

Report of the Committee on Part I Regulations

I. THE COMMISSION'S EVOLVING JURISDICTION

A. *Jurisdictional Threats to Unlicensed Projects*

In 1987, the Director of the Office of Hydropower Licensing (Director) of the Federal Energy Regulatory Commission (FERC or Commission) was instructed to begin a nationwide investigation of unlicensed hydroelectric facilities to determine if any were subject to licensing under Part I of the Federal Power Act (FPA).¹ No public notice of the new investigation was issued. The existence of the program did not come to public attention until Commissioner Trabandt discussed it in his dissent in *Fairfax County Water Authority*.²

Commissioner Trabandt stated that the full Commission had not been informed of the existence of the investigation until consideration of that very case, which involved a challenge to the Director's delegated authority to make such a jurisdictional determination.³ According to Commissioner Trabandt, the Director announced at the March 30, 1988, public meeting that the Commission's regional offices had been systematically reviewing available information on existing unlicensed projects and conducting informal investigations of projects deemed to be likely candidates for affirmative jurisdictional determinations. The Director indicated that somewhere between 80 and 120 projects had been investigated. Commissioner Trabandt also stated that plans called for the Director to assert jurisdiction over 92 projects in the Fiscal Year 1989, which began October 1, 1988.⁴

Commissioner Trabandt reiterated the existence of this investigation several times after his *Fairfax County* dissent, including his dissent to Order No. 502, the Final Order on the Commission's civil penalties rulemaking.⁵ There, the Commissioner claimed that the "Commission and its management are institutionally obsessed with the issue of unlicensed hydroelectric project operations."⁶

Even if a project has been investigated previously and, on the basis of facts and law at the time of the investigation, found to be not subject to the Commission's jurisdiction, the Commission is not precluded from asserting jurisdiction at a later date.⁷ This lack of finality may be a problem for the

1. 16 U.S.C. §§ 791a-823b (1988).

2. *Fairfax County Water Auth.*, 43 F.E.R.C. ¶ 61,062, at 61,169-170 (1988) (Trabandt, dissenting).

3. *Id.* at 61,170.

4. *Id.*

5. Order No. 502, *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act*, III FERC Stats. & Regs. ¶ 30,828, at 62,275, 53 Fed. Reg. 32,035, 32,040 (1988), *reh'g denied*, Order No. 502-A, 45 F.E.R.C. ¶ 61,407 (1988).

6. 53 Fed. Reg. at 32,046. In correspondence with the Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Commissioner Trabandt stated that the Commission estimated that seventy percent of the reviews will lead to positive jurisdictional determinations. *Id.*

7. *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

owners of unlicensed projects because the Commission's jurisdiction was significantly expanded in 1988.

B. *Expansion of Jurisdiction*

In 1988, two court decisions upheld orders in which the Commission expanded its interpretation of the bases for its jurisdiction.⁸ Two similar Commission orders have yet to be subjected to judicial review.⁹

1. *Cooley v. FERC*

Traditionally, the Commission has principally relied on section 23(b) of the FPA,¹⁰ to assert jurisdiction over hydro-electric projects. Section 23(b) has been defined to subject the following classes of projects to its jurisdiction:

- a) Projects located at Federal dams or using surplus water from such dams;
- b) Projects located on Federal lands and reservations; and
- c) Projects located on navigable waters of the United States.

The Commission also has the authority to license projects under section 4(e) of the FPA.¹¹ Section 4(e) allows the Commission to license projects that are located on non-navigable waters over which Congress has authority under the Commerce Clause. In 1988, the D.C. Circuit Court of Appeals upheld the Commission's expansion of its section 4(e) authority to allow it to license a project *not* otherwise subject to section 23(b) of the FPA.¹²

In *Clifton Power Corp.*¹³ an owner of a project with no "post-1935 construction" voluntarily sought a license. The Commission held that section 23(b) was not the exclusive authority by which it may license a project because that provision contains only the jurisdiction which is mandatory over specific classes of projects. The Commission held that projects falling outside those specific classes could be licensed under section 4(e). The Commission thus gave notice to the owners of unlicensed projects excluded from the mandatory licensing requirement of section 23(b) that their projects may be wrested away by non-owner license applicants, pejoratively called "claim-jumpers," under the appropriate circumstances pursuant to either section 23(b) or 4(e).¹⁴

The D.C. Circuit upheld the *Clifton* decision in *Cooley v. FERC*. The court specifically recognized that its affirmance of the *Clifton* order would provide non-owner applicants with the means to wrest away projects grandfathered from the licensing requirements of section 23(b):

[T]he owner of a project not requiring a license may find himself the target of a license application by strangers. Of course, even if true, nothing prevents the current owner-operator from opposing such an application or filing a competing

8. *Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 327 (1988); *Aquenergy Sys., Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988).

9. *Orange & Rockland Utils., Inc.*, 44 F.E.R.C. ¶ 61,236 (1988); *Fairfax County Water Auth.*, 43 F.E.R.C. ¶ 61,062 (1988).

10. Federal Power Act, 16 U.S.C. § 817(b) (1988).

11. 16 U.S.C. § 797(e) (1988).

12. *Cooley*, 843 F.2d at 1467-70.

13. *Clifton Power Corp.*, 39 F.E.R.C. ¶ 61,117 (1987).

