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NOTES AND COMMENTS

FERC INTERACTION WITH FISH AND WILDLIFE AGENCIES IN HYDROPOWER LICENSING UNDER THE FEDERAL POWER ACT SECTION 10(j) CONSULTATION PROCESS

I. INTRODUCTION

Enacted as part of the Electric Consumers Protection Act of 1986 (ECPA), section 10(j) directs the Federal Energy Regulatory Commission (FERC or Commission) to give environmental issues greater consideration in the hydropower licensing process.¹ However, the section 10(j) consultation process had not been delineated by specific guidelines, and agency recommendations were often only broad statements against the hydropower project.² The FERC recently adopted a final regulation codifying hydropower licensing procedures added to the Federal Power Act (FPA) by the ECPA's section 10(j) consultation process.³

This comment explores the legal theory behind the FPA to demonstrate that environmental protection has been an inherent aspect of the hydropower licensing process. Secondly, the attempt of the 1986 ECPA amendments⁴ to coerce greater FERC consideration of fish and wildlife values into the procedure is evaluated. Finally, the future of hydropower licensing is examined in the context of policy decisions embodied in the final rule.⁵ The hydropower licensing process has effectively made the procedure more efficient, fairer to the parties, and has clarified FERC practices in the section 10(j) consultation process.

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

2. *See generally* California v. FERC, 110 S. Ct. 537 (1990); National Wildlife Fed'n v. FERC, 912 F.2d 1471 (D.C. Cir. 1990); Elkem Metals Co., 41 F.E.R.C. ¶ 62,289 (1987).

3. Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 23,108 (1991) (to be codified at 18 C.F.R. §§ 4, 16, 375, 380) [hereinafter Licensing Regulations].

4. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

5. Licensing Regulations, *supra* note 3.

II. THE FEDERAL POWER ACT

A. *Historical Development of the FPA and the FERC*

Originally enacted as the Federal Water Power Act of 1920 (FWPA),⁶ the FPA was designed to eliminate the controversy between private developers seeking rapid advancement of hydropower and conservationists opposed to unregulated use of government lands.⁷ Private development of the nation's waterways during this period was encouraged,⁸ and the environment was suffering the consequences. Yet, even in this early stage of development of the hydropower industry, the need for control over natural resources was recognized. The Wilson administration required hydropower licensing decisions balance factors in favor of protecting the public's interest in power generation with the countervailing public interest in conserving natural resources.⁹ To provide federal control over this balancing action, Congress created the Federal Power Commission (FPC), which is now the FERC.¹⁰

The primary tool used by the FERC to balance the discordant interests was a licensing requirement. The FERC issued licenses, not to exceed fifty years, for the general construction, operation, and maintenance of facilities related to the development of water power.¹¹ The FPA contained a broad delegation of regulatory power governing the agency's licensing decisions.¹² However, there were no express provisions for FERC streamflow maintenance to protect or enhance fish and wildlife.¹³ Mitigating actions were completely discretionary, and the FERC and its predecessor, the FPC, often slighted fish and wildlife issues during the

6. Federal Water Power Act of June 10, 1920, ch. 285, § 7, 41 Stat. 1063, 1067 (codified at 16 U.S.C. § 800(a) (1988)). See generally Jeffrey S. Marcus, *Municipal Preference in Hydroelectric Licensing: Interpretation of Section 7(a) of the Federal Power Act*, 52 FORDHAM L. REV. 903, 910-14 (1984); John F. Shields, *The Federal Power Act*, 73 U. PA. L. REV. & AM. L. REG. 142 (1924).

7. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 n.23 (1946).

8. S. REP. NO. 180, 66th Cong., 1st Sess. 2, 3 (1919); H.R. REP. NO. 715, 65th Cong., 2d Sess. 40 (1918). The Wilson administration proposed privatization of water power developments to bring a sense of certainty to the future of utilities and to restore financial stability to the industry. *Id.*

9. S. REP. NO. 180, 66th Cong., 1st Sess. 2, 3 (1919).

10. Department of Energy Organization Act, Pub. L. No. 95-91, tit. IV, § 401(a), 91 Stat. 565, 582 (1977) (codified at 42 U.S.C. § 7171(a) (1988)). On October 1, 1977, the FERC assumed regulatory responsibilities previously held by the Federal Power Commission.

11. 16 U.S.C. §§ 797(e), 799 (1988). The FERC's general authority to issue hydropower licenses is drawn from the commerce clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3.

12. 16 U.S.C. §§ 792-828c (1988).

13. The FPA contains only implied protections for fish and wildlife under three provisions, 16 U.S.C. §§ 797(e), 810, 823a(c) (1988), which allow direct protective conditioning of FERC licenses by other federal agencies. However, these sections apply only in limited circumstances.

