

NOTE

IF IT'S WORTH A DAM, IT'S "NAVIGABLE WATERS": A PROPOSED REVISION OF SECTION 3(8) OF THE FPA DERIVED FROM DECISIONS FOLLOWED IN *FPL ENERGY MAINE HYDRO LLC V. FERC*

This case note discusses the navigable waters standard as set forth in section 3(8) of the Federal Power Act (FPA).¹ Once a waterway is determined to be navigable, it is subject to extensive federal licensing requirements promulgated by the Federal Energy Regulatory Commission (FERC or Commission).² Because of inconsistencies that have become apparent through FERC and court decisions, the navigable waters standard has become, to say the least, imprecise. For that reason, this note sets forth a revised definition of section 3(8) of the FPA in order to provide a more exact and consistent standard. If the proposed revisions were adopted, those entities contemplating construction of hydroelectric projects, among others, would be better able to assess their licensing requirements.

I. BACKGROUND

The history of this case is inconsistent. For example, multiple decisions – by the FERC and courts – have purported to classify the Messalonskee Stream as either navigable or non-navigable waters. As demonstrated in the following text, the subjective nature of section 3(8) caused several decisions to be reversed by the former.

FPL Energy Maine Hydro LLC (FPL) is the successor in interest to Central Maine Power Company (Central Maine). In 1968, the Federal Power Commission (FPC) granted FPL a license to operate the Union Gas Project on the Messalonskee Stream (Stream). The original license expired in 1993.³ From 1993 until 1996, the Union Gas Project operated under annual licenses. In August 1996, as part of a licensing status examination of over thirty-six hydroelectric projects, the FERC's Office of Hydropower Licensing (OHL) conducted a navigation report on the Stream and suggested it was non-navigable, but the OHL requested comments and inquiries regarding the report to be filed within sixty days.⁴ Within that period, several intervening parties filed affidavits hoping to establish that the waterway was navigable.⁵

The acting director of the OHL reviewed the navigation report and affidavits filed by the interveners and determined the Stream was navigable waters pursuant to section 3(8).⁶ As a result of the director's decision, the Union Gas Project would be subject to federal licensing.⁷

1. 16 U.S.C. § 796(8) (2000).

2. 16 U.S.C. § 817(1) (2000).

3. *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1155 (D.C. Cir. 2002).

4. *Kennebec Water Dist.*, 79 F.E.R.C. ¶ 62,041, 64,064 (1996).

5. 79 F.E.R.C. ¶ 62,041, at 64,064. The intervening parties included American Rivers, American Whitewater Affiliation, Appalachian Mountain Club, Conservation Law Foundation, New England Flow, Trout Unlimited, and Maine Department of Inland Fisheries and Wildlife. *Id.*

6. 79 F.E.R.C. ¶ 62,041, at 64,064; 16 U.S.C. § 796(8).

7. *FPL Energy Me. Hydro*, 287 F.3d at 1155.

Soon thereafter, FPL filed a request for rehearing,⁸ the FERC granted the request, and the Commission, on rehearing, held that the waterway was non-navigable.⁹ Because of that decision, several intervening parties filed a request for rehearing and submitted affidavits hoping to establish navigability once again. The Commission allowed FPL to file an answer to the rehearing request, and also the Commission appointed an Administrative Law Judge (ALJ) to hear the case.¹⁰ After examining evidence provided by each party, the ALJ concluded that the Stream was non-navigable. Two affidavits considered by the ALJ stated that the only route of travel downstream involved a portage—"carrying of boats and supplies overland between two waterways or around an obstacle to navigation."¹¹ The only evidence supporting navigability was an affidavit submitted by an owner of a canoe and kayak rental store, which established that vessels were rented for recreational purposes on the Stream. The problem with that affidavit, however, was that it did not establish a specific area where the recreational crafts were used.¹² On July, 16 1998, the Commission reversed the holding of the ALJ¹³ concluding that the ALJ applied an incorrect legal standard when determining the outcome of the case, i.e., the ALJ did not consider the test canoe trips, and therefore based his determination solely on evidence of substantial use.¹⁴ FPL then filed a rehearing request to have the July 16 Commission decision reversed. Not surprisingly, the Commission issued a tolling order.¹⁵

On July 28, 1999, the Commission denied FPL's rehearing request, consequently, FPL filed a petition¹⁶ to have the issue of navigability resolved by the courts.¹⁷ The United States Court of Appeals for the District of Columbia

8. 16 U.S.C. § 825(l)(a) provides statutory authority for parties to seek a rehearing from a decision issued by the FERC. Specifically, § 825(l)(a) provides, in pertinent part, "[a]ny person . . . aggrieved by an order . . . may apply for a rehearing within thirty days after the issuance of such order. [U]pon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." 16 U.S.C. § 825(l)(a) (2000).