14. *Id.* at 61,452.

application; the Commission must still address all such applications in terms of its public interest standard. Finally, despite a similar theoretical threat to pre-1935 project owner-operators from nonowner applicants proposing improvements involving new construction, there is no cited evidence of massive abuses; before the Commission claimed § 4(e) voluntary license authority, an aggressive stranger could threaten an unlicensed owner-operator by applying for a license under § 23(b) involving post-1935 construction improvements.¹⁵

2. *Orange & Rockland Utilities, Inc.*

In *Orange & Rockland, (O&R)*, the Commission held that a non-owner applicant who sought to increase the capacity of a project currently not subject to section 23(b) could do so under that provision, thereby taking the project away from the project owner who may or may not propose a similar expansion. In that case, the non-owner applicant proposed to add a 500 KW turbine to a project that the Director had found not required to be licensed pursuant to section 23(b). The project owner, Orange & Rockland Utilities, filed a motion to dismiss the application. The Commission denied the motion on September 11, 1987.¹⁶

Relying on *Nantahala*, the Commission held that a project otherwise exempt from the Commission's licensing authority can become subject to its jurisdiction under section 23(b) if the Commission determines that a change in the underlying facts or a correct exposition of the applicable law has disclosed that the project affects interstate commerce.¹⁷ Because the non-owner applicant proposed to add new capacity to the project, the Commission held that the non-owner's application was subject to section 23(b).¹⁸

Orange & Rockland Utilities appealed the decision. The Second Circuit dismissed the appeal on the grounds that the Commission's order denying O&R's motion to dismiss was interlocutory and, therefore, the issue was not ripe for review until a license was issued for the project. Orange & Rockland has filed a license application for the project and the Commission will now have to resolve the matter in the context of a competitive proceeding.

3. *Aquenergy Systems, Inc. v. FERC*

In *Aquenergy*¹⁹ the Fourth Circuit affirmed a Commission decision that reconstruction of a project constituted "post-1935 construction" within the meaning of section 23(b) of the FPA. The project in question was constructed at the turn of the century and operated until 1953, when it was shut down by a previous owner. Because it was located on non-navigable water and involved no post-1935 construction, it was beyond the Commission's jurisdiction. In 1984, the current owner, Aquenergy Systems, Inc., purchased the project and began to rehabilitate it. The site had virtually returned to its natural condition. The turbine had been removed and the powerhouse had disintegrated or

15. *Cooley*, 843 F.2d at 1470.

16. *Orange & Rockland Utils., Inc.*, 40 F.E.R.C. ¶ 61,222 (1987).

17. 44 F.E.R.C. at 61,867.

18. *Id.* at 61,868-69.

19. *Aquenergy Sys., Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988).

been torn down.²⁰ While the reconstruction was substantial, the new owner planned for it to meet the specifications of the original project in an attempt to avoid Commission jurisdiction,²¹ relying on a court decision which held that jurisdiction did not attach to a pre-1935 project destroyed by a landslide and subsequently rebuilt.²²

On appeal, the Fourth Circuit held that the restoration of the project did not qualify as "[c]onstruction activity in the maintenance and repair of projects,"²³ which traditionally has not been considered to be post-1935 construction activity, and which was the basis for finding jurisdiction in *Puget Sound*. The court noted that the owner was new and characterized the project as a new business cast in the image of the one that had been abandoned more than thirty years previously.²⁴ The court noted that *Puget Sound* did not involve an abandonment because the reconstruction of the destroyed project took place immediately after the destruction and held that the exemption would not apply because the exemption was designed to keep in operation projects existing in 1935, not to restore abandoned operating rights.²⁵

4. *Fairfax County Water Authority*

The Commission also began to expand its definition of interstate commerce under section 23(b), resulting in the possibility that many projects not previously subject to section 23(b) may now be jurisdictional. Projects located on non-navigable waters but which affect interstate commerce and which were constructed after 1935 are subject to the Commission's section 23(b) jurisdiction. Historically, whether a particular project affects interstate commerce has been determined by whether the project affects a downstream navigable water, or by whether the electrical power generated by the project is transmitted into a power grid. That the latter affects interstate commerce has not been disputed recently.²⁶

The test was reformulated in *Fairfax County*.²⁷ There, the Commission found that a project affected interstate commerce even though the project owner consumed the entire output of the project. The Commission applied a test traditionally used in Commerce Clause cases: even if an activity does not substantially affect the interests of interstate commerce, it can nevertheless be reached if it belongs to a class of projects whose cumulative activities do affect interstate commerce.²⁸

By consuming all of the output of the project, the owner of the project purchased less from utility generating units that are part of the interstate electric grid.²⁹ The Commission found that because these utility units are inter-

20. *Aquenergy*, 857 F.2d at 230.

21. *Id.* at 229.

22. *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311, 1315-16 (9th Cir. 1977).

23. *Aquenergy*, 857 F.2d at 228.

24. *Id.* at 230.

25. *Id.* at 229-30.

26. *See, e.g., City of Centralia v. FERC*, 661 F.2d 787 (9th Cir. 1981).

27. *Fairfax County Water Auth.*, 43 F.E.R.C. ¶ 61,062 (1988).

28. *Fairfax*, 43 F.E.R.C. ¶ 61,062, at 61,166.

29. *Id.*

locked electromagnetically, the actions of one unit within the system affect every other generating unit in the system.³⁰ To the extent the load required by the owner was decreased because of the hydroelectric project, it affected the functioning of the interstate grid and, therefore, interstate commerce, because it affected the amount of power that other resources must produce to keep the grid balanced.³¹ In essence, the Commission expanded its jurisdiction over projects on non-navigable streams by applying the “electromagnetic theory” previously adopted for the regulation of electric utilities under Part II of the FPA.³²

C. *Competition and Claimjumping*

The D.C. Circuit struck down an order of the Commission that had denied a preliminary permit for the development of unused capacity at a facility that was licensed to a third party and that would be eligible for relicensing in the near future.³³ The implication is that unused capacity at the site of a licensed project may not be reserved for the relicensing proceedings of the project simply because the relicensing is on the horizon.

