

## HYDROELECTRIC FACILITIES LICENSING— A FERC JURISDICTIONAL PRIMER

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**W**ITH THE ADVENT of soaring energy costs, hydroelectric facilities<sup>1</sup> which produce electricity without the constant need to burn fossil fuels are becoming increasingly popular.<sup>2</sup> The economic realities, particularly the relatively intense capital costs associated with construction of a power dam, which may have deterred construction of hydroelectric facilities during the days of oil and natural gas abundance, now appear to be favorable. For the entity seeking to take advantage of these economies, the obvious question in this time of increased regulatory awareness is “what approvals are required to build a dam which generates electricity?” In order to build, modify or acquire a water power facility, at least one federal license will, in most instances, be required.

This was not always so. The ability to construct water power facilities, without permits, on any stream was not limited by federal legislation until 1890. That year Congress passed the Rivers and Harbors Appropriation Act of 1890<sup>3</sup> which was superseded by The Rivers and Harbors Appropriation Act of 1899.<sup>4</sup> These Acts prohibited any obstruction to navigation in waters over which the United States had jurisdiction and required approvals therefor by Congress, the Secretary of War and the Chief of Engineers. Prior enactments<sup>5</sup> had not required affirmative authorization but did prescribe the removal of objects upon determinations by the Secretary of War that they hindered navigation. Essentially, the only constraints on the erection of projects in navigable streams or projects which would impact on navigability were state and common law<sup>6</sup> and the potential risk that they might be ordered removed from the stream.

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<sup>1</sup>These facilities can take many forms such as: “run of the river” where the flow of the stream is used to generate electricity; “reservoir dam” by which generation can be regulated by controlled release and which can also be an aid in flood management; and “pumped storage facilities” where, generally, two reservoirs are employed to achieve economies by using off-peak system power to transfer water from one reservoir to the other which, in turn, is the one from which controlled releases provide peaking power for the system.

<sup>2</sup>In the past year, there was a 100% increase in the incidence of applications for preliminary permits filed at the Federal Energy Regulatory Commission (FERC), the agency which regulates and licenses water power facilities. Thirty-six applications were filed in 1978, seventy-eight were filed in 1979. The FERC succeeded the Federal Power Commission. See Department of Energy Organization Act, 42 U.S.C. § 7172. References to the “Commission” are to either agency, depending on the context.

<sup>3</sup>26 Stat. 454 (1890), as amended by 27 Stat. 88 (1892).

<sup>4</sup>30 Stat. 1151 (1899), now codified at 33 U.S.C. §§ 401, 403 (1970).

<sup>5</sup>Rivers and Harbors Acts of 1880 (21 Stat. 197), 1884 (23 Stat. 133) and 1888 (25 Stat. 424).

<sup>6</sup>See *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899).

Following the 1890-1899 Acts, Congress passed several pieces of legislation which orchestrated the movement toward development of water power and comprehensive federal authority over most facets of hydroelectric facilities.<sup>7</sup> In addition to the duties delegated to the Secretary of War and the Chief of Engineers, Congress provided in the subsequent acts that, among other things, revocable permits or rights-of-way must be secured from the Secretaries of Interior and Agriculture for projects or project works located on public lands or in forests of the United States.

These legislative initiatives culminated in the Federal Water Power Act of 1920<sup>8</sup> and Part I of The Federal Power Act of 1935 by which Congress gave the Commission jurisdictional and regulatory control over hydroelectric facilities.<sup>9</sup> Unlike the earlier enactments which were aimed at prohibiting obstructions to navigation or which had limited applications, these Acts focused on "a complete scheme of national regulation which would promote the development of the water resources of the Nation . . ."<sup>10</sup> This theme of the comprehensive nature of the acts and their aim at "national regulation" has underscored the evolution of federal jurisdiction over the development of water power projects. Accordingly, it can be said today that almost any hydroelectric project will require federal approval before it can be constructed.