FPA licensing procedure.¹⁴

In *Udall v. FPC*,¹⁵ the Supreme Court directed the FERC to consider fish and wildlife values in the FPA licensing process.¹⁶ The test for future hydropower licensing applications was to be a broad "public interest" inquiry.¹⁷ The Court explained that "public interest" should account for future energy needs, alternative power sources, as well as "the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreation purposes, and the protection of wildlife."¹⁸ Consideration of environmental elements was no longer discretionary, but mandatory as a part of the public interest.

B. *Environmental Frustration and the ECPA*

With the environmental movement of the late 1960s and the regulating environmental legislation, the FERC plunged deeper into a regulatory framework in an effort to balance fish and wildlife resources¹⁹ with a national demand for greater domestic energy production.²⁰ The Commission neglected its environmental obligations²¹ and frustrated the general purposes of the legislation governing the environmental impact of

14. *Udall v. FPC*, 387 U.S. 428 (1967). The FPC issued a license to construct the High Mountain Sheep Dam on the Snake River in Idaho, though the Secretary of the Interior urged postponement until methods of protecting the fish in the river could be studied. The Commission rejected this request as well as the request that the federal government construct the dam so that the protective devices could be installed. *Id.* at 432.

15. 387 U.S. 428 (1967).

16. The Court held that, under the FPA, a dam licensing project must be within the "public interest." *Id.* at 450.

17. *Id.*

18. *Id.*

19. For example, the FERC is required by the National Environmental Policy Act, 42 U.S.C. § 4231 (1988) (NEPA), to do an environmental survey of actions which may have a significant impact on the quality of the human environment. *Id.* § 4332. Also, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1988) (FWCA), requires that federal agencies give equal consideration to wildlife conservation as part of water resource development plans. *Id.* § 662(a).

20. Following the oil crisis of the 1970s, Congress created the Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 823a-825s, 2601-2645, 2701-2708 (1988)) (PURPA), which provided incentives for the development of hydropower in small-scale (less than 50 MWh) facilities.

21. *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 470-73 (9th Cir. 1984), *cert. denied*, 471 U.S. 116 (1985). A coalition of tribes joined with various environmental groups and wildlife agencies to challenge the FERC's relicensing of Rock Island Dam on the Columbia River, originally licensed in 1930. *Id.* at 467. The FERC granted a license to build a second powerhouse without fish passage facilities, with only a provision allowing the utility company deferment of the fishery issues until completion of further studies. The Ninth Circuit rejected the FERC's licensing procedure and failure to give wildlife "equal consideration" under the FWCA and "equitable treatment" under the PNPA. *Id.* at 473.

hydropower operations.²² Concern over the FERC's lack of consideration for environmental values led Congress to reform and clarify the FPA in 1986.²³

In 1986, the ECPA amended the FPA relicensing process to provide for enhanced protection of natural resources. Section 3(a) amended 4(e) to mandate "equal consideration" of fish and wildlife values in licensing decisions.²⁴ Section 3(b) amended 10(a) to require that the project plan "for the adequate protection and enhancement of fish and wildlife (including related spawning grounds and habitat)."²⁵ Finally, the ECPA section 3(c) amended 10(j) of the FPA to require that the FERC "adequately and equitably" protect fish and wildlife.²⁶

22. See generally *Relicensing of Hydroelectric Projects: Hearings on H.R. 4402, H.R. 5299, and H.R. 5416 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. (1984); *Small Hydro Program: Hearings Before the Subcomm. on Energy Conservation and Power of the Comm. on Energy and Commerce*, 98th Cong., 2d Sess. (1984) (containing extensive comment on the FERC's neglect of its environmental obligations); *Hydroelectric Relicensing: Hearings on S. 403, S. 426, S. 12919, and S. 1260 Before the Subcomm. on Water and Power of the Senate Comm. of Energy and Natural Resources*, 99th Cong., 1st Sess. (1985); *Hydropower Relicensing: Hearings on H.R. 44, H.R. 1815, H.R. 1959, and H.R. 2605 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. (1985).

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

24. 16 U.S.C. § 797(e) (1988).

25. *Id.* § 803(a).

26. *Id.* § 803(j), which states:

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter [16 U.S.C. §§ 792-828c] shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1). Subsection (i) of this section shall not apply to the conditions required under this subsection.

Id.