The *Kamargo* court held that, in denying the permit, the Commission made a policy determination that departed from its own precedent without articulating a rational basis for the departure. The Commission had reasoned that the provisions of the Electric Consumers Protection Act of 1986 (ECPA),³⁴ which set the earliest date on which the licensee is required to file a notice of intent for relicensing, would have been violated if the licensee had to file a competing application during the pendency of the preliminary permit. The court found that implicit in this reasoning was the assumption that the excess capacity on a river near an existing project would be treated as the subject of a new license in relicensing proceedings, rather than as an original license. The court held that nothing in ECPA warranted this assumption and that the facts of the case otherwise fell within Commission precedent which granted original licenses to third parties for the development of additional capacity at licensed projects.³⁵ The court noted that Commission precedent also supports the addition of new project works on relicensing, but the case decided by the Commission was one in which the existing licensee had made no formal expression of intent to harness the unused capacity.³⁶ Failure by the Commission to point to its basis for disregarding the first precedent was reversible error. Thus, the court directed the Commission to “find acceptable legal support under its authorizing statute if it wishes to pursue the policy that

30. *Id.*

31. *Id.*

32. 16 U.S.C.A. §§ 824-824k (West 1985 and Supp. 1987).

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

34. Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified as amended in scattered sections of 16 U.S.C.).

35. *Kamargo*, 852 F.2d at 1397 (citing *Town of Madison Elec. Works Dep't*, 11 F.E.R.C. ¶ 61,318 (1980)).

36. *Kamargo*, 852 F.2d at 1396-97 (citing *City of Batesville*, 38 F.E.R.C. ¶ 61,105 (1987); *Niagara Mohawk Power Corp.*, 29 F.E.R.C. ¶ 61,005 (1984); *Montana Power Co.*, 56 F.P.C. 2008 (1976)).

underlies its decision here."³⁷

D. State Efforts to Limit Commission Jurisdiction

While the Commission appears to have taken steps which expand its jurisdiction over hydroelectric projects, the exclusivity of its jurisdiction has been subject to challenge by the states. In 1988, several cases involving state control over hydroelectric projects within state boundaries were litigated.

One of the most important is *California ex rel. State Water Resources Control Board v. FERC* where the court of appeals held that the FPA vests sole authority to set flow rates in the federal government.³⁸ At issue was the right of the California State Water Resources Control Board (Board) to regulate the minimum flow releases of a licensed project. For the past several decades, under *First Iowa Hydro-Electric Cooperative v. FPC*³⁹ and other cases,⁴⁰ the undisputed rule has been that the Commission has the exclusive responsibility for establishing appropriate terms and conditions governing the construction and operation of hydroelectric projects subject to its jurisdiction. However, juxtaposed against *First Iowa* and its progeny is section 27 of the FPA, which states:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.⁴¹

The debate over the meaning of section 27 arose in *Rock Creek Limited Partnership*.⁴² The Commission held that an attempt by the Board to impose minimum by-pass flows on a licensed project would conflict with the conditions established in the license and thus were preempted under *First Iowa*.

The Board appealed the Commission's decision to the Ninth Circuit, arguing that *First Iowa* had been overruled by *California v. United States*,⁴³ which interpreted a similar provision of the Reclamation Act of 1902,⁴⁴ to require the United States Bureau of Reclamation to adhere to conditions set by a state permit issued for a federal irrigation project. The appeal drew many intervenors, including sixteen states and several environmental organizations. Nevertheless, the court affirmed that the exclusive power to regulate flow rates belongs to the FERC, citing *First Iowa* and their interpretation of the FPA.

Another states' rights case, recently decided by the Third Circuit, affirmed the Commission's superior authority. In *Pennsylvania v. FERC*,⁴⁵ the Pennsylvania Department of Environmental Regulation (DER) appealed the

37. *Kamargo*, 852 F.2d at 1398.

38. *California ex rel. State Water Resources Control Bd. v. FERC*, 57 U.S.L.W. 2746 (9th Cir. 1989).

39. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

40. Later, in *Federal Power Commission v. Oregon*, 349 U.S. 435, 442-43 (1955), the U.S. Supreme Court found that Congress invoked its broad authority under the Commerce Clause and the Property Clause of the Constitution to the fullest extent possible to carry out this responsibility.

41. 16 U.S.C. § 821 (1985).

42. *Rock Creek Ltd. Partnership*, 38 F.E.R.C. ¶ 61,240 (1987).

43. *California v. United States*, 438 U.S. 645 (1977).

44. 43 U.S.C. §§ 372 and 383 (1986).

45. *Pennsylvania v. FERC*, No. 88-3175 (3d Cir. Feb. 23, 1989).

issuance of a license for a project that would be located at a state dam. The DER argued that the Commission had no authority to issue the license because the DER opposed the issuance and had refused to grant the licensee the property rights necessary to build and operate the project. The Commission disagreed with the DER on the grounds that the eminent domain authority of section 21 of the FPA⁴⁶ conferred on licensees the authority to condemn the state-owned land. The Third Circuit affirmed both the Commission's authority to include various conditions in the license, including the condition conferring on the licensee the powers of eminent domain, and the Commission's decision not to waive such conditions.

Long Lake Energy Corp. v. New York State Department of Environmental Conservation,⁴⁷ pending before a New York state court, involves state authority to use the water quality certification process to regulate many aspects of project operation. Section 401(a)(1) of the Federal Water Pollution Control Act (FWPCA),⁴⁸ prohibits the Commission from licensing a project that may result in the discharge of water pollutants into the navigable waters of the United States if a state denies water quality certification for the project. The section 401 certificate process is the one established means by which a state can exercise a veto power over a proposed hydroelectric project. If a state denies a certificate, the Commission has no choice but to dismiss the license application. Because the Commission has no authority to determine what issues a state can legitimately examine during the certificate process, the extent to which the states can delve into non-water quality issues is left to state law.⁴⁹

At issue in *Long Lake* is the State of New York's right to examine non-water quality issues in the section 401 water quality certificate process. The New York State Department of Environmental Conservation has been using the section 401 process to examine the operational effects of projects on navigation, flooding, and fishery and other aquatic resources.⁵⁰ This practice is the object of attack in the review proceeding in *Long Lake*.

E. Expansion of Other Federal Agency Authority

The Commission's authority over hydroelectric projects has also been subject to limitation as a result of the expansion of the authority of other federal agencies.

1. Forest Service

In *Pasadena Water & Power Department*,⁵¹ the Commission held that the United States Forest Service (USFS) had the authority to issue mandatory

46. 16 U.S.C. § 814 (1985).

