

Committee on Hydroelectric Regulation: Report on 1991 Developments

The Federal Energy Regulatory Commission (FERC or Commission) has been preparing for an onslaught of applications for new hydroelectric project licenses as original licenses expire. The FERC continued that process in 1991 through several important rulemakings, administrative decisions, and a Statement of Policy.

I. FERC RULEMAKINGS

A. *Order No. 533: Streamlining of the Hydroelectric Process and the Implementation of Section 10(j)*

Order No. 533¹ promulgated regulations to implement section 10(j) of the Federal Power Act² (FPA) and revised license conditions and procedures for filing license applications. The section 10(j) regulations codify existing Commission practices governing section 10(j) dispute resolution. The other regulations create deadlines for resource agencies to submit licensing conditions under FPA sections 4(e) and 10(j) and dispense with water quality certification for benign amendments to licenses and license applications. The revised procedures for filing and processing license applications borrow from the relicensing regulations adopted in 1989.³

1. Section 10(j) Regulations

Pursuant to FPA section 10(j), enacted as part of the Electric Consumers Protection Act of 1986⁴ (ECPA), the Commission is required to adopt license conditions proposed by state and federal fish and wildlife agencies unless, after attempts to resolve any disagreement, the Commission finds such conditions inconsistent with the purposes of the FPA. Since 1986, the Commission has developed an informal procedure for implementing section 10(j). Order No. 533 codified that procedure in the new regulations.⁵

1. Order No. 533, *Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters*, F.E.R.C. Stats. & Regs. ¶ 30,921; 56 Fed. Reg. 23,108, Order on Rehearing, 56 Fed. Reg. 61,137 (1991).

2. 16 U.S.C. § 803(j) (1988). All references to sections in this report are to the FPA unless otherwise specified.

3. Order No. 513, F.E.R.C. Stats. & Regs., Regs. Preambles 1986-90 ¶ 30,854, at 31,437, 54 Fed. Reg. 23,756 (1989).

4. Pub. L. No. 99-495, 100 Stat. 1243 (1986).

5. 56 Fed. Reg. 23,108, at 23,149 (1991) (to be codified at 18 C.F.R. § 4.34(e)). Section 4.34(e) of the regulations establishes a six-step 10(j) process. First, the resource agency must submit its section 10(j) recommendations within 60 days after the Commission declares that the application is ready for environmental analysis. Second, within 45 days of the receipt of timely submitted recommendations, FERC staff may seek clarification from the resource agency. Third, FERC staff must issue a preliminary determination, in an Environmental Assessment or Environmental Impact Statement, of any inconsistency between proposed recommendations and applicable law. Fourth, the resource agencies and other parties may respond to the preliminary section 10(j) determination within 45 days of its issuance. Fifth, the

The section 10(j) process applies to recommendations proposed by resource agencies meeting the definitional requirements of Order No. 533.⁶ Section 4.34(b)(9)(i) of the regulations defines fish and wildlife agency, as used in section 10(j), to include the Fish and Wildlife Service (FWS), National Marine Fishery Services (NMFS), and state agencies that manage fish and wildlife resources, but to exclude Indian tribes and environmental groups. Section 4.34(b)(9)(ii) defines fish and wildlife recommendations as those designed to "protect, mitigate damages to or enhance any wild member of the animal kingdom," but does not include items such as a recommendation to benefit recreation or requests for studies.⁷ The section 10(j) process also only applies to recommendations timely submitted. Untimely recommendations are not subject to the special requirements of the section 10(j) process, but will be treated as ordinary comments filed by other interested parties.⁸

2. Deadlines and Changes in Water Quality Certification

a. Water Quality Certification (WQC)

Order No. 533 made two important changes in the FERC's regulations dealing with WQC's under section 401 of the Federal Water Pollution Control Act (also known as the Clean Water Act (CWA)).⁹ The first clarifies the commencement date of the one-year period within which state agencies must act on a certification request or be deemed to have waived certification.¹⁰ Order No. 533 provides that the applicant need only provide the FERC with proof of the date the state agency received the request. The one-year waiver period begins on that date. If a certifying agency lacks enough information to act on a section 401 request within one year, it can deny the application and the applicant must reapply.¹¹ The second change to the FERC's CWA section 401 regulation in Order No. 533 is that amendments to licenses and license applications require a new WQC request only if the amendment "would have a material adverse impact on the water quality in the discharge from the project or proposed project."¹²

Commission must convene a meeting of the resource agency and other interested parties to resolve any disputes. The Commission must complete the dispute resolution portion of the section 10(j) process within 75 days of its issuance of any preliminary findings of inconsistency. If the FERC and the resource agency are unable to resolve the dispute, the FERC's order on the license application must specify its findings of inconsistency.

6. *Id.* at 23,146 (to be codified at 18 C.F.R. § 4.30(b)(9)).

7. *See infra* part IV.A.1.

8. 56 Fed. Reg. 23,108, at 23,131 (1991).

9. 33 U.S.C. § 1341 (1988).

10. *See* 56 Fed. Reg. 23,108, at 23,153 (1991) (to be codified at 18 C.F.R. § 4.38(f)(7)(i)(ii)).

11. *Id.* Still to be determined is whether the new regulation complies with *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111-12 (4th Cir. 1989). This case ruled that "a valid request for certification occurs only if the prospective license complies with the state agencies' procedures." The FERC's defense of its new regulation is that the regulation does not supercede state filing requirements; state agencies are free to deny WQC applications if they do not comply with such requirements.

12. 56 Fed. Reg. 23,108, at 23,153 (1991) (to be codified at 18 C.F.R. § 4.38(f)(7)(iii)); *see also* 56 Fed. Reg. 23,108, at 23,154 (1991) (to be codified at 18 C.F.R. § 16.8(f)(7)(iii)). The regulation states that new water quality certification would not be needed where the project change proposed by the applicant "would

b. Enforceable Deadlines

Order No. 533 implements regulations that set firm deadlines for submission of conditions pursuant to sections 4(e)¹³ and 10(j) of the FPA. Specifically, section 4.34(b) of the regulations¹⁴ requires that all section 4(e) mandatory conditions and section 10(j) recommendations be submitted within sixty days of the Commission's notice that an application is ready for environmental analysis.¹⁵ If agencies fail to submit these recommendations on time, the FERC will consider them as part of the section 10(a) balancing process,¹⁶ but the recommendations or conditions will not be accorded the mandatory (section 4(e)) or heightened (section 10(j)) deference otherwise required.

3. The Revised License Application Procedures

a. Three-Step Consultation

The pre-hearing procedures for the hydroelectric licensing process follow the structure of the recent regulations governing applications for a new license,¹⁷ but differ slightly from the current three-step consultation process for licenses.¹⁸ First, a prospective applicant must meet with the appropriate resource agencies jointly and provide them with an information package on the proposed application.¹⁹ The agencies then have sixty days to comment.²⁰ Second, the applicant must provide the agencies with a draft license application.²¹ The agencies then have ninety days to review and comment on the draft.²² Third, the applicant must file the application with the Commission,

add recreational facilities without having any effect on discharges of water" or "would replace outmoded electrical facilities . . . without adversely affecting the quality of the water discharged," but also states that a new WQC application would be required where there is a "fundamental alteration of the project or proposed project, such as adding or deleting a dam or comparably significant facility . . ." F.E.R.C. Stats. & Regs. ¶ 30,921, at 30,137. See, e.g., Keating, 57 F.E.R.C. ¶ 61,262 (1991) and Keating, 57 F.E.R.C. ¶ 61,261 (1991). The FERC will need to define the regulation further in case-by-case decisions.

13. 16 U.S.C. § 797(e) (1988). Under Section 4(e) of the FPA, those federal agencies responsible for administering a reservation can impose mandatory conditions on a license to protect the primary purposes of the reservation. In the event that the Commission opposes these conditions, its only alternative is to decline to issue the license.

14. 56 Fed. Reg. 23,108, at 23,148 (1991) (to be codified at 18 C.F.R. § 4.34(b)).

15. An application is ready for environmental analysis when substantially all additional information requested by the FERC has been filed and found adequate. *Id.* at 23,147 (to be codified at 18 C.F.R. § 4.30(b)(25)).

16. 16 U.S.C. § 803(a) (1988). Section 10(a) of the FPA directs the Commission to consider whether a proposed project promotes best comprehensive use of the waterway for such purposes as power production, mitigation and enhancement of fish and wildlife, recreation, irrigation and flood control, and other beneficial uses.

17. Order No. 513, 18 C.F.R. §§ 16.8-16.12 (1990).

18. 18 C.F.R. § 4.38 (1989).

19. 56 Fed. Reg. 23,108, at 23,150 (1991) (to be codified at 18 C.F.R. § 4.38(b)(3)). The joint meeting is open to the public.

20. *Id.* at 23,151 (to be codified at 18 C.F.R. § 4.38(b)(4)).

21. *Id.* at 23,151 (to be codified at 18 C.F.R. § 4.38(c)).

22. *Id.* at 23,152 (to be codified at 18 C.F.R. § 4.38(c)(6)). If an agency disagrees with an applicant's

serve copies on the resource agencies and intervenors, and make a copy available in a public library or similar facility.²³

b. Scientific Studies

During the first stage of consultation, the agency must furnish the applicant with a description of the basis for a study request and explain why the study methodology specified is appropriate. During the second stage, the applicant must conduct any reasonable study necessary to enable the FERC to make an informed decision on the application. If the applicant disagrees with a resource agency's request for a study, it can refer the request to the Commission for dispute resolution. Within forty-five days after an application is filed, anyone can request an additional study, but the request must contain a detailed showing as to the necessity of the study.²⁴

c. Non-Capacity Amendments

Under the former regulations, certain amendments to a license application changed the original filing date to the date when the amendment was filed.²⁵ The revised regulations specify that an applicant may amend its license application to accommodate the comments of resource agencies and retain the original filing date.²⁶ Thus, first-filed applicants may accommodate resource agencies without risking a loss of priority.²⁷

4. The Controversial Definition of Fishway

The FERC also revised the original definition of fishway.²⁸ The original order defined fishway "as any facility for the upstream passage of fish through, over, or around the project works." On rehearing, the Commission revised the definition to include downstream facilities for the safe passage of fish through and around the project.²⁹ The Commission also clarified that its definition of fishway was limited to facilities and did not encompass non-structural measures such as instream minimum flows, and that the requirement only applies when "passage of a population is necessary for the life cycle" of the species.³⁰

proposed mitigation or enhancement, it must meet with the applicant within 60 days of providing comment to attempt to resolve the dispute.

23. *Id.* at 23,152 (to be codified at 18 C.F.R. § 4.38(d)).

24. *Id.* at 23,150 (to be codified at 18 C.F.R. § 4.38(b)).

25. 18 C.F.R. § 4.35(b)(1) (1991).

26. 56 Fed. Reg. 23,108, at 23,149 (to be codified at 18 C.F.R. 4.35(e)(4)).