Even though fish and wildlife concerns significantly affect hydropower license considerations, Congress had not authorized fish and wildlife agencies to directly condition or control a FERC license or veto the hydropower projects. The amount of "consideration" the FERC was to give fish and wildlife protection, as well as the weight to be placed on agency recommendations, was uncertain. These interests in the FERC hydropower licensing and relicensing projects are addressed within the new consultation process.²⁷

III. THE FERC'S FINAL RULE

After the 1986 enactment of the ECPA amendments to the FPA, the Commission used only informal guidelines in implementing the 10(j) process. Consequently, the right of interested parties, fish and wildlife agencies, and Indian tribes to participate in the 10(j) procedure was vague. In order to facilitate efficiency in the hydropower licensing procedure, the Commission adopted the Department of Energy's rule making procedure which codified the existing FERC practices.²⁸ This enabled the Commission to receive input from interested parties on how the process could be improved. In response to the comments received, the FERC issued a final rule on the regulatory procedure.²⁹ The new procedure should standardize the process, making it more efficient and predictable for concerned parties.

The Commission has an important motive to see that a practical licensing procedure is implemented. In the fiscal year 1992, the FERC anticipates that 170 relicensing applications will be received.³⁰ Most of these projects were licensed when streamflow management of fish and wildlife was nonexistent.³¹ The Commission found itself in need of an ordered, efficient procedure which would give due consideration to wildlife concerns. Thus, relicensing under today's regulatory requirements

27. *Id.*

28. The FERC published a proposed rule to govern and clarify the legal requirements added by the ECPA under section 10(j) of the FPA. 55 Fed. Reg. 9,894 (1990) (to be codified at 18 C.F.R. pts. 4, 16, 375, 380) (proposed March 6, 1990). The proposed ruling explained the relationship of administrative processes within section 10(j), the FWCA, and the NEPA. The ruling also established various deadlines for agency submissions. *Id.*

29. Licensing Regulations, *supra* note 3.

30. 55 Fed. Reg. 9,894, 9,904-05 (1990) (to be codified at 18 C.F.R. pts. 4, 16, 375, 380) (proposed March 6, 1990). Over the next decade, some 238 projects will require relicensing. 52 Fed. Reg. 4,648 (1987).

31. Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 114 (1991).

will restructure the nation's waterways.³²

The process is designed to allow the FERC to consult with interested fish and wildlife agencies. The six stage process the FERC will use to determine the future of our nation's waterways in relation to hydro-power and fish and wildlife concerns consists of:

- (1) Submittal of fish and wildlife recommendations;
- (2) Clarification of fish and wildlife recommendations;
- (3) Preliminary determination (in E[nvironmental] A[ssessment] or draft E[nvironmental] I[m]pact S[tatements]) of any inconsistency of the fish and wildlife recommendations with applicable law by Commission staff and notification to all parties, affected resource agencies, and Indian tribes of this determination;
- (4) Response by fish and wildlife agency, affected resource agencies, Indian tribes, and other parties to any preliminary determination of inconsistency;
- (5) Meeting to be held at the discretion of the Commission staff, as requested by the fish and wildlife agency, any party, or affected resource agency or Indian tribe; and
- (6) Issuance of the order granting or denying the license application.³³

A. *Fish and Wildlife Recommendations*

1. Participants

Fish and wildlife recommendations must be submitted pursuant to the FWCA.³⁴ The Commission grants intervention rights only to those parties specifically listed in the regulations. In effect, participating agencies include only the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency in charge of administrative management over fish and wildlife resources.³⁵ The FERC's final ruling eliminates from the consultation process³⁶ both Indian tribes³⁷ and state agencies responsible for implementing water quality standards unless those agencies have direct statutory management

32. See *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 470-71, 476 (9th Cir. 1984), *cert. denied*, 471 U.S. 116 (1985).

33. Licensing Regulations, *supra* note 3, at 23,139.

34. 16 U.S.C. § 803(j).

35. *Id.*

36. Licensing Regulations, *supra* note 3, at 23,110. This was evidently intended to relegate participation within the pre-filing process mandated in section 10(a) to Indian tribes.

37. Licensing Regulations, *supra* note 3, at 23,146-47 (to be codified at 18 C.F.R. § 4.30(b)(10)):

Indian tribe means, in reference to a proposal to apply for a license or exemption for a hydropower project, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal

over fish and wildlife.³⁸

Although limited in the consultation phase, these regulations significantly expand the rights of Indian tribes and the general public in other areas of the hydropower licensing process.³⁹ The ruling requires applicants to consult with affected tribes in the pre-consultation process and allows public participation through public meetings and the viewing of public files. Indian tribes and the general public may also intervene as parties in the proceeding or file protests concerning the application.⁴⁰ Any interested party may file recommendations, request a rehearing, or seek judicial review under the FPA.⁴¹ However, these "interested parties" are not part of the strict procedural process reserved for "fish and wildlife" agencies as outlined in section 10(j).⁴²

2. Recommendations

The "recommendations" of professional or technical advice given by the fish and wildlife agencies are essential to the entire 10(j) consultation process. Section 10(j) provides an endpoint in the licensing procedure, whereby the FERC and the fish and wildlife agencies determine final conditions to be included in the license.⁴³

The recommendations must be actual conditions to be included in the license.⁴⁴ The FERC's final ruling requires the agency to give an affirmative statement designed for the actual protection of and mitigation

governments in the Federal Register in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed

Id.