47. *Long Lake Energy Corp. v. New York State Dep't of Env'tl. Conservation*, Index No. 6499/88 (Sup. Ct. Albany Co., appeal filed Oct. 21, 1988).

48. 33 U.S.C. § 1341(a)(1) (1986).

49. *See Roosevelt Campbello Int'l Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982). *But see National Wildlife Federation v. Consumers Power Inc.*, 862 F.2d 580 (6th Cir. 1988).

50. *See, e.g., DeRham v. Diamond*, 39 A.D.2d 302, 333 N.Y.S.2d 771 (N.Y. App. Div., 3d Dep't 1972), *aff'd*, 32 N.Y.2d 34, 295 N.E.2d 763, 343 N.Y.S.2d 84 (1973).

51. *Pasadena Water & Power Dep't*, 46 F.E.R.C. ¶ 61,004 (1989).

conditions in a relicensing for a project located on a "reservation" as defined in section 3(2) of the FPA.⁵² Under section 4(e) of the FPA, the Federal agency in charge of such a reservation has the authority to require that protective conditions be included in a license. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*,⁵³ the United States Supreme Court, while stating that section 4(e) applies to the issuance of an initial license, expressly declined to address the issue of whether section 4(e) applied to a relicensing. However, in *Pasadena Water & Power*,⁵⁴ the Commission held that USFS authority under section 4(e) applies to relicensing proceedings. The effect of this decision, if allowed to stand, will be to give the applicable agencies absolute authority to require that conditions designed to protect the federal reservation be inserted in new licenses. Under *Escondido*, these agencies' authority would be limited to conditions that directly affect the reservations that they are charged to protect.

2. Northwest Power Planning Council and Bonneville Power Administration

In the rehearing order to its rule on comprehensive plans,⁵⁵ the Commission stated it would consider the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan as comprehensive plans for purposes of section 10(a)(2)(A) of the FPA.⁵⁶

In an effort to control hydroelectric development within the Pacific Northwest, the Northwest Power Planning Council designated approximately 44,000 miles (20 percent) of the Northwest's streams as protected areas because of their importance as critical fish and wildlife habitat. The protected areas amendment is a formal amendment to both the Columbia River Basin Fish and Wildlife Program, which covers the Columbia Basin, and the Northwest Power Plan, which covers the states of Idaho, Oregon, Washington, and the western part of Montana. The rule applies only to new hydroelectric projects; it does not apply to existing hydroelectric projects, to the relicensing of existing projects, or to the addition of hydropower capacity at existing dams. The development of new projects inside these protected areas may be precluded as a result of the Council's action because the Commission will consider the Council's plan in determining whether to issue a license for a project.

In addition, the Bonneville Power Administration has announced a policy whereby it will deny access to its transmission line to California, the "intertie," to projects proposed to be located on protected areas inside the Columbia River Basin. The effect of Bonneville's policy may be to preclude a

52. 16 U.S.C. § 796(2) (1985). A reservation is federal land, such as a national forest, that is withdrawn, reserved, or withheld from private appropriation or held for any public purpose. *Id.*

53. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 779-80 n.23 (1984).

54. 46 F.E.R.C. ¶ 61,004, at 61,011.

55. *Interpretation of Comprehensive Plans Under Section 3 of the Electric Consumers Protection Act: Order on Rehearing*, III F.E.R.C. Stats. & Regs. ¶ 30,811, 53 Fed. Reg. 15,802 (1988).

56. 53 Fed. Reg. at 15,804 (discussing 16 U.S.C. § 802(a)(2)(A) (1988)).

potential market for power from these projects. The Council recommended that Bonneville also deny intertie access to projects in protected areas located outside the Columbia Basin. Consequently, approximately 20 percent of the streams in the Pacific Northwest could be closed to new hydropower development.

3. Legislation and Proposed Rules

Legislation pending at the adjournment of the 100th Congress would have given the Bureau of Land Management and the USFS the power to veto hydroelectric projects located on lands over which they have jurisdiction.⁵⁷ In 1988, the Commission took the position that the bureau lacks the authority to require right-of-way permits before a licensed (or exempted) project can be constructed.⁵⁸ The bill was referred to the House Interior and Insular Affairs Committee where it was amended to exempt relicensed projects with no structural changes. Also added was a five-year limit by which agencies must specify what is required for the right-of-way permit. The bill was before the House Energy and Commerce Committee when Congress adjourned. Similar legislation may be reintroduced in the 101st Congress.

In a draft letter to Representative John Dingell, the Commission indicated that it would direct Staff to prepare a Notice of Proposed Rulemaking (NPR) on procedures for resolving conflicts with the recommendations of fish and wildlife agencies.⁵⁹ The NPR would implement section 10(j) of the FPA (added by section 3(d) of the ECPA),⁶⁰ which specifies that if the Commission concludes recommendations are inconsistent with applicable law, the Commission and the agencies must attempt to resolve the inconsistencies, and that if inconsistencies cannot be resolved, then the Commission must explain the conflict and show that its actions are adequate.

II. THE EXPANSION OF FERC'S ENFORCEMENT AUTHORITY

On August 17, 1988, the Commission issued Order No. 502,⁶¹ establishing procedures for the assessment of civil penalties under section 12 of the ECPA. Section 12 amended Part I of the FPA by adding a new section 31,⁶² which bolstered the Commission's authority to assess civil penalties.

A. Owners of Unlicensed Projects

In Order No. 502, the Commission interpreted section 31 to allow it to assess civil penalties of up to \$10,000 per day against a licensee, an exemption holder, a permittee, or a person who should have a license or exemption but does not, for violations occurring after October 16, 1986, of the following:

- a.) Any rule or regulation issued by FERC pursuant to Part I of the FPA;

57. H.R. 3593, 100th Cong., 2d Sess. (1987).

58. See *Henwood Associates, Inc.*, 44 F.E.R.C. ¶ 61,076, at 61,214 (1988).

59. *INSIDE F.E.R.C.*, 8-9 (Jan. 16, 1989).