The basic statutory delegation of authority is found in Section 4(e) which empowers the Commission to issue licenses for the construction, operation and maintenance of water power and related facilities for "the development and improvement of navigation . . . for the development, transmission and utilization of power [and for] utilizing the surplus water or water power from any government dam".<sup>11</sup> The provision which requires

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<sup>7</sup>See, e.g., Act of Feb. 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 (1970); Act of Feb. 1, 1905, 33 Stat. 628, now codified at 16 U.S.C. §§ 472, 551 (1970). A review of these acts can be found in Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 *Geo. Wash. L. Rev.* 9 (1945).

<sup>8</sup>41 Stat. 1063.

<sup>9</sup>49 Stat. 863, 16 U.S.C. § 791, *et seq.* Part I of the Federal Power Act retained much of the Federal Water Power Act. Unless otherwise noted, the following discussion will relate to the 1935 Federal Power Act. The latter ". . . Legislation was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . ." *Northwest Paper Co. v. FPC*, 344 F.2d 47, 52 (8th Cir. 1965).

<sup>10</sup>*First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). There, the Court held that conflicting state controls must give way to the new expression of federal jurisdiction because the focus was now on national regulation.

<sup>11</sup>16 U.S.C. § 797(e). That section provides in pertinent part that the Commission is authorized and empowered:

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided.

a person to seek a federal license is Section 23(b).<sup>12</sup> Briefly, that section requires FERC licensing under the following circumstances:

1. if the project is located or operated and maintained on a navigable stream;
2. if the project is located on a stream over which Congress has jurisdiction under its authority over interstate and foreign commerce if such commerce would be affected by the proposed project;
3. if the project is located on public lands or reservations of the United States ("other works incidental" to the project works would require licensing if on public lands or reservations);
4. if the project utilizes the surplus water or water power from any government dam.

An exception is given those projects operating under a "permit or right-of-way granted prior" to the enactment of the 1920 Federal Water Power Act.<sup>13</sup>

Section 4(d) of the 1920 Act authorized the Commission to issue licenses for any construction on navigable waters. Unlike the 1935 Act, however, Section 23 of The Federal Water Power Act did not mandate licensing for such construction. That mandate remained in The Rivers and Harbors Appropriation Act of 1899.<sup>14</sup> The Commission, thus, had authority to license construction under that Act from June 10, 1920 (enactment date of The Federal Water Power Act) forward. Upon passage of the 1935 Act, the Commission was required to license hydroelectric projects pursuant to the provision in Section 23(b).<sup>15</sup>

Section 23(b) has been judicially interpreted on many occasions. In some instances, FERC jurisdiction has been upheld by invoking more than one of the four separate bases (above) by which licensing is required. Satis-

<sup>12</sup>16 U.S.C. § 817:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

<sup>13</sup>Operators of projects not so "grandfathered" were thus required to obtain a license from the government for continued operation and maintenance. See *Pennsylvania Water and Power Co. v. FPC*, 123 F.2d 155 (D.C. Cir. 1941), cert. denied, 315 U.S. 806 (1942). If a pre-existing project on navigable waters is acquired or modified after 1920, the Commission has oversight and licensing control. See *Minnesota Power and Light Co. v. FPC*, 344 F.2d 53 (8th Cir. 1965).

<sup>14</sup>33 U.S.C. §§ 401, 403.

<sup>15</sup>See *The Farmington River Power Co. v. FPC*, 155 F.2d 86, 88 (2nd Cir. 1972).

fraction of any one of the bases will, however, bring the project under the licensing purview of the statute.

### 1. *Location or Operation and Maintenance on a Navigable Stream*

A federal permit for constructing any water power project in navigable waters is required. The question of what comprises "navigable waters" is the pivotal determination of whether jurisdiction attaches under this standard. The legal tests of navigability that had evolved over the years were codified in Section 3(8) of the Act.<sup>16</sup> The criteria for the consideration of what is navigable under the Federal Power Act were discussed in the leading case of *United States v. Appalachian Electric Power Co.*<sup>17</sup> Holding that navigability is a factual question to which legal standards as to navigability must be applied, the Court stated that an analysis of only the present natural conditions of a waterway is error: its potential for navigation must be considered;<sup>18</sup> "... the feasibility of interstate use after reasonable improvements which might be made" must be weighed;<sup>19</sup> and, if it was once navigable or suitable therefor, then it must now and in the future remain navigable.<sup>20</sup>

The facts of navigability to be considered include the physical characteristics of the waterway, character of the region, and past use, even if by primitive navigation such as keelboats and rafts and even though small in amount. Nonnavigable reaches in an otherwise navigable stream, non-use, or lack of commercial traffic where private use demonstrates the availability of the stream for simple commerce are factors generally immaterial to the determination.