27. *Id.*

28. Under section 18 of the FPA, 16 U.S.C. § 811 (1988), the Secretaries of the Interior and Commerce may prescribe fishways for hydropower projects, which the Commission is then required to incorporate into the license. Therefore, the definition of fishway is an important issue.

29. 56 Fed. Reg. 23,108, at 23,146 (to be codified at 18 C.F.R. § 4.30(b)(9)(iii)).

30. *Id.*

B. Order No. 530: Streamlining Commission Procedures for Review of Staff Action

On December 3, 1990, the Commission issued Order No. 530,³¹ which amended rule 1902,³² to streamline the procedures for review of actions taken by the Commission staff pursuant to delegated authority. The Commission condensed the former two-stage appeal process into a single stage. Under the amended rule, the only administrative recourse of a person aggrieved by a staff action is to file a request for rehearing of that action.

II. RELICENSING

A. Background

As of December 31, 1991, 167 relicensing applications had been filed at the Commission.³³ In addition, American Rivers has announced its intent to use the FERC's relicensing process to restore ecological and recreational values at project sites.³⁴ Thus, over the next few years, the Commission will process a significant number of relicensing applications.

B. Licensing Incremental Hydroelectric Capacity Contemporaneous with the Relicensing of the Project Where the Capacity is Located

1. The Commission Uses a Section 6 Analysis of Applications for Preliminary Permits at Sites Where Relicensing Is Imminent

In its 1986 *Kamargo Corp.* decision,³⁵ the Commission denied eleven preliminary permit applications to study the feasibility of developing additional capacity at existing licensed projects with licenses that would expire in 1993. The Commission held that the ECPA,³⁶ which provided a marginal preference for incumbents, would have been violated if the traditional preferences afforded license applications filed pursuant to preliminary permits applied and if the existing licensees had to file competing applications in response to license applications filed under the preliminary permits. Commissioner Tra-bandt dissented, contending that the ECPA provided no basis for dismissing the applications.³⁷ He noted, however, that the projects proposed in seven of the applications would have required substantial alteration of the existing licenses and therefore should have been dismissed pursuant to section 6 of the FPA,³⁸ which prohibits the alteration of a license without the licensee's consent.³⁹ On appeal the D.C. Circuit found that the Commission's construction

31. *Streamlining Commission Procedures for Review of Staff Action*, F.E.R.C. Stats. & Regs., Regs. Preambles 1986-90 ¶ 30,906, 56 Fed. Reg. 3520, Order Denying Rehearing, 56 Fed. Reg. 4719 (1991), 18 C.F.R. § 385 (1991).

32. 18 C.F.R. § 385.1902 (1991).

33. *HYDROWIRE*, Jan. 13, 1992, at 1.

34. *Id.*

35. *Kamargo Corp.*, 37 F.E.R.C. ¶ 61,281 (1986); *reh'g denied*, 39 F.E.R.C. ¶ 61,226 (1987).

36. *See supra* note 4.

37. 37 F.E.R.C. ¶ 61,281, at 61,845.

38. 16 U.S.C. § 799 (1988).

39. *Id.*

of ECPA was not reasonable and that its other positions were not adequately explained.⁴⁰

On remand,⁴¹ the Commission adopted Commissioner Trabandt's section 6 argument and denied seven of the eleven preliminary permit applications because the proposed developments would require substantial alteration of the existing licenses. The remaining four proposals did not appear to involve encroachment precluded by section 6, so the Commission issued permits for those projects.⁴² The Commission also stated that the issue of whether additional capacity based on unused water power is the subject of an original or a new license would become relevant in those cases only if and when the permittees filed acceptable license applications.⁴³ The Commission further addressed this issue in a Statement of Policy, discussed below.

2. Notice of Inquiry on Licensing of Excess Capacity at Relicensing Sites

On February 20, 1991, the FERC published a Notice of Inquiry on the general subject of incremental development at or near the time of relicensing.⁴⁴ The Commission requested that comments consider a situation where a third party seeks to develop undeveloped capacity at an existing project, and the incumbent licensee seeks to develop the same capacity in connection with a relicensing application.⁴⁵ The Commission also inquired about the applicability of permittee priority, municipal preference, and the incumbent licensee's "marginal relicensing preference,"⁴⁶ and the interaction of those preferences if they came into conflict.⁴⁷

The Commission acted on the Notice of Inquiry and issued a Statement of Policy on December 19, 1991.⁴⁸ The Commission did not propose new regulations, but provided guidance for applicants based on "several common central principles upon which most of the commenters seem to agree."⁴⁹ The principles set forth the Commission's present intentions for processing applications, but they may be refined or modified based on experience. The core

40. *Kamargo Corp. v. FERC*, 852 F.2d 1392 (D.C. Cir. 1988).

41. *Kamargo Corp.*, 53 F.E.R.C. ¶ 61,411 (1990), *reh'g denied*, 58 F.E.R.C. ¶ 61,057 (1992).

42. *Hannawa Corp.*, 53 F.E.R.C. ¶ 61,409 (1990); *Deferiet Corp.*, 53 F.E.R.C. ¶ 61,410 (1990); *Colton Hydro Corp.*, 53 F.E.R.C. ¶ 61,412 (1990); *Higley Corp.*, 53 F.E.R.C. ¶ 61,414 (1990). The permits were specifically conditioned to: (1) limit the scope of the permits to studying the feasibility of developing the available head using only the river flows in excess of the flows utilized by the currently licensed projects; (2) require the permittees to coordinate their studies with the existing licensees; and (3) limit the term of the permits so that any license applications filed pursuant to the permits would coincide with the existing licensees' new license applications, so that any development applications under the permits could be considered along with the relicensing applications for the four sites. *See also Carry Falls Corp.*, 55 F.E.R.C. ¶ 61,378 (1991) (permit denied where the generating potential to be studied under the permit was already covered by existing license).

43. 53 F.E.R.C. ¶ 62,411, at 62,439-441.

44. IV F.E.R.C. Stats. & Regs. ¶ 35,522, 56 Fed. Reg. 8164 (1991).

45. *Id.* at 35,675.

46. *Id.*

47. *Id.*

48. 57 F.E.R.C. ¶ 61,349 (1991).

49. *Id.* at 62,141-10.

principle is that the FERC will undertake a comprehensive analysis of the total usable capacity of a site in relicensing proceedings, and will defer evaluation of "reasonably contemporaneous"⁵⁰ incremental development applications so they may be considered in a comparative analysis together with relicensing applications involving the site.⁵¹ The Commission will define "reasonably contemporaneous" on a case-by-case basis.⁵²

Where no applicant applies to develop the total usable capacity of a site and more than one applicant has filed an incremental development application that is compatible with continued operation of the existing project, permittee priority and municipal preference will apply as among the incremental development applicants.⁵³ However, permittee priority and municipal preference will not apply against the incumbent licensee or other applicants for new licenses for the existing project, even where a new license applicant also proposed enhancements.⁵⁴

C. *Jurisdiction to Issue a New License in a National Park*

In *James River II, Inc.*,⁵⁵ the FERC determined that it had jurisdiction to issue a new license for a project located on lands designated as a part of a national park after the original license was issued. At the time of its initial licensing in 1926, the project was situated partly on private lands and partly on national forest lands. Thereafter, the land surrounding most of the project's reservoir was made part of the Olympic National Park.

When the Federal Water Power Act was amended in 1935 and made Part I of the FPA, the definition of reservation was modified to remove the Commission's authority under section 4(e) of the FPA⁵⁶ to license projects in national parks and monuments. In *James River II*,⁵⁷ a number of petitioners argued that this prohibition also extended to new licenses issued under section 15.⁵⁸ Petitioners relied on the FERC's analysis in *City of Pasadena*,⁵⁹ where it ruled that new licenses are not governed solely by section 15, but, like initial licenses, are subject to mandatory conditions submitted by land-administering Secretaries pursuant to section 4(e).⁶⁰

In finding that it had authority to relicense the project, the Commission majority explained that *Pasadena* did not address the jurisdiction of the Commission, but instead examined whether section 4(e) governed conditions

50. *Id.* at 62,141-11.

51. *Id.*

52. *Id.*

53. *Id.* at 62,141-12.

54. In the first case to apply the new Statement of Policy, the Commission issued a three-year preliminary permit to study incremental development at the site of a project whose license would be expiring one year prior to the expiration date of the permit. *Genesee River Hydro Assoc.*, 58 F.E.R.C. ¶ 62,003 (1992).

55. *James River II, Inc.*, 55 F.E.R.C. ¶ 61,034 (1991), *aff'g*, 53 F.E.R.C. ¶ 61,096 (1990).

56. 16 U.S.C. § 797(e) (1988).

57. 55 F.E.R.C. ¶ 61,034.

58. 16 U.S.C. § 808 (1988).

59. *City of Pasadena*, 46 F.E.R.C. ¶ 61,004 (1989).

60. *Id.* at 61,268.

imposed on a new license.⁶¹ The Commission also held that the section 15(a)(1) requirement that all new licenses be issued in accordance with "then existing laws and regulations"⁶² applied to the "terms and conditions"⁶³ to be imposed on the license, and did not serve to limit the FERC's threshold authority to issue a license.⁶⁴ The Commission indicated that its decision was influenced by "the practicalities of the situation."⁶⁵

D. Application for New License Not Required

In *Pennsylvania Electric Co. (Penelec)*,⁶⁶ the Commission held that the owner of an existing licensed project that was not required to be licensed under section 23(b)(1) of the FPA⁶⁷ did not have to obtain a new license for the project upon the expiration of the original license. The Commission concluded that, although Penelec had originally obtained a voluntary license for the project under section 4(e) of the FPA,⁶⁸ Penelec was not required to obtain a new license after the expiration of the existing license in 1993, so long as it informed the Commission by letter that it did not want a new license for the project.⁶⁹ Alternatively, Penelec could apply to surrender its existing license.⁷⁰

The Commission expanded on the *Penelec* surrender option in *McRay Energy, Inc.*⁷¹ The Commission concluded that a project licensed for a forty-year term in 1982 was not located on a navigable waterway and did not involve any post-1935 construction and, accordingly, was not required to be licensed under section 23(b)(1) of the FPA. The Commission noted that the project had a valid section 4(e) voluntary license that would remain in effect until the year 2022 unless the licensee applied for, and the Commission approved, an application to surrender the license.⁷² However, the Commission hinted that the licensee might not be able to continue to generate at the project if it surrendered the license:

We note in this regard, however, that to date all applications to surrender a license have contemplated the termination of electric generating operations. If McRay files an application to surrender the license but with the intent of continuing to operate the project, the Commission would at that point have to consider all aspects of the public interest that may be inherent in authorizing such a sur-

61. *Id.* at 61,269.

62. *Id.*

63. *Id.*

64. *Id.*

65. 55 F.E.R.C. ¶ 61,034, at 61,091. Some of the practical considerations included a regulatory gap created by a lack of the FERC jurisdiction over part, but not all, of the project, and the fact that the project was operated in tandem with the license's jurisdictional project on the same river. Commissioner Trabandt concurred, but argued that relicensing is governed exclusively by section 15 of the FPA. He would have overruled *City of Pasadena*, rather than attempt to distinguish it. *Id.* at 61,092.