9. *Kennebec Water Dist.*, 80 F.E.R.C. ¶ 61,208, 61,829 (1997).

10. *Kennebec Water Dist.*, 81 F.E.R.C. ¶ 61,073, 61,305 (1997).

11. Lexico Publishing Group, LLC, *Dictionary.com*, at <http://www.dictionary.com> (last visited Mar. 1, 2005).

12. *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1155 (D.C. Cir. 2002).

13. 16 U.S.C. § 825(l)(i) provides the FERC statutory authority to modify or set aside any of its former decisions, i.e., in pertinent part, "[u]ntil the record in a proceeding shall have been filed in a court of appeals . . . the Commission may at any time . . . modify or set aside . . . any finding or order made or issued by it . . ." 16 U.S.C. § 825(l)(a).

14. *Kennebec Water Dist.*, 84 F.E.R.C. ¶ 61,027 (1998).

15. "Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 16 U.S.C. § 825(l)(a).

16. 16 U.S.C. § 825(l)(b) provides the statutory procedure for a party to seek a review of a FERC decision by a court. Section 825(l)(b) provides:

Any party . . . aggrieved by an order issued by the Commission . . . may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

16 U.S.C. § 825(l)(b) (2000).

17. *Kennebec Water Dist.*, 88 F.E.R.C. ¶ 61,118 (1999).

Circuit affirmed the FERC's decision on navigability and denied the subsequent rehearing petition.¹⁸ The court held that the FERC's reliance on test canoe trips and physical characteristics of the river, in the absence of any record of past use for commercial transportation, was sufficient to establish that the waterway was navigable.¹⁹ In fact, several decisions discussed later in this note were cited by the court, but if the court would have realized the magnitude of the all-encompassing interpretation of section 3(8) provided in *Rochester Gas & Electric Co. v. FERC* discussed herein, the court could have provided a more precise decision by only applying the *Rochester* holding.²⁰

II. FACTS

The Union Gas Project is located on the Stream, one mile north of the Kennebec River in Maine. The Stream is a tributary of the Kennebec River. It runs north and south approximately ten miles, connecting the southern banks of the Messalonskee Lake to the northern banks of the Kennebec River. The Union Gas Project is the last of four hydroelectric power projects to the south of the Messalonskee Lake.²¹

South of the Union Gas Project, and between it and the Kennebec River, the Stream contains three sets of rapids and two islands. The two islands are located in the center of the Stream impeding transportation up or downstream. To the east of the islands, the water is extremely shallow. To the west, the water channel runs through a rocky, hazardous, and potentially non-navigable area. Once south of the two islands, the Stream deepens and widens into the Kennebec River before entering into the Kennebec Lake. The Kennebec Lake eventually empties into the Atlantic Ocean.²²

It was undisputed that there has never been any sustained recreational or commercial transportation on the Stream.²³ Actually, the only evidence establishing transportation on the Stream stemmed from the litigation. Evidence showed that people familiar with the Stream believe the "steep gradient . . . suggests difficult passage for both logs and commercial watercraft. In addition, the stream was dammed so early . . . that it made passage difficult."²⁴

Five test canoe trips were conducted on the Stream for the express purpose of resolving the litigation. Of those five, three were able to navigate successfully downstream during a time of exceptionally high water. The other two trips were upstream, and successful, even though they were conducted during a time of decreased average output from the Union Gas Project. The upstream tests encountered difficulty around the two islands, but in the end, the canoeists were still able to navigate the Stream.²⁵

18. FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151, 1155-56 (D.C. Cir. 2002).

19. *Id.*

20. Rochester Gas & Elec. Co. v. FERC, 344 F.2d 594 (2d Cir. 1965).

21. FPL Energy Me. Hydro, 287 F.3d at 1154.

22. *Id.*

23. *Kennebec Water Dist.*, 79 F.E.R.C. ¶ 62,041, 64,064 (1997).

