

THE ELECTRIC CONSUMERS PROTECTION ACT OF 1986

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The Electric Consumers Protection Act of 1986 (ECPA)¹ is the most important federal legislation dealing with the standards for development of the Nation's rivers for hydroelectric purposes since the Federal Water Power Act of 1920. This article provides a comprehensive overview of this important piece of energy legislation. In addition, it identifies some of the issues that have arisen, and that are likely to arise in the future, concerning its implementation.

I. RELICENSING PROVISIONS

The most controversial issue the ECPA addresses—and the issue that led Congress to begin considering new hydroelectric legislation in the first place²—is what standards should govern the selection of a new licensee for a hydroelectric project once the term of the original license for the project has expired.

A. *The Nature Of The Problem*

Since it was established in 1920, the Federal Power Commission, now the Federal Energy Regulatory Commission (the Commission), generally has exercised its jurisdiction over hydroelectric development by deciding whether or not to issue licenses for the construction of new projects. The Commission usually issued original licenses for terms of fifty years.³ Accordingly, the Commission only began to consider the unique issues associated with relicensing of existing projects in the 1970's as the first licenses issued by the Commission began to expire. Those issues are of crucial importance to the Commission and to owners of hydroelectric projects because dozens of projects now are before the Commission for relicensing, and hundreds more will require relicensing between this

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1. Pub. L. 99-495, 100 Stat. 1243 (1986); Pub. L. 66-280. Other highly significant legislation in this field includes the Public Utilities Regulatory Policies Act of 1978, Pub. L. 66-245, which established a federal policy to encourage hydroelectric development, and the Wild and Scenic Rivers Act, Pub. L. 90-542, which established a mechanism for protecting certain free-flowing rivers from hydroelectric and other types of development.

2. Congress' consideration of new hydroelectric legislation commenced in November 1983, when Congressman Shelby and others introduced H.R. 4402, a three-page bill, which would have simply eliminated the public power preference in relicensing and created a strong presumption in favor of granting new licenses to incumbent licensees.

3. Section 6 of the Federal Power Act (the Act) states that "Licenses under this subchapter shall be issued for periods not exceeding fifty years." 16 U.S.C. § 799 (1982).

year and the year 2000.⁴

The advent of the relicensing era presented several fundamental issues. The first was whether and how freely existing projects should be transferred to new owners. The second was whether state and municipal utilities should receive a preference over other applicants in the relicensing process.⁵

The barebones relicensing provisions in the Federal Water Power Act of 1920 (the Act)⁶ appeared to contemplate relatively frequent project transfer. The basic philosophy of the Act was that a license to exploit river resources for hydroelectric purposes is a privilege that should last only for a limited term.⁷ Consistent with that philosophy, the Act provided a mechanism for transferring projects to new owners at the end of the original license term. First, the Act authorized the federal government to take over a project upon expiration of the original license, subject only to the requirement that the government pay the licensee's net investment in the project, which was essentially the original cost minus accumulated depreciation, plus severance damages.⁸ Second, in the event the government did not take over a project, the Act authorized the Commission

4. In remarks presented at a joint American Bar Association-Federal Energy Bar Association Workshop on Relicensing of Hydroelectric Projects, on January 16, 1987, the Chairman of the Commission, Martha O. Hesse, stated that 51 relicensing applications were then pending before the Commission and that an additional 320 licenses would expire before the year 2000. Chairman Hesse also noted that 173 licenses will expire in the year 1993 alone.

5. This description of the legal and policy issues raised by relicensing is drawn in large part from the extensive hearings on ECPA conducted by the House of Representatives and the Senate. See *Hydropower Relicensing: Hearings Before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce on H.R. 44, H.R. 1815, H.R. 1959, and H.R. 2605, 99th Cong., 1st Sess. (1985)* [hereinafter 1985 House Hearings]; *Relicensing of Hydroelectric Projects: Hearing Before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce on H.R. 4402, H.R. 5299, and H.R. 5416 (1984)* [hereinafter 1984 House Hearings]; *Hydroelectric Relicensing: Hearings Before the Subcommittee on Water and Power of the Senate Committee on Energy and Natural Resources on S. 403, S. 426, S. 1219, and S. 1260, 99th Cong., 1st Sess. (1985)* [hereinafter Senate Hearings]; see also *Small Hydro Program: Hearings Before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, 98th Cong., 2nd Sess. (1984)* [hereinafter Small Hydro Hearings].

6. Pub. L. No. 66-245. The Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, made the Federal Water Power Act of 1920 Part I of the Federal Power Act.

7. Prior to the enactment of the General Dam Act of 1910, Congress generally authorized the construction of particular dam projects on a case-by-case basis. In his veto of one such piece of legislation, the Rainey River bill, in 1908, President Roosevelt urged that general dam legislation be enacted which would include, among other things, a time limitation on project licenses:

The public must retain the control of the great waterways. It is essential that any permit to construct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand. The right reserved by Congress [in the Rainey River Bill] to alter, amend, or repeal is based on this principle; but actual experience of what happens with indeterminate public-utility franchises proves that they are in the vast majority of cases practically perpetual. Each right should be issued to expire on a specified day, without further legislative, administrative, or judicial action.

Message from the President to the Speaker of the House (April 13, 1908), *reprinted in* Report of the Subcommittee on Dams and Water Power to the House Interstate and Foreign Commerce Committee on Rainey River and James River Dams, 60th Cong., 2d Sess. 35 (1908). The General Dam Act of 1910, which was enacted in response to the President's veto, provided that "the authority granted under or in pursuance of the provisions of this Act shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this Act." Pub. L. No. 61-245 § 4. This fifty year limitation on project licenses was incorporated in the Federal Water Power Act of 1920. See *supra* note 3.

8. See 16 U.S.C. § 807 (1982).

to issue a new license to either a new licensee or to the original licensee.⁹ At least as between competing private applicants, the Act afforded the incumbent no advantage, except that the new licensee was required to pay net investment cost plus severance damages on the same terms as the government.¹⁰

The Commission's experience with relicensing during the late 1970's and early 1980's demonstrated that the threat that projects might be transferred to new owners created healthy competition in the relicensing process. Based on a study of nineteen early relicensing proceedings, the General Accounting Office (GAO) found that competition spurred the applicants to propose significant project improvements.¹¹ In five of the nine proceedings involving competing applications, the GAO found that the original licensee submitted a new application to upgrade the project after a competitive application was filed. In some cases, incumbents subject to competition proposed to increase generating capacity, and in others they filed upgraded recreational plans.

However, incumbent licensees raised several substantial objections to the practical effects of project transfers.¹² The first was that new licensees would receive a significant windfall at the expense of the incumbent. Because many projects have a number of remaining years of useful life, but the original investment in the projects has been largely, if not fully, amortized, the value of the projects measured by the value of the power they generate frequently exceeds the amount the incumbent would receive upon transfer. Furthermore, incumbent licensees invoking the interests of their customers argued that project transfers would deprive their customers of the rate benefits of low-cost hydroelectric power. Finally, incumbent licensees contended that project transfers entailed significant technical problems that could produce dislocations in the distribution of electrical power.

The second related issue raised by the Commission's initial experience with relicensing was to what extent municipal and state utilities should receive a preference over private utilities in the relicensing process.

The proponents of the so-called public power preference contended that hydroelectric projects involve the exploitation of public resources and therefore, as a matter of policy, public entities, rather than private entities, should take over the management of hydroelectric projects whenever possible.¹³ On the other hand, the private utilities contended that, since most existing hydroelectric projects were largely if not fully amortized they constituted only a small fraction of any utility's rate base and, therefore, generated only small profits. As a result, private utilities contended, the primary impact of transferring existing projects to state or municipal utilities would be felt by the customers of private utilities who would be deprived of the rate benefits of low-cost hydroelectric

9. See 16 U.S.C. § 807 (1982).

10. *Id.*

11. Letter from J. Dexter Peach, General Accounting Office, to Congressman Richard L. Ottinger (May 15, 1984), *reprinted in* 1984 House Hearings, *supra* note 5, at 630-36.

12. See, e.g., Statement of David F. Bolender, President, Pacific Power & Light Co., *reprinted in* Senate Hearings, *supra* note 5, at 234-334.

13. See, e.g., Statement of Alex Radin, American Public Power Association, *reprinted in* 1985 House Hearings, *supra* note 5, at 306, 323.

projects.¹⁴ They argued that shifting low-cost power projects for the benefit of customers of state and municipal utilities was inequitable, especially in view of the fact that state and municipal utilities are accorded a preference over private utilities in the purchase of low-cost power from federal power projects.

Apart from the public policy issues raised by the so-called public power preference, there was substantial legal uncertainty over how the preference actually applied to relicensing. Section 7 of the Act required the Commission "in issuing licenses to new licensees" to "give preference" to an application filed by a state or municipality if it was "equally well adapted to conserve and utilize in the public interest the water resources of the region" as an application filed by a private developer.¹⁵ While section 7 clearly created a preference for state and municipal utilities in seeking a "new" license to construct a project, it was uncertain whether the preference had the same scope when a state or municipality sought a "new" license for an existing project in a relicensing proceeding. One plausible interpretation of the Act was that in relicensing, the preference only applied against private entities that were potential new licensees, but not against a private entity that was an incumbent licensee. Not surprisingly, the private utilities adopted that interpretation. Publicly-owned utilities contended that section 7 granted them a preference in relicensing proceedings against all competing private applicants, including the incumbent.