66. *Pennsylvania Elec. Co.*, 56 F.E.R.C. ¶ 61,435; *reh'g denied*, 57 F.E.R.C. ¶ 61,211 (1991).

67. 16 U.S.C. § 817(b)(1) (1988).

68. *Id.* at 797(e). *See Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir.), *cert. denied*, 488 U.S. 933 (1988).

69. 56 F.E.R.C. § 61,435, at 62,550.

70. *Id.*

71. *McRay Energy, Inc.*, 57 F.E.R.C. ¶ 61,061 (1991).

72. *Id.* at 61,234.

render under those circumstances.⁷³

E. Application of Relicensing Regulations (Order No. 513)

In its Order Denying Rehearing in *Central Nebraska*,⁷⁴ the Commission clarified the exemption provisions of section 16.8(j) of the regulations⁷⁵ from Order No. 513's consultation requirements for hydroelectric relicensing proceedings.⁷⁶ The relicensing applications at issue were filed in June 1984. The Commission held that the pre-filing consultation requirements of section 16.8 of the regulations, as adopted in Order No. 513, did not apply because, absent a rejection for a patent defect, any application filed and stamped by the Commission Secretary before July 3, 1989, was exempted entirely from the consultation requirements.⁷⁷ Thus, the Commission refused to make a distinction under section 16.8 between applications filed and those accepted for filing. The controlling factor for triggering the exemption is solely the official filing date.⁷⁸

F. Transfer of License When Relicensing Is Imminent

*Augusta Development Corp.*⁷⁹ was the Commission's first application of its policy decision to allow a licensee to transfer a license even when relicensing is imminent,⁸⁰ subject to the required finding that such a transfer is in the public interest.⁸¹ The Commission approved Augusta's transfer of its license where (1) the transfer was not undertaken to conceal a poor record of compliance since Augusta's compliance record was satisfactory, (2) few changes would occur as a result of the transfer, since the transferee had been operating Augusta's project under lease for the past ten years, and (3) Augusta's notice of intent to seek a new license for the project, filed in December 1988, would serve as sufficient notice of the transferee's application.⁸²

73. *Id.* at 61,234.

74. *Central Nebraska Pub. Power & Irrigation Dist.*, 54 F.E.R.C. ¶ 61,175 (1991).

75. Section 16.8(j) states in part that "The provisions of this section are not applicable to applications filed before July 3, 1989." 18 C.F.R. § 16.8 (1991).

76. Order No. 513, *Hydroelectric Relicensing Regulations Under the Federal Power Act*, F.E.R.C. Stats. & Regs., Regs. Preambles 1986-90 ¶ 30,854, 54 Fed. Reg. 23,756 (1989), established procedures for the processing of license applications for existing hydroelectric facilities when their current licenses are due for expiration.

77. 54 F.E.R.C. ¶ 61,175, at 61,529, n. 17, 20. The Commission also noted that, under 18 C.F.R. § 16.8(j)(2-4), potential applicants who had not filed applications before July 3, 1989 still may be exempt from various stages of the consultation process depending on whether the potential applicants had met any of the consultation requirements under 18 C.F.R. § 4.38 before the effective date of Order No. 513.

78. *Id.* The Commission was careful to note that under 18 C.F.R. § 4.32(f), acceptance of an application by the Commission is made as of the date it was filed rather than the actual date of acceptance.

79. *Augusta Dev. Corp.*, 57 F.E.R.C. ¶ 61,070 (1991).

80. In its *Hydroelectric Relicensing Regulations*, the Commission declined to forbid license transfers during the last five years of an existing license, despite contentions that third parties might buy out existing licensees to obtain a relicensing advantage. See 54 Fed. Reg. 23,756 (1989).

81. 18 C.F.R. § 9.3 (1991).

82. 57 F.E.R.C. ¶ 61,070, at 61,260.

G. Repair of Facilities Prior to Application for New License

In *New York State Electric & Gas Corp.*,⁸³ the Commission rejected the licensee's argument that it should not be required to complete extensive repair work on a dam by the end of 1992 unless it decided to apply for a new license by the December 31, 1991, deadline. The licensee argued that, if it did not seek a new license, it could surrender the project and undertake only that work necessary to leave the project in a safe condition. The Commission held that it was authorized to require repair work on the dam now, even though the dam was not part of the licensed project. The dam was part of the project (as defined in FPA section 3(11))⁸⁴ and should have been licensed; it would have to be included as part of the project if a new license were sought.⁸⁵

H. ECPA Section 10 Compensation Developments

Section 10 of the ECPA permitted incumbent licensees at eight projects, then facing relicensing competition from municipalities, to elect to seek relicensing under the new law's provisions if they would pay compensation should a municipal competitor thereupon withdraw. If no election were filed, competition and award of the license would proceed substantially under the terms of the pre-ECPA law, which may or may not have included municipal preference.⁸⁶ In only one instance, Utah Power & Light's (UP&L) Olmsted Hydroelectric Project, did the incumbent licensee decline to make the election. UP&L believed that it would not lose a relicensing contest because the project would not be relicensed at all.

In 1990, UP&L and the U.S. Bureau of Reclamation settled a condemnation suit that had been pending when the ECPA was passed. The Bureau received title to the project works; UP&L retained the right to operate the project and own the project generation for twenty-five years. In *Utah Power & Light Co.*,⁸⁷ the FERC determined that this settlement removed the Olmsted Project from its licensing authority and, accordingly, terminated UP&L's existing annual license and dismissed all pending relicensing applications. This left UP&L's two competitors with neither the opportunity to compete for the project nor the right to receive compensation under ECPA section 10. The FERC found that UP&L's actions did not violate the FPA or ECPA section 10, reasoning that there was no right to compensation in the absence of the licensee's election, and that UP&L's motives for declining to file an ECPA

83. *New York State Elec. & Gas Corp.*, 56 F.E.R.C. ¶ 61,144 (1991).

84. *Id.* at 61,528.

85. Similarly, in *City of Escondido*, 55 F.E.R.C. ¶ 62,157 (1991), the Director reaffirmed that the Henshaw Dam and Lake Henshaw facilities were required to be included in the project on relicensing because, although not themselves containing hydroelectric facilities, they were part of the complete unit of development, as provided in FPA section 3(11). The Director required the owner and operator of the dam and lake to file an emergency action plan pursuant to part 12 of the Commission's regulations, which applies not only to licensed projects but to unlicensed projects required to be licensed.

86. The question of municipal preference on relicensing is explained and was resolved in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987) (en banc), cert. denied, 485 U.S. 913 (1988).

87. *Utah Power & Light Co.*, 55 F.E.R.C. ¶ 61,466, reh'g granted and stay denied, 56 F.E.R.C. ¶ 61,286 (1991).

election were immaterial.⁸⁸

III. LICENSING

A. Jurisdiction

1. The Presence of Fish in a River Does Not Make It Navigable for Purposes of FPA Section 23(b)(1)

*Niagara Mohawk Power Corp. (Niagara Mohawk)*⁸⁹ involved two projects built before 1935 and located on the Salmon River in Oswego County, New York. In 1987, the Director found that the Salmon River was navigable and required the owner of the projects to obtain licenses for them.⁹⁰ The Commission subsequently found that the river was not navigable and hence the projects were not required to be licensed.⁹¹

The state fishery agency challenged the Commission's position, asserting that the river was navigable because fish migrate from the river into Lake Ontario, fish caught in the river are shipped to other states and countries, and the river generates interstate commerce by attracting out-of-state fishermen who hire commercial guideboats. In response to the first argument, the Commission found that the natural movement of fish moving upstream or downstream does not constitute transportation of goods. As to the second, the Commission held that there was no evidence showing that the fish caught for shipment were transported from as far upstream as the project sites. Finally, it held that, while the river's generation of interstate commerce through the attraction of out-of-state fishermen might be relevant in cases involving post-1935 construction (since that mandatory jurisdictional basis requires a showing that a project has an effect on interstate or foreign commerce), it is not relevant in navigability cases since it does not show that the river is part of an interstate aqueous highway.

2. Other Jurisdiction Orders

a. Commerce Clause Waters Jurisdiction Without Commerce Clause Waters?

In *Summit Energy Storage, Inc.*,⁹² the director issued a license for the 1,500 MW Summit Pumped Storage Hydroelectric Project in Ohio. The project's lower level reservoir is an abandoned mine, and the upper level reservoir is to be constructed by means of an encircling embankment. The order does

88. The year 1991 also brought a partial settlement in the Rock Creek-Cresta and Haas-Kings River ECPA section 10 compensation proceedings, the only such cases remaining unresolved more than five years after the ECPA's passage. *Pacific Gas & Elec. Co.*, 57 F.E.R.C. ¶ 61,026 (1991). The FERC has yet to set compensation in a contested proceeding; the other five cases all settled.

89. *Niagara Mohawk Power Corp.*, 54 F.E.R.C. ¶ 61,100 (1991); *order on reh'g*, 55 F.E.R.C. ¶ 61,006 (1991); *appeal pending sub nom.* *New York State Dep't of Envtl Conservation v. FERC*, No. 91-4102 (2nd Cir., argued Oct. 7, 1991).

90. *Niagara Mohawk Power Corp.*, 39 F.E.R.C. ¶ 62,075 (1987); *Niagara Mohawk Power Corp.*, 39 F.E.R.C. ¶ 62,076 (1987).

91. *Niagara Mohawk Power Corp.*, 53 F.E.R.C. ¶ 61,329 (1990).

92. *Summit Energy Storage, Inc.*, 55 F.E.R.C. ¶ 62,026 (1991).

not indicate that any navigable or other Commerce Clause waters are involved. It does state that the project is to be constructed off-stream.⁹³ The only reference to jurisdiction is a single statement that "[t]he project would affect the interests of interstate commerce."

b. Jurisdiction over Already Constructed Projects

In a number of 1991 orders, the Commission found jurisdiction over already constructed projects, typically on the basis of navigability and/or post-1935 construction on a Commerce Clause water.⁹⁴

c. When Refurbishment of Abandoned Projects Counts as Post-1935 Construction

In *McRay Energy, Inc.*,⁹⁵ the Commission held that a license it had issued was not required. The project, originally constructed in 1926 and put into operation in 1928, was retired by Duke Power Company in 1976 and was revived by another company in 1982.⁹⁶ The Commission concluded that the second and third bases for jurisdiction to require a license under FPA section 23(b)⁹⁷—location on federal lands and use of surplus water from a government dam—did not apply. Buck Creek, the site of the project, had never been navigable, so the first basis of jurisdiction under section 23(b) was also inapplicable. As to the fourth and last possible basis for jurisdiction, the Commission held that the project did affect interstate commerce, because it was interconnected to Duke Power Company.⁹⁸ Buck Creek was also held to be a headwater tributary of a navigable stream and thus, contrary to the licensee's assertion, was a Commerce Clause water.