24. *Id.*

25. FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151, 1154 (D.C. Cir. 2002).

III. NAVIGABILITY

A. Statutory Requirements

A waterway can be subject to extensive federal licensing requirements if it is classified as navigable waters and if it "form[s] a highway for commerce with other states or with foreign countries, by itself or by connecting with other waters."²⁶ On the other hand, if a waterway is considered non-navigable, there is a small chance that the hydroelectric project could only be subject to state licensing requirements. To determine the licensing requirements of a proposed project located on non-navigable waters, a declaration of intent to build would have to be filed with the FERC.²⁷ In turn, the FERC determines if federal licensing is appropriate on the non-navigable waters by examining three factors:²⁸ 1) will the project affect interstate commerce;²⁹ 2) is the river or stream "commerce clause waters;"³⁰ and 3) has there been any post-1935 construction?³¹ After the FERC investigates the project's effect on the non-navigable waters, if one of the three factors above is not present, then the project can be constructed pursuant to state licensing requirements.³² The next section demonstrates the standard to determine if a hydroelectric project is located on navigable waters.³³

First, an examination of the statute providing for mandatory federal licensing is required. Section 23(b)(1) of the FPA provides the mandatory licensing requirements for hydroelectric projects:

(1) It shall be unlawful for any person . . . to construct, operate, or maintain any dam . . . across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a *license granted pursuant to this Act*. Any person . . . intending to construct a dam or other project works across . . . or in any stream or part thereof, other than those defined herein as navigable waters . . . shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the

26. *Id.*

27. 16 U.S.C. § 817(1) (2000).

28. *James M. Knott, Sr.*, 102 F.E.R.C. ¶ 61,241, 61,728 (2003).

29. In an Eleventh Circuit opinion, the court discussed the affect on commerce under the FPA as follows: "[f]ull authority under the Commerce Clause includes the power to reach a local activity whose effect on commerce, 'taken together with that of many other similarly situated, is far from trivial.'" *Habersham Mills v. FERC*, 976 F.2d 1381, 1384 (11th Cir. 1992) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

30. "Commerce Clause waters are bodies of water that Congress has jurisdiction to regulate under the Commerce Clause of the Constitution." 102 F.E.R.C. ¶ 61,241, at 61,728.

31. Post-1935 construction, pursuant to section 23(b)(1), is a significant change to the plant, i.e., increased capacity to generate, and not ordinary repair and maintenance. See *Puget Sound Power & Light v. FPC*, 557 F.2d 1311, 1316 (9th Cir. 1977).

32. 16 U.S.C. § 817(1). Power plants located on public or federal lands also affect federal licensing, but that issue will not be discussed further in this note.

33. Since state or federal licensing of non-navigable waters is determined by a different standard, this case note only discusses the imprecise definition of navigable waters and does not address the state or federal licensing of non-navigable waters.

provisions of this Act. If the Commission shall not so find . . . permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.³⁴

Hence, it is improper for a company to construct a hydroelectric project on interstate navigable waters without obtaining a federal license. The critical question stemming from that legislation is, what qualifies as “navigable waters?” Section 3(8) of the FPA provides:

“Navigable waters” means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams *as shall have been authorized by Congress* for improvement by the United States *or shall have been recommended to Congress* for such improvement after investigation under its authority.³⁵

After reading the definition of navigable waters, it is nearly impossible to derive objective or workable criteria for practitioners to evaluate their licensing susceptibility. Actually, merely reading the definition of navigable waters would cause someone to conclude that every river is considered to be navigable waters. Therefore, it is necessary to examine case law to determine how the FERC and different courts have interpreted section 3(8).

B. Relevant Case Law

1. Requirements to Establish Navigable Waters

In 1921, the United States Supreme Court adopted the holding of *The Daniel Ball in Economy Light & Power Co. v. United States*.³⁶ In *Economy*, the facts established that passenger transportation downstream was no longer possible due to the construction of hydroelectric dams, but evidence showed that the waterway had been used for transportation in the past.³⁷ Even though transportation was no longer feasible, the Court classified the river as navigable waters because navigation was possible before the construction of any dams. The Court stated: “whether the river, in its natural state, *is used or capable of being used* as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water.”³⁸ Consequently, the Court concluded that the waterway was subject to federal licensing because recorded evidence established that the river was navigable in its natural state.³⁹

In a similar case, *United States v. Utah*, decided in 1931, the United States

34. 16 U.S.C. § 817(1) (2000) (citations omitted) (emphasis added).

