black straps, Pet. Add. 7 (¶24)) would not avoid the adverse effect to the Dam's architecture that FERC itself acknowledged would occur. *Cf. Muckleshoot Indian Tribe*, 177 F.3d at 808. The wooden flashboards would still be removed and replaced by a steel and concrete system; the Dam's unique engineering, visual appearance, and architectural elements would still be damaged.

Therefore, an adverse effect exists, and the Project cannot proceed as proposed under the Act.

Where, unlike here, Congress means to allow the mitigation or minimization of adverse effects, rather than their complete elimination, it says so expressly. For example, Section 110(f) of the NHPA directs federal agencies whose actions will "adversely affect" NHLs "to minimize harm . . . to the maximum extent possible" before proceeding. No such language appears in the Act, which was passed only two years before Section 110(f) was added to the NHPA. Pub. L. No. 96-515, § 110(f), 94 Stat. 2987 (1980) (codified at 16 U.S.C. § 470h-2(f)).[10] Similarly, pursuant to Section 4(f) of the Department of Transportation Act, passed a dozen years before the Act, the Secretary of Transportation may only approve projects that "include[] all possible planning to minimize harm to [the] historic site," provided there is "no prudent or feasible alternative" that would avoid the historic site. Pub.

[10] In the more typical federal review and consultation process under NHPA Section 106, agencies are directed to "avoid, minimize, or mitigate" adverse effects. 36 C.F.R. § 800.6. For each of these steps to have meaning, "mitigate" must mean something other than avoid, or entirely eliminate, an adverse effect. The Act does not have as lengthy a consultation process as Section 106 because the analysis ends at "avoid," requiring less discussion between parties in order to reach agreement on the extent of minimization or mitigation.

L. No. 89-670, 80 Stat. 931, 933 (1966) (current version at 49 U.S.C. § 303(c)). Congress chose not to include such language in the Act. *Cf. Bates v. U.S.*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *In re 229 Main St. Ltd. P'ship*, 262 F.3d 1, 6 (1st Cir. 2001) (ascribing "considerable significance" in interpretation of a statute to the fact that a term used in a different provision was omitted).

D. The Act's Plain Meaning of Adverse Effect is Consistent with the Meaning of the Term in the Historic Preservation Context.

If the Court were to look to the meaning of "adverse effect" beyond the Act, it would find that the plain meaning of "adverse effect" is consistent with its well-understood meaning in the field of historic preservation, including in the regulations issued by the Advisory Council on Historic Preservation ("ACHP") implementing Section 106 of the NHPA. When the Lowell Act was passed in 1978, the ACHP regulations provided criteria and examples of activities from which adverse effects would "generally" occur, including:

- "Destruction or alteration of all or part of a property;" and
- "Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting."

36 C.F.R. § 800.9 (1978); *see also* 39 Fed. Reg. 3,366, 3,369 (Jan. 25, 1974). The current regulatory definition of adverse effect is not only consistent with, but more detailed than, the 1974 version, *see* 36 C.F.R. § 800.5, and has been praised for its "laudable job of enumerating criteria for adverse effects in a field—historic preservation—that involves intangibles and inexact, subjective elements." *National Min. Ass'n v. Slater*, 167 F. Supp. 2d 265, 295 (D.D.C. 2001), *rev'd on other grounds*, 324 F.3d 752 (D.C. Cir. 2003). Removing the flashboards would alter and destroy part of the Dam; replacing them with a steel and concrete structure would introduce visual and atmospheric elements not in keeping with the historic Dam and its setting. The Project would have an adverse effect as that term is understood in the context of the NHPA.

While FERC has argued that "adverse effect" under the Act means something other than what it means under the NHPA, it has failed to

offer any definition of the term. Instead, FERC arbitrarily states there is no adverse effect, but without stating the criteria it used to make that determination. Because there is no baseline principle supporting its finding, FERC's ad hoc determination is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (requiring agencies to maintain a rational connection between the facts and their judgment). In any event, allowing each federal agency that licenses a project in the Park or Preservation District to produce its own definition would lead to non-uniform enforcement and regulatory chaos.