93. 55 F.E.R.C. ¶ 62,026, at 63,081. No natural stream runoff contributes to the project's generating capacity and no minimum releases are required, *Id.* at 63,083.

94. City of Oswego, 57 F.E.R.C. ¶ 62,100 (1991) (Oswego River, New York, is navigable and the existing project, on a Commerce Clause water, had post-1935 construction and was connected to an interstate grid); McArthur, 56 F.E.R.C. ¶ 62,133, 62,134 (1991) (Baraboo River, Wisconsin, is navigable); City of Stoughton, 55 F.E.R.C. ¶ 62,149 (1991), and Wisconsin Edison Co., 55 F.E.R.C. ¶ 62,148 (1991) (Yahara River, Wisconsin, is navigable); Metropolitan Dist. Comm'n, 54 F.E.R.C. ¶ 61,330 (1991) (Swift River, Massachusetts is a Commerce Clause water); Madison Elec. Works, 54 F.E.R.C. ¶ 61,261 (1991) (Sandy River, Maine is navigable; an alternate basis for jurisdiction is post-1935 construction); Sheffield Car Co., 54 F.E.R.C. ¶ 61,177 (1991) (St. Joseph's River Michigan, is navigable); North Am. Hydro, Inc., 54 F.E.R.C. ¶ 61,131 (1991) (Little Wolf River, Wisconsin, is navigable); Consolidated Hydro, Inc., 54 F.E.R.C. ¶ 62,094 (1991) (Sebasticook River, Maine, is navigable); Consolidated Hydro, Inc., 54 F.E.R.C. ¶ 62,095 (1991) (Little Androscoggin River, Maine, is navigable); Wind & Water Power, Inc., 54 F.E.R.C. ¶ 62,084 (1991) (Nubanusett Brook, New Hampshire is Commerce Clause water; post-1935 construction).

95. *McRay Energy, Inc.*, 57 F.E.R.C. ¶ 61,061 (1991). This case is also discussed above at part II.D.1.

96. 16 U.S.C. § 817 (1988).

97. The license was transferred from Saranac to McRay Energy in 1985.

98. "Every generator in an interstate system contributes energy to maintain the system's balance between generation and load, and any change in generation or load anywhere in the system affects every other generating unit in the system because all generating units are interlocked electromagnetically." 57 F.E.R.C. ¶ 61,061, at 61,233 (footnote omitted). A lead case on this point is Fairfax County Water Authority, 43 F.E.R.C. ¶ 61,062 (1988).

The need for a license turned on whether a six-year abandonment, followed by refurbishment, constituted post-1935 construction. Ordinary maintenance, repair, and reconstruction activity do not constitute post-1935 construction, but this exception does not apply if a project was abandoned and then later reconstructed to its original condition. Here, the project was in good working order when taken out of service and when put back into service by another six years later. No construction was required other than routine maintenance. The Commission held that actual construction is an essential element of this basis for jurisdiction, and that no construction had occurred here.⁹⁹ Therefore, there was no mandatory licensing jurisdiction.

In *North American Hydro, Inc.*,¹⁰⁰ the Commission found, in addition to navigability as a basis for jurisdiction, that the project had been abandoned for many years, so that refurbishment prior to operation constituted post-1935 construction on a Commerce Clause water. The project contained post-1935 construction even though the dam and other facilities had been maintained and operated for other purposes in the interim.¹⁰¹

d. Interconnection Establishes Sufficient Effect on Interstate Commerce, Even if De Minimis

In *Habersham Mills*,¹⁰² the Commission rejected an argument that electricity generated at a hydroelectric project did not affect interstate commerce sufficiently to form a basis for FERC jurisdiction because the electricity was primarily for the owner's use and because, although the project was interconnected to the interstate electricity grid, the owner was a net purchaser of electricity (sales for resale were minimal and purely intrastate). The Commission stated that there is no rule setting quantitative minima for isolated effects of activities if the cumulative effect on interstate commerce is real and substantial. The Commission purportedly applied the standard articulated in *City of Centralia v. FERC*,¹⁰³ but appeared to depart from that case's holding of no jurisdiction because significant interstate effects had not been shown.¹⁰⁴

99. The Commission thus distinguished *Aquenergy Systems, Inc., v. FERC*, 857 F.2d 227 (4th Cir. 1988); *Keck*, 51 F.E.R.C. ¶ 61,018 (1990); *Yankee Hydro Corp.*, 50 F.E.R.C. ¶ 61,289 (1990); *North Am. Hydro Corp.*, 49 F.E.R.C. ¶ 61,386 (1989); and, on a somewhat different basis, *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311 (9th Cir. 1977).

100. *North Am. Hydro, Inc.*, 54 F.E.R.C. ¶ 61,131 (1991).

101. *Id.* at 61,431.

102. *Habersham Mills*, 55 F.E.R.C. ¶ 61,158 (1991).

103. *City of Centralia v. FERC*, 661 F.2d 787 (9th Cir. 1981) (reversing jurisdiction because, despite interstate interconnection, no real and substantial effect on interstate commerce was shown), *supplemented*, 851 F.2d 278 (9th Cir. 1988) (affirming Commission determination on remand finding jurisdiction based on navigability).

104. See also the discussion of interstate effects of interconnection in *McRay Energy, Inc.*, *supra*, part III.A.2.c.

e. Pre-1920 Permits as Exempt from Licensing

In 1991 the FERC ruled on a handful of cases in which it addressed the criteria for a valid pre-1920 permit which would except a project from licensing under FPA section 23(b)(1).¹⁰⁵

3. Legislation to Revise the Commission's Jurisdiction

Among the dozens of energy policy bills introduced this past session in Congress, several proposed limiting Commission jurisdiction over small hydroelectric projects, and the idea became an integral part of the eventual comprehensive proposal. The earliest proposal to limit Commission jurisdiction¹⁰⁶ was introduced by Senator Johnston (D.-LA). Its recommendations for streamlining the FPA included an exclusion from FERC jurisdiction of projects under 1500 kW.¹⁰⁷ A subsequent version of the National Energy Strategy bill,¹⁰⁸ sponsored by Senators Johnston and Wallop (R-WY), proposed to remove FERC jurisdiction from hydro projects of five MW or less. Congressman Lent's (R.-NY) Energy bill contained a similar set of provisions.¹⁰⁹

The next version of the National Energy Strategy bill, introduced by Senator Johnston,¹¹⁰ contained further refinements of the proposal to remove small projects from FERC jurisdiction. The bill would have added several new provisions to FPA section 23. New section 23(c) would provide that for projects of five MW or less, located entirely in a single state and not otherwise affected with certain federal land interests,¹¹¹ the state would have authority to authorize the project in lieu of any federal licensing or other authorization, such as exemption. Federal environmental, natural, and cultural resources protection laws would remain in effect.¹¹² For projects located in whole or in part on federal lands, state authorization would be subject to approval of the Secretary with authority over such lands.¹¹³ Already licensed projects that would, if not yet licensed, be subject to state rather than federal authority could elect to subject themselves to state licensing authority.¹¹⁴

105. 16 U.S.C. § 817(1) (1988). *See* Wisconsin Power & Light Co., 55 F.E.R.C. ¶ 61,169 (1991), Sheffield Car Co., 54 F.E.R.C. ¶ 61,177 (1991), Otter Tail Power Co., 54 F.E.R.C. ¶ 62,027 (1991), Upper Peninsula Power Co., 56 F.E.R.C. ¶ 61,191 (1991), and New York State Elec. & Gas Corp., 56 F.E.R.C. ¶ 61,144 (1991).

106. S. 341, 102d Cong., 1st Sess. (1991).

107. *Id.* at § 4202(c).

108. S. 570, 102d Cong., 1st Sess. § 612 (1991); *see* H.R. 1301, 102d Cong., 1st Sess. (1991) (companion bill).

109. H.R. 1543, 102d Cong., 1st Sess., § 312 (1991).

110. S. 1220, 102d Cong., 1st Sess. (1991).

111. These include location on an Indian reservation, a unit of the National Park System, a component of the Wild and Scenic Rivers System, or a river segment under study for potential addition to the Wild and Scenic Rivers System.

112. S. 1220, 102d Cong., 1st Sess., § 5302 (1991) (proposed FPA § 23(f)).

113. *Id.* (proposed FPA § 23(e)).

114. *Id.* (proposed FPA § 23(d)). S. 1220 also incorporated case-specific adjustments to FERC jurisdiction, some of which were also addressed in other bills. Section 5305 of S. 1220 would remove FERC jurisdiction from the fresh waters of the state of Hawaii; *compare* H.R. 3027, 102d Cong., 1st Sess. (1991).

B. Commencement of Construction Deadlines

1. Issuance of Stays

In the past, the Commission has stringently enforced the FPA section 13 commencement of construction deadline¹¹⁵ by denying requests for stay of licenses except in extreme circumstances beyond the licensee's control (e.g., license pending judicial review).¹¹⁶ However, two recent statements by Commission Trabant in *Nockamixon Hydro Associates*¹¹⁷ and *Town of Gassaway*,¹¹⁸ indicate that at least one commissioner may be willing to undertake a broader view of the equities in determining whether to grant a request for a stay.

2. Applicability of Section 13 Limitation on Extensions of Time to Increased Capacity Amendments of Licenses

In *Fieldcrest Cannon, Inc.*,¹¹⁹ the Commission addressed the question of whether the FPA section 13 construction deadline and limit on extensions apply to an amendment to increase capacity at a licensed project. The project was initially licensed at 4.26 MW;¹²⁰ the Commission then approved an additional 23.4 MW and extended the license term.¹²¹ The Commission rejected the argument that the authorization for the additional units constituted an original license as to them, so that section 13 would apply to limit the available time extensions to one. The Commission stated that license amendments adding additional capacity are treated as original licenses for purposes of section 4(e) and 10(a), but in this context it was appropriate to consider the amendment in conjunction with the original license, which had met the section 13 deadline.¹²²

C. Annual Charges

In *East Columbia Basin Irrigation District v. FERC*,¹²³ the D.C. Circuit affirmed the Commission's decision that, notwithstanding irrigation district contracts with the Department of the Interior (DOI), which confer on the districts sole ownership of revenues from district hydroelectric projects constructed on reclamation areas, the Commission is not precluded from assessing

Section 5306 would remove certain specified projects in Alaska from FERC jurisdiction. Section 5307 provides further extensions for commencement and completion of construction to two specified projects in Arkansas; compare S. 1283, 102d Cong., 1st Sess. (1991) (amended August 2, 1991), and H.R. 2677, 102d Cong., 1st Sess. (1991).

115. Section 13 of the FPA, 16 U.S.C. § 806 (1988), provides that the Commission may extend the deadline for commencement of construction only once, and for no longer than two additional years.

116. See, e.g., *Simmons*, 52 F.E.R.C. ¶ 61,315 (1990).

117. *Nockamixon Hydro Assoc.*, 54 F.E.R.C. ¶ 61,245 (1991).