60. 16 U.S.C. § 803(j) (1988).

61. See note 5, *supra*.

62. 16 U.S.C. § 823b (1988).

- b.) Any term or condition of a license, permit, or exemption;
- c.) A compliance order issued under section 31(a) of the FPA; or
- d.) Any requirement of Part I of the FPA.⁶³

Several commentators on the proposed rule argued that the effect of imposing liability on those who operated unlicensed projects would be to raise the stake in any contest over jurisdiction and that the rule would enable the Commission to use civil penalties to coerce project owners to voluntarily submit to the Commission's jurisdiction.⁶⁴ Commissioner Trabandt dissented to that portion of the Order that would make those who do not have licenses or exemptions subject to Section 31 for violations of the FPA.⁶⁵ The Commission nevertheless affirmed its position on rehearing.

B. Two Procedures for Assessment

Under the new rule, before issuing a civil penalty the Commission will provide notice of the proposed penalty, including notice of the violation, and the procedures which the alleged violator may elect to follow.⁶⁶

The rule provides two procedures by which civil penalties may be assessed. The first procedure, involving proceedings before the Commission, will be used if the alleged violator does not elect, within 30 days after receiving notice of the proposed penalty, to use the district court procedure discussed below.⁶⁷ This procedure *must* be used if the alleged violator is accused of violating a compliance order.⁶⁸ The second procedure, involving district court proceedings established by section 31 of the FPA, provides an expedited means of resolving a compliance problem if the violator does not wish to contest the issue. If a violator does not wish to contest the Commission's findings, it may pay the fine after notice of the proposed penalty and avoid the legal expense that would otherwise be incurred by the administrative process.

Alternatively, if a violator contests the proposed penalty and believes that it will not obtain a fair hearing from the Commission, it can use this procedure to take the issue to the district court. To use this procedure, an alleged violator must, within 30 days after receipt of notification of a proposed penalty, notify the Commission that it has elected to have the district court procedures apply.⁶⁹ The alleged violator's notice may include an answer to the notification of the proposed penalty, setting out the factual or legal reasons why the proposed assessment should not be issued, should be reduced in amount, or should otherwise be modified. If the alleged violator does not file an answer within the 30-day time limit, all material facts stated in the Commission's notice will be deemed admitted.⁷⁰ If the violator does not pay the assessment within 60 calendar days after an assessment order is issued by the Commis-

63. 18 C.F.R. § 385.1503 (1989).

64. 53 Fed. Reg. at 32,038.

65. *Id.* at 32,040-49.

66. 18 C.F.R. § 385.1506 (1989).

67. 18 C.F.R. § 385.1508 (1989).

68. 18 C.F.R. § 385.1506(b)(3)(ii) (1989).

69. 18 C.F.R. § 385.1507 (1989).

70. 18 C.F.R. § 385.1507(a) (1989).

sion, the FERC General Counsel will institute an action in the appropriate district court for an order affirming the assessment of the civil penalty.⁷¹ Under section 31(d)(3)(B) of the FPA,⁷² a district court has the authority to engage in a *de novo* review of the facts and the law of the case and to enter a judgment enforcing, modifying, or setting aside the assessment.

C. Compliance Orders

Section 31(a) gives the Commission the authority to issue an order requiring compliance with the terms and conditions of an exemption or license "after notice and opportunity for public hearing."⁷³ The Commission interpreted this provision as *not* requiring a hearing, because, according to the Commission, Congress did not intend to create cumbersome procedures at this preliminary stage of the civil penalty assessment process. Consequently, a compliance order issued by the Commission or its delegate will be preceded by an opportunity to respond in writing, with written submissions placed into the public record. However, an exemption holder or licensee will have the opportunity, as required by other provisions of section 31, for a trial-type hearing later in the proceeding, before the Commission assesses the civil penalty.

Violation of a compliance order, unless stayed, may serve as the basis for a civil penalty. Therefore, it appears that once a licensee violates one of the conditions of its license, the Commission could assess a civil penalty not only on the basis of the violation itself, but also on the basis of the violation of an order requiring compliance.

Finally, it should be noted that the Commission intends to use some discretion in assessing civil penalties. Under § 1505 of the new rules,⁷⁴ the Commission will consider several factors in determining the amount of a civil penalty, including whether the alleged violator had actual or constructive knowledge of the violation, whether the alleged violator has a history of previous violations, whether the violation caused a loss of life or property, and whether the violator attempted to remedy the violation. The Commission will also take into account violations taking place prior to enactment of section 31 in 1986 to discourage repeat offenders.

III. RELICENSING

A. ECPA Rulemaking

On May 24, 1988, the Commission issued a Notice of Proposed Rulemaking to revise its regulations governing relicensings.⁷⁵ The regulations would dictate the obligations of existing licensees and would-be competitors as existing licenses approach the end of their terms.

71. 18 C.F.R. § 385.1509(b) (1989).

72. 16 U.S.C. § 823b(d)(3)(B) (1988).

73. 16 U.S.C. § 823b(a) (1988).

74. 18 C.F.R. § 385.1505 (1989).

75. Notice of Proposed Rulemaking, *Hydroelectric Relicensing Regulations Under the Federal Power Act*, 53 Fed. Reg. 21,844 (1988). The statement accompanying the proposed regulations is published at IV F.E.R.C. Stats. & Regs. ¶ 32,461 (1988).