These broad standards<sup>21</sup> facilitated the exercise of the Commission's jurisdiction over many streams and waterways previously thought to be nonnavigable.<sup>22</sup>

In recent FERC decisions, the Commission favored "navigability" over the other jurisdictional bases which were suggested to it. Dismissing these as unnecessary, the Commission has relied on a finding of "navigability" to

<sup>16</sup>16 U.S.C. § 796(8):

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

<sup>17</sup>*United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

<sup>18</sup>*Id.*, at 407.

<sup>19</sup>*Id.*, at 409.

<sup>20</sup>*Id.*, at 408.

<sup>21</sup>As summarized in *Rochester Gas and Electric Corp. v. FPC*, 344 F.2d 594, 596 (2nd Cir. 1965), a stream is navigable if:

... (1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements.

<sup>22</sup>Indeed, it has been stated that "... it is not seen how any stream can be found not to be navigable..." under these standards. *United States v. Appalachian Electric Power Co.*, *supra* note 17 at 433 (Roberts, J., dissenting).

hold projects jurisdictional involving the following sites: a currently non-navigable stream unsuitable for future use because it was used and suitable for commerce in the past;<sup>23</sup> a white water rocky stream with a gradient descending 35 feet per mile;<sup>24</sup> the flow of water through aqueducts because the source waters were "navigable waters".<sup>25</sup> The first two cases involved pre-1920 projects which had not received permits or rights-of-way grants. The operators were required to file for licenses and thereby accept federal regulation because they operated and maintained power projects on waters that were "navigable".<sup>26</sup>

If any evidence of navigability can be detected, no matter how slight or seemingly insignificant, the FERC will probably exercise jurisdiction on the basis of that finding. To do so insures the broadest base of regulatory control and the least potential conflict with a reviewing court.<sup>27</sup> Since Section 23(b)'s main licensing provision relates to construction on navigable waters, the courts have viewed navigability as the primary issue to be resolved. And, if the issue is decided affirmatively, the "secondary" issues of the effect on downstream navigability or on interstate commerce generally will not be considered.<sup>28</sup>

## 2. Location on a Stream Over Which Congress has Jurisdiction Under its Authority Over Interstate and Foreign Commerce if Such Commerce Would be Affected by the Proposed Project

Under this standard, the Commission has jurisdiction over any project which may *affect interstate commerce* even though located in nonnavigable waters. Until the *Taum Sauk*<sup>29</sup> decision in 1965 and the underlying Commission decision<sup>30</sup> project works that were to be built on nonnavigable

<sup>23</sup>Puget Sound Power and Light, Project No. 2494, Opinion Nos. 2, 2-A, October 28, 1977 and August 9, 1978, respectively (not reported). The decision was founded on evidence that the applicable reach was used for flotation of milled logs. The Commission's embrace of log flotation evidence to establish navigability had been judicially approved. See, e.g., *The Connecticut Light and Power Co. v. FPC*, 557 F.2d 349 (2nd Cir. 1977).

<sup>24</sup>*Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company*, Docket No. E-9530, Opinion No. 61, August 10, 1979 (not reported). Again, the attachment of jurisdiction was founded on past log flotation even though the Presiding Administrative Law Judge had found that log driving on the stream was relegated to "a few isolated experiments". *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company*, Docket No. E-9530, Initial Decision, November 25, 1977, slip op. at 10 (not reported).