35. 16 U.S.C. § 796(8) (2000) (emphasis added).

36. *Econ. Light & Power Co. v. United States*, 256 U.S. 113 (1921).

37. *Id.*

38. *Economy Light & Power*, 256 U.S. at 121–22 (citing *In re The Daniel Ball*, 77 U.S. 557 (1870)) (emphasis added).

39. *Id.* at 121–22.

Supreme Court held that the “capacity [of a waterway to meet the needs of commerce] may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.”⁴⁰ In that case, evidence showed that “sand and sediment wh[en] combined with the tortuous course of the rivers produce[d] a succession of shifting sand bars, shallow depths, and instability of [the] channel.”⁴¹ However, based on past use of the stream during nine months of the year, the Court held that navigation could be conducted and, therefore, the stream was navigable waters.⁴² The Court also noted that if experimental transportation was conducted for litigation – if evidence established that getting from point A to point B by vessel was possible – that fact could be sufficient to determine navigability.

Expanding on the holding in *Utah*, the United States Supreme Court held in *United States v. Appalachian Power* that with regard to use or suitability for use in the past: “[e]ven absence of use over long periods of years, because of changed conditions . . . does not affect the navigability of rivers in the constitutional sense.”⁴³ With respect to suitability for use in the future: “In determining the navigable character of [a river] it is proper to consider the feasibility of interstate use after reasonable improvements which might be made[.]”⁴⁴ and “[i]t [is not] necessary that the improvements should be actually completed or even authorized.”⁴⁵

About ten years later, in *Montana Power Co. v. Federal Power Commission*, the United States Court of Appeals for the District of Columbia Circuit clarified the relative significance of the waterways physical characteristics. The court held, “[i]f the stream’s flow, depth, gradient, width and capacity make it ‘suitable for use’ in interstate commerce, it is subject to the licensing authority of the Federal Power Commission.”⁴⁶ In that case, evidence established that the river contained rapids and falls that presented barriers to navigation. Although the court looked to the physical characteristics of the river, they were not the deciding factor. The court found that the river was navigable because past evidence established that gold miners had traveled the entire river with only a short portage.⁴⁷ In summary, the court determined that the waterway was navigable, despite its physical characteristics, based on historical examples of use.⁴⁸

In a later decision, *Rochester Gas & Electric Co. v. FERC*, the Second Circuit attempted to summarize the existing law on navigability, drawing on decisions from the United States Supreme Court, i.e., *Economy Light & Power Co.*, *Utah*, and *Appalachian*.⁴⁹ The court held “that . . . [a] [r]iver is ‘navigable

40. *United States v. Utah*, 283 U.S. 64, 83 (1931).

41. *Id.* at 84.

42. *Utah*, 283 U.S. at 89.

43. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409–10 (1940).

44. *Id.* at 409.

45. *Appalachian Elec. Power*, 311 U.S. at 408 (emphasis added).

46. *Mont. Power Co. v. FPC*, 185 F.2d 491, 495 (D.C. Cir. 1951).

47. *Id.*

48. *Mont. Power*, 185 F.2d at 495.

49. See *Econ. Light & Power Co., v. United States*, 256 U.S. 113 (1921); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–10 (1940).

waters' . . . if (1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements."⁵⁰ Proof of any one of the three factors would be sufficient for the court to determine that a particular body of water meets the test of navigability.⁵¹

2. The FERC's Slight Step Back from the *Rochester* Criteria

Perhaps in response to the broadness of the *Rochester* decision, an exception to both the first and second *Rochester* criteria has evolved.⁵² In *PacifiCorp Electric Operations*, the FERC determined that a waterway was non-navigable because past use only established that "skilled kayakers or whitewater rafters" used the waterway.⁵³ The FERC noted that a determination of navigability was dependent on simpler types of travel, i.e., canoes or rafts.⁵⁴ In that case, the waterway contained Class IV rapids, which are considered extremely dangerous for common water vessels like canoes.⁵⁵ The *PacifiCorp Electric Operations* holding was derived from an earlier decision in *Pennsylvania Electric Co.* In *Pennsylvania*, the FERC set forth that a river was non-navigable because a substantial reach of the river could "only be navigated by a kayak (or comparably specialized sporting craft designed for river running) maneuvered by an expert paddler."⁵⁶ These two decisions indicate a willingness to move away from the virtually all-encompassing navigable waters standard, which essentially declares all waterways navigable.