III. Agencies with Specialized Expertise in Historic Preservation Should Receive More Deference than FERC, Which Has No Specialized Expertise in the Field.

As explained above, the Act's prohibition on adverse effects is unambiguous. Should this Court, however, find any ambiguity in the Act or the Act's Standards relating to historic preservation, it should defer to DOI's interpretations, rather than FERC's, in light of DOI's position as the agency with authority to implement the Act and its expertise in the field of historic preservation. In addition, should this Court reach the issue of whether the Project complies with the Act's

Standards, discussed *infra,* FERC's decision to disregard the conclusions of DOI, ACHP, and other agencies with expertise in historic preservation is one of many factors demonstrating that FERC's decision is arbitrary and capricious.

DOI, through the NPS, has safeguarded and managed this country's historical resources since 1916, 39 Stat. 535 (1916), thereby developing expertise and experience relevant to the historic preservation issues in this case and, specifically, to historic preservation issues impacting the Park. FERC's experience regarding historic preservation simply cannot compare with the depth of DOI's specialized knowledge and experience.

DOI's expertise in historic preservation is reflected in the NHPA's delegation of authority to DOI to designate and maintain the National Register and select and protect NHLs, including through the issuance of guidance under Section 110 of the NHPA. 16 U.S.C. § 470a(a)(1), (g). With respect to the Act, Congress designated DOI, in conjunction with the Lowell Commission, as the agency responsible for interpreting and implementing the Act and managing the Park. *See, e.g.*, 16 U.S.C. §§ 410cc-11 to 12, 410cc-21 to 25. Congress also created a system for other

agencies, less familiar with the unique value of Lowell, to work closely with DOI when conducting activities in the Park or Preservation District: agencies must "consult with, cooperate with, and to the maximum extent practicable, coordinate [their] activities with the Secretary and the Commission." *Id.* § 410cc-12(a). Regardless of whether this provision imposes additional substantive requirements,[11] it illustrates Congress' recognition of DOI as the agency best equipped to apply the Act, and to do so with consistency.

Where, as here, agencies have conflicting interpretations and applications of a statute or its implementing tools, this Court should give deference to the agency with greater expertise in the statute's subject matter. In this instance, it is DOI, not FERC, to which Congress delegated authority under the Act. Accordingly, where FERC and DOI disagree over the interpretation of statutory terms such as "adverse effect" in the Act, *see, e.g.*, Pet. Brief at 21-24, the court should defer to

[11] Directives to perform tasks "to the maximum extent" have been interpreted as imposing substantive requirements. *See, e.g., Amann v. Stow Sch. Sys.*, 982 F.2d 644, 650 (1st Cir. 1992) ("maximum extent appropriate" language dictates a specific education policy); *Biodiversity Legal Found. v. Babbitt*, 63 F. Supp. 2d 31, 35 (D.D.C. 1999) (holding that the language "to the maximum extent practicable" prohibits unjustified delay).

DOI. *See Dep't of the Navy, Military Sealift Command v. Fed. Labor Relations Auth.*, 836 F.2d 1409, 1410 (3d Cir. 1988) ("[A]n agency decision is not entitled to such deference when it interprets another agency's statute."); *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 492 (2004) (according the interpretation of EPA, as the "expert federal agency charged with enforcing the Act," "respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009) (applying *Skidmore* deference).

Similarly, where FERC and DOI disagree over the interpretation of the Standards promulgated under the Act, *see, e.g.*, Pet. Brief at 48-51, DOI's interpretation merits deference and should govern. *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the statute); *Neighborhood Ass'n of the Back Bay*, 463 F.3d at 59 ("We do not owe deference to the [lead agency's] interpretation of regulations promulgated by other agencies.").