<sup>25</sup>*Metropolitan Water District of Southern California*, Docket No. E-9555, Opinion No. 17, July 20, 1978 (not reported). It should be noted that Congress recently authorized the Commission to exempt, in its discretion, conduit facilities of 15 megawatts or less located on nonfederal lands which are primarily operated for water distribution rather than for electric generation. Section 213, Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 823a. The Commission has decided to accomplish this on an *ad hoc* basis rather than by rule. See *Exemptions of Small Hydroelectric Facilities from Part I of the Federal Power Act*, Docket No. RM79-35, Order No. 76, April 18, 1980 (not reported).

<sup>26</sup>See *Pennsylvania Water and Power Co. v. FPC*, *supra* note 13; *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967).

<sup>27</sup>While the Commission is not the exclusive arbiter of the facts establishing navigability, its decision will not be overturned if its determination is based on substantial evidence. 16 U.S.C. § 8251(b). See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2nd Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

<sup>28</sup>See *The Connecticut Light and Power Co. v. FPC*, 557 F.2d 349, 358 (2nd Cir. 1977). If the project is to be located on nonnavigable waters but affects downstream navigability, it too will be considered jurisdictional. A new project on nonnavigable waters not affecting downstream navigability but affecting interstate commerce generally will require licensing. Certain existing projects on nonnavigable waters are immune. (See the discussion in Section 2 of this article).

<sup>29</sup>*FPC v. Union Electric Company*, 381 U.S. 90 (1965).

<sup>30</sup>*Union Electric Company*, 27 FPC 801 (1962).

waters were considered jurisdictional only if the affected "commerce" was water commerce on a downstream navigable waterway. Section 23(b) requires any person contemplating construction of a water power project on a non-navigable stream to first declare its intent to do so to the FERC.<sup>31</sup> Prior to the start of construction, the Commission must determine whether the project is located on a stream over which Congress has jurisdiction and whether the project will affect interstate commerce. An affirmative determination will require a license application and FERC approval before construction can begin.

The Commission determined in the underlying case to *Taum Sauk* that the Congressional intent in drafting Section 23(b) was to invoke the full commerce jurisdiction of Congress and that a project is jurisdictional if it affects interstate commerce in "any manner", including the interstate transmission and use of electricity produced by the project.<sup>32</sup> The project was held jurisdictional because the electricity produced was transmitted interstate. Since the dam was located on a nonnavigable fork of a navigable river, the Commission also based its decision on the finding that the project would have an effect on the navigable capacity of the downstream river. The United States Court of Appeals for the Eighth Circuit reversed the Commission with respect to the broader issue and held to the traditional theory that the determination in Section 23(b) is limited to what effect there may be on downstream navigability.<sup>33</sup> In other words, the Court concluded that Congress had not employed its full authority over commerce. The Court also found that there was insufficient evidence upon which to base the Commission's finding that there would be an effect on downstream navigation.

In affirming the Commission, however, the Supreme Court stated that Congress "invoke[d] its full authority over commerce, without qualification, to define what projects on nonnavigable streams are required to be licensed."<sup>34</sup> Any new project which would affect interstate commerce in any manner must be licensed. If any electricity produced by such a project were to find its way into an interstate grid, the project would be FERC jurisdictional. Moreover, such projects built prior to *Taum Sauk*, but after 1935, which had been determined not to affect "navigability" would now be subject to the licensing requirements of the Act and federal regulation if they affected any interstate commerce.<sup>35</sup> Thus, any post-1935 water power project located on nonnavigable waters which affects downstream water commerce or any interstate or foreign commerce falls within the jurisdiction of the Commission.

There is an exception to the requirement that a FERC license be

<sup>31</sup>Such a declaration was voluntary under the 1920 Act. See the discussion later in the text of this section.

<sup>32</sup>Union Electric Company, 27 FPC 801, 808 (1962).

<sup>33</sup>Union Electric Company v. FPC, 326 F.2d 535 (8th Cir. 1964).

<sup>34</sup>FPC v. Union Electric Company, *supra* note 29, at 97. The Court did not decide whether the lower court was correct in finding no effect on downstream navigation.