38. The Oklahoma Water Commission argued that "state agencies" should include those agencies responsible for implementing water quality standards since they have an indirect role in fish and wildlife management. *Id.* at 23,111 n.14.

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

40. *Id.*

41. *Id.* at 23,110-13.

42. 16 U.S.C. § 803(j).

43. Licensing Regulations, *supra* note 3, at 23,112.

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

Fish and wildlife recommendation means any recommendation designed to protect, mitigate damages to, or enhance any wild member of the animal kingdom, including any migratory or nonmigratory mammal, fish, bird, amphibian, reptile, mollusk, crustacean, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any egg or offspring thereof, related breeding or spawning grounds, and habitat. A "fish and wildlife recommendation" includes a request for a study which cannot be completed prior to licensing, but does not include a request that the proposed project not be constructed or operated, a request for additional pre-licensing studies or analysis or, as the term is used in §§ 4.34(e)(2) and 4.34(f)(3), a recommendation for facilities, programs, or other measures to benefit recreation or tourism.

Id.

of damage to fish and wildlife.⁴⁵ Mere negative assertions opposed to the licensing as a whole are unacceptable recommendations.⁴⁶ Such assertions are not licensing recommendations and are not subject to the section 10(j) licensing procedure.⁴⁷

The regulations also state that neither pre-licensing procedures nor further studies are valid recommendations.⁴⁸ In addition, although the FWCA recognizes fish and wildlife agency concerns regarding the promotion of recreation in the hydropower program,⁴⁹ the ECPA directs that recreational concerns not be the subject of FPA section 10(j) recommendations.⁵⁰

3. Submittal

The FWCA recommendations will determine the final conditions of the license,⁵¹ and must be submitted early in the consultation procedure for the Commission to adequately regard the seriousness of any environmental consequences. Thus, the only feasible arrangement is for fish and wildlife recommendations to precede the Commission's environmental analysis.⁵² The FERC regulation mandates that all fish and wildlife agencies submit recommendations and terms no later than sixty days after issuance by the Commission⁵³ of notice declaring that the application is "ready for environmental analysis."⁵⁴

Should a draft environmental impact statement (EIS) indicate a need for modification of the recommendations, modified proposals may

45. The final ruling also provides that the agency submitting the recommendation must specify the evidentiary support for the proposal. *Id.* at 23,148 (to be codified at 18 C.F.R. § 4.34(b)(2)).

46. These comments should either be made pre-filing, or post-filing, after the application is ready for environmental analysis. *Id.* at 23,112 (to be codified at 18 C.F.R. § 4.30(b)(9)(ii)).

47. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243. The ECPA directs that only valid recommendations under 10(j) require written determinations, negotiations, and findings. *Id.*

48. Licensing Regulations, *supra* note 3, at 23,146 (to be codified at 18 C.F.R. § 4.30(b)(9)(ii)).

49. 16 U.S.C. § 803(a) (1988); *Udall v. FPC*, 387 U.S. 428 (1967); Licensing Regulations, *supra* note 3, at 23,112.

50. Licensing Regulations, *supra* note 3, at 23,112.

51. NEPA requires the Commission to evaluate whether approval of a particular hydropower proposal would constitute a major federal action significantly affecting the human environment. 42 U.S.C. § 4332 (1988). The NEPA process includes a careful evaluation of the impact of the proposed action on fish and wildlife. *Id.* If the proposed action would significantly affect the quality of the human environment, the Commission must prepare an Environmental Impact Statement (EIS). The EIS analyzes any adverse effects of the proposal and any alternatives. *Id.*

52. 55 Fed. Reg. 9894, 9900-01 (1990).

53. Licensing Regulations, *supra* note 3, at 23,148 (to be codified at 18 C.F.R. § 4.34(b)).

54. An application that is "ready for environmental analysis" has been accepted for filing and contains adequate information requested by the Commission. *Id.* at 23,147 (to be codified at 18 C.F.R. § 4.30(b)(25)).

be submitted no later than the due date for comments on the draft EIS.⁵⁵ Recommendations filed after these deadlines will not be subject to the FPA section 10(j) process.⁵⁶ The FERC may, however, grant an extension for such filing.⁵⁷ If there is a possibility of irreparable harm, such as a threat to an endangered species, the Commission will grant requests for extensions of time upon a showing of good cause.⁵⁸