Over time, the Commission resolved this debate in contradictory ways. The Commission first addressed the issue when the Cities of Bountiful, Utah and Santa Clara, California, which had filed relicense applications for projects owned by Utah Power & Light Company and Pacific Gas & Electric Company, respectively, requested that the Commission issue a declaratory ruling on the scope of the public power preference in relicensing. In June 1980, the Commission issued an order holding that the preference applied in all relicensing cases and not just those in which the original licensee is not an applicant.¹⁶ The U.S. Court of Appeals for the Eleventh Circuit affirmed that order.¹⁷

In October 1983, three months after the Supreme Court declined to review the Court of Appeals' decision in the *Bountiful* case, the Commission reversed itself. In the *Merwin* case, involving another application by a municipality to take over a private utility project, the Commission declared that "Bountiful is wrong."¹⁸ The Commission ruled that states and municipalities do not have a preference in any proceeding involving the original licensee.

The municipal applicant for the Merwin dam project appealed the Commission's order to the U.S. Court of Appeals for the District of Columbia Cir-

14. See, e.g., Statement of Joseph M. Farley, Alabama Power Company, reprinted in 1984 House Hearings, *supra* note 5, at 335, 354-55; Statement of Frederick Webber, Edison Electric Institute, reprinted in 1984 House Hearings, *supra* note 5, at 135, 128-31.

15. 16 U.S.C. § 800 (1982). Section 7 also provides a state or municipality the last right to amend an application in order to demonstrate that its plans are at least equal to those of competing private developers.

16. City of Bountiful, Utah, 11 F.E.R.C. ¶ 61,337 (1980).

17. Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

18. Virginia Elec. & Power Co., 25 F.E.R.C. ¶ 61,052 (1983). The Commission's reversal of position was at least in part the result of the changes in the composition of the Commission following the election of Ronald Reagan as President.

cuit. The appellant argued that the Commission was barred from reversing the interpretation of section 7 adopted in the *Bountiful* case, and also that the Commission's ruling in *Merwin* was wrong on the merits. In an unusually harsh opinion, the Court of Appeals accepted both arguments and overruled the Commission's order. On the merits, the court found that the statute was "somewhat unclear," but concluded that the legislative history demonstrated beyond "any shadow of doubt" that the municipal preference applies in all relicensing proceedings.¹⁹

On January 16, 1986, a majority of the Court of Appeals, sitting *en banc*, voted to rehear the case and vacated the panel's decision.²⁰ While the court did not explain the reasons for its order, it is likely that the full court wished to address the novel issue of administrative law raised by the panel's ruling that the Commission was precluded from adopting a new interpretation of section 7, rather than the panel's ruling that section 7 applied in all relicensing cases. As of May 1987, the appeal was still pending.

B. *New Relicensing Standards*

The ECPA resolves the debate over the scope of the public power preference in relicensing by entirely eliminating it.²¹ In the future, municipalities and states will have no preference against private entities in seeking a relicense, whether or not the original licensee is an applicant.

While this change appears to represent a clear break with the original intent of the Act, there was surprisingly little effective opposition to this change during the legislative debates on the ECPA.²² A majority of Congress apparently was persuaded that the public preference issue ultimately turned on whether customers of public utilities should receive an economic windfall at the expense of customers of private utilities. Congress concluded that they should not. Apart from the various arguments discussed above, Congress undoubtedly was influenced by the consideration that, as a matter of politics, it was more palatable to preserve the benefits of low-cost power enjoyed by the many customers of private utilities, than to provide the relatively smaller number of customers of public utilities an unanticipated benefit.

The ECPA resolves the debate over the role of competition in relicensing by creating an advantage—but only a nominal advantage—for incumbent licen-

19. See *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366, 379 (D.C. Cir. 1985), *vacated and rehearing en banc granted*, 787 F.2d 674 (D.C. Cir. 1986).

20. See *supra* note 20.

21. ECPA, § 2, amending section 7 of the Act (to be codified at 16 U.S.C. § 800). The amendments to section 7 preserve the public power preference in original licensing proceedings.

22. Then Senator Gary Hart offered the most thoughtful opposition to the elimination of the public power preference. Expressly invoking the progressive tradition of Theodore Roosevelt, Senator Hart proposed that public recapture of hydroelectric projects be made automatic unless the Commission makes an affirmative decision to issue a new private license. See 123 CONG. REC. S4244 (daily ed. April 15, 1986). Senator Hart proposed that the recaptured projects be operated, depending upon their location, by the Tennessee Valley Authority, the Bureau of Reclamation, or the U.S. Army Corps of Engineers. This amendment, Senator Hart contended, would restore "the 1920 act's presumption that hydropower resources and facilities would revert to public control." *Id.* at S4257. The amendment was defeated on the Senate floor by a vote of 80 to 18. *Id.* at S4273.

sees in relicensing proceedings. At the same time, the ECPA establishes a new set of substantive criteria to ensure that, whether or not competitive applications are filed, the Commission will encourage relicense applicants to mitigate the effects of existing projects on environmental and recreational resources.

Section 15 of the Act, as amended, directs the Commission to consider, in addition to the general criteria for licensing in Section 10 of the Act, a new set of criteria specific to relicensing: (A) the "plans and abilities" of the applicant to comply with the Act and the conditions of the license; (B) the safety of the applicant's proposal; (C) the "plans and abilities" of the applicant "to provide efficient and reliable electric service"; (D) the applicant's "need" for power; (E) the applicant's "existing and planned transmission services"; (F) the cost-effectiveness of the applicant's plans; and (G) "[s]uch other factors as the Commission deems relevant."²³ In addition, the ECPA directs that, in considering a relicense application by an existing licensee, the Commission must consider (A) the incumbent's "record of compliance with the terms and conditions of the existing license," and (B) any "actions taken by the existing licensee related to the project which affect the public."²⁴

These criteria represent a compromise between the different sets of relicensing criteria adopted by the House of Representatives and the Senate. By far the most contentious factor in the conference committee was the "need for power."²⁵ The Senate bill contained an "economic impact" provision that favored existing licensees because it focused on the economic consequences to the incumbent's customers if the incumbent did not receive the new license.²⁶ The House bill contained a comparatively simple provision that required the Commission to consider each applicant's need for power.²⁷ The conference committee resolved the conflict by adopting an expanded need for power test that, according to the conference report, requires the Commission "to evaluate the relative need of each applicant for the project to serve its customers over the short- and long-term, including consideration of the reasonable costs and the reasonable availability of alternative sources of power (taking into account conservation and other relevant factors), the effect on the applicant's operating and load characteristics, and the effect on the communities served by the project."²⁸

The new section 15(a)(2) of the Act directs the Commission, based on its evaluation of the applicable criteria, to grant the new license to "the applicant having the final proposal which the Commission determines is best adapted to serve the public interest," except that, in making this determination, the Commission must ensure that "insignificant differences" between the applications will not result in a transfer of a project to a new owner.²⁹ This provision represents a compromise between the House bill, which would have required the Commission to award the license to the applicant whose proposal is "best

23. ECPA, § 4(a) (to be codified at 16 U.S.C. § 808(a)(2)).

24. *Id.* (to be codified at 16 U.S.C. § 808(a)(3)).

25. See H.R. REP. NO. 934, 99th Cong., 2d Sess. 27-28 (1986).

26. See S.426 § 4, 123 CONG. REC. S4450 (daily ed. Apr. 17, 1986).

27. See H.R. 44 § 4, 123 CONG. REC. H1996 (daily ed. Apr. 21, 1986).

28. H.R. REP. NO. 99-934, *supra* note 25.

29. ECPA, § 4(a) (to be codified at 16 U.S.C. § 808 (a)(2)).

adapted" to serve the public interest,³⁰ and the Senate bill, which would have required the Commission to issue a new license to the original licensee unless the Commission makes an affirmative finding "that the plans of another applicant are better adapted to serve the public interest."³¹

The legislative history contains little guidance on the meaning of the term "insignificant differences," and therefore the Commission will have fairly broad latitude in interpreting this provision. If the Commission chooses to define "insignificant differences" narrowly, competition in relicensing almost certainly will be encouraged. On the other hand, if the Commission interprets the provision as a watered-down version of the Senate's incumbent preference, competition will be deterred. It appears that the present Commission is likely to adopt a narrow construction of "insignificant differences." During her first public statement on ECPA, the Chairman of the Commission, Martha Hesse, stated: "In passing ECPA, Congress clearly wanted to level the proverbial playing field and bring more competition into the relicensing process."³²

During the House debate on the conference report, several congressmen suggested that the incumbent's record of compliance with the terms of the original license should be a key factor in selecting among relicense applications submitted by the original licensee and a new applicant. For example, Congressman Moorhead of California stated, "If there are only insignificant differences, then the existing licensee's track record will be dispositive."³³

Congress created one important exception to the competitive relicensing process by barring the Commission from comparing applicants' plans relating to the protection of fish and wildlife resources. The new section 15(a)(2)(G) provides that "the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources . . . shall be determined in accordance with section 10," and an applicant's plans concerning fish and wildlife "shall not be subject to a comparative evaluation."³⁴ As discussed below, under the new section 10(j) of the Act, the Commission is required to protect fish and wildlife by consulting with and relying upon the recommendations of state and federal fish and wildlife agencies; Congress apparently concluded that the Section 10(j) procedure for developing fish and game measures made it unnecessary to rely on competition to generate remedial proposals. In addition, section 15(a)(2)(G) reflects the desire of certain legislators to avoid "gold plating" of existing projects.³⁵

C. *Transmission Facilities*

Congress' effort to encourage competition in relicensing would be fruitless if incumbents were permitted to use their control over existing electric distribu-

30. See H.R. 44 § 4, 123 CONG. REC. H1996 (daily ed. Apr. 21, 1986).

31. See S. 426 § 4, 123 CONG. REC. S4450 (daily ed. Apr. 17, 1986).

32. Remarks of Commission Chairman Martha O. Hesse, at the joint American Bar Association-Federal Energy Bar Association Workshop on Relicensing of Hydroelectric Projects. (Jan. 16, 1987).