<sup>35</sup>See *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

obtained for projects on nonnavigable streams which affect interstate commerce where the project was constructed before the 1935 amendment to Section 23(b).<sup>36</sup> The 1920 Act provided for a discretionary declaration of intention to construct a project on nonnavigable waters.<sup>37</sup> It was not until the 1935 Act, however, that such a declaration became mandatory.<sup>38</sup> This difference was to be the crux of judicial interpretations which gave rise to the exception.

In *Farmington*,<sup>39</sup> a non-utility corporation had constructed a power dam in 1925 on the nonnavigable Farmington River. The company had chosen not to declare its intent to build the project pursuant to Section 23 of the 1920 Act. After *Taum Sauk*, the Commission notified project owners whose power was sold interstate<sup>40</sup> that they were required to file applications for licenses because of the expanded interpretation of the Commission's jurisdiction. This was said to be required of any project owner whose dam was built after the enactment of the Federal Water Power Act on the theory that Section 23 of the 1920 Act required licensing based on the *Taum Sauk* interpretation. Farmington Power filed a license application under protest, but its project was held to be jurisdictional.

Reversing the Commission, the *Farmington* Court held that since Section 23 of the 1920 Act had not *required* the filing of a declaration of intent to build on a nonnavigable stream, the Commission was powerless to attach jurisdiction absent a voluntary declaration which would set the investigating provision in motion.<sup>41</sup> The Court also held that Section 23(b) of the 1935 Act and its mandatory filing requirement could not be applied retroactively. Since the filing provision was interpreted to apply to *future* construction only, the project was held non-jurisdictional.

The court concluded, therefore, that projects on nonnavigable streams which were constructed prior to 1935 and for which the operator had not sought a Commission determination on whether interstate commerce

<sup>36</sup>While the former Act was largely retained, the 1935 Federal Power Act amended certain sections of the Federal Water Power Act, including Section 23.

<sup>37</sup>Section 23, 41 Stat. 1075 (1920):

Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality, shall not proceed with such construction until it shall have applied for and received a license under the provisions of this chapter. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

<sup>38</sup>"Any person . . . intending to construct a dam . . . shall before such construction file declaration of such intention with the Commission. . . ." Section 23(b), 16 U.S.C. § 817.

<sup>39</sup>*The Framington River Power Company v. FPC*, *supra* note 15.

<sup>40</sup>The company sold power to Connecticut Light and Power Co. which in turn sold power interstate. Thus, the project "affected" interstate commerce. *The Farmington River Power Company*, 44 FPC 1393, 1420-1421 (1970).

<sup>41</sup>*See also Puget Sound Power and Light Co. v. FPC*, 557 F.2d 1311, 1314 (9th Cir. 1977).

may be affected thereby are outside of FERC jurisdiction.<sup>42</sup> The Supreme Court has concluded the same, at least with respect to such projects which do not affect downstream navigation.<sup>43</sup>

However, FERC licensing appears to be required for pre-1935 projects built on nonnavigable streams but which affect the navigability of downstream waters.<sup>44</sup> Whether a FERC license is required for such a project depends on the applicability of the prior acts and whether the license would be required for continued operation and maintenance.<sup>45</sup> There is no doubt that, prior to 1935, Congress had control over such projects pursuant to The Rivers and Harbors Appropriation Acts of 1890 and 1899.<sup>46</sup> The Secretary of War would have controlled such a project prior to 1920; if a permit had not been received pursuant to the prior acts, the Secretary could presumably have ordered removal.<sup>47</sup>

Although the 1920 Act did not require licensing for projects on navigable or nonnavigable waters, it made the Commission responsible for licensing projects on navigable waters pursuant to The Rivers and Harbors Appropriation Acts. Since Section 23 of the 1920 act was intended to "... take care of a proposed structure in a nonnavigable tributary of an interstate navigable stream"<sup>48</sup> and since the 1920 Act did not mandate licensing, the Commission's authority to license would be under the Rivers and Harbors Appropriation Acts just as in the case of a project on navigable waters. The Supreme Court so indicated in *Taum Sauk*.<sup>49</sup>

Pre-1935 projects on nonnavigable waters with no effect on downstream navigability whose owners did not volunteer a declaration of intent are immune from the Commission licensing requirement even though continued operations might affect interstate commerce generally.<sup>50</sup> Neither *Farmington* nor *Puget Sound*, however, differentiated between (1) a project on non-

<sup>42</sup>Should the Commission undertake to review the facts of navigability and determine that the stream is now "navigable" a license would be required to operate and maintain the project. See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967). Any post 1935 repair or restoration construction on a project built before then would not provide a basis upon which to attach jurisdiction unless the project is altered from its original configuration. See *Puget Sound Power and Light Company v. FPC*, *supra* note 41, at 1316.