Finally, where FERC and DOI disagree regarding the application of the Standards, this Court should give weight to DOI's conclusions in light of the agency's greater expertise in the subject matter of the

Standards and Act. Although the Act provides that the permitting agency "determines [whether] the proposed activity will be conducted in a manner consistent with the standards and criteria," 16 U.S.C. § 410cc-12, the reasonableness of that determination should be considered in light of determinations of other agencies with more subject-matter expertise. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1298 (1st Cir. 1996) (rejecting a lead agency's determination that two bodies of water are "of like quality" in favor of EPA's technical expertise); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) ("[T]he court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting view of other agencies having pertinent expertise."); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (finding lead agency conclusion inadequate where proposal "drew heavy fire" from three agencies "with expertise . . . equal to or greater than that of [the lead agency]"). As in *Silva*, here there are several agencies with significant topical expertise and experience that disagree with FERC's finding of no adverse effect on the Dam, Park, and historic districts. In particular, both DOI and the ACHP, an agency

with almost forty years of experience defining and implementing the term "adverse effect,"[12] have consistently disagreed with FERC's findings in this case.[13] *See, e.g.,* App. 1689-94. The views of these expert agencies should be considered and given deference.

Another reason to defer to DOI, rather than FERC, in each of these legal and factual contexts is to promote uniformity and consistency in the application of the Act. Since the statutory dissolution of the Lowell Commission in 1995, DOI has been responsible for design review in the Park and Preservation District, including determining whether projects comply with the Standards. *See* Lowell Historic Preservation Commission, *Preservation Plan* 27 (1980). But for each project in the Park or Preservation District, there may be a different permitting agency. Deferring to these permitting agencies, such as FERC, rather than to DOI, would create confusion in application of the Act and contravene Congress' intent in delegating authority to DOI.

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[12] The ACHP is the agency entrusted with interpreting and administrating Section 106 of the NHPA. *See, e.g.*, 16 U.S.C. § 470s; *CTIA – The Wireless Association vs. FCC*, 466 F.3d 105, 116 (D.C. Cir. 2006).

[13] *See also* App. 1142-43, 1336-37 (correspondence from Massachusetts Historical Commission).

See Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 152 (1991) ("Congress intended to invest interpretive power in the administrative actor in the best position to develop [historical familiarity and policymaking expertise]"). Deferring to DOI's interpretation of the requirements of the Act would strengthen uniformity in implementing the statute.

IV. The Act Prohibits Projects that Do Not Comply with its Standards and Criteria.

As part of its unique ownership structure, the Act mandated that all properties in the Park and Preservation District undergoing "construction, preservation, restoration, alteration, and use" comply with historic preservation standards and criteria. 16 U.S.C. § 410cc-32(e). The Standards ensure "that privately owned properties in historic Lowell are not altered improperly, or used in a manner that substantially detracts from the intentions of the Act." *Details of the Preservation Plan, supra,* at 53; *see also* 46 Fed. Reg. 24,000 (Apr. 29, 1981). To accomplish this, the Act provides that:

> 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.

16 U.S.C. § 410cc-12(b).

Standards that are relevant to the Project include:

- E-2 Historic Architectural Features: Because historic structures "owe their character to the particular blend of their architectural features: scale, rhythm, form, massing and proportion," "[o]riginal building features should whenever feasible be preserved rather than replaced," and the "imposition of historically unsympathetic architectural treatments should be avoided." 46 Fed. Reg. 24,000, 24,001 (Apr. 29, 1981);
- E-3 Historic Materials: Because "historic character also comes from the use and design of construction materials . . . retain significant existing materials whenever possible, stabilizing, repairing, or matching them with compatible new materials as required". *Id.*

Given FERC's acknowledgement that the wooden flashboards are the Dam's "original crest control feature," Pet. Add. 38 (¶ 140), replacing them with a system of modern design unknown in the 19th-century, made of materials unknown to the 19th-century, utilizing

technology unavailable in the 19th-century would be inconsistent with the Standards.