118. *Town of Gassaway*, 54 F.E.R.C. ¶ 61,259 (1991).

119. *Fieldcrest Cannon, Inc.*, 55 F.E.R.C. ¶ 61,096 (1991).

120. *Reeves Brothers, Inc.*, 53 F.P.C. 1449 (1975).

121. *Fieldcrest Cannon, Inc.*, 37 F.E.R.C. ¶ 61,124 (1986).

122. The Commission had previously held that the additional units constituted a new license for purposes of the applicability of the ECPA. 37 F.E.R.C. ¶ 61,264, at 61,766, n.6 (1986).

123. *East Columbia Basin Irrig. Dist. v. FERC*, 946 F.2d 1550 (D.C. Cir. 1991).

annual charges under FPA section 10(e).¹²⁴

In *City of Oswego*,¹²⁵ the City had applied in 1982 for a license for a pre-1935 hydroelectric project on the Oswego River that had been upgraded in 1949. The Oswego River was declared navigable in 1968. In issuing a license for the project, the FERC assessed annual charges for prior years to place Oswego in the same position it would have occupied had its project been licensed in 1949.

In *Robley Point Hydro Partners Limited Partnership*,¹²⁶ a licensee determined not to construct a project and sought to surrender its license. The licensee protested the annual charges assessed for licensed project capacity and use of government lands, because no capacity was constructed and no government lands occupied. The FERC declined to waive the annual charges and declared that charges would continue to accrue until the license had been surrendered.

When revised as-built drawings submitted by a licensee in *Pacific Gas & Electric Co.*¹²⁷ reflected changes including past capacity increases from generator rewindings, the FERC issued retroactive license amendments and retroactively increased the applicable annual charges.

D. Competition Between License and Preliminary Permit Applications

In competition between applicants for licenses or exemptions from licensing and applicants for preliminary permits, permit applicants are disadvantaged but may prevail if they can substantiate the superiority of their applications. Although the facts are complex and possibly unique, in *Town of Summersville*¹²⁸ the Commission substantially increased the anti-permittee tilt in such competitions.¹²⁹

124. 16 U.S.C. § 803(e) (1988).

125. *City of Oswego*, 57 F.E.R.C. ¶ 62,139 (1991).

126. *Robley Point Hydro Partners L.P.*, 56 F.E.R.C. 61,041 (1991). While the FERC has waived annual charges in instances of licensee insolvency, here the licensee's unsubstantiated claim that it possessed no assets was insufficient to merit a waiver.

127. *Pacific Gas & Elec. Co.*, 55 F.E.R.C. ¶ 62,335 (1991).

128. *Town of Summersville*, 55 F.E.R.C. ¶ 61,271 (1991).

129. Manassas, Virginia filed a preliminary permit application for the Summersville Dam Project on August 8, 1988, just ahead of a competing license application filed by Summersville, West Virginia. Summersville received a deficiency letter. Shortly after passage of the deadline for curing Summersville's deficiencies, the FERC issued notice of Manassas's permit application. In July 1989, within the deadline set in that notice, Summersville refiled its deficient license application, which was assigned a new project number. In December 1989, the FERC staff rejected Summersville's first license application on account of the uncorrected deficiencies and issued a deficiency letter for Summersville's refiled application, identifying the same deficiencies that resulted in dismissal of the first application. This time, however, Summersville timely cured the deficiencies. In December 1990, acting pursuant to a Commission order issued on November 26, 1990, the FERC staff accepted Summersville's refiled license application and dismissed Manassas's preliminary permit application without prejudice to its reacceptance should Summersville's license application be subsequently dismissed. The Commission's November 26 order had affirmed the staff's dismissal of Summersville's 1988 application, but had also rescinded the notice of Manassas's permit application, thereby eliminating the deadline that had led Summersville to refile its own application prior to curing the deficiencies. Had Summersville's license application already been rejected as deficient, Summersville's refiled application without curing the deficiencies would have been barred by 18 C.F.R. § 4.32(e)(2)(iii). Manassas contended that the same result should obtain when an uncorrected

E. Amendments

1. Substitution of License Applicants Not Considered Amendment

In *Michigan Power Co.*,¹³⁰ the Commission permitted one applicant to be substituted for another in a pending application for license, waiving application of section 4.35 of the regulations. Under that section, a change in the identity of the applicant, such as the complete substitution at issue, normally results in a change in the filing date to the date of the amendment and reissuance of public notice. The Commission held that the new application was not in competition with the initial application and should therefore not be rejected because it was filed after the deadline for filing competing applications. Moreover, there were no pending competing applications, so the waiver did not create any unfairness.¹³¹ Because the change involved only a substitution and both applicants were closely related, the Commission also held it was not necessary to reissue notice of the application.

2. Post-License Changes to Projects

In submitting its final design drawings, the licensee in *Burlington Electric Department*¹³² proposed to alter the project's intake structure, tailrace, and powerhouse from the preliminary design drawings contained in its license application. The revised plans also showed three small turbines in the powerhouse rather than the single large turbine proposed in the application. An opponent argued that the changes constituted a license amendment requiring public notice under FPA section 6. The FERC rejected the claim, concluding that there were no material changes in the plans of development and that the changes would not adversely affect neighboring property owners in a manner not contemplated in the original license.

In *Central Nebraska Public Power & Irrigation District*,¹³³ an intervenor in this relicensing proceeding sought rehearing of the FERC's acceptance of several modifications to the outstanding annual license which had been proposed by the licensee. The FERC explained that intervention in the relicensing proceeding and participation in a related court case did not confer party status in the proceeding to amend the applicant's annual license, and that intervention should have been sought when the proposed amendments were originally noticed.

deficient application is refiled prior to being rejected. On rehearing, the FERC stood firm on its dismissal of Manassas's permit application and its acceptance of Summersville's license application. Accordingly, refiling of uncorrected deficient applications may now become a viable technique for obtaining additional time to cure deficiencies, and the FERC's previous policy on the time allowed to permittees for substantiating the superiority of their applications may be void.

130. *Michigan Power Co.*, 57 F.E.R.C. ¶ 61,227 (1991).

131. The Commission thus distinguished *Palisade Irrigation Dist.*, 34 F.E.R.C. 61,377 (1986), where it refused to waive § 4.35 because it would be unfair to a competing applicant.

132. *Burlington Elec. Dep't*, 57 FERC ¶ 61,113 (1991).

133. *Central Neb. Pub. Power & Irrigation Dist.*, 57 F.E.R.C. ¶ 61,175 (1991).

F. *Permissible Lease Agreements*

In *Fieldcrest Cannon, Inc.*,¹³⁴ the Commission approved a lease agreement after ascertaining that the licensees retained the requisite level of control over the project. The lease expressly reserved to the lessor the right to perform any and all acts required by the Commission.

In *City of Oswego*,¹³⁵ the Director held that the lease of a project by a municipality did not contain sufficient reservations of control and gave the lessee utility too definite a right during the term of the lease. The director required a number of modifications to the lease. He also determined that it was permissible for the municipal licensee to lease the project to a non-preference entity. Although such arrangement might sometimes constitute abuse of the municipal preference,¹³⁶ here the original application was filed jointly; the director subsequently required an unbundling of the application into several project applications, including the one filed by the city. Moreover, the municipal licensee never sought to conceal the utility's participation in the operation of the project. The director did state that if it were proposed to transfer the license to the utility or to make it a co-licensee, the matter would have to be reexamined.

G. *Section 31 Compliance and Enforcement Matters*

The ECPA added a new section 31 to the FPA¹³⁷ which expanded the FERC's enforcement authority over hydro projects, enabling it to impose civil penalties and to revoke a license or exemption if a project fails to meet a deadline imposed in a compliance order.¹³⁸

1. *Compliance Orders*

The FERC's 1991 compliance orders were issued primarily in response to allegations that project conditions could have potentially hazardous impact on the environment or public safety. Environmental issues that have triggered FERC compliance orders include an exemptee's failure to install continuous streamflow gauging devices,¹³⁹ a project's failure to submit plans for fish passage installation,¹⁴⁰ and a project's failure to file timely construction reports

134. *Fieldcrest Cannon, Inc.*, 55 F.E.R.C. ¶ 61,096 (1991).

135. *City of Oswego*, 57 F.E.R.C. ¶ 53,139 (1991).

136. 16 U.S.C. § 800(a) (1988). *See also* *City of Fayetteville Public Work Comm'n*, 16 F.E.R.C. ¶ 61,209 (1981).

137. Section 12 of the ECPA, *supra* note 4, added section 31 of the FPA, codified at 16 U.S.C. § 823b (1988).

138. Section 31(c) permits assessment of civil penalties for violation of the terms of a license, permit or exemption, or for violation of any FERC rule or regulation, or of any term of a compliance order. The FERC's regulations regarding section 31 enforcement are at 18 C.F.R. §§ 385.1501-385.1511. The FERC's initial rulemaking, Order No. 502, appears at 53 Fed. Reg. 32,035 (1988). The Order on Rehearing, Order No. 502-A, appears at 53 Fed. Reg. 50,925 (1988).

139. *Akin*, 54 FERC ¶ 62,177 (1991); *Akin*, 56 F.E.R.C. ¶ 62,157 (1991); *Akin*, 56 F.E.R.C. ¶ 62,091 (1991); *Akin*, 57 F.E.R.C. ¶ 62,028 (1991); *Ravenscroft*, 57 F.E.R.C. ¶ 62,205 (1991); *Northeast Hydrodev. Corp.*, 56 F.E.R.C. ¶ 62,219 (1991).

140. *Northeast Hydroelec. Corp.*, 56 F.E.R.C. ¶ 62,219 (1991). *See also* *City of Emporia*, 57 F.E.R.C. ¶ 62,068 (1991).

and erosion prevention plans.¹⁴¹

Compliance orders triggered by safety-oriented concerns include a project's lack of safety devices including a boater restraint system,¹⁴² a project's failure to complete a thorough safety inspection under part 12, subpart D¹⁴³ when an initial inspection by a consultant found the dam "theoretically unstable,"¹⁴⁴ a project's failure to file an Emergency Action Plan or exemption as required by part 12, subpart C,¹⁴⁵ and a municipality's lack of any "real property interest" in the dam associated with its hydro plant, raising concerns over the project's ability to effect safety-related initiatives without the approval of the owner of the dam.¹⁴⁶ Other issues that have triggered compliance orders include operating a project without a license in violation of section 23(b)¹⁴⁷ and failure to construct required recreation facilities.¹⁴⁸

2. Notices of Proposed Penalty

In *City of Tallahassee*,¹⁴⁹ a Notice of Proposed Penalty (NOPP), the FERC proposed a civil penalty despite the fact that the licensee had met the deadline set in a compliance order. In that case, Tallahassee repaired its dam in accordance with a schedule worked out with the FERC staff and memorialized in a compliance order. Despite this, over a year after the repair was completed, the FERC noticed a proposed penalty, determining that "[f]ailure to timely repair the leak in the high hazard dam exposed the public to possible hazard and undermined the Commission's ability to protect persons, property, and the environment."¹⁵⁰ The basis for the FERC's determination that the city had failed to repair the leak in timely fashion is uncertain.¹⁵¹ Given that aggressive approach, it is not surprising that the FERC would seek civil penalties where compliance post-dated the deadline established by the compliance order, as it did in *City of Forsyth*.¹⁵²

3. Settlements

In *Washington Water Power Co.*,¹⁵³ three boaters died when their boat

141. Fallon, 57 F.E.R.C. ¶ 62,206 (1991).

142. Northeast Hydrodev. Corp., 57 F.E.R.C. ¶ 62,189 (1991).

143. 18 C.F.R. § 12.38(a) (1990).