Normally, a commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances.⁵⁹ However, late filings by fish and wildlife agencies may be considered by the Commission.⁶⁰ Also, if an applicant significantly amends, agency modifications may be submitted up to the due date specified by the Commission for comments on the amendment.⁶¹

B. *Determination of Inconsistencies*

The submission of fish and wildlife recommendations marks the beginning of the FPA section 10(j) process.⁶² The Commission may seek clarification of the recommendation if necessary, but must do so within forty-five days of filing.⁶³ The FERC, through the Director of the Office of Hydropower⁶⁴ and his staff,⁶⁵ must next make a written preliminary finding as to whether each fish and wildlife recommendation is consistent with applicable law and FPA requirements.⁶⁶ This initial determination is done in conjunction with the issuance of the environmental assessment

55. *Id.* at 23,148 (to be codified at 18 C.F.R. § 4.34 (b)(4)). The modifications must be clearly distinguished from any comments on the draft EIS. The process also requires strict deadlines. Without specific deadlines, timed for maximum effectiveness and practicality, it is unlikely the hydropower licensing process will work. Resource agencies and other interested parties should not be able to delay or disrupt the hydropower hearings by refusing to submit recommendations on a timely basis. All administrative bodies use deadlines to carry out their functions. Agency failure to construct and recognize deadlines would give these opposing forces a veto power over future development.

56. *Id.* at 23,132.

57. *Id.* The Commission reserves the right to extend the comment or reply as it deems appropriate, for example when a scientific study cannot be completed before the deadline.

58. *Id.*

59. *Id.*

60. *Id.* The Commission may hear late recommendations unless such consideration would delay or disrupt the proceeding.

61. *Id.*

62. *Id.* at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(1)).

63. *Id.* However, the Commission may extend the time period by notifying the agency.

64. *Id.* at 23,139.

65. 55 Fed. Reg. 9894, 9899 (1990).

66. Licensing Regulations, *supra* note 3, at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(4)).

or the EIS.⁶⁷

If viewed as consistent with applicable law,⁶⁸ the recommendations bypass the negotiation process.⁶⁹ The Commission either implements the terms and conditions supplied by the agencies into a granted license⁷⁰ or denies the application.⁷¹ If the FERC views the recommendations as inconsistent with applicable law, the fish and wildlife agency and the Commission attempt to reconcile the discrepancies through a negotiation process.⁷²

C. Section 10(j)(2) Negotiations

Upon receiving written notice from the Commission of an inconsistency, the fish and wildlife agencies have forty-five days within which to file written comments and to request meetings with the Commission.⁷³ The FERC may decide to conduct hearings at the request of the agency or on its own initiative.⁷⁴ The FERC may conduct negotiations and use the means it deems most appropriate for the situation.⁷⁵

If the Commission conducts a meeting, all affected parties must be given notice of the FERC decision at least fifteen days prior to the meeting.⁷⁶ At the conclusion of the meeting or conference, the Commission will provide a written summary of the meetings.⁷⁷ To resolve the differences in opinions, the Commission will give due weight to the recommendations, expertise and statutory responsibilities of the submitting party.⁷⁸

67. *Id.*

68. The determination may rest on a conflict of interest between the parties and a balancing of the recommendations with the potential for hydropower, Licensing Regulations, *supra* note 3, at 23,139, and other interests, such as water supply, *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1483 (D.C. Cir. 1990).

69. Licensing Regulations, *supra* note 3, at 23,139.

70. *Id.*

71. *Id.* at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(5)).

72. *Id.* at 23,139; 55 Fed. Reg. 9894, 9899-900 (1990).

73. Personal meetings, video conferences, telephone conferences, or other such means as the agency requires in order to resolve the inconsistency may be requested. Licensing Regulations, *supra* note 3, at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(4)).

74. *Id.* (to be codified at 18 C.F.R. § 4.34(e)(5)).

75. *Id.* The Commission has direct power to decide whether to conduct any meetings and the format of such meetings. *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1481 (D.C. Cir. 1990) (meeting is not required by section 10(j)).

76. Licensing Regulations, *supra* note 3, at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(5)).

77. *Id.* The written summaries will be distributed to all interested parties in the licensing procedure. *Id.*

78. *Id.*

D. *The FERC's Decision to Grant or Deny the Hydropower Application*

The Commission implements FPA section 10(j), FWCA and NEPA in hydropower proceedings as a singular administrative procedure.⁷⁹ The FERC views these statutes as having a related objective—to order the Commission to employ certain procedural steps in its decision-making process.⁸⁰ However, these statutes do not affect the substantive standards applied to hydropower applications.⁸¹ This substantive power remains within FPA sections 4(e) and 10(a).⁸²