33. 123 CONG. REC. H8950 (daily ed. Oct. 2, 1986); see also *id.* at H8954 (statement of Congressman Shelby).

34. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(d)(1)).

35. See, e.g., 123 CONG. REC. 8950 (daily ed. Oct. 2, 1987) (statement of Congressman Moorhead).

tion systems to thwart the plans of the new licensee. Congress adopted two measures to ensure that the incumbent cannot obtain an unfair advantage in the relicensing process simply as a result of having an installed distribution system.

First, the ECPA directs the Commission not to consider the incumbent's natural advantage with respect to transmission facilities in making relicensing decisions. The section 15(d)(1) of the Act provides that, "[i]n evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project."⁸⁶

Second, the ECPA attempts to ensure that a successful applicant for a new license will be able to obtain access to the transmission facilities it needs to operate the facility.⁸⁷ If the Commission determines that it is "not feasible" for the new licensee to operate the hydroelectric facility without obtaining transmission services from the original licensee, the Commission will first direct the original licensee and the new licensee to attempt to negotiate an agreement for access to transmission facilities. If the parties cannot reach an agreement, the Commission will then order the former licensee to file a tariff, subject to refund, to ensure service beginning on the date of the transfer of the facility. Thereafter, the Commission is required to issue a final order adopting or modifying the tariff "at just and reasonable rates." The Commission's final order must "ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project." In addition, the final order must comply with a number of other specific criteria designed to ensure that this service obligation does not compel the original licensee to make substantial enlargements or improvements to its existing transmission system and to avoid any interference with the original licensee's ability to provide reliable service to its customers.⁸⁸

36. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(d)(1)).

37. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(d)(2)).

38. New section 15(d)(2) of the Act states in part that the Commission in issuing a final interconnect order:

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisitions related to such enhancement or improvement) necessary to carry out the purposes of this paragraph);

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;

(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and

(E) shall not order any entity other than the existing licensee to provide transmission or other services.

D. *New Timetable For Relicensing Procedures*

The ECPA also establishes a new timetable for the submission and processing of relicense applications.

First, the new section 15(b)(1) of the Act provides that, at least five years before the expiration of an existing license, an incumbent is required to notify the Commission whether or not it intends to seek a new license.³⁹ The Commission, "promptly" after receiving notice under this provision, is required to publish a notice of the incumbent's decision, and to notify the National Marine Fisheries Service, the Fish and Wildlife Service, and appropriate state fish and wildlife agencies of the licensee's decision.⁴⁰

At the same time, apparently regardless of whether or not the original licensee intends to seek a new license, the incumbent is required to make certain information available to the public for inspection and copying.⁴¹ The purpose of this requirement is to ensure that government agencies and the public have access to the information necessary to make an informed decision on whether to propose new terms and conditions for the project. The new Act does not specify the information required to be disclosed. Instead, it directs the Commission, within 180 days of the enactment of the 1986 Act, to promulgate regulations describing the information required to be made available under this provision.

The deadline for the submission of actual license applications, whether by the incumbent or a new licensee, is two years before the expiration of the existing license term.⁴² Then, within sixty days of that date, the Commission is required to establish "expeditious procedures for relicensing and a deadline for submission" of amendments to the application.⁴³ While the Commission presumably would have the discretion to issue annual licenses after the end of the term of the original license, this provision apparently contemplates that two years ordinarily will be sufficiently to make the relicensing decision.⁴⁴

II. NEW SUBSTANTIVE CONSIDERATIONS AND PROCEDURAL REQUIREMENTS IN LICENSING

The second major goal of the ECPA is to ensure that the Commission pays more attention to environmental concerns in deciding whether to issue licenses for hydroelectric projects and on what terms and conditions.⁴⁵ To achieve this goal, the ECPA includes two major categories of amendments which apply in initial licensing and relicensing proceedings: (1) new substan-

39. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(b)(1)).

40. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(b)(3)).

41. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(b)(2)).

42. ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(c)(1)).

43. *Id.*

44. In recognition of the fact that it will be impossible for licensees whose licenses expire less than five years from the date of enactment of ECPA to comply with this statutory timetable, ECPA directs the Commission to adjust the timetable for such licensees. *See* ECPA, § 4(a)(to be codified at 16 U.S.C. § 808(c)(2)).

45. During the hearings on ECPA, Congress heard extensive testimony criticizing the Commission's lack of concern for environmental values. *See, e.g.*, Statement of David Conrad, Senate Hearings, *supra* note 5, at 801-18.

tive considerations that the Commission will be required to take into account in making licensing decisions, and (2) new procedural provisions requiring the Commission to consult with, and in some instances take guidance from, state and federal agencies with expertise in resource management.

The related changes in the Commission's comprehensive planning responsibilities and the new environmental restrictions on small power production facilities are discussed below in sections III and IV.

A. *New Substantive Criteria*

Sections 4(e) and 10(a) of the Act were the basic provisions establishing the standards and conditions upon which the Commission could issue licenses for hydroelectric projects. Prior to the enactment of the ECPA, section 4(e) authorized the Commission to issue a license "[w]henver 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."⁴⁶ The ECPA adds the following new sentence at the end of section 4(e):

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 issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.⁴⁷

In addition, the ECPA expands the list of factors the Commission must consider under section 10(a).⁴⁸ New section 10(a)(1) now provides that the Commission can only issue a license on the condition

[t]hat the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)*, and for other beneficial public uses, including irrigation, flood control, water supply, and recreational *and other purposes referred to in Section 4(e)*. . . .⁴⁹

The underscored language was added by the ECPA.

In 1967 in *Udall v. Federal Power Commission* the Supreme Court adopted an expansive interpretation of Sections 4(e) and 10(a):

The test is whether the project will be in the public interest. And the determination can be made only after an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.⁵⁰

46. 16 U.S.C. § 797(e)(1982).

47. ECPA, § 3(a)(to be codified at 16 U.S.C. § 797(e)).

48. 16 U.S.C. § 803(a)(1982).

49. ECPA, § 3(b)(to be codified at 16 U.S.C. § 803(a)(1)).

50. 387 U.S. 428, 450 (1966).

The Court's gloss on sections 4(e) and 10(a) arguably encompassed most of the specific factors that the ECPA adds to these problems. The legislative history of the ECPA demonstrates, however, that Congress believed the Commission had not given equal weight to all relevant "public interest" factors in deciding whether or on what conditions to approve projects. The conference committee report states that the amendments to section 4(e) and 10(a) "were adopted with a view of not merely codifying existing practice at the . . . [Commission] under these sections, but to change and improve it."⁵¹ Furthermore, the conference report specifically explained how Commission decision-making should change:

The conferees believe that as a Nation we have come a considerable distance in recognizing the importance of our heritage. This legislation extends that 'distance' a bit more. The amendments expressly identify fish and wildlife protection, mitigation, and enhancement, recreational opportunities, and energy conservation as nondevelopmental values that must be adequately considered by FERC when it decides whether and under what conditions to issue a hydroelectric license for a project. We agree that there are instances in which careful and thoughtful consideration of the impact of a proposed project would and should lead to the conclusion that an original license ought not to be issued.⁵²

The conference committee adopted the requirement in section 4(e) that the Commission give "equal consideration" to non-development values in lieu of the provision adopted by the House requiring "equal treatment" of these values.⁵³ The conference committee apparently made this change out of concern that the "equal treatment" standard might be interpreted as a requirement that equal dollar amounts be spent on power generation equipment and environmental mitigation measures. As one congressman stated, the conference committee's amendment to section 4(e) avoids this result because it does not "require FERC to order a licensee to spend an equal dollar amount on each purpose."⁵⁴ At the same time, it is clear that the conference committee intended the "equal consideration" requirement to alter the results and not merely the process of Commission decision-making. The conference committee report expressly states that the "equal consideration" requirement is "both procedural and substantive."⁵⁵

One new licensing criterion added by the ECPA that is likely to be significant is the requirement under the new section 4(e) that the Commission give equal consideration to energy conservation in making licensing decisions. The House Report states that this provision is intended "to ensure that those who receive original licenses, or are permitted to get new licenses on relicensing, will initially consider energy conservation among energy supply alternatives."⁵⁶ This language appears to indicate that energy conservation must be considered as one of the possible project alternatives in every proceeding.

In addition, new section 10(a)(2)(B) contains more detailed requirements relating to energy conservation that apply to utilities. This provision requires

51. HR. REP. NO. 934, *supra* note 25.

52. *Id.* at 22.

53. H.R. 44 § 3(a), 123 CONG. REC. H1997 (daily ed. Apr. 21, 1986).

54. 123 CONG. REC. H8951 (daily ed. Oct. 2, 1986) (statement of Congressman Moorhead).

55. H.R. REP. NO. 934, *supra* note 25.

56. H.R. REP. NO. 507, 99th Cong., 2d Sess. 23 (1986).

the Commission to consider

[i]n the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from conservation facilities or small power production facilities), the electrical consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.⁵⁷

To implement this provision the Office of Hydropower Licensing recently requested that numerous applicants submit comprehensive reports to the Commission describing their current and planned programs to improve the efficiency of electricity generation and consumption.⁵⁸

B. New Procedural Requirements

The ECPA also expands the Commission's responsibility to consider environmental issues by establishing new procedures requiring the Commission to solicit and consider the views of other federal and state agencies with resource management responsibility. First, the new section 10(a)(2)(B) requires the Commission to consider

[t]he recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.⁵⁹

Under the new section 10(a)(3), the Commission, after receiving a license application, is required to request that the agencies and tribes described in section 10(a)(2)(B) submit proposed terms and conditions to be included in the license.⁶⁰

Second, the new section 10(j) establishes an elaborate procedure compelling the Commission to consult closely with state and federal agencies in developing license conditions for the protection of fish and wildlife.⁶¹ This provision is modeled after section 30(c) of the Act, adopted in 1978, which requires the Commission to adopt fish and wildlife conditions recommended by state and federal agencies for conduit hydroelectric facilities.⁶² Unlike section 30(c), however, section 10(j) authorizes the Commission to reject agency recommendations, provided it carries out certain procedures and makes certain necessary findings.