144. American Hydro Power Co., 55 F.E.R.C. ¶ 62,136 (1991).

145. Village of Big Falls, 57 F.E.R.C. ¶ 62,049 (1991).

146. City of Rock Falls, 54 F.E.R.C. ¶ 62,120 (1991).

147. Hitchcock & Assoc., 56 F.E.R.C. ¶ 62,188 (1991).

148. NYSD L.P., 54 F.E.R.C. ¶ 62,012 (1991).

149. City of Tallahassee, 53 F.E.R.C. ¶ 61,472 (1990).

150. 53 F.E.R.C. ¶ 61,472, at 62,657. Tallahassee had made an unsuccessful attempt to repair the leak prior to issuance of the compliance order.

151. The compliance order did not contain the usual boiler plate that "[c]ompliance with this order does not preclude the Commission from assessing penalties, pursuant to Section 31, for violations that have already occurred."

152. City of Forsyth, 56 F.E.R.C. ¶ 61,357 (1991). Other 1991 NOPPs resulted from alleged continuing violations which had been the subject of previous compliance orders. Clifton Power Corp., 54 F.E.R.C. ¶ 61,339 (1991); Hitchcock, 56 F.E.R.C. ¶ 61,413 (1991); Bluestone Energy Design, Inc., 56 F.E.R.C. ¶ 61,426 (1991).

153. Washington Water Power Co., 56 F.E.R.C. ¶ 61,048 (1991). This settlement is also noteworthy

was swept over a dam while a log boom boat safety barrier was not in place. While the FERC made no allegation that Washington Water Power had violated any specific license requirement by removing and not replacing the log barrier, the FERC did argue that the licensee had "failed to follow sound or prudent engineering practices."¹⁵⁴ Nonetheless, in settling, the Commission agreed to vacate its prior assessment order which had found that failure to maintain the log boom "was not a sound or prudent safety practice." The FERC conceded that "[i]t is not known whether a log boom would have prevented the accident." Finally, the FERC determined that "the Agreement shall not be construed . . . as imposing any legal duty of care owed to the public." This settlement, noteworthy for the complete absence of any language from which fault or violation could be implied, is also remarkable for the settlement amount of \$500,000 (the full amount of the vacated civil penalty assessment), more than four times the settlement payment for any admitted violation at a single dam in 1991.¹⁵⁵

4. Enforcement Actions Against Jurisdictional Projects Operating Without Licenses

A series of orders in *Wolverine Power Corp.*¹⁵⁶ (pending review before the U.S. Court of Appeals for the D.C. Circuit) raise the issue of FERC jurisdiction under FPA section 31¹⁵⁷ to impose civil penalties on projects that are required to obtain licenses but have not done so.¹⁵⁸ The issue will certainly recur until the D.C. Circuit decides it.¹⁵⁹

because the FERC agreed to grant permission to Washington Water Power to revoke its initial election to have its case heard in district court.

154. 56 F.E.R.C. ¶ 61,048, at 61,153 (1991). Thus, the FERC alleged that the licensee was in violation of section 10(c) of the FPA and of Commission regulations at 18 C.F.R. § 12.5 (1991).

155. Four other section 31 enforcement actions were settled in 1991. Alpena Power Co., 54 F.E.R.C. ¶ 61,377 (1991), Rapidan Redev. L.P., 54 F.E.R.C. ¶ 61,194 (1991); Methven Falls Hydro Elec. Co., 56 F.E.R.C. ¶ 61,346 (1991); F.W.E. Staphenhorst, Inc., 55 F.E.R.C. ¶ 61,354 (1991).

156. *Wolverine Power Corp.*, 51 F.E.R.C. ¶ 63,012, *modified*, 53 F.E.R.C. ¶ 61,062 (1990), *reh'g pending sub nom.* *Wolverine v. FERC*, No. 90-1497 (D.C. Cir. filed Dec. 14, 1990) (oral argument held Nov. 5, 1991).

157. 16 U.S.C. § 823b (1988).

158. The Commission found that the record revealed a flagrant and sustained pattern of conduct. It refused to accept that the filing of unacceptable license applications should be a mitigating factor. The Commission also rejected an argument that the penalties should run only from the date of the Commission's order on rehearing establishing procedures pursuant to section 31. The authority to impose penalties comes from the statute itself, not the regulations; moreover, the statutory provision violated was section 23(b)(1), concerning mandatory licensing, and section 23(b)(1) has been in effect for many years. The Commission thus affirmed the imposition of a \$2,024,000 penalty. Commissioner Trabandt dissented. 53 F.E.R.C. ¶ 61,062, at 61,200 (1990).

159. In *Hitchcock*, the Commission issued a NOPP assessment of \$20,000 for operating a 60 kW project without either a license or exemption during a three-year period. The estimated economic benefit of the alleged illicit operation was about \$14,000; the Commission claimed authority, pursuant to FPA section 31, to impose a penalty of up to \$10,000 per day per violation. 56 F.E.R.C. ¶ 61,413 (1991); *see also* *Hitchcock & Assoc.*, 56 F.E.R.C. ¶ 62,188 (1991) (compliance order); *Cameron Gas and Electric Co.*, 57 F.E.R.C. ¶ 61,334 (1991).

IV. ENVIRONMENTAL MATTERS

A. FPA Section 10(j)

1. Studies Are Not 10(j) Recommendations

In a victory for the Commission, the D.C. Circuit upheld the Commission's ruling in the *Ohio River Basin* proceeding that studies do not constitute section 10(j) recommendations within the meaning of the FPA.¹⁶⁰ On rehearing in the *Ohio River Basin Cases*,¹⁶¹ the Commission rejected the argument that its decision to deny requests of the Department of the Interior and the Pennsylvania Fish Commission for additional precicensing studies violated section 10(j). During consultation prior to issuance of the license, a group of agencies submitted a list of requested precicensing studies. The Commission held that such studies "were not needed to provide an adequate record for decision"¹⁶² and that agency requests for precicensing studies are not recommendations pursuant to section 10(j) because they are not conditions imposed on issued licenses. The Commission distinguished its routine adoption of agency recommendations for postlicensing studies, which it characterized as ordinary license conditions.¹⁶³

The D.C. Circuit affirmed, stating that it found nothing in the FPA which would require the FERC to conduct studies that resource agencies deem necessary for the section 10(j) process. The court also emphasized that Congress never intended that the resource agencies' authority under section 10(j) be so broad as to give them veto power over the licensing process.¹⁶⁴

2. Rejection of 10(j) Recommendations

In *Nelson*,¹⁶⁵ the Commission addressed a disagreement over a minimum flow requirement in a license order. The Commission notified the federal and state agencies of its disagreement with their recommendations, as required by section 10(j)(2).¹⁶⁶ When the state agency continued to object, the Commission included a finding in its order on rehearing, required by section 10(j)(2), that the agency recommendation was inconsistent with the purposes and requirements of the FPA. The Commission found it would result in a substan-

160. *Ohio River Basin Cases*, Allegheny Elec. Coop., 51 F.E.R.C. ¶ 61,268 (1990), United States Dept. of Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992).

161. *Allegheny Elec. Coop.*, 51 F.E.R.C. ¶ 61,268 (1990).

162. *Id.* at 61,826.

163. *Allegheny Elec. Coop.*, 48 F.E.R.C. ¶ 61,363, at 62,370-378 (1989), *aff'd on reh'g*, 51 F.E.R.C. ¶ 61,268, at 61,828-830 (1990).

164. The D.C. Circuit's decision in *Ohio River Basin* lends credence to the Commission's holding in *Rancho Rialta Hydro Partners, Inc.*, which preceded the court's decision. 42 F.E.R.C. ¶ 61,012, at 61,031 (1988). In an Order Denying Rehearing, the Commission discussed the contention that its order violated section 10(j) by not adequately explaining why it rejected the positions of the California Department of Fish and Game and the United States Fish & Wildlife Service (USFWS). The Commission stated that the agencies' comments had basically said the precicensing studies were inadequate. The Commission, relying on *Allegheny Elec. Coop.*, 51 F.E.R.C. ¶ 61,268 (1990), held that "requests for precicensing studies are not 'recommendations' as used in Section 10(j)." 54 F.E.R.C. ¶ 61,045, at 61,176 (1991), *petition for review filed sub nom. County of Inyo v. FERC*, No. 91-71274 (9th Cir., filed April 24, 1991).

165. *Nelson*, 57 F.E.R.C. ¶ 61,071 (1991).

166. 16 U.S.C. § 803(j)(2) (1988).

tial loss of power and that the lower flow with an additional monitoring plan adequately protected fish and wildlife.

B. Endangered Species Act (ESA)

1. Central Nebraska Public Power and Irrigation District

The Commission took further action in 1991 to implement the D.C. Circuit's direction, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*,¹⁶⁷ to assess the need for "temporary, 'rough and ready' measures" in creating a stricter screening of annual licenses issued to Central Nebraska Public Power and Irrigation District (Central) for its Kingsley Dam Project on the Platte River. This is to prevent irreversible environmental damage, including damage to certain species which had been listed as either threatened or endangered under the ESA.

Central's project is operated jointly with Nebraska Public Power and Irrigation District's (Nebraska) North Platte/Keystone Diversion Project. On February 4, 1990, the Commission entered an order amending Nebraska's license to provide for certain minimum stream flows, construction of a number of nesting sites for threatened interior least terns and endangered piping plovers, and development of a monitoring and implementation plan for those actions. Because it found that it lacked authority to amend Central's license unilaterally to require cooperation with Nebraska to make the minimum flow condition effective, the Commission stayed the minimum flow and associated monitoring and implementation portions of its order.¹⁶⁸

On February 25, 1991, Central filed a request to amend its annual license by adding conditions related to (1) meeting specified target flows, (2) enhancing offsite wetland habitat, (3) protecting nesting sites, and (4) maintaining reservoir water levels at several project lakes to protect game fish spawning. Because the Commission lacked authority to amend the license unilaterally, it concluded Central's voluntary proposal presented the only currently available means to provide additional interim protection for endangered species pending relicensing. The Commission accepted Central's first three conditions but rejected Central's fourth proposed amendment because it did not benefit species shown to be in need of protection and "could conflict with the objective of providing instream target flows to protect the forage food base for endangered species."¹⁶⁹

An intervenor sought rehearing, contending that the order (1) did not comply with the D.C. Circuit's 1989 remand, (2) was not supported by substantial evidence, (3) violated the ESA, and (4) should have found that Central's refusal to cooperate in implementing the February 14, 1990, order was arbitrary and thus outside the scope of section 6 of the FPA, so that the 1990

167. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 116 (D.C. Cir. 1989).