The Commission expressly solicited comments on, among other issues, the appropriate treatment for an application for a new license filed by co-applicants, one of which is the incumbent licensee. The Commission has proposed that this not be treated as an application from an "existing licensee" under section 15 of the FPA,⁷⁶ but nevertheless has sought comment on whether the rule should vary according to the circumstances.⁷⁷ A related issue is whether a hybrid applicant should be allowed to compete in a situation where the incumbent licensee has failed to apply for a new license within the time restrictions imposed by section 15(c)(1).⁷⁸ An additional issue is whether an incumbent who elects not to seek a new license should be given a second chance in the event that no license applications are filed. The Commission suggests that, if no relicensing application has been filed within the section 15(c) deadline, a new application could be filed by the incumbent licensee under section 4(e).⁷⁹

The Commission also has proposed to streamline the agency consultation process by providing for joint consultations, either face-to-face or by conference call, with *all* interested agencies. Under the proposed regulations, any agency that does not participate in the joint consultations will be deemed to have waived the consultation requirement.⁸⁰

The Commission has taken the position that the relicensing criteria of section 15(a)(2) and (3)⁸¹ incorporate the public interest standards of section 10, which themselves include the considerations set forth in section 15(a)(2) and (3).⁸² Thus, the Commission proposes that there be little distinction between minor or minor part project relicensings where section 15 may have been waived, and conventional relicensings under section 15.⁸³ Indeed, the Commission proposes to impose by regulation the same deadlines in section 4(a) relicensings⁸⁴ which are imposed by statute for section 15 relicensings.⁸⁵

B. Merwin

The *Merwin*⁸⁶ saga continues to unfold. In 1987, on rehearing, the D.C. Circuit held that the Commission was not bound by *City of Bountiful*⁸⁷ to apply the municipal preference in relicensing proceedings, and that the Commission's determination that the preference does not apply against an incumbent licensee was not inconsistent with the statute.⁸⁸ Since certiorari was

76. 16 U.S.C. § 808 (1988).

77. IV F.E.R.C. Stats. & Regs. at 32,246.

78. *Id.* at 32,247 (discussing 16 U.S.C. § 808(c)(1) (1988)).

79. *Id.*

80. IV F.E.R.C. Stats. & Regs. at 32,248-49.

81. 16 U.S.C. § 808(a)(2), (3) (1988).

82. *Id.* at 32,256.

83. IV Stat. & Regs. at 32,250-51, 32,254, 32,256.

84. 16 U.S.C. § 797(a) (1985).

85. *Id.*

86. *Pacific Power & Light Co.*, 25 F.E.R.C. ¶ 61,052, *reh'g denied*, 25 F.E.R.C. ¶ 61,290 (1983) [hereinafter *Merwin*].

87. *City of Bountiful*, 11 F.E.R.C. ¶ 61,337, *reh'g denied*, 12 F.E.R.C. ¶ 61,179 (1980), *aff'd sub nom. Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

88. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 1088 (1988).

denied in February of 1988 it would appear the question of preferences in relicensing prior to the passage of the ECPA has been forever closed.

The sole remaining issue in *Merwin* is how to correct the flaws found by the D.C. Circuit in the Commission's economic impact analysis.⁸⁹ The Commission has requested briefing on this issue unless the parties are able to negotiate a settlement.⁹⁰

C. *Compensation Proceedings*

The ECPA gave special treatment to the nine relicense applications that were pending at the time of enactment. Section 10 sets forth a scheme providing for compensation to a municipal applicant that withdraws its application after the incumbent applicant elects to have post-ECPA competition standards apply. In each of the nine proceedings, the incumbent so elected and the competing municipality withdrew. Compensation has been set by agreement of the parties in seven of the nine proceedings. At present, the only compensation cases being litigated are those relating to the Rock Creek-Cresta and Haas-Kings River projects. In each instance, the licensee is Pacific Gas & Electric Company, and the competitors who withdrew are the Northern California Power Agency, the Sacramento Municipal Utility District, and the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California. The Commission has made no determination in either of these cases.

D. *The Importance of Economic Factors in the Relicensing Decision*

In *Elkem Metals Co.*,⁹¹ the Commission denied an appeal that challenged the Director's refusal to require minimum flow releases in excess of 100 cfs on grounds that the resulting higher power supply costs would force the licensee out of business and thereby create serious adverse socio-economic impacts on the region and the state.⁹² On appeal, various environmental groups argued, among other things, that the Commission had not considered all the relevant factors required by the FPA, that it had not given equal consideration to fish and wildlife as required by section 4(e) (as amended by section 3(a) of the ECPA), that fish and wildlife were not adequately and equitably protected as required by section 10(j)(1),⁹³ and that an Environmental Impact Statement (EIS) should have been prepared prior to an action on the application.⁹⁴

The Commission affirmed the Director's decision as consistent with the requirement that a project as adopted be best adapted to a comprehensive plan for the waterway, taking into account all beneficial public uses.⁹⁵ The Director had determined that any improvements in fishery resources which cost hundreds of jobs in an economically depressed region would not be in the

89. *Merwin*, 826 F.2d at 1091-92.

90. *Pacific Power & Light Co.*, 44 F.E.R.C. ¶ 61,354, at 62,194 (1988).

91. *Elkem Metals Co.*, 45 F.E.R.C. ¶ 61,044 (1988).

92. *Id.* at 61,151.

93. 16 U.S.C. § 803(j)(i) (1988).

94. *Id.* at 61,150.

95. *Id.*

public interest.⁹⁶ The Commission found that the Director gave equal consideration to fish and wildlife as required by section 4(e), and commented that equal consideration does not compel the Commission to provide any specific level of protection and enhancement for fish and wildlife. Moreover, the Commission held that Congress, in enacting the ECPA, made it clear that the Commission must consider the impact of increases in power supply costs for industrial facilities in relicensing proceedings.⁹⁷

Finally, the Commission held that the Director properly relied on the Environmental Assessment (EA) prepared pursuant to the Commission's regulations, and that reliance on an EA which found no major federal action significantly affecting the quality of the environment fully complied with the National Environmental Policy Act (NEPA). The Commission concluded that it adequately took a hard look as required by the NEPA.⁹⁸

IV. ENVIRONMENTAL DEVELOPMENTS

A. Cluster Impact Assessment Procedures

In 1988, the Commission issued orders involving two of the river basins that were to be considered initially under the Cluster Impact Assessment Procedure (CIAP) established in 1985.⁹⁹