Section 10(j)(1) establishes as a basic mandate that the Commission "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the develop-

57. ECPA, § 3(b)(to be codified at 16 U.S.C. § 803(a)(2)(C)).

58. Statement by Fred Springer, Federal Energy Regulatory Commission, Office of Hydropower Licensing, at joint American Bar Association-Federal Energy Bar Association Workshop on Relicensing of Hydroelectric Projects. (Jan. 16, 1987).

59. ECPA, § 3(b)(to be codified at 16 U.S.C. § 803(a)(2)(B)).

60. ECPA, § 3(b)(to be codified at 16 U.S.C. § 803(a)(3)).

61. ECPA, § 3(c)(to be codified at 16 U.S.C. § 803(j)).

62. See 16 U.S.C. § 823a(c)(1982). Section 30 was added to the Act as a result of the Public Utilities Regulatory Policies Act of 1978.

ment, operation, and management of the project." Furthermore, it directs that each license issued by the Commission "shall include conditions for such protection, mitigation, and enhancement."

In order to carry out this mandate, section 10(j) provides that, in general, fish and wildlife conditions in a license "shall be based" on recommendations received from "the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies." If the Commission believes that the proposed conditions "may be inconsistent with the purposes and requirements" of the Act or "other applicable law," the Commission is required to attempt to resolve the inconsistency, "giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies." If the Commission "does not adopt in whole or in part" a condition recommended by an agency, the Commission is required to make each of the following "findings:"

(A) A finding that adoption of such recommendations is inconsistent with the purposes and requirements of this Part [of the Act] or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1) [i.e., the Commission's mandate to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project].

The Commission is required to publish these findings together with a "statement of the basis for each of the findings."

While the final version of Section 10(j) was derived almost word-for-word from the House bill,⁶³ the conference committee report contains an extensive discussion of the provision.⁶⁴ While the report recognizes that the Commission retains ultimate authority to fix appropriate fish and wildlife conditions, it emphasizes that the Commission should generally defer to the judgment of the resource agencies. The report states that section 10(j) "clearly and unmistakably upgrades the status" of recommendations by fish and wildlife agencies, and constitutes a "guarantee that the recommendations of the agencies cannot be lightly dismissed."

During the conference committee's consideration of the ECPA, the late Senator Zorinski of Nebraska raised a concern about the potential effects of the new section 10(j) process on pending relicensing proceedings involving two projects on the Platte River in Nebraska. To allay Senator Zorinski's concerns, the conference committee included in its report a lengthy, yet seemingly rather inconclusive, discussion of how Congress intended section 10(j) to effect the Platte River proceedings. A few points made during that discussion appear to provide useful guidance to the Commission on how to apply section 10(j) to other projects: (1) an agency recommendation should not be deemed consistent with the statutory purposes simply because it is designed to protect fish and wildlife; (2) the Commission must engage in a balancing of costs and benefits in determining whether an agency's recommendations are inconsistent with the Act, or, as the report states, "FERC might find inconsistency if a fish and

63. See H.R. 44 § 3(c), 123 CONG. REC. H1997 (daily ed. Apr. 21, 1986).

64. H.R. REP. NO. 934, *supra* note 25.

wildlife recommendation could have so harmful an impact on any of these projects that the fish and wildlife protection, mitigation, and enhancement resulting from the recommendation could not support the inclusion of that recommendation in the license;" and (3) a fish and wildlife recommendation cannot be deemed inconsistent with the statutory purposes merely because implementing the recommendation would require a reduction of power output.⁶⁵

III. COMPREHENSIVE PLANNING

Prior to the enactment of the ECPA, it was well established that consideration of a comprehensive plan for a river basin was one of the Commission's central responsibilities in deciding whether or not to issue a license for a hydroelectric project. Section 10(a) of the Act required the Commission to issue licenses for those projects that are "best adapted to a comprehensive plan for improving or developing a waterway."⁶⁶ This requirement reflected the basic purpose of the Act to "promote the comprehensive development of the water resources of the Nation," in place of "the piecemeal, restrictive, negative approach of the River and Harbors Act and other federal laws previously enacted."⁶⁷

While it was well established that the Commission must act in accordance with a comprehensive plan, the exact scope of the Commission's comprehensive planning responsibilities has been a matter of debate. Certain states and environmental groups have argued to the Commission and in court that section 10(a) requires the Commission to prepare some type of document that sets forth an actual plan for the development and/or protection of the river basin.⁶⁸ The Commission, on the other hand, has taken the position that it satisfies the comprehensive planning requirements of section 10(a) simply by making its decisions based on the complete administrative record compiled in particular licensing proceedings.⁶⁹

The ECPA expands the Commission's comprehensive planning responsibilities. As discussed above, the ECPA expands the range of substantive considerations the Commission must address under section 10(a), now redesignated as Section 10(a)(1). Whatever the scope of the Commission's comprehensive planning responsibility prior to the enactment of the ECPA, this amendment expands the factors the Commission must consider in carrying out that responsibility.

65. *Id.* at 24-25.

66. 16 U.S.C. § 803(a)(1982)(to be recodified as 16 U.S.C. § 803(a)(1)).

67. See *Hearings Before the House Committee on Water Power*, 65th Cong., 2d Sess. 25 (1918)(statement of O. C. Merrill, Department of Agriculture).

68. For example, in related litigations, the National Wildlife Federation and the Washington State Department of Fisheries recently challenged the Commission's failure to prepare a comprehensive plan under section 10(a) for the Salmon and Snohomish river basins. While the Court of Appeals was not squarely faced with the issue of what steps the Commission must take to carry out its comprehensive planning responsibilities, the court did affirm that "The Federal Power Act requires that a comprehensive plan for river basin development be available before licensing." *National Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1507-08 (9th Cir. 1986); see also *Washington State Department of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986)(adopting by reference the discussion of comprehensive planning in *National Wildlife Federation*).

69. *Small Hydro Hearings*, *supra* note 5, at 78.

The ECPA also adds an entirely new provision to the Act relating to comprehensive plans prepared by other federal or state agencies. The new section 10(a)(2) requires the Commission in determining whether or not to issue a license to consider

The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—(1) an agency established pursuant to Federal law that has the authority to prepare such a plan, or (2) the State in which the facility is or will be located⁷⁰

A related provision, the new section 10(a)(3), directs the Commission to solicit recommendations from any federal agency or state that has prepared a comprehensive plan “for proposed terms and conditions for the Commission’s consideration for inclusion in the license.”⁷¹

The language of new section 10(a)(2) undoubtedly will influence the debate over the scope of the Commission’s comprehensive planning responsibilities under section 10(a)(1). Both the reference in section 10(a)(2) to plans “prepared by” state or federal agencies, and the fact that the Commission only is obligated to consider such a plan “where one exists,” suggest that Congress had in mind actual planning documents when it drafted section 10(a)(2). The term “comprehensive plan” appears in both subsections 10(a)(1) and 10(a)(2), and presumably should mean the same thing in both places within the same section. Accordingly, the language of section 10(a)(2) appears to support the conclusion that the Commission must prepare actual planning documents in carrying out its comprehensive planning responsibility under section 10(a)(1).

The significance of the new provision requiring the Commission to consider comprehensive plans prepared by states and other federal agencies will depend upon how the Commission and the courts construe this provision. One question is what state and federal river plans qualify as comprehensive plans within the meaning of section 10(a)(2). Several recent orders issued by the Commission adopt a very narrow construction of this provision:

The Commission considers plans to be within the scope of Section 10(a)(2) only if such plan reflect the preparers’ own balancing of the competing uses of a waterway, based on their data and applicable policy considerations (i.e., consider and balance all relevant public use considerations). With regard to plans prepared at the state level, such plans are within the scope of Section 10(a)(2) only if they are prepared and adopted pursuant to a specific act of the state legislature and developed, implemented and managed by an appropriate state agency.⁷²

Applying these stringent tests, the Commission concluded that most of the plans presented did not constitute “comprehensive plans” under section 10(a)(2).⁷³

The new section 10(a)(2) raises other questions. For example, is section 10(a)(2) merely a procedural requirement, or is the “extent” to which a project is consistent with a comprehensive plan a substantive factor that the Commission must weigh in deciding whether or not to issue a license? Second, how did

70. ECPA, § 3(b)(to be codified at 16 U.S.C. § 803(a)(2)(A)).

71. ECPA, § 3 (a)(to be codified at 16 U.S.C. § 803(a)(3)).

72. See, e.g., Order of December 30, 1986, *In re County of Colusa, California*, (Project No. 8017-001).

73. *Id.*

Congress intend for the Commission to resolve conflicts between state and other federal agency plans and the results of the Commission's own comprehensive planning? The Commission undoubtedly will be required to confront these questions in the near future.