<sup>43</sup>See *FPC v. Union Electric Company*, *supra* note 29, at 109, where the Court stated:

The applicable provision prior to this amendment [the declaration requirement of 23(b)], §9 of the Rivers and Harbors Act, 30 Stat. 1151 forbidding obstructions to navigations was adequate to insure that projects with a substantial effect on downstream navigability would be brought before the Commission. Persons intending to construct a project which would have no such effect, such as some pure pumped storage installations, could decline to file a declaration of intention with immunity. Thus, the 1935 amendment made a difference principally in regard to projects which predictably have little, if any, effect on navigation but a significant effect on interstate commerce.

For an analysis of the pre *Taum Sauk* cases dealing with the exercise of jurisdiction over projects on nonnavigable waters, see Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 *Geo. Wash. L. Rev.* 42 (1945).

<sup>44</sup>*Cf. Georgia Power Co. v. FPC*, 152 F.2d 908 (5th Cir. 1946) where a post 1935 project on nonnavigable waters which affected downstream navigation was required to be licensed.

<sup>45</sup>See *Pennsylvania Water and Power Co.*, *supra* note 13.

<sup>46</sup>See *United States v. Rio Grande Dam and Irrigation Co.*, *supra* note 6.

<sup>47</sup>See *Scenic Hudson and Preservation Conference v. Callaway*, 370 F.Supp. 162, *aff'd*, 499 F.2d 127 (2nd Cir. 1974).

<sup>48</sup>*United States v. Appalachian Electric Power Co.*, 107 F.2d 769, 795 (4th Cir. 1939), *rev'd on other grounds*, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

<sup>49</sup>*Supra* note 43; see also *Northwest Paper Co. v. FPC*, 344 F.2d 47 (8th Cir. 1965).

<sup>50</sup>The *Farmington River Power Company v. FPC*, *supra* note 15; *Puget Sound Power and Light Co. v. FPC*, *supra* note 41.



navigable waters which has an effect on downstream navigation, and (2) one which does not. But, *Farmington* dealt with a nonnavigable tributary of a navigable river which was held by the Commission not to affect downstream navigability.<sup>51</sup>

The *Citizens Utilities*<sup>52</sup> case appears to be dispositive in favor of requiring licensing of these projects. There, the Commission was upheld in its exercise of jurisdiction based on the fact that the continued operation and maintenance of the projects in question affected the navigable capacity of a downstream navigable stream. Neither the Commission nor the Court indicated whether any of the projects were built prior to 1935, but the unreported initial decision of the presiding examiner reveals that certain of the projects were constructed and in operation prior to 1935.<sup>53</sup>

Clearly then, the only water power projects that generate electricity for transmission into interstate commerce which are outside FERC jurisdiction are those constructed prior to 1935 on nonnavigable waters which do not impact on the "navigable capacity" of downstream navigable waters.

An operator of a pre-1935 water power project may still operate potentially without risk of federal intervention. That risk advances considerably, however, if the stream can now be termed navigable or if the project may have an impact on the "navigable capacity" of downstream navigable waters. A post 1935 in-place project which affects interstate or foreign commerce generally, or which satisfies the remaining bases for jurisdiction will be subject to federal control. Any new water power project will almost assuredly be held jurisdictional.

### 3. *Location on public lands or reservations of the United States*

If a project is to be built on public lands or reservations<sup>54</sup> a Commission license is required.<sup>55</sup> This requirement exists whether the hydroelectric facilities are located on navigable or nonnavigable waters<sup>56</sup> and regardless of whether the project will affect interstate commerce.