The FERC is required under section 10(j) to give serious attention to all fish and wildlife agency recommendations.⁸³ However, in *National Wildlife Federation v. FERC*,⁸⁴ the court of appeals concluded that resolution of any discrepancies ultimately rests with the Commission.⁸⁵

The National Wildlife Federation petitioned for review of FERC orders granting a license for construction and operation of a dam with a small hydroelectric powerhouse to the city of Fort Smith, Arkansas.⁸⁶ The dam was proposed in two phases. The court affirmed the FERC's approval of the first phase of construction even though the Commission failed to consider the environmental impact of the second phase of the project.⁸⁷ The court stated that the Commission must give "equal consideration" to environmental values and to the need for hydropower development.⁸⁸ Because hydropower licensing proceeds on a case by case basis, however, it is not feasible to give these competing values "equal weight" in every situation.⁸⁹ Nor does the FPA require that the proposed needs of fish and wildlife always prevail.⁹⁰

79. Overlapping legal requirements to protect the environment can be satisfied by a single administrative process. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972); *Monongahela Power Company*, 58 F.P.C. 2702, 2706 (1977).

80. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (NEPA duties were viewed as procedural); *Sierra Club v. Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980) (FWCA only required that agency views on fish and wildlife "be given serious consideration"), *aff'd*, 633 F.2d 206 (2d Cir. 1980).

81. 55 Fed. Reg. 9894, 9900 (1990).

82. *Id.*

83. *Licensing Regulations*, *supra* note 3, at 23,149 (to be codified at 18 C.F.R. § 4.34(e)(5)).

84. 912 F.2d 1471 (D.C. Cir. 1990).

85. "The Commission's actions are not subject to the effective veto of every state or federal wildlife agency, and consensus is not required before the Commission can authorize a project to proceed." *Id.* at 1482.

86. *Id.* at 1474.

87. *Id.* at 1480.

88. *Id.* at 1481.

89. *Id.*

90. *Id.*

The 10(j) process ends when the final order of the Commission either grants or denies the application.⁹¹ At that point, the right of agency intervention ends.⁹² If the license is granted, it will contain only those fish and wildlife recommendations viewed by the Commission as consistent with applicable law.⁹³ The Commission will publish its findings and statements regarding inconsistencies not included in the permit.⁹⁴

IV. THE FUTURE OF HYDROPOWER LICENSING

A. *Hydropower to Reenter the Environmental Law Arena*

Although the first modern environmental law case involved hydropower licensing,⁹⁵ hydroelectric licensing is not generally considered a central environmental law component.⁹⁶ In fact, many environmental texts and treatises ignore the subject completely.⁹⁷

However, relegation of the FPA to the shadows of environmental law may soon end. The FERC is responsible for licensing and relicensing all nonfederal dams.⁹⁸ The damming of the nation's waterways has the potential to destroy habitat and spawning grounds and could alter the flow, temperature, and quality of the water.⁹⁹ Therefore, high environmental stakes exist in the hydropower licensing and relicensing operation.

Generation from hydroelectric plants in 1989 was over nineteen percent higher than in 1988.¹⁰⁰ Still, hydropower occupied only ten percent of the net generation, while coal fired power plants accounted for over

91. *Id.*

92. Statement of Policy Permitting Limited Intervention by Fish and Wildlife Agencies at the Appeal Stage of a Licensing Proceeding, 46 F.E.R.C. ¶ 61,161 (1989). The FERC proposed a statement of policy in which fish and wildlife agencies were allowed to intervene as parties within thirty days after issuance of FERC's final ruling on the license application. This permitted the agency to appeal the Commission action directly to the Commission itself. This Order was directly revoked in the final rule making procedure. Licensing Regulations, *supra* note 3, at 23,140.

93. Licensing Regulations, *supra* note 3, at 23,140.

94. *Id.* at 23,149 (to be codified at 18 C.F.R. § 4.34(f)).

95. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

96. Blumm, *supra* note 31, at 113.

97. *Id.* at 114.

98. The electric power industry is a combination of electric utilities and nonutility power producers. Recent statistics show that over ninety-one percent of the electric utility industry is either investor, public, or cooperative owned. The federal government comprises the other nine percent of the industry. ENERGY INFO. ADMIN., ELECTRIC POWER ANN. 1989, 3 (1991).

99. See, e.g., F. Lorraine Bodí & Eric Erdheim, *Swimming Upstream: FERC's Failure to Protect Anadromous Fish*, 13 ECOLOGY L.Q. 7 (1986).