IV. PURPA AMENDMENTS

In 1978 Congress enacted the Public Utilities Regulatory Policy Act (PURPA), establishing a comprehensive federal program to resolve the energy crisis of the 1970's by reducing the nation's dependence on foreign oil.⁷⁴ One aspect of the program was an effort to increase domestic energy production from renewable resources. To encourage the construction of small-scale power facilities, including hydroelectric facilities, section 210 of PURPA directed the Commission to promulgate rules requiring electric utilities to purchase electricity generated by qualifying power facilities with capacities not greater than 80 megawatts.⁷⁵

Section 210, together with favorable tax legislation, produced what one congressman described as a "hydropower gold rush."⁷⁶ Not surprisingly, this intense development pressure on the nation's rivers generated substantial concern among state and federal resource management agencies as well as environmentalists. The most controversial aspect of the Commission's PURPA program was the Commission's decision to extend the benefits of PURPA to projects that involved the construction of new dams and diversions.⁷⁷ Opponents of extensive development argued that the Commission's decision to extend PURPA to new dams and diversions flaunted Congress' intent to limit PURPA benefits to hydropower development at existing dams with unexploited hydroelectric potential.⁷⁸ In general, adapting existing dams for hydroelectric purposes entails significantly fewer risks of environmental harm than new dam construction. In addition, private utilities, who were required by section 210 to purchase the power generated by small-scale hydroelectric projects, objected that PURPA required them to purchase power they did not need or to pay unjustifiably high rates.⁷⁹

In response to these concerns, and no doubt in part because of waning public interest in energy supply problems, ECPA limits the availability of

74. Public Utilities Regulatory Policy Act of 1978, Pub. L. No. 95-617.

75. 16 U.S.C. § 824a-3 (1982). The regulations promulgated by the Commission pursuant to section 210 of PURPA are published in 18 C.F.R. § 292.101 (1986).

76. See 123 CONG. REC. H8962 (statement of Congressman Wyden).

77. The Commission had interpreted "renewable resources," see 16 U.S.C. § 795(17)(A)(1982), to include water used at hydroelectric projects located at either an existing or a new dam or diversion. See Small Power Production and Cogeneration Facilities—Qualifying Status, 45 Fed. Reg. 17,959, 17,966 (Mar. 20, 1980). The Commission's decision to extend PURPA benefits to new dam projects was a primary focus of the 1984 hearings conducted by the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce on the Commission's small hydro program held on September 11, 1984. See Small Hydro Hearings, *supra* note 5.

78. See, e.g., Statement of David Conrad, Friends of the Earth, Small Hydro Hearings, *supra* note 5, at 421.

79. See, e.g., 123 CONG. REC. S4141 (statement of Senator McClure describing "problems" with implementation of PURPA).

PURPA benefits for future projects involving new dams or diversions. It establishes a temporary moratorium on PURPA benefits for future development involving new dam projects. At the same time, in order to protect developers who had proceeded with planning and design of projects in reliance on the prior legal regime, ECPA contains an elaborate set of grandfather provisions exempting many projects from the moratorium. When the moratorium expires, and assuming Congress has not further amended section 210, PURPA benefits will be available for projects involving new dams or diversions only if they meet new, stringent environmental standards.⁸⁰

A. *The Moratorium And The Commission PURPA Study*

Section 8(e) of the ECPA provides that section 210 of PURPA will not apply during the "moratorium period" to any project that "utilizes a new dam or diversion."⁸¹ The moratorium period began on the date of enactment of the ECPA (October 16, 1986) and ends at the expiration of the first session of Congress following the session during which Congress receives the Commission study discussed below.

Section 8(d) of the ECPA directs the Commission to conduct a study, and an accompanying environmental impact statement under the National Environmental Policy Act, on whether PURPA benefits should be applied to hydroelectric facilities utilizing new dams and diversions.⁸² The Commission was required to commence the study within three months of the enactment of the ECPA and is required to complete the study "as promptly as practicable."⁸³

In accordance with this statutory timetable, the Commission already has

80. The table in Appendix A at the end of this article explains how the effective dates and moratorium provision work together to deny PURPA benefits for certain projects or to subject the projects to stringent new environmental conditions.

81. ECPA, § 9(e)(to appear at 16 U.S.C. § 8241-3 note). New section 210(k) of PURPA defines a new dam or diversion as "a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices)."

82. ECPA, § 8(d)(1)(to appear at 16 U.S.C. § 824a-3 note). The ECPA directs the Commission to study not only whether the benefits of section 210 of PURPA should be made available for projects utilizing new dams or diversions, but also whether the benefits of section 210 of the Act, dealing with the Commission's power to require interconnection of electric power facilities, should be available for such projects. Section 8(d)(2) of ECPA states that the Commission's study shall:

take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act and section 210 of the Public Utility Regulatory Policies Act of 1978), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of the Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact or such section 210 on the rates paid by electric power consumers.

83. ECPA, § 8(d)(3)(to appear at 16 U.S.C. § 824a-3 note). If the Commission has not completed the report within eighteen months of enactment (April 1988), the Commission is required to notify the House Committee on Energy and Commerce and the Senate Committee on Energy and Natural Resources "of the reasons for the delay and specify a date when it will be completed and a report submitted." ECPA, § 8(d)(6)(to appear at 16 U.S.C. § 824a-3 note).

commenced work on the study. For example, on January 22, 1987, the Commission published a notice in the Federal Register initiating the scoping process for the study, as required by National Environmental Policy Act.⁸⁴

When the study is complete, the Commission is required to submit the final report to Congress.⁸⁵ At that time, Congress is likely to hold hearings on the report, and presumably will consider whether or not to enact further legislation. Congress' decision to fix the end of the moratorium period more than one year after the study is submitted obviously was designed to afford Congress sufficient time to consider the report and develop legislation.

The legislative history of the ECPA indicates that the moratorium and study provisions were the product of legislative compromise. While some legislators desired an immediate ban on PURPA benefits for new dam projects,⁸⁶ a majority determined that the issue required further study. Once the Commission issues its report, it appears likely that the Congress will need to finally resolve the policy question of whether or not PURPA benefits should be available for new dam projects.

B. Grandfather Provisions

Although the moratorium ostensibly went into effect as of the date of enactment, the moratorium actually will take effect slowly over the next several years.

First, the ECPA completely exempts certain projects from the moratorium. All qualifying small power production facilities that have already been approved by the Commission will receive PURPA benefits.⁸⁷ In addition, projects for which an application "was filed and accepted for filing by the Commission" before enactment of the ECPA are exempt from the moratorium.⁸⁸ Finally, projects located at federal dams at which non-federal hydroelectric development is permitted are not affected by the ECPA amendments to PURPA, including the moratorium provision.⁸⁹

Second, other types of projects are exempted from the moratorium on the condition that they meet certain new environmental requirements. Project ap-

84. Electric Consumers Protection Act, Section 8(d) Study; Intent to Prepare An Environmental Study and Conduct a Scoping Session, 52 Fed. Reg. 2440 (1987). See also Notice of Public Conferences and Requests for Comments, 52 Fed. Reg. 2552 (1987)(announcing series of regional conferences to be held in Spring 1987 on implementation of section 210 of PURPA).

85. ECPA, § 8(d)(4)(to appear at 16 U.S.C. § 824a-3 note).

86. Senator Evans, for example, proposed to completely exclude from PURPA any new projects that involve construction of a new dam or diversion. See 123 CONG. REC. S4141 (daily ed. Apr. 11, 1986).

87. ECPA, § 8(b)(1) states that amended § 210 of PURPA only applies to projects "for which benefits under section 210 . . . are sought and for which a license or exemption is issued . . . after the enactment of this Act."

88. ECPA, § 8(b)(2)(to appear at 16 U.S.C. § 824a-3 note). After an application is filed, the Commission closely examines the application to determine whether it satisfies the Commission's elaborate application requirements and should be accepted for filing. See 18 C.F.R. § 4.32 (1986). The Commission frequently requires an applicant to amend its application at least once before it accepts the application for filing. Once the application has been accepted for filing, the Commission begins its review of the application on the merits.

89. ECPA, §§ 8(a), 8(e). Section 4(e) of the Act authorizes the Commission to issue licenses "for the purpose of utilizing the surplus water or water power from any government dam." 16 U.S.C. § 797(e)(1982).

plications filed prior to enactment and accepted for filing within the next three years (October 16, 1989) are eligible for PURPA benefits if they meet the protected rivers requirement.⁹⁰ For a project to meet this requirement, the Commission must determine that, as of the time the application was accepted for filing, the project was not located on “[a]ny segment of a natural watercourse which is included in (or designated for potential inclusion in) a state or national wild and scenic river system”, or on “[a]ny segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which could be adversely affected by hydroelectric development.”⁹¹

Another category of applications consists of those filed after the enactment of the ECPA, where the applicant can show that he had, prior to enactment, committed “substantial monetary resources directly related to the development of the project and to the diligent and timely completion of all requirements . . . for filing an acceptable application.”⁹² Projects within this category are exempt from the moratorium and eligible for PURPA benefits if they satisfy the protected rivers requirement as well as the adverse environmental effects requirement. For a project to satisfy this latter requirement, the Commission must determine that the project “will not have substantial adverse effects on the environment, including recreation and water quality.”⁹³

Section 8(b)(4) of the ECPA establishes a formal process for determining whether or not an applicant had devoted “substantial monetary resources” to a project.⁹⁴ If an applicant wishes to demonstrate that he meets this test, he is required to file a petition with the Commission within eighteen months of enactment (April 1988).⁹⁵ After it receives a petition, the Commission must make the petition available to the public, and the applicant is directed to provide written notice of the petition to “affected Federal and State agencies.” In addition, the Commission must provide an opportunity for public comment on the petition of at least forty-five days before deciding whether or not the applicant meets the test.