IV. EXAMINATION OF THE NAVIGABLE WATERS STANDARD

"When I use a word . . . it means just what I choose it to mean, neither more nor less." – Lewis Carroll⁵⁷

Overly broad interpretations of the term "navigable waters" by the courts have resulted in a definition so broad as to be tantamount to no definition at all. Although the FERC's recent decisions have seemed to narrow the standard, this is not sufficient to bring the needed rationality to the area which can only be achieved by revised statutory language that provides a more objective and workable standard.⁵⁸ To retrace our steps, section 3(8) does not provide any language explaining how easily, under what conditions, by what type of watercraft, or how often a waterway must be navigable in order to be considered navigable waters. For that reason, the courts and the FERC have dealt with the issue on a case-by-case basis.

50. *Rochester Gas & Elec. Co. v. FERC*, 344 F.2d 594, 596 (2d Cir. 1965).

51. *Id.*

52. *PacifiCorp Elec. Operations*, 73 F.E.R.C. ¶ 61,365, 62,140 (1995).

53. *Id.*

54. 73 F.E.R.C. ¶ 61,365, at 62,140–41.

55. *Id.*

56. *Pa. Elec. Co.*, 56 F.E.R.C. ¶ 61,435, 62,549 (1991).

57. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND: HUMPTY DUMPTY* (Macmillan Co. 1872).

58. 56 F.E.R.C. ¶ 61,435, at 62,549–50; *PacifiCorp Elec. Operations*, 73 F.E.R.C. ¶ 61,365, 62,140–41 (1995).

For instance, in *Rochester Gas & Electric Co. v. FERC* the holding provided “that . . . [a] [r]iver is ‘navigable waters’ . . . if (1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements.”⁵⁹ The FERC and courts have applied this three-prong test in numerous later decisions because it has purported to be a more workable standard to resolve navigable water disputes.⁶⁰ Since the *Rochester* elements seem to encompass all of the prior holdings by the FERC and courts it will be used to demonstrate the overly broad interpretations of section 3(8).

In *FPL Energy Maine Hydro*, the court based its decision on several test canoe trips to determine navigability.⁶¹ The evidence established that canoes could travel the waterway up and downstream in a continuous manner without great difficulty.⁶² Accordingly, the court held that the waterway met the first *Rochester* element of recent use.⁶³ Clearly, the FERC and courts can conclude that a river is navigable if a boater is able to travel the river almost continuously.⁶⁴

Past commercial or recreational use on a waterway establishes navigability under the second *Rochester* criterion.⁶⁵ The FERC and courts have relied upon as little evidence as past log transportation downstream to establish adequate evidence of navigability.⁶⁶ Essentially, if there is evidence that an item floated downstream for use in commerce, the waterway can be determined navigable. To support that statement, the United States Supreme Court cases demonstrate that evidence of isolated past use, even in the face of challenging physical characteristics, would be sufficient for navigability.⁶⁷

The third *Rochester* criterion is probably so broad by itself that it is almost a mockery of the express language of section 3(8).⁶⁸ A waterway made suitable in the future, by reasonable improvements, can be determined navigable.⁶⁹ The critical question is: What are considered reasonable improvements? The *Appalachian* court held that a waterway can be classified as navigable waters through reasonable improvement if there is a “balance between cost and need at a time when the improvement would be useful.”⁷⁰ Accordingly, the river or stream must be classified as a waterway of the United States, meaning that it connects interstate waters.⁷¹ In effect, the FERC and courts are to apply a balancing test to determine if necessity warrants future interstate commerce use.

59. *Rochester Gas & Elec. Co. v. FERC*, 344 F.2d 594, 596 (2d Cir. 1965).

60. The decision has been cited in close to 100 subsequent cases.

61. *Rochester Gas & Elec.*, 344 F.2d at 596.

62. *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002).

63. *Id.*

64. *Kennebec Water Dist.*, 79 F.E.R.C. ¶ 62,041, 64,064 (1997).

65. *Rochester Gas & Elec. Co. v. FERC*, 344 F.2d 594, 596 (2d Cir. 1965).

66. *Id.* at 597.

67. *Econ. Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Utah*, 283 U.S. 64 (1931).