For the Owens River Basin, an extensive Final Environmental Impact Statement (Final EIS) prepared in 1986 quantified the expected impact of seven proposed projects on six identified target resources, recommended mitigation measures, and evaluated project economics. Although the Commission noted that the conclusions of the Final EIS did not relieve it of its duty to weigh all public interest considerations, it nevertheless adopted all the conclusions and issued two licenses, denied four applications, and held one in abeyance. The Commission rejected a contention that the EIS prepared pursuant to the CIAP must be taken into account for review of applications for preliminary permits, although the Final EIS did analyze outstanding preliminary permits as alternatives to the primary projects considered. For one of the projects, the Commission permitted the applicant to submit a modification of its proposal as an alternative to the severe mitigation measure that the Final EIS had deemed appropriate, and postponed final decision.¹⁰⁰

For the Snohomish River Basin, the Commission again followed the recommendations of a Final EIS that quantified the effect of seven proposed projects on six identified target resources with and without recommended mitigation measures. As one of the alternatives to the development of the river basin, the Commission considered a number of potential out-of-basin hydro projects, even though the Commission noted these projects might never be

96. *Id.*

97. *Id.* at 61,150-52.

98. *Id.* at 61,152.

99. *Procedures for Assessing Hydropower Projects Clustered in River Basins*, 31 F.E.R.C. ¶ 61,095 (1985).

100. *Joseph M. Keating*, 42 F.E.R.C. ¶ 61,030 (1988) (Order Denying Application for License); *John L. Symons*, 42 F.E.R.C. ¶ 61,031 (1988) (Order Issuing License); *Camille E. Held*, 42 F.E.R.C. ¶ 61,032 (1988) (Order Issuing License).

built. One license was issued, two denied, one rescinded, and two held in abeyance.¹⁰¹

At the July 13, 1988, public meeting, the Commission discussed the CIAP and indicated that the decision to require the CIAP for hydroelectric development properly lies in the hands of the Commission, not the Office of Hydropower Licensing.¹⁰² It thus appears that the Commission has reserved the right to resort to the CIAP if necessary, but it will not be used without specific authorization of the Commission.

B. *Emergency Exclusion from Cumulative Impact EIS*

In *Twin Falls Canal Co.*,¹⁰³ the Commission issued a license for a project on the Snake River even though a Final EIS assessing the cumulative effects of the project and three other projects would not be ready for several more months. The Commission had not followed the CIAP for this river basin, preparing instead an EIS that takes into account the cumulative effect of four proposed projects. The project was at an existing irrigation dam that required immediate repairs. Financing for the repairs could not be obtained until a license was issued (revenues from the hydroelectric project were to be used to pay for the repairs). As permitted by regulations of the Council on Environmental Quality (CEQ), the Commission consulted with CEQ, which approved a plan to license prior to completion of the Final EIS.

C. *Cumulative Impacts and Comprehensive Plans*

Decisions from the past year show a tendency on the part of the Commission and the Ninth Circuit to combine the otherwise distinct requirements to consider a "comprehensive plan" pursuant to section 10(a)(1) of the FPA and to consider "cumulative impacts" on the environment pursuant to section 102 of NEPA.¹⁰⁴

In *Skykomish River Hydro*,¹⁰⁵ the Commission held that neither a comprehensive plan for a river basin nor the study of both the site specific and cumulative environmental impacts of a project are required for the issuance of a preliminary permit. The Commission relied on the holding of an earlier order,¹⁰⁶ namely, that a preliminary permit does not relieve the permittee of the obligation to study cumulative impacts for this determination. It said that the section 4.38 pre-filing consultation process¹⁰⁷ is designed to assure development of adequate information on the cumulative impacts of a project at the licensing stage.¹⁰⁸

101. *City of Seattle*, 44 F.E.R.C. ¶ 61,181 (1988) (Order on Rehearing, Lifting Stay, Denying Applications for License, and Rescinding Issued License); *Weyerhaeuser Co.*, 44 F.E.R.C. ¶ 61,182 (1988) (Order Issuing License and Denying Application for Preliminary Permit).

102. *INSIDE F.E.R.C.*, 6-7 (July 18, 1988).

103. *Twin Falls Canal Co.*, 45 F.E.R.C. ¶ 61,423 (1988).

104. 42 U.S.C. § 4332 (1988).

105. *Skykomish River Hydro*, 42 F.E.R.C. ¶ 61,283 (1988).

106. *Skykomish River Hydro*, 39 F.E.R.C. ¶ 61,361 at 62,133-134 (1987).

107. 18 C.F.R. § 4.38 (1987).

108. *Id.*

The Commission also took the opportunity to set out its interpretation of the meaning of the section 10(a)(1) requirement to consider a "comprehensive plan." According to the Commission, a comprehensive plan is not a single plan against which a proposed project is measured, "[r]ather, a proposed project is measured against the aggregate of information on beneficial public uses of the waterway developed in the record of a licensing proceeding."¹⁰⁹ The Commission reasoned that licensing procedures, including pre-filing consultation, are collectively designed to elicit the information to develop the record on all beneficial public uses relating to the comprehensive development of a watercourse.¹¹⁰

The Commission then applied this analysis of "comprehensive plan" in the context of a license proceeding in *City of Fort Smith*.¹¹¹ However, this interpretation may be at odds with the ruling of the Ninth Circuit in *La Flamme v. FERC*.¹¹² There, the Ninth Circuit reversed the Commission's order issuing a license for the Sayles Flat project on the South Fork of the American River on grounds that the Commission issued the license without considering a comprehensive plan for the river basin, without undertaking an assessment of the cumulative impact of the project, without undertaking an adequate assessment of the site-specific environmental impacts of the project, and without preparing an EIS.