The ECPA does not give the Commission any detailed guidance for determining whether or not the applicant had made a commitment of “substantial monetary resources.” However, the statute does provide that, “if the applicant had a preliminary permit and had completed environmental consultations . . . [under the Commission’s three-stage consultation process] prior to enactment,” the Commission must adopt “a rebuttable presumption” that the applicant had made a commitment of substantial monetary resources.⁹⁶ On February 20, 1987, the Commission adopted an interim rule that clarifies the standards and procedures for meeting the substantial commitment of monetary resources

90. ECPA, § 8(b)(3)(to appear at 16 U.S.C. § 824a-3 note).

91. ECPA, § 8(a)(to be codified at 16 U.S.C. § 824a-3(j)(2)).

92. ECPA, § 8(b)(4)(to appear at 16 U.S.C. § 824a-3 note).

93. ECPA, § 8(c)(to be codified at 16 U.S.C. § 824a-3(j)(1)).

94. ECPA, § 8(b)(4)(to appear at 16 U.S.C. § 824a-3 note).

95. ECPA, § 8(b)(4)(A)(to appear at 16 U.S.C. § 824a-3 note). This provision also directs the Commission to promulgate, within 120 days of enactment, a rule setting out the appropriate form for the petition.

96. ECPA, § 8(b)(4)(B)(to appear at 16 U.S.C. § 824a-3 note).

test.⁹⁷

If the Commission rejects an applicant's petition, and determines that the applicant had not made a substantial monetary commitment prior to the enactment of the ECPA, the project will be exempted from the moratorium and eligible for PURPA benefits only if it satisfies the protected rivers requirement, the adverse environmental effects requirement, and the fish and wildlife requirement.⁹⁸ For a project to satisfy the latter requirement, the Commission must ensure that the project will meet terms and conditions set, in accordance with section 30(c) of the Act, by the National Marine Fisheries Service, the Fish and Wildlife Service, or the fish and wildlife agency of the state in which the project is located.⁹⁹

Section 8(b)(4)(C) of the ECPA establishes a procedure for an applicant who has committed substantial monetary resources to a project to obtain an "initial determination" from the Commission on whether or not the project will satisfy the "adverse environmental effects requirement."¹⁰⁰ The statute does not explain what type of proceeding the Commission ought to conduct in making this determination, or how intervenors or the general public can participate. However, the statute provides that, if the applicant seeks such an initial determination, and the Commission "initially finds" that the project will have substantial adverse environmental effects, the Commission is then required to afford the applicant a "reasonable opportunity to provide for mitigation of such adverse effects." In that event, the Commission will make the final determination of whether or not the adverse environmental effects requirement is satisfied when it decides whether or not to issue the license or exemption.

When the Commission makes an initial determination that the project will have substantial adverse effects, the state in which the project is located has the opportunity to play a significant role in guiding the Commission's final decision. Indeed, section 8(b)(4)(C) places the onus on the state to take some type of affirmative action if it wishes to protect the river segment from development. Once the Commission has notified the state of the Commission's initial determination, the state can elect to protect the river as provided in section 210(j)(2), either by designating the river for inclusion in a state wild and scenic river system, or by making a determination that the segment possesses "unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development."

If the state fails to take either of these steps before the Commission makes its final determination of whether the project will result in substantial adverse environmental effects, "the failure to take such action shall be the basis for a rebuttable presumption" that the project will "not have a substantial adverse effect on the environment related to natural, recreational, cultural, or scenic attributes for purposes of such finding." In other words, if the state fails to act to protect a river, the Commission apparently would conclude that the adverse

97. Hydroelectric Applicants Seeking Benefits Under Section 210 of the Public Utilities Regulatory Policies Act of 1978 for Projects Located at a New Dam or Diversion, 52 Fed. Reg. 5276 (Feb. 20, 1987).

98. ECPA, § 8(b)(4)(D) (to appear at 16 U.S.C. § 824a-3 note).

99. ECPA, § 8(a)(to be codified at 16 U.S.C. § 824a-3(j)(3)).

100. ECPA, § 8(b)(4)(C)(to appear at 16 U.S.C. § 824a-3 note).

environmental effects requirement has been satisfied, unless an environmental organization or some other party makes an affirmative showing to the contrary.

The statute does not specify how the Commission should treat a state decision to protect a river. It is fair to assume, however, that Congress intended the Commission generally to conclude that the project would have unacceptable adverse environmental effects and to deny the application.

C. *Post-Moratorium Period*

As discussed above, the legislative history of the ECPA suggests that Congress intends to revisit the issue of whether PURPA benefits should be available for projects utilizing new dams or diversions. However, if Congress chooses not to further amend PURPA, projects approved after the end of the moratorium period will be eligible for PURPA benefits if they satisfy the protected rivers requirement, the adverse environmental effects requirement, and the fish and wildlife requirement.¹⁰¹

V. ENFORCEMENT PROVISIONS

While less controversial than the relicensing and PURPA issues discussed above, the Commission's enforcement program with respect to hydroelectric projects has been a focus of increasing criticism in recent years. For example, during the 1985 House subcommittee hearings on the ECPA, two fundamental concerns were raised about the Commission's enforcement program.¹⁰² The first was that numerous hydroelectric projects across the country that clearly are subject to Commission jurisdiction have been operating without Commission licenses or exemptions.¹⁰³ The complete exclusion of certain projects from the regulatory process has hampered efforts to monitor the safety and to mitigate the environmental effects of those projects. Second, the Commission was faulted for failing to aggressively monitor compliance with the terms and conditions of the license and exemptions that it has issued.¹⁰⁴ Many licenses and exemptions include, for example, conditions requiring the maintenance of minimum reservoir levels and/or downstream flows; in many cases, the Commission found those conditions essential to reduce the projects' impacts to an acceptable level and therefore to justify issuing the license or exemption in the first place.

To address these concerns, section 12 of the ECPA first establishes a mandate for the Commission to expand its enforcement efforts:

The Commission shall monitor and investigate compliance with each license and permit issued under this Part and with each exemption granted from any requirement of this Part. The Commission shall conduct such investigations as may be necessary and proper in accordance with this Act.¹⁰⁵

The express purpose of this provision, which originated in the House, was to

101. See ECPA § 8(a)(to be codified at 16 U.S.C. § 824a-3(j)); ECPA § 8(b)(to appear at 16 U.S.C. § 824a-3 note).

102. See, e.g., Statement of Edward G. Horn, 1985 House Hearings, *supra* note 5, at 85-102.

103. *Id.* at 90-91.

104. *Id.* at 95-96.

105. ECPA, § 12 (to be codified at 16 U.S.C. § 823b).

ensure that the Commission monitors "all projects" to ensure compliance with terms and conditions, and locates projects subject to Commission jurisdiction currently being operated without authorization from the Commission.¹⁰⁶

Second, second 12 of the ECPA, which adds a new section 31 to the Act, provides the Commission with new tools to carry out the mandate to conduct a stronger enforcement program. In brief, section 31 grants the Commission clearer authority to revoke licenses or exemptions for noncompliance with the terms and conditions.¹⁰⁷ In addition, it grants the Commission authority to impose civil penalties up to \$10,000 per day.¹⁰⁸

To initiate a revocation proceeding, the Commission is first required to issue a specific order under section 31(a) directing the person holding the license or exemption to comply with the terms and conditions of the license or exemption. Before issuing such an order, the Commission is required to provide "notice and opportunity for public hearing." In many cases, the *in terrorem* effect of a compliance order undoubtedly will be sufficient to correct the alleged violation.

If the alleged violation is not resolved, the Commission may then issue a second order under section 31(b) revoking the license or exemption. The revocation order must be supported by findings that the person (1) "knowingly violated" the compliance order, and (2) has been given a "reasonable opportunity to comply" with the order. Section 31(b) states as a general caveat that the Commission cannot issue a revocation order "until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation." It is clear from the legislative history that Congress intended for the Commission to use this severe remedy sparingly.¹⁰⁹

While section 31 does not contain an express judicial review provision, a person whose license or exemption has been revoked under this procedure presumably is entitled to seek judicial review of the Commission's action in an appropriate United States Court of Appeals.

Section 31(c) authorizes the Commission to pursue the alternative of civil penalties up to \$10,000 per day for violations of (1) "any term or condition" of a license, permit or exemption, (2) "any rule or regulation" issued by the Commission, or (3) any term of a compliance order issued under section 31(a). As in determining whether or not to issue a revocation order, the Commission is required in determining the amount of the penalty to "take into consideration the nature and seriousness of the violation, failure or refusal, and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner."

In general, the person subject to a proposed civil penalty can select one of two alternative procedures for determining whether and in what amount a penalty should be assessed. The first alternative is to have the Commission assess the penalty through an administrative hearing process; the Commission's decision is subject to appeal, under a limited standard of review, in a United States

106. H.R. REP. NO. 507, *supra* note 56.

107. ECPA, § 31(a)-(b)(to be codified at 16 U.S.C. § 823b(a)-(b)).

108. ECPA, § 31(c)-(d)(to be codified at 16 U.S.C. § 823b(c)-(d)).

109. H.R. REP. NO. 507, *supra* note 56.

Court of Appeals. Alternatively, the person can elect a de novo hearing before a United States District Court. There is one exception: where the Commission is seeking a civil penalty for violation of a compliance order under section 31(a), the penalty proceeding must be conducted by the Commission.

Before issuing an order assessing a civil penalty the Commission is required to notify the person of the proposed penalty. When the person has a choice between proceeding before the Commission or in district court, the notice must contain a description of the available options. Unless the person affirmatively elects a district court proceeding by submitting a written notice to the Commission within 30 days of receiving the Commission's notice, the Commission will proceed to assess the penalty itself.

If the Commission conducts the penalty proceeding, the Commission is required to hold a formal adjudicatory hearing before an administrative law judge. The Commission's order assessing the penalty must include the administrative law judge's "findings and the basis for such assessment." Section 31(d) expressly provides that the Commission's order can be appealed to the United States Court of Appeals. The court of appeals is required to apply the deferential standards of review appropriate for judicial review of discretionary administrative action under the Administrative Procedure Act.