It should be noted that the Commission is also authorized to license "project works necessary . . . for the development, transmission and utilization of power . . ." from hydroelectric projects or for utilization of "surplus

<sup>51</sup>44 FPC at 1403.

<sup>52</sup>*Citizens Utilities Company v. FPC*, 279 F.2d 1 (2nd Cir. 1960), *cert. denied*, 364 U.S. 893 (1960).

<sup>53</sup>The Commission's records include the initial decision of August 12, 1958.

<sup>54</sup>Defined as:

Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations," as hereinafter defined; [41 Stat. 1063; 49 Stat. 838; 16 U.S.C. § 796(1)]

(2) "reservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interest in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; [41 Stat. 1063-1064; 49 Stat. 838; 16 U.S.C. § 796(2)]

<sup>55</sup>*FPC v. State of Oregon*, 349 U.S. 435 (1955).

<sup>56</sup>*State of California v. FPC*, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965).

water or water power from any government dam."<sup>57</sup> The statute defines the types of project works covered, and is fairly extensive.<sup>58</sup> However, unless they are part of a hydroelectric project, they are not jurisdictional even though located on public lands or reservations. In other words, transmission lines, for example, from a thermal plant which cross public lands or reservations are not subject to FERC jurisdiction.<sup>59</sup>

#### 4. *Utilization of surplus water or water power from a government dam*

Finally, the Commission has jurisdiction over use of any surplus water or water power from a government dam. Even prior to the 1920-1935 Acts, Congress began to recognize the benefits of controlling the use of water or water power from government projects.<sup>60</sup> Besides the financial assets to be derived from charges for federal water power for electrical distribution, the public was seen to benefit from federal control which would "insure[e] the self-sufficiency of projects and maximum use of public resources."<sup>61</sup> The 1920 Act was intended to accomplish these results by "regulat[ing] the nonfederal exploitation of the nation's water power resources and the disposition of excess federally controlled water or power."<sup>62</sup>

The extent of federal jurisdiction was discussed in *Chemehuevi*.<sup>63</sup> There, the Supreme Court held that the use of surplus water from a government dam by a thermal electric plant was not within the purview of the statute. The surplus water or water power from a government dam must be used in a water power project in order for the licensing requirement to attach.<sup>64</sup> The Court analyzed the surplus water provision in light of the entire act, and concluded that it related only to hydroelectric projects.<sup>65</sup> The Court noted, however, that a license for "project works does not automatically authorize use of surplus water from a government dam."<sup>66</sup> The Commission can and has required a second license for the use of surplus

<sup>57</sup>Section 4(e), 16 U.S.C. § 797(e).

<sup>58</sup>16 U.S.C. 796 §§(11), (12):

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

<sup>59</sup>See *Pacific Power and Light Co. v. FPC*, 184 F.2d 272 (D.C. Cir. 1950). See also *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975), where the FERC was upheld in its refusal to extend its jurisdiction to thermal plants (non-hydroelectric) located on navigable waters and which use those waters in the production of electricity. The Act was held to apply only to water power projects.

<sup>60</sup>See note 7, *supra*. See also Act of April 16, 1906, 34 Stat. 177, as amended, 43 U.S.C. § 522 (1970).

<sup>61</sup>*Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207, 1240 (1973), *rev'd on other grounds*, *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975).

<sup>62</sup>*Id.*

<sup>63</sup>*Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975).

<sup>64</sup>*Id.* at 413.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 421.

water or water power.<sup>67</sup> “Finally”, the Court stated, “it is by no means irrational for Congress to provide the Commission with alternative, albeit sometimes coextensive, bases of jurisdiction, so that it can proceed on the strength of one where the existence of the other may be unclear.”<sup>68</sup>

#### CONCLUSION

FERC jurisdiction attaches where any hydroelectric project is located on: (1) a navigable stream; (2) a nonnavigable stream but impacts on downstream navigation; (3) a nonnavigable stream and does not affect navigability but was built after 1935 and affects interstate or foreign commerce generally. Hydroelectric projects or project works on public lands or reservations and those which use surplus water or water power from a government dam are jurisdictional.

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<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 422.