FERC's assertion that the Project complies with the Standards is based, in part, on the faulty premise that the flashboards are "not an integral" part of the Dam. Pet. Add. 74 (¶ 31). However, nowhere do the Standards state that they apply only to "integral" features; FERC in its analysis has unilaterally rewritten the Standards to include that criterion. Rather, the Standards focus on "original" features and materials, ranging from windows and roofs to cornices and veneers. Even if this criterion were relevant, FERC is wrong in characterizing the flashboards as not integral to the Dam. As explained *supra*, the flashboards were critical to the Dam's power generating capacity and flood management; their essentiality is evidenced by their constant use over 176 years. Suggesting that the flashboards are not integral because they are anchored to the top of the Dam and can be replaced is like suggesting that the sails on the U.S.S. Constitution are not integral to the character of the vessel and could be replaced with a modern engine.

Under E-2, FERC must avoid, if feasible, licensing projects that replace original features of the Dam and avoid imposing new features on the Dam that are unsympathetic to its architectural character, including its "form," which refers to "shapes [and] combinations of shapes as seen from different perspectives, skylines and contours." *Details of the Preservation Plan*, *supra*, at 60. FERC's suggestion that the flashboards were an "early" but not an original feature of the Dam, because the Dam "had no flashboards [from] 1826-1838" and because the flashboards have varied in length, is arbitrary. Pet. Add. 74 (¶ 31). The latter fact has no bearing on whether flashboards, as opposed to other forms of water control, were original to the Dam, and the former is both misleading and incorrect. The use of flashboards would not be expected during the construction of the Dam, between 1826-1830, but they were added to the Dam within two years of its completion and were reintroduced by 1838 after further construction on the Dam's crest. A handful of years without flashboards is negligible compared to their uninterrupted use over 176 years.

FERC recognized that the Project would change the Dam's architectural character, finding that replacing the flashboards with a

new crest gate system "will change the appearance of the dam crest." Pet. Add. 27 (¶ 98). Nowhere does FERC suggest that the crest is not part of the Dam or its architectural character. Indeed, the crest and its flashboards give the Dam its distinctive, historic appearance; the shapes of the boards and contours they form *are* the above-water architectural form of the Dam that Park visitors view. FERC's attempt to define the Dam as starting and ending with its masonry ignores the Standards' broader concept of "architectural character," which, by including form, entails more than the elements that provide structural support. FERC's position also contradicts its own earlier finding that the Project would have an adverse effect on the Dam's architecture. *See, e.g.,* App. 1200, 1364.

FERC's primary contention regarding the infeasibility of maintaining the flashboards relates to flooding concerns, *see, e.g.,* Pet. Add. 75 (¶ 33). However, as discussed in DOI's brief, FERC has not demonstrated the infeasibility of addressing flooding concerns with the correct usage of flashboards. Pet. Brief at 45-46. In fact, the license applicant previously took the position in a dispute with the City of Lowell that there is no need, from a flood control perspective, to replace

the flashboards. *City of Lowell v. Enel North America*, 705 F. Supp. 2d 116, 119 (D. Mass. 2010) ("Enel [applicant's parent company] argues [that] the City cannot show that, when flooding has occurred in the past, the Dam's flashboards caused or contributed to the problem.").

Standard E-3 provides that projects should "duplicate the architectural feature in the original as closely as possible," and "use wood rather than synthetic materials" when "replacing wood." 46 Fed. Reg. 24,000, 24,002 (Apr. 29, 1981). FERC suggests that preserving the existing flashboards is unnecessary because the flashboards are "not original," having been "continually replaced." Pet. Add. 39 (¶ 140). This conclusion misinterprets the word "original" in the E-3 Standard, which refers to the original material used (*i.e.*, wood generally), not the original piece of wood itself. The latter reading would be nonsensical. Indeed, that wood may, and should, be replaced with other wood "when it is beyond salvage," is clear from another of the Standards, E-5, which provides context in determining the Project's consistency with the Standards. 46 Fed. Reg. at 24,001. The Project would replace the historically accurate wood-based system with synthetic materials in direct contradiction of the Standards.

CONCLUSION

For the foregoing reasons, the *amici* respectfully urge this Court to set aside FERC's orders.

Respectfully submitted,

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[14] We would like to acknowledge the contributions to this brief by Sarah Peterson and Albert Teng, second-year students in the Emmett Environmental Law & Policy Clinic at Harvard Law School.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) & 29(d)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 29(d) because this brief contains 6,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

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