If a district court proceeding is selected, the Commission is required, without first conducting a hearing, to promptly issue an order assessing the proposed penalty. Assuming the penalty is not paid within sixty days after the Commission issues the order, the Commission is required to institute an action in an United States District Court to affirm the penalty. The district court is authorized "to review de novo the law and the facts involved," and to enter the judgment it deems appropriate. While section 31 does not expressly so state, the district court's judgment presumably could be appealed to a United States Court of Appeals.

To provide the Commission the greatest possible leverage in resolving penalty actions informally, section 31(d)(4) authorizes the Commission to "compromise, modify, or remit" any civil penalty, "taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner." Significantly, however, this authority to compromise a penalty apparently expires after a "final decision" by the Court of Appeals, if a proceeding before the Commission was selected, or by the District Court, if the District Court option was selected.

If the penalty assessed by the Commission or by the district court is not paid after it has become final and nonappealable, the Commission is authorized to institute an action to collect the penalty "in any appropriate district court." In a collection action, "the validity and appropriateness of such final assessment order or judgment shall not be subject to review."¹¹⁰

It is plainly an understatement that this enforcement scheme is complex and burdensome for the Commission to implement. Nevertheless, Congress ap-

110. New section 31(d)(6) of the Act expressly authorizes the Commission to be represented by its own legal staff, rather than the Department of Justice, in all federal courts other than the Supreme Court, in connection with suits to affirm a civil penalty. This authorization also extends to any related collection action to enforce a district court judgment affirming a civil penalty.

parently believed that, since hydroelectric licenses and exemptions are enormously valuable, they should not be cancelled until the holder of the license or exemption has been accorded a substantial opportunity to correct the violation. Whether these enforcement provisions will also be sufficient to correct the perceived defects in the Commission's past enforcement efforts will largely depend on the effort and attention the Commission chooses to devote to this problem.

VI. MISCELLANEOUS PROVISIONS

During the course of Congress' deliberations, the ECPA evolved from a straightforward relicensing bill into a literal grab-bag of individual modifications to the Act. The most significant and complex amendments are described in the preceding sections. This final section discusses, in essentially random order, the other provisions of ECPA that are worthy of note.

A. Antitrust Provision

In response to determined efforts by Senator Metzenbaum, the Senate adopted, and the conference committee accepted, a modest provision directing the Commission to consider the implications of its licensing decisions under the federal antitrust laws. The new section 10(h)(1) of the Act directs the Commission to issue a license only on the condition:

That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in Part II of this Act) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance.¹¹¹

Senator Metzenbaum was the sole dissenter from the Senate report on the ECPA, and his dissent largely was based on the belief that the bill "should address the basic competitive inequities confronting those without hydro resources by incorporating an antitrust review procedure."¹¹² According to Senator Metzenbaum, examples of anticompetitive conduct in the field of hydroelectric power included "arbitrary refusals by private utilities to wheel power, frequent attempts to block their competitors from obtaining federally-marketed power, and other anticompetitive actions by larger hydro licenseholders against small publicly-owned utilities and rural electric cooperatives."¹¹³

The final language was arrived at through "painstaking negotiations" spanning several months.¹¹⁴ As one of the House conferees stated during the floor debate on the conference report, the provision ultimately adopted expands the Commission's power "in the most narrow fashion."¹¹⁵ In light of the "not otherwise justified" clause, and the restrictive interpretations of this provision offered during the House debate on conference report,¹¹⁶ it is an open question

111. ECPA, § 13 (to be codified at 16 U.S.C. § 803(h)(1)).

112. S. REP. NO. 161, 99th Cong., 1st Sess. 228-30 (1985)(minority views of Senator Metzenbaum).

113. *Id.* at 229.

114. 123 CONG. REC. S4128 (daily ed. Apr. 11, 1986)(statement of Senator Metzenbaum).

115. 123 CONG. REC. H8950 (daily ed. Oct. 2, 1986)(statement of Congressman Moorhead).

116. *See, e.g.*, 123 CONG. REC. H8950 (daily ed. Oct. 2, 1986) (statement of Congressman Moorhead).

whether this provision will have any practical significance at all.

B. Significant Modifications to Projects

ECPA reinforces the Commission's authority to control modifications of existing projects during the term of the license or exemption. The new section 23(b) of the Act states that:

No person may commence any significant modification of any project licensed under, or exempted from, this Act, unless such modification is authorized in accordance with the terms and conditions of such license or exemption and the applicable requirements of this Part.¹¹⁷

The conference committee report states that this provision "is intended as a specific reinforcement of a requirement of existing law."¹¹⁸

C. Calculation of Time

In May 1986, in response to a request by Congressman John Dingell, then the Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the GAO issued a report discussing, among other things, the difficulty state fish and game agencies had encountered in attempting to meet the Commission's 30-day deadline for submitting rehearing requests.¹¹⁹ Section 4(c) of the ECPA, which grew out of that study,¹²⁰ attempts to resolve the problem by effectively lengthening the time allowed for submitting rehearing requests. Section 4(c) directs the Commission to "review" all provisions of the Act "requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning working days, 'rather than calendar days,' " unless the Act specifically requires the use of calendar days.

D. Expanded Exemption for State and Local Conduits

As described above, in 1978, Congress added a new section 30 to the Act authorizing the Commission to exempt from the Commission's licensing requirements any proposal to utilize the hydroelectric potential of a manmade conduit that is operated for distribution of water for agricultural, municipal or industrial consumption and not primarily for generation of electricity.¹²¹ This exemption only applied to conduit hydroelectric facilities if the installed capacity was less than 15 megawatts. Section 7(a) of the ECPA expands the exemption to 40 megawatts in the case of projects constructed, operated and maintained by a state or local government solely for municipal water supply purposes.¹²²

117. ECPA, § 6, (to be codified at 16 U.S.C. § 817).

118. H.R. REP. NO. 934, *supra* note 25.

119. GENERAL ACCOUNTING OFFICE, ENERGY REGULATION: HYDROPOWER IMPACTS ON FISH SHOULD BE ADEQUATELY CONSIDERED (May 1986).

120. 123 CONG. REC. H8956 (daily ed. Oct. 2, 1986)(statement of Congressman Dingell).

121. *See supra* text accompanying note 62.

122. ECPA, § 7(a)(to be codified at 16 U.S.C. § 823a(b)).

E. Negotiation of Pending Relicensing Proceedings

By eliminating the public power preference, Congress significantly changed the rules of the game for state and municipal utilities seeking to obtain relicenses for projects operated by private utilities. Congress concluded that, where state and municipal utilities had already expended significant time and effort in prosecuting relicensing applications in reliance on the public power preference, fairness dictated that they not be deprived of the preference without some form of compensation for their efforts. Congress singled out nine pending relicensing proceedings in which the state and municipal applicants should be compensated.

Section 10 of the ECPA established a complex procedure for fixing the appropriate level of compensation in these nine cases. First, the incumbent private licensees were granted the option of either having the relicensing proceedings continue under the provisions of the Act in effect prior to the enactment of the ECPA, or agreeing to enter into "good faith" negotiations with the competing state or municipal applicants.¹²³ If the incumbent selected negotiations, the competing municipal or state applicant, in turn, was given the option of either concurring with the incumbent's choice to negotiate or to have the proceeding continue under the provisions of the Act that went into effect after the enactment of the ECPA.¹²⁴ The goal of this statutory scheme was to encourage the competing applicants to agree to negotiations; consistent with that goal, by the deadline of January 14, 1987, for selection of a procedure applicants in seven of the nine cases had agreed to negotiate.¹²⁵

Parties who have agreed to negotiate are required to attempt to arrive at a dollar figure representing (1) the costs incurred by the state or municipality in pursuing its application before the FERC and in pursuing any related litigation in the courts and (2) "compensation . . . representing a reasonable percentage (but not to exceed 100 percent) of the net investment of the existing licensee in the project."¹²⁶ This figure is intended to compensate the state and municipal applicants for the costs they actually incurred in pursuing the relicense applications, as well as for a portion of the value of the lost opportunity to obtain a hydroelectric facility at minimal cost. If the negotiations between the parties fail, the Commission is required, after providing notice and an opportunity for a hearing, to issue an order setting the level of compensation.¹²⁷ Section 10(f) of the ECPA sets forth detailed criteria for the Commission to follow in setting the level of compensation in the absence of a negotiated settlement.

F. Merwin Dam

Section 11 of the ECPA completely exempts the pending relicensing pro-

123. ECPA, § 10(b)-(c).

124. ECPA, § 10(d).

125. Remarks of Commission Chairman Martha O. Hesse, at the joint American Bar Association-Federal Energy Bar Association Workshop on Relicensing of Hydroelectric Projects (Jan. 16, 1987).

126. ECPA, § 10(e).

127. ECPA, § 10(f).

ceeding involving the Merwin dam in the State of Washington from the new relicensing provisions, as well as from the negotiation provisions that apply to nine other pending relicensing proceedings.¹²⁸ Congress concluded that a special exemption from ECPA for this particular relicensing proceeding was warranted in light of the extremely time-consuming litigation in that case before the Commission as well as in the U.S. Court of Appeals for the District of Columbia Circuit. Furthermore, both competing applicants informed Congress of their preference to have the case resolved under prior law.¹²⁹

G. Landowner Notification

The new section 9(b) of the Act provides that upon the filing of an application for a license for a new project (but not for a new license for an existing project), the applicant is required to "make a good faith effort to notify . . . by certified mail" (1) the owners of any property within the project area, and (2) any governmental agency "likely to be interested in or affected by such application."¹³⁰ Senator Humphrey of New Hampshire offered this provision as a floor amendment during the Senate debate on S. 426, and the provision was adopted without opposition.¹³¹ According to Senator Humphrey, this new provision was necessary in light of the demonstrated insufficiency of newspaper notice to inform landowners who will be directly affected by construction of a hydroelectric facility.