100. ENERGY INFO. ADMIN., *supra* note 98, at 8.

fifty-six percent.¹⁰¹ The Clean Air Act, as recently amended in 1990,¹⁰² may soon change these representative statistics.¹⁰³

It seems inevitable that these amendments will lead to decreased generation of electric power through the burning of fossil fuels. If so, hydroelectric, nuclear, and gas fired plants seem the most likely candidates for bridging the "gap" that will be created and will be the basis of future energy needs. In addition, between now and 2010, the demand for electricity is expected to grow faster than the demand for other energy sources.¹⁰⁴ Electricity is expected to account for sixty-six percent of the total energy production.¹⁰⁵ This will force hydroelectric issues to the forefront.

Certainly then, the licensing process that the FERC has selected and will utilize is critical. But just what are the policies represented in the final rule? Will the process accomplish the arduous task of balancing the country's needs for energy with its concern for the environment?

B. *Participation in the 10(j) Process*

The commenting Indian tribes¹⁰⁶ claimed that the Commission has severely limited their participation in the process and has ignored the distinct rights of the tribes with respect to tribal lands.¹⁰⁷ The Indian tribes have a strong argument that their role should parallel that of federal and state fish and wildlife agencies.

The Commission failed to respond directly to the Indian tribe's particular needs. Most commenters contended that Indian tribes should participate in the consultation process,¹⁰⁸ according the tribes an opportunity to review the proposals and engage in the planning process. Contrary to its proclaimed intent, the Commission arguably, in effect, deprives Indian tribes of meaningful participation. Because the Indian

101. *Id.* at 15.

102. 42 U.S.C.A. §§ 7401-7671 (West Supp. 1991).

103. When fossil fuels are burned, a variety of gases (sulfur dioxide, nitrogen oxides, and carbon dioxides) and particulates are formed. If these gases and particulates are not captured by pollution control equipment, they enter the atmosphere. One of the goals of the Clean Air Act Amendments was a ten million ton reduction in sulfur dioxide emissions and a two million ton reduction in nitrogen oxide emissions. 42 U.S.C.A. § 7651(b) (West Supp. 1991). Since not all plants have environmental equipment and the cost of installation is high, failure to comply will lead to shutting the facility down. Thus, the number of facilities will likely decrease.

104. ENERGY INFO. ADMIN., *supra* note 98, at 18, citing ENERGY INFO. ADMIN., ANN. OUTLOOK FOR U.S. ELECTRIC POWER 1990.

105. *Id.*

106. Licensing Regulations, *supra* note 3, at 23,110.

107. *Id.*

108. *Id.* at 23,141.

tribes are not treated as fish and wildlife agencies and because their recommendations are not subject to the provisions of section 10(j),¹⁰⁹ the Commission has failed to support tribal rights.

A primary concern of the Commission was the possibility that extended deadlines would prolong the process.¹¹⁰ The Indian tribes, however, have only limited resources which restricts their ability to meet the short consultation, recommendation, and comment deadlines.¹¹¹ Furthermore, short deadlines may interfere with treaty rights or violate the federal trust responsibility.¹¹² Although the Commission has accorded the Indian tribes the opportunity to participate in the process, several commenters argued that the procedures have essentially eliminated any significant role the Indian tribes might play.

In response, the Commission has not altogether excluded tribes from the licensing process and, in fact, grants them a status above the general public. All applicants are required to identify Indian tribes that could be affected by the project,¹¹³ and the Commission specifically seeks their comments on the applications.¹¹⁴ Comments from relevant tribal parties are considered and addressed, but not in the final phase of the licensing procedure.¹¹⁵ The Commission believes the final rule provides adequate rights to Indians with respect to their participation during the application process.¹¹⁶

The proposed rule states that the Director of the Office of Hydropower Licensing or the Regional Director must provide, on request, a list of Indian tribes in the region that may be affected by the project.¹¹⁷ If the project applicant decides not to request a list of potentially affected Indian tribes, there is the possibility that a particular tribe would not receive ample notice of the project. As governmental entities, the Indian tribes should determine for themselves whether a proposed hydropower project might affect tribal rights or interests. It is, therefore, suggested

109. *Id.* at 23,142.

110. *Id.* at 23,141.

111. *Id.*

112. *Id.*

113. *Id.* at 23,150 (to be codified at 18 C.F.R. § 4.38(a)(1)).

114. *Id.* (to be codified at 18 C.F.R. § 4.34(b)(2)).

115. The Commission further notes that the licensing decision should include a discussion of any condition recommended by any Indian tribe and address why they were or were not included in the license. *Id.* at 23,142. In addition, since the regulations require the applicant to hold a public meeting in the vicinity of the proposed site, both public and tribal participation is substantial. *Id.* at 23,150 (to be codified at 18 C.F.R. § 4.38(b)(2)).

116. *Id.* at 23,110-11.