The Court held that the NEPA requires the Commission to consider cumulative impacts, i.e., the impact of all past, present and reasonably foreseeable future projects on a river basin's resources. The Court rejected the Commission's reliance on a staff report which purported to examine the cumulative effects of all the projects on the river, including the Sayles Flat project, but which relied entirely on an EIS prepared in conjunction with the licensing of another project. The Court found that the EIS was too narrow in its scope, and did not assess the cumulative effects of all the projects in the area:

[The Commission] examined the Sayles Flat project *in isolation*, without considering the "net" impact that all projects in the area may have on the environment. Therefore, because FERC has not considered the impact that *all* past, present, and reasonably foreseeable future projects may have on the basin's resources, the record simply cannot support FERC's conclusion that the Sayles Flat project does not have a potential for adverse cumulative impacts on the environment.¹¹³

The Court also held that the Commission did not satisfy the FPA's requirement to consider the comprehensive plan. The Commission articulated the same test for the necessity of consideration of cumulative impacts under NEPA as it did for comprehensive plans under the FPA. The Court stated:

The record does not support FERC's contention that they satisfied FPA's requirement of developing a comprehensive plan. Although FERC did consider the feasibility and need for power and the project's impact on fishery and cultural resources, and did recognize that there were visual and recreational resources to consider in the Sayles Flat Area, at no point was any reference made to the entire

109. *Skykomish*, 42 F.E.R.C. ¶ 61,283, at 61,880.

110. *Id.*

111. *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362 (1988) (order Issuing License (Minor)).

112. *LaFlamme v. FERC*, 842 F.2d 1063, *superseded*, 852 F.2d 389 (9th Cir. 1988).

113. *LaFlamme*, 842 F.2d at 1073 (citations omitted) (emphasis in original).

water system of which the Sayles Flat project constitutes a part, to the Sayles Flat project's impact on other projects in the basin, or to the other projects' impact on the Sayles Flat project. To fulfill its obligation of exploring all issues relevant to the public interest, this type of comprehensive analysis must be performed on the record.¹¹⁴

In issuing the license, the Commission included some conditions designed to mitigate the visual and recreational impacts of the project on the environment. Recognizing that the measures might prove inadequate, on rehearing the Commission included a requirement of a post-licensing study on visual and recreational impacts. However, as noted, the Ninth Circuit refused to allow the Commission to rely on a post-licensing study to develop mitigation measures: it held that NEPA requires consideration of environmental impacts on the record before the licensing decision is made.

In an order issued subsequent to *LaFlamme*, the Commission stated that it was not required by *LaFlamme* and *Yakima*¹¹⁵ to resolve every detail regarding fishery and other issues *before* issuing a license.¹¹⁶ Rather, the Commission is required only to evaluate the *effect* of the project and to consider possible mitigation measures prior to acting on the application. Open-ended license conditions are acceptable so long as they are not used as a substitute for a reasoned pre-license evaluation of fishery and other issues.¹¹⁷ In *Pennsylvania Hydroelectric Development Corp.*,¹¹⁸ Commissioner Trabandt took issue with a license condition which specified the amount of water to be released over a spillway to mitigate visual impact. The Commissioner's concern was that the condition would render the project uneconomic, and that the license would be abandoned. He argued that while *Yakima* requires resolution of issues before licensing where irreparable harm may result, the visual effect of flow releases over the spillway should have been explored after licensing.¹¹⁹

D. License Amendments

In *Pacific Gas & Electric Co.*,¹²⁰ in a proceeding involving an application to amend a license to add new capacity, the Director required environmental studies for portions of the project unaffected by the proposed new addition to capacity. The Director also extended the license term (for the purpose of allowing the licensee to recover its investment in the new addition).¹²¹ The Director reasoned that the studies would be appropriate at that time because, by extending the license term, the Commission gave up an opportunity to review the entire project earlier. The licensee has appealed.

114. *Id.* at 1074.

115. *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

116. *Delmar Wagner*, 44 F.E.R.C. ¶ 61,213 at 61,801 (1988) (Order Staying License).

117. *Id.*

118. *Pennsylvania Hydroelectric Dev. Corp.*, 44 F.E.R.C. ¶ 61,252 (1988) (Trabandt, dissenting).

119. *Id.* at 61,949-50.

120. *Pacific Gas & Elec. Co.*, 43 F.E.R.C. ¶ 62,136 (1988) (Order Amending License (Major), Denying Competing Preliminary Permit Application, and Extending License Term).

121. *Id.* at 63,194.

E. NPDES Permits

The Sixth Circuit held that the discharge of entrained fish and fish remains from a hydroelectric project does not constitute a "discharge of pollutants" requiring a NPDES permit pursuant to Section 402 of the FWPCA.¹²² In *National Wildlife Federation v. Consumers Power Co.*,¹²³ the Sixth Circuit held that the release of entrained fish (including live fish, dead fish, and chopped fish) from the Ludington pumped storage facility did not constitute an "addition" of pollutants to the navigable waters of the United States, and therefore was not a "discharge of pollutants" as defined in section 502(12) of the FWPCA.¹²⁴

The Court relied on the construction of the FWPCA set forth in *National Wildlife Federation v. Gorsuch*,¹²⁵ which held "for NPDES requirements to apply to any given set of circumstances, five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source."¹²⁶ The court focused solely on the issue of an "addition."¹²⁷ Finding the notion to be ambiguous, the Court deferred to the EPA's construction: the EPA argued that no "addition" takes place unless a source "physically introduces a pollutant into the water from the outside world."¹²⁸ The court agreed that the fish were there both before and after discharge and therefore were not added. Instead, the impact of the project was to "transform" the water, placing the case squarely within the holding of *Gorsuch*, which held that the release of water from a storage reservoir did not constitute an addition of a pollutant to a navigable water solely on grounds of deterioration in water quality attributable to the impoundment.¹²⁹ Finally the Court found that the EPA's construction of the FWPCA was consistent with a Congressional intent to exempt dam-caused pollution from the NPDES requirements.¹³⁰

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122. 33 U.S.C. § 1342 (1988).

123. *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

124. *Id.* at 585 (discussing 33 U.S.C. § 1362(12) (1986)).

125. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982).

126. *Id.* at 165 (emphasis in original); see also *Consumers Power Co.*, 862 F.2d at 583.

127. *Id.* at 538-84.

128. *Id.* at 584.

129. *Id.* at 585-86.

130. *Id.* at 586.