168. *Central Nebraska Pub. Power & Irrigation Dist.*, 50 F.E.R.C. ¶ 61,180 (1990), *appeal pending sub. nom.* *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989).

169. *Central Nebraska Pub. Power & Irrigation Dist.*, 50 F.E.R.C. ¶ 61,059, at 61,226 (1990).

conditions be imposed on Central. The Commission rejected all four of those contentions.¹⁷⁰

2. Alabama Power Company

On July 31, 1991, the Commission issued an Order On Rehearing of its December 19, 1990, order establishing new minimum flows for an Alabama Power Company project.¹⁷¹ Alabama Power had sought modification of the order on the ground that, the new minimum flows, which were designed to protect the downstream population of the tulotoma snail might actually adversely affect them. Because the snail was listed as endangered by the USFWS on February 8, 1991, after the Commission's December 9, 1990, order, the Commission requested and obtained a biological opinion from the USFWS on the impact of its order on the snail. The USFWS concluded that the new minimum flows would not jeopardize the snail if modified to provide a ramped transition from spring to summer flows. Alabama Power disagreed and requested up to two years to complete a scientific study of the issue. Based on the USFWS opinion and its own staff investigation, the Commission denied the request, concluding that the snail was being helped, not hurt, by the continuous minimum flows. The FERC modified its order to provide for a graduated level of releases in effecting the change from the spring to summer flow requirements.

C. Water Quality Certification

1. Impact of WQC Conditions on a FERC Jurisdictional Project

a. Attempts to Go Beyond Water Quality in WQC Conditions

In *California v. FERC*,¹⁷² the U.S. Supreme Court rejected an attempt by the California Water Resources Control Board to set minimum flow rates at a higher level than those set in the project's FERC license. Nonetheless, some state agencies have continued to try to impose operational requirements on FERC jurisdictional projects through the Water Quality Certification (WQC) process pursuant to section 401 of the Clean Water Act.¹⁷³

In recent years the scope of the term water quality has been expanded in some WQCs granted to hydro projects. For example, one recent WQC contained conditions requiring a FERC licensee "to design and construct various recreational facilities and to study the need for and the public's use of such facilities" as well as "to design and construct fish protection devices, and to

170. Central Nebraska Pub. Power & Irrigation Dist., 57 F.E.R.C. ¶ 61,175 (1991). With respect to the ESA claim, the Commission held that its informal consultation with the Secretary of the Interior about Central's proposed conditions supported a conclusion that the proposed amendments would have no adverse effect on endangered or threatened species, so that formal consultation was not required. It emphasized that the USFWS did not request formal consultation or object to the Commission's action in approving Central's request.

171. Alabama Power Co., 56 F.E.R.C. ¶ 61,173 (1991).

172. *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S. Ct. 3304 (1990).

173. 33 U.S.C. § 1341 (1988).

study the effect of project operations on fish resources." The FERC found these conditions "not related to water quality."¹⁷⁴

b. FERC Policy on WQC Conditions

While WQC conditions are not copied verbatim in a FERC license, the FERC's position is that "the terms and conditions of such certification . . . become terms and conditions of the license as a matter of law."¹⁷⁵ Thus, even the conditions cited above as unrelated to water quality were deemed to be part of that project's FERC license.¹⁷⁶ This was so even for those non-water-quality conditions that were in conflict with a previously issued FERC license:

[R]eview of the appropriateness of water quality certification conditions is a matter for state courts to decide. To the extent that a certification condition and a license article are different, the more stringent provision governs; to the extent that a certification condition and a license article conflict with each other, the certification condition, if lawful, prevails.¹⁷⁷

In a separate opinion, Commissioner Trabandt argued that "the Commission has the discretion as a matter of law to decline to enforce" such provisions.¹⁷⁸

c. The FERC's Role in Monitoring WQC Procedures

In *Keating v. FERC*,¹⁷⁹ a proposed hydro project required both a dredging permit from the Corps of Engineers and a FERC license. Both the permit and the license required a WQC. A WQC was granted, after which the Corps permit was granted. The state board then told the FERC it was revoking the WQC. The FERC found itself unable to grant a license if the WQC was revoked. It also found itself unable to determine whether the WQC had been properly revoked, since the propriety of a WQC is a matter for state courts. The *Keating* court disagreed on the last point. It found that the FERC could not defer to state courts on whether the WQC had been properly revoked.¹⁸⁰

2. Impact of Denial of WQC on a Pending FERC Licensing Application

Since the FERC's regulations require that at least proof of a request for a WQC accompany a license application, and the FERC will not issue a license

174. *City of New Martinsville*, 57 F.E.R.C. ¶ 61,033, at 61,119, n. 9 (1991). See also *Noah Corp.*, 57 F.E.R.C. ¶ 61,170, at 61,601, n. 10 (1991).

175. *Carex Hydro*, 52 F.E.R.C. ¶ 61,216, at 61,769 (1990). See also *City of New Martinsville*, 57 F.E.R.C. ¶ 61,033, at 61,119 (1991).

176. *City of New Martinsville*, 57 F.E.R.C. ¶ 61,033, at 61,119-120.

177. *Noah Corp.*, 57 F.E.R.C. ¶ 61,170, at 61,601-602 (footnotes omitted). The Commission has also adopted for a project average daily minimum flow levels set in a WQC in addition to the lower continuous minimum flow levels found appropriate by the FERC. *Great Northern Nekoosa Corp.*, 55 F.E.R.C. ¶ 61,472 (1991).

178. *Carex Hydro*, 52 F.E.R.C. ¶ 61,216, at 61,771 (Trabandt, C., concurring).

179. *Keating v. FERC*, 927 F.2d 616, *reh'g denied*, 1991 U.S. App. LEXIS 8997 (D.C. Cir. 1991).

180. "[T]he state, alone, decides whether to certify under section 401(a)(1). The issue . . . [here] involves a different question, i.e., one going to the authority of a federal agency to issue a federal permit or license once the state has already issued a certification." *Keating*, 927 F.2d at 624.

until the WQC has been granted, the question arises as to the fate of a license application if the corresponding WQC request is denied. Citing earlier cases that dealt with specific situations, the FERC recently laid out its policy on the question.¹⁸¹ If a WQC request is denied, the FERC will keep the associated license application on file if, within ninety days of the denial, the applicant notifies the FERC that it has either appealed the denial or has filed a second WQC request. If the applicant appeals and loses, it again has ninety days to inform the FERC that it has filed a second WQC application. However, a second attempt is all the FERC will allow. If the second request is denied, the FERC will dismiss the license application even if the second denial is appealed or a third request is filed.¹⁸² The results have been mixed in attempts to get relief from the ninety-day limit.¹⁸³

3. Application of State Standards

In a dispute over whether state dissolved oxygen standards need to be met in a project's tailrace or only in the river downstream of the project, the FERC decided that the standards should be met in both.¹⁸⁴ However, the FERC also indicated that such a requirement was appropriate even aside from the project's WQC, because the tailrace was navigable and was "an important recreational fishing resource."¹⁸⁵

4. State Decisions

In *Bangor Hydro Electric Co. v. Board of Environmental Protection*,¹⁸⁶ the Maine Board of Environmental Protection (Board) appealed from a lower court judgment vacating the Board's denial of a WQC for a project operated by Bangor Hydro Electric Company. The issue on appeal was whether the Board exceeded its authority under the Water Classification Statute,¹⁸⁷ in seeking to examine the applicant's fish passage and recreation facilities plan, rather than limiting its examination to the project's compliance with numerical standards for water chemistry. The Maine Supreme Court reversed, holding that the Board's requests for information did not go beyond the scope of the water quality standards then applicable.

181. *Long Lake Energy Corp.*, 56 F.E.R.C. ¶ 61,021 (1991).

182. *Id.* at 61,088-61,089.

183. In one case, a license application that had been dismissed by the Director (because of the applicant's failure to appeal or re-file for a WQC within 90 days) was reinstated on appeal to the Commission. The FERC waived the 90-day deadline because the applicant was "making a good faith effort to satisfy the State Board's requirements" and had filed a second WQC request since the expiration of the 90-day period. *North Star Hydro Ltd.*, 51 F.E.R.C. ¶ 61,017, at 61,030 (1990). However, in a more recent case, the Commission refused, over Commissioner Trabandt's dissent, to waive the 90-day period even though the applicant had since reapplied for a WQC and had informed the FERC staff during the 90-day period that it would either appeal the denial of a WQC or file a second WQC request. These actions were ruled not to constitute a showing of good cause to waive the 90-day deadline. *Enviro Hydro, Inc.*, 53 F.E.R.C. ¶ 61,214 (1990) and *Enviro Hydro, Inc.*, 54 F.E.R.C. ¶ 61,315 (1991).

184. *Potomac Edison Co.*, 55 F.E.R.C. ¶ 61,390 (1991).

185. *Id.* at 62,189.

186. *Bangor Hydro Elec. Co. v. Board of Env'tl. Protection*, 595 A.2d 438 (Me. 1991).

187. ME. REV. STAT. ANN. tit. 38, § 464(4)(F)(3) (West 1991).

This issue arose when Bangor Hydro sought a section 401 WQC as part of its efforts to obtain a license renewal. Bangor Hydro had failed to provide the Board with certain requested information relating to fish passage and recreational activities associated with the project. Bangor Hydro argued that the Board's scope of inquiry was limited to items that were relevant to the determination of the numerical water quality standards¹⁸⁸ and inquiry into the need for fish passage, recreational facilities, and other concerns, was preempted by the FERC's jurisdiction.

The Maine Supreme Court determined that the Board properly requested information relating to fish passage and recreational use, since the statute mandated that the waters "shall be of such quality that they are suitable for the designated uses, among which were fishing, recreation and providing habitat for fish and other aquatic life."¹⁸⁹ The court explained, however, that it was not deciding to what extent it could condition water quality certification upon the recipient's taking measures designed to promote the future attainment of the designated uses of fishing, recreation, etc.¹⁹⁰ On the preemption issue, the court held that since the Board had not issued a WQC as a result of Bangor Hydro's failure to provide the requested information, the issue of whether or not the Board had exceeded its jurisdiction under section 401 of the CWA was not before the court.¹⁹¹

C. *Federal-State Conflicts*

1. *Preemption*

On April 18, 1991, the Commission granted the Weyerhaeuser Company's petition for a declaratory order stating that the construction and operation of its licensed Black Creek hydro project, located in King County, Washington, did not require the approval of King County in the form of permits under the Washington State Environmental Policy Act (SEPA) and Washington's Shoreline Management Act (SMA).¹⁹²

Weyerhaeuser argued that King County's attempts to assert its SMA and

188. Title 38, § 465(4)(B).

189. Bangor 595 A.2d at 442.

190. *Id.* at 443.