H. Wheeling Amendment

The most contentious issue in the Senate floor debates on the ECPA was the proposal by Senator Melcher of Montana to amend the provisions of PURPA dealing with wheeling of power. According to Senator Melcher, the wheeling provisions in PURPA had not been successful, and further legislative action was needed to address "the problems smaller utilities have had in obtaining transmission . . . services from larger utilities."¹³² While many Senators disagreed with Senator Melcher on the merits of his proposals, others objected that the entire subject of wheeling raised complex issues that Congress could not effectively address in the ECPA.¹³³

After the Senate defeated several alternative amendments offered by Senator Melcher, the Senate agreed to a very modest, technical amendment which was also accepted by the House.¹³⁴ Section 15 of the ECPA amends section 211 of the Act to make clear that a wheeling application may be filed prior to termination or modification of an existing rate schedule filed with the Commission, and that the Commission can issue a wheeling order while the tariff is still outstanding to become effective upon the expiration or modification of the

128. ECPA, § 11.

129. H.R. REP. NO. 99-507, *supra* note 56, at 48.

130. ECPA, § 14 (to be codified at 16 U.S.C. § 802(b)).

131. 123 CONG. REC. S4138-40 (daily ed. Apr. 11, 1986).

132. 123 CONG. REC. S4130 (daily ed. Apr. 11, 1986).

133. *See, e.g.*, 123 CONG. REC. S4132 (daily ed. Apr. 11, 1986) (statements of Senator Johnston and Senator Wallop).

134. 123 CONG. REC. S4421 (daily ed. Apr. 16, 1986).

rate schedule.¹³⁵

I. Bans on Hydroelectric Development

Congress traditionally has declared pristine rivers off-limits to hydroelectric development by enacting legislation designating them as wild and scenic rivers under the federal Wild and Scenic Rivers Act.¹³⁶ The ECPA contains a relatively new twist on federal protection for rivers because it prohibits hydroelectric development on certain rivers without including the rivers in the wild and scenic river system. Section 15A of the ECPA prohibits hydroelectric development, subject to exceptions for a few specific projects, on 61 miles of the Henry's Fork of the Salmon River in Idaho and at Lake Tuscaloosa in Alabama.¹³⁷

These designations represent a less stringent form of river protection than inclusion in the wild and scenic system. While designation of a wild and scenic river precludes hydroelectric development, it also requires preparation of a multi-purpose management plan for the river, and authorizes federal acquisition of land bordering the river through condemnation proceedings.¹³⁸ Section 15A does not authorize the federal government to take either of the latter two steps. Furthermore, whereas inclusion in the federal wild and scenic river system is generally treated as a decision to preserve the river in perpetuity, the protection for Henry's Fork and Lake Tuscaloosa is expressly tentative. Section 15A only prohibits hydroelectric development on these rivers until and "unless [development is] authorized by law enacted after the enactment of [ECPA]."

J. Congressional Oversight

Section 16 of the ECPA directs the Commission to keep the House Committee on Energy and Commerce and the Senate Committee on Energy and Natural Resources "fully and currently informed regarding actions of the Commission" under the provisions of the Act relating to hydroelectric development.¹³⁹ This provision reflects Congress' dissatisfaction with Commission hydropower policies in the past, and signals Congress' intent to engage in frequent oversight with respect to the implementation of ECPA.

K. Statutory Ceilings on Charges

Relying on its general authority under section 10(e) of the Federal Power Act, the Commission has promulgated rules requiring licensees to pay the federal government license fees for the right to construct facilities utilizing government dams or other structures owned by the United States.¹⁴⁰ The new section 10(e)(2) establishes statutory ceilings on the amount of these charges.¹⁴¹ The

135. ECPA, § 15 (to be codified at 16 U.S.C. § 824j(c)(2)(B)).

136. 16 U.S.C. § 1271 (1982).

137. ECPA, § 15A(a).

138. See 16 U.S.C. §§ 1277, 1281(a)(1982).

139. ECPA, § 16 (to be codified at 16 U.S.C. § 797b).

140. See 16 C.F.R. § 11.22 (1986).

141. ECPA, § 9 (to be codified at 16 U.S.C. § 803(e)(2)-(4)).

ceilings apply to all licenses issued in the future, as well as to licenses issued prior to the passage of the ECPA so long as the licenses do not fix a specific charge or state that there will be no charge. The Commission is directed to review "the appropriateness" of these statutory ceilings every five years, and to make recommendations to Congress on whether the ceilings should be changed.

L. Mandatory Environmental Conditions

Prior to the passage of the ECPA, section 30(c) of the Act required the Commission to consult about proposed conduit hydroelectric facilities with the U.S. Fish and Wildlife Service and with state fish and game agencies.¹⁴² In addition, Section 30(c) required the Commission to include in any exemption "such terms and conditions as the Fish and Wildlife Service and the State agency each determine are appropriate to prevent loss of, or damage to," fish and wildlife resources. Perhaps as a result of a legislative oversight,¹⁴³ Section 30(c) omitted any reference to the National Marine Fisheries Services, the lead federal agency responsible for the protection of marine and anadromous fisheries.

Section 6(b) of the ECPA closes this regulatory gap by including an express reference to the National Marine Fisheries Service in Section 30(c).¹⁴⁴ Accordingly, the Commission is now required to adopt fish and wildlife conditions proposed by the National Marine Fisheries Service with respect to any project to which section 30(c) applies. This includes not only conduit hydroelectric projects, but also exempt small-scale hydropower projects with a generating capacity of less than 5 megawatts,¹⁴⁵ and certain new PURPA projects entailing construction of a new dam or diversion.¹⁴⁶

M. Fish and Game Fees

In addition to expanding the number of agencies authorized to impose mandatory conditions under Section 30, section 7 of the ECPA also provides a mechanism to reimburse the agencies for the cost of work they perform in enforcing these conditions. The new section 30(e) of the Act requires the Commission to establish fees to be paid by the applicant with respect to any project that must meet mandatory terms and conditions set by fish and wildlife agencies under section 30(c).¹⁴⁷ The Commission is directed to fix the fees at a level that will be "adequate to reimburse the fish and wildlife agencies . . . for any reasonable costs incurred in connection with any studies or other reviews car-

142. See 16 U.S.C. § 823a (1982).

143. See *The Steamboaters v. FERC*, 759 F.2d 1382, 1389 (9th Cir. 1985).

144. ECPA, § 6(b)(to be codified at 16 U.S.C. § 823a(c)). See also H.R. REP. NO. 507, *supra* note 56, at 42 (discussing need to close "regulatory gap" by adding express reference to National Marine Fisheries Service in section 30).

145. 16 U.S.C. § 2705(d)(1982)(authorizing the Commission to grant projects smaller than 5 megawatts exemption from the Act's licensing requirement, subject to the limitation that the projects must satisfy fish and wildlife conditions set pursuant to section 30 of the Act).

146. See ECPA, § 8(a)(to be codified at 16 U.S.C. § 824a-3(a)(j))(future PURPA projects shall meet fish and wildlife conditions set pursuant to section 30).

147. ECPA, § 7(c)(to be codified at 16 U.S.C. § 823a(e)).

ried out by such agencies for purposes of compliance with this section.”

N. New License Terms

Section 5 of the ECPA adds a new section 15(e) to the Act specifying that new licenses for existing projects shall be issued for a term of not less than 30 years, nor more than 50 years, as the Commission determines to be in the “public interest.”¹⁴⁸ This provision represents a compromise between the Senate bill,¹⁴⁹ which would have altered the time periods for which an initial license, a new license, or an exemption could be issued, and the House bill,¹⁵⁰ which had no provisions touching on this issue. The compromise leaves the term of for an initial license at a maximum of fifty years.

148. ECPA, § 5 (to be codified at 16 U.S.C. § 808(e)).

149. See S. 426, 99th Cong., 1st Sess., 8 CONG. REC. S4450 (daily ed. Apr. 17, 1986).

150. See H.R. 44, 99th Cong., 1st Sess., 123 CONG. REC. H1996 (daily ed. Apr. 21, 1986).

APPENDIX A

CATEGORIES OF PURPA PROJECTS SUBJECT TO PROTECTED RIVERS,
ADVERSE ENVIRONMENTAL EFFECTS, AND/OR FISH AND WILDLIFE REQUIREMENTS

I

Applications approved, and applications filed and accepted for filing, before October 16, 1986.

None of the three requirements applies.

II

Applications filed before October 16, 1986, and accepted for filing before October 16, 1989.

The protected rivers requirement applies, but the adverse environmental effects and the fish and wildlife requirements do not apply.

III

Applications filed after October 16, 1986, and petitions filed before April 16, 1988.

A. If the Commission finds that the applicant committed, before October 16, 1986, substantial monetary resources to the project, the protected rivers and the adverse environmental effects requirements apply, but the fish and wildlife requirement does not apply.

B. If Commission finds that the applicant did not commit, before October 16, 1986, substantial monetary resources to the project, all three requirements apply.

IV

All applications not covered by I, II, or III approved after October 16, 1986.

A. If the Commission grants the application before the end of the moratorium, PURPA benefits are not available.

B. If the Commission grants the application after the end of the moratorium, all three requirements apply.

NOTE: None of the three requirements applies to an application, regardless of when the application is filed, for a project located at a federal dam at which non-federal hydroelectric development is permitted.