68. *Rochester Gas & Elec.*, 344 F.2d at 596; *see generally* 16 U.S.C. § 796(8) (2000).

69. *Rochester Gas & Elec. Co. v. FERC*, 344 F.2d 594, 596 (2d Cir. 1965).

70. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–08 (1940).

71. *Sierra Pac. Power Co. v. FERC*, 681 F.2d 1134, 1140 (9th Cir. 1982).

In *Rochester*, the court noted that “[it is not] necessary that the improvements should be actually completed or even authorized” to find the waterway navigable.⁷² In essence, that interpretation provided that the FERC only has to recommend that the waterway would be suitable for interstate commerce after reasonable improvement. Section 3(8) provides support for that interpretation, which provides, in pertinent part, “parts of streams as shall have been *authorized by Congress* for improvement by the United States or shall have been *recommended to Congress* for such improvement after investigation under its authority.”⁷³

It is extremely troubling that Congress would provide the FERC power to find a waterway navigable from a mere recommendation. What if improvements are recommended but never initiated? The facts of *FPL Energy Maine Hydro* can be used to illustrate the concern. In that case, the FERC could have recommended to Congress that the waterway, after reasonable improvement, could be navigable, but it was unnecessary in light of the evidence.⁷⁴ Although, if the facts in *FPL Energy Maine Hydro* were slightly different, the court could have concluded that the waterway was non-navigable. For example, evidence could have established that a long stretch of the waterway was very shallow and as a result would not permit any transportation. In theory, the FERC could argue that the cost to deepen the channel would be outweighed by interstate use. From that recommendation, Congress could classify the waterway as navigable.

The third *Rochester* criterion provides the FERC and Congress overwhelming power. Of course, the FERC’s recommendation would have to be supported by substantial evidence, but substantial evidence is simply “more than a scintilla of evidence, but less than a preponderance.”⁷⁵ Congress is essentially denying hydroelectric project developers any definite standard to determine their susceptibility to federal licensing requirements. Consequently, there is virtually no way that a project’s developer could forecast future licensing requirements with any certainty, in effect denying a developer the ability to evaluate long-term expenditures. Although, as a safety measure, project developers could forecast that the project will be subject to federal licensing because unless the FERC keeps narrowing the navigable waters standard, almost every waterway worth placing a dam upon is classified as navigable.

V. FUTURE ARGUMENT

Pointing out the broad interpretations of section 3(8), it only seems intuitive for the FERC to continue narrowing its future holdings, e.g., the kayakers’ classification of rapids distinction.⁷⁶ In addition, the FERC should promulgate rules, which might help to narrow the application of the third *Rochester* criterion. The third criterion would seem rational if it only applied to waterways that were in the process of being improved. Instead, the standard adopted is that a waterway can be considered navigable even if the improvement is only in

72. *Rochester Gas & Elec.*, 344 F.2d at 596 (quoting *Appalachian Elec. Power*, 311 U.S. at 408).

73. 16 U.S.C. § 796(8) (2000) (emphasis added).

74. See *Rochester Gas & Elec.*, 344 F.2d at 594.

75. *Sprague v. Dir., Office of Workers’ Comp. Programs*, 688 F.2d 862, 866 (1st Cir. 1982).

76. See *supra* text accompanying notes 52–56.

theory.⁷⁷ If the FERC adopted a standard which only permitted a recommendation for navigability once a waterway was being improved, then it would remove the possible danger of classifying a waterway as navigable which might never actually be improved.

In both *Pennsylvania Electric Co.*, and *PacifiCorp Electric Operations*, the FERC has demonstrated a slight willingness to narrow section 3(8) interpretations. In those cases both of the waterways were classified as non-navigable.⁷⁸ Both waterways contained Class IV rapids, which are predominantly dangerous to travel without a specialized craft in accordance with the International Scale of River Difficulty.⁷⁹ The FERC based its decisions on the notion that only simple types of travel constitute navigability.⁸⁰ Those decisions have attempted to apply some common sense rather than rely on a literal definition of navigability—literally meaning that if anybody at any time under any conditions can navigate a body of water, it must be navigable.⁸¹