191. *Id.* The result of this case appears to be that an applicant for a FERC license for a project in Maine must go through the expense of gathering the information requested by the Board relating to the designated uses under the Maine water statutes, even though the Board may not have the authority to use the information obtained to impose certain requirements on the applicant. This decision will probably result in the need for a case-by-case determination as to the preemption of the Board's authority relating to various requirements that may be imposed on future WQC recipients.

192. Weyerhaeuser Co., 55 F.E.R.C. ¶ 61,079 (1991). The SMA (Wash. Rev. Code Ann. §§ 90.58-010 to 930 (West Supp. 1991) requires local governments in Washington to develop master programs to regulate shoreline uses within their jurisdictions. King County's master program calls for the issuance of Shoreline Substantial Development Permits for shoreline development projects, based on their compatibility with the master program and the policies of the SMA. The SEPA (Wash. Rev. Code Ann. §§ 43.21c-010 to 910 (West 1983 and Supp. 1991)) requires King County to prepare an environmental impact statement when it determines that the issuance of a Shoreline Substantial Development Permit is a major action significantly affecting the quality of the environment. Wash. Rev. Code Ann. § 43.21c-030. Under the SEPA, King County is authorized to deny a permit for a project with significant adverse environmental impacts, or to impose reasonable conditions to mitigate such impacts. WASH. REV. CODE ANN. § 43.21c-135.

SEPA authority with respect to Weyerhaeuser's licensed (but unconstructed) project were improper, and that regulation of the project was preempted under the FPA.¹⁹³ King County argued, among other things, that preemption did not apply because the federal Coastal Zone Management Act (CZMA)¹⁹⁴ requires Weyerhaeuser to obtain SMA approval from King County, and King County's SMA and SEPA review of Weyerhaeuser's project did not conflict with, and therefore was not preempted by, the license requirements imposed under the FPA.

As to the first argument, the Commission noted that Weyerhaeuser had stated in its license application that it had applied for and would obtain a Shoreline Substantial Development Permit and, contemporaneously with the filing of the license application, had submitted its permit application with King County. By these actions, Weyerhaeuser had fulfilled its obligation under section 307(c)(3)(A) of the CZMA¹⁹⁵ to certify to the Commission and King County that the project is consistent with the SMA.¹⁹⁶ The Commission also found, however, that King County had failed to fulfill *its* obligation under section 307(c)(3)(A) to notify the Commission, within six months of receiving Weyerhaeuser's certification under the SMA, that it objected to the certification. This failure, according to the Commission, "creates the conclusive presumption that King County concurred in the [project's] consistency with the SMA in the licensing proceeding."¹⁹⁷ The Commission concluded that King County's post-licensing assertion of SMA and SEPA approval authority was "outside the scope of the CZMA."¹⁹⁸

With reference to the argument that King County's authority was not preempted because it did not conflict with the FPA requirements, the Commission found that there was an inherent, fundamental conflict between the local authority and the comprehensive federal licensing and regulatory scheme established in the FPA.¹⁹⁹

2. Proposed Legislation

Legislation was proposed in 1991 to diminish the preemptive effect of the FPA. Congressmen Richard Stallings (D.-ID.) and Larry LaRocco (D.-ID.) jointly introduced a bill in the House of Representatives.²⁰⁰ Senator Larry

193. 16 U.S.C. § 803 (1988).

194. *Id.* at §§ 1451-1464(c) (1988).

195. 16 U.S.C. § 1456(c)(3)(A) (1988).

196. 55 F.E.R.C. ¶ 61,079, at 61,245.

197. *Id.* at 61,246.

198. *Id.* The clear implication of the Commission's reading of the CZMA is that a timely objection by King County to Weyerhaeuser's certification would have been within the scope of the federal statute, and could have operated to preclude issuance of the license by the Commission (unless the Secretary of Commerce interceded under the CZMA to overrule the local agency).

199. "King County's assertion of its land use permitting authority under the SMA, and its related SEPA review, as prerequisites to construction of Project No. 6221 is tantamount to an assertion of final review authority over the construction and environmental requirements in the license for Project No. 6221, and the Commission and the courts have held that such review conflicts with the Commission's licensing and comprehensive development authority and is therefore preempted. *Id.* at 61,247 (footnote omitted). This order is pending review on rehearing. 55 F.E.R.C. ¶ 61,433 (1991).

200. H.R. 649, 101st Cong., 1st Sess. (1991).

Craig (R-ID.) introduced an identical bill in the Senate²⁰¹ that would amend sections 9 and 27 of the FPA.²⁰² In his speech introducing H.R. 649 on January 24, 1991, Congressman Stallings made clear that the intent of the legislation was to reverse the Supreme Court's interpretation of the FPA in the *Rock Creek* decision²⁰³ and restore the "original objective" of the statute.²⁰⁴

In November 1991, Congressman Peter Kostmayer (D.-PA.) introduced a bill²⁰⁵ that would amend section 21 of the FPA²⁰⁶ to: (a) except "lands or improvements owned or controlled by a State" from a licensee's right to condemn property necessary for project development; and (b) provide that "[n]o permit, license, or exemption shall be issued under this part of the construction of any project (1) located on any waterway, or portion or segment thereof, on which hydroelectric power development is prohibited under State law or (2) which would have a direct and significant adverse effect on aquatic or riparian habitat which is protected under State law." In his speech introducing it, Congressman Kostmayer stated that the bill "gives States more say in protecting water quality, State recreation areas, and outstanding free-flowing rivers from ill-advised decisions of the . . . [FERC]."²⁰⁷ H.R. 3976 was referred to the House Committee on Energy and Commerce.

D. Comprehensive Plans

Since the enactment of section 10(a)(1) of the FPA,²⁰⁸ some parties have interpreted it to mean that the Commission must develop a comprehensive plan before granting a license to operate a project. In 1983, the Commission rejected this idea in *Skykomish River Hydro*.²⁰⁹ In 1991, the Commission reiterated its position that section 10(a)(1) does not impose upon it the duty to develop a comprehensive plan. Rather, the Commission's duty under the FPA is to study those plans filed by others and determine whether the proposed project fits into the scheme developed for the area. Once this determination is made, the Commission has fulfilled its obligation under section

201. S. 106, 101st Cong., 1st Sess. (1991).

202. 16 U.S.C. §§ 802, 821 (1988).

203. *California v. FERC*, 495 U.S. 490 (1990).

204. "This bill will remove any ambiguity created by the Supreme Court decision regarding the double licensing requirements originally intended by the Federal Power Act. It is consistent with Congress' traditional deference to State water law and the principles of cooperative federalism." 137 Cong. Rec. E292.

205. H.R. 3976, 101st Cong., 1st Sess. (1991).

206. 16 U.S.C. § 814 (1988).

207. 177 Cong. Rec. E4119 (November 26, 1991).

208. 16 U.S.C. § 803(a)(1) (1988). Section 10(a)(1) states:

[T]he project adopted . . . 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)] . . .

209. *Skykomish River Hydro*, 42 F.E.R.C. ¶ 61,283 (1983).

10(a)(1).²¹⁰

E. Environmental Review

1. Need to Perform an Environmental Impact Statement

In *LaFlamme v. FERC*,²¹¹ the Ninth Circuit reviewed a Commission environmental review of a licensed project. That court had earlier remanded the case because the Commission had failed to prepare either an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or an Environmental Impact Statement (EIS).²¹² On remand, the Commission issued an EA and a FONSI. The Court affirmed the Commission action, rejecting petitioner's argument that the Commission had failed to develop a comprehensive plan for the project. It agreed with the Commission that no document entitled comprehensive plan is necessarily required, so long as the Commission considers the comprehensive picture of the water system of which the project is a part.

In *North Carolina v. City of Virginia Beach*,²¹³ the Fourth Circuit addressed the relationship between the Corps of Engineer's obligations under the National Environmental Policy Act (NEPA)²¹⁴ in approving a water supply pipeline and the Commission's environmental review based on the presence of a licensed hydroelectric project at the reservoir dam that would be affected by the pipeline. The district court had granted an injunction against construction of any part of the project until the Commission completed its review. The Fourth Circuit reversed in part, permitting Virginia Beach to go forward with two minor portions of construction that were outside the project boundary of the hydroelectric project. The Fourth Circuit held that the Commission would not be unduly influenced in its ultimate decision by these expenditures.

The court also rejected the argument that the Commission must review all of the environmental consequences of the entire project where they have already been reviewed by the Corps.²¹⁵ It held that the FPA defined the scope of the Commission's responsibility: the Commission had to approve the granting of easements by the licensee to Virginia Beach, but had no authority over other parts of the project. Even if the Commission were to opt to analyze the entire project, the court would give preclusive effect only to the Commission's views concerning the portion of the water supply project directly affecting the hydroelectric project.

210. Saco River Salmon Club, 55 F.E.R.C. ¶ 61,039, 61,112 (1991), *reh'g denied*, 55 F.E.R.C. ¶ 61,367 (1991); Smith, 55 F.E.R.C. ¶ 61,184 (1991).

211. *LaFlamme v. FERC*, 945 F.2d 1124 (9th Cir. 1991).

212. *LaFlamme v. FERC*, 852 F.2d (9th Cir. 1988).

213. *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991).

214. 42 U.S.C. §§ 4321-4370 (1988).

215. The Corps' issuance of a permit without performing an EIS was affirmed. *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987), *on remand*, 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd sub nom. Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991).

2. Dam Removal and Environmental Impact Statements

In Order No. 513, the Commission rejected a policy of allowing mitigation on relicensing for impacts that occurred during project construction and operation under the initial license (original impact mitigation).²¹⁶ Nevertheless, the Commission recently showed that it was not adverse, considering what could be regarded as a major original impact mitigation—dam removal.

In its draft EIS on the Glines Canyon and Elwha Projects, the Commission investigated a number of alternatives to the applicants' proposal to retain both the Glines and Elwha Dam, including the removal of either or both dams. The Commission examined the cost of dam removal and the impacts on the environment. It found that, while dam removal would contribute to the restoration of the salmon and trout populations, the huge quantities of sediment that would pass through the river following removal would destabilize the riverine environment for a period of up to twenty years.²¹⁷

Studying the impacts of dam removal is not limited to the Glines and Elwha Projects. Recently, the Wisconsin and Michigan announced a proposal asking the Commission to decommission some of the power dams along the river located near Crystal Falls, Wisconsin.²¹⁸

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216. 54 Fed. Reg. 23, 757, at 23,777 (1989).

217. See Draft EIS, Glines Canyon (Project No. 588) and Elwha (No. 3683) Projects, Washington (Feb. 1991) at xxv-xxxvii.

218. *State Plans to Restore Waterfall on Menominee*, CHI. TRIB., Sept. 3, 1991, at 3.