In both *PacifiCorp Electric Operations* and *FPL Energy Maine Hydro*, the FERC and the court, respectively, seemed to have relied heavily upon the sporting industry's classifications of waterways as having a certain "class" of rapids. Interestingly, participants in the sport of kayaking and rafting have created an objective system to classify waterways, whereas the FERC and courts have not. In *FPL Energy Maine Hydro*, the FERC determined the waterway navigable even though the waterway possessed Class II rapids.⁸² On the other hand, in *PacifiCorp Electric Operations*, the court determined the waterway was non-navigable because it contained Class IV rapids.⁸³

Since the FERC and courts have made the Class II versus Class IV distinction, it must be assumed that it was developed for a very good reason, although section 3(8) does not provide express terms to support it. Navigability necessarily means a person can navigate a body of water—get oneself from point A to point B by means of a watercraft. The fact that persons of unusual skill and motivation might be able to navigate a stream in a specialized watercraft definitely should not result in a determination that a waterway is navigable. It seems that the FERC's recent decisions have recognized a conundrum that can

77. *Rochester Gas & Elec. Co. v. FERC*, 344 F.2d 594, 596 (2d Cir. 1965).

78. *PacifiCorp Elec. Operations*, 73 F.E.R.C. ¶ 61,365, 62,140 (1995); *Pa. Elec. Co.*, 56 F.E.R.C. ¶ 61,435, 62,549–50 (1991).

79. ONT. RECREATIONAL CANOEING ASSOC., INTERNATIONAL SCALE OF RIVER DIFFICULTY, APPENDICES ORCA INSTRUCTOR'S MANUAL (2002), available at <http://www.canoeclub.barrie.on.ca/mwscale.htm> (last visited Mar. 7, 2005).

CLASS IV: Advanced: Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Depending on the character of the river, it may feature large, unavoidable waves and holes or constricted passages demanding fast maneuvers under pressure. A fast, reliable eddy turn may be needed to initiate maneuvers, scout rapids, or rest. Rapids may require must moves above dangerous hazards. Scouting may be necessary the first time down. Risk of injury to swimmers is moderate to high, and water conditions may make self-rescue difficult. Group assistance for rescue is often essential but requires practiced skills. A strong Eskimo roll is highly recommended.

Id.

80. 73 F.E.R.C. ¶ 61,365, at 62,140.

81. See *supra* text accompanying notes 52–56.

82. *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1158 (D.C. Cir. 2002).

83. *PacifiCorp Elec. Operations*, 73 F.E.R.C. ¶ 61,365, 62,140 (1995).

only be solved by sufficiently narrowing section 3(8) so that only those bodies of water which substantially impact interstate commerce are considered when determining navigability.

For the reasons already discussed, a revision to section 3(8) could be drafted with input from hydrologists and the sporting – kayaking or canoeing – industry. A minimum flow rate could be implemented into the terms of the statute so that small streams, tributaries, and the “non-navigable” upper reaches of rivers would be excluded from the definition of navigable waters, assuming the waterways do not substantially affect interstate commerce. Section 3(8) could be revised to provide something along the following:

“Navigable Waters” for purposes of this section means a body of water which at the point in question has an average daily flow rate of _____gallons per minute (GPM) over the course of one year; provided, however, if a body of water has been determined to be navigable by previous adjudications pursuant to this section it shall continue to be classified as navigable and further provided that, if a body of water would be so classified, but because of man-made obstructions or man-made drainage, has ceased to meet the requisite flow rate, it shall be considered “navigable waters.” Any body of water found to be navigable at any point shall be considered navigable for all points downstream of that point. If Congress authorizes improvement on a waterway that is considered “non-navigable waters,” then once improvement is actually initiated, the waterway from that point downstream shall be considered “navigable waters.” Congress shall have jurisdiction under its authority to regulate commerce with foreign nations and among the several states of any waterway considered “navigable waters.”⁸⁴

VI. CONCLUSION

An effective statute needs to provide a reasonably objective standard whereby companies can determine if they are subject to its regulation. Over time, courts and the FERC have interpreted section 3(8) in an extremely broad manner because the terms of the statute do not provide any objective terms to determine if a waterway is navigable. Accordingly, hydroelectric companies do not have any concrete means to determine their susceptibility to federal licensing requirements. For those reasons, section 3(8) should be revised to provide a narrower, more objective standard, enabling hydroelectric companies to determine their potential licensing requirements at their time of formation and, more importantly, in the future.

Jeremy Ward

84. 16 U.S.C. § 796(8) (modifying the text based on interpretations supplied by prior case law).