117. *Id.* at 23,150 (to be codified at 18 C.F.R. § 4.38(a)(2)).

that the Commission be responsible for providing notice of the project by letter to all tribes included on the list.¹¹⁸

Perhaps the most persuasive of the Commission's responses to the tribes is that Congress, not the FERC, chose not to include Indian tribes in the 10(j) consultation process.¹¹⁹ Most tribes operate their own fish and wildlife agencies and, in fact, acquire area expertise. Yet, the FERC must apply a faithful interpretation of the law as written in its rulemaking and not speculate as to what Congress may have meant or should have decided at the time.¹²⁰

Some commenters suggested that more than one state agency be allowed to make recommendations.¹²¹ For some time, states have argued that the considerations important to a particular state may be lost if the process for licensing hydropower projects is turned over to a federal commission.¹²² Advocates of a strong federal influence argue that state control must be submissive in order to implement planning with a more regional focus.¹²³ Case law also indicates a need for federal control of licensing to counter "the private greed that more easily influences local officials and state legislatures than remote federal commissioners and courts."¹²⁴

If any agency that might arguably have an indirect bearing upon fish and wildlife matters was allowed to make recommendations, the intent of the section 10(j) requirement would be circumvented. The intent was to provide an efficient method for local concerns to be considered by specific fish and wildlife experts in the field.¹²⁵ Recommendations gleaned from these experts would be implemented into the permit structure. Water quality, quantity, and temperature are concerns that fish and wildlife agencies should be aware of without the addition of another departmental group. It is in the best interests of the environmental quality to limit

118. *Id.* at 23,113.

119. *Id.* at 23,110. Congress, in the creation language of the ECPA, discussed fish and wildlife agencies distinct and apart from Indian tribes. *Id.*

120. *Id.*

121. If this were the case, agencies with secondary control over the state's water, such as the Oklahoma Water Commission, could have direct veto control over hydropower projects. *Id.* at 23,111.

122. Betsy Vencill, *The Federal Power Act and Western Water Law: Can States Maintain Their Own Water Use Priorities?*, 27 NAT. RES. J. 213, 232-33 (1987).

123. *Id.* at 219.

124. *Id.* at 232.

125. Licensing Regulations, *supra* note 3.

the number of recommending agencies.¹²⁶ The concerns will then be integrated by an agency with its primary concern being the health and welfare of fish and wildlife.¹²⁷

In addition, the hydropower license proceeding is not limited to only fish and wildlife agencies. Interested parties may first intervene as a party when the Commission issues public notice of the filing, and a second opportunity arises if comments are invited on a draft environmental impact statement.¹²⁸ All interested parties have the same opportunities to participate as "formal" parties in the proceeding. Although consultation does not apply equally to all interested parties, intervention does.

In effect, participation in the proceeding by interested parties is not limited. The process merely avoids needless confrontation and delay, which could result if numerous parties were allowed to enter the consultation process. The FERC will evaluate requests for intervention on a case-by-case basis.¹²⁹ While these parties are not given the same procedural leeway that is given fish and wildlife agencies under the 10(j) consultation process,¹³⁰ limited resources necessitate a specific structure through which the Commission receives and considers suggestions and comments.

C. *Appropriate Recommendations*

Fish and wildlife preservation is the overriding concern during the consultation stage of the licensing process. To this end, agency recommendations designed to "protect or mitigate" potential damages to a member of the animal kingdom are utilized.¹³¹ The scope of possible recommendations is not, however, without limitation.

The commenting parties were at odds over whether a recommendation that the project not be constructed should be a viable recommendation.¹³² Several commenters argued that if sufficient remedial measures could not be taken (and thus cannot be recommended), recommendations other than "nonconstruction" or "no grant of license" would not be

126. 55 Fed. Reg. 9,894, 9,899-900 (1990).

127. *Id.* at 9,906-07.

128. Licensing Regulations, *supra* note 3, at 23,140.

129. *Id.*

130. 55 Fed. Reg. 9,894, 9,904 (1990).

131. Licensing Regulations, *supra* note 3, at 23,146 (to be codified at 18 C.F.R. § 4.30(b)(9)(ii)).

132. *Id.* at 23,111.

adequate to protect or mitigate damages to fish and wildlife.¹³³ Furthermore, whether or not the Commission decides to adopt the recommendations, the universe of possible suggestions should not be limited.¹³⁴ The Department of Interior concluded that “[i]f nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or . . . even deny a license.”¹³⁵

Other commenters argued that agencies have a duty under the FWCA to make necessary recommendations, and the statute does not exclude recreational concerns from such suggestions.¹³⁶ Might recommendations that are beneficial to fish and wildlife in some way be unduly excluded because they primarily benefit tourism or recreation?

However, the section 10(j) consultation is just one segment of the hydropower licensing process. As the final rule explains, the recommendations are “for conditions that will be included in a license.”¹³⁷ If an agency believes that a hydropower project will have detrimental effects that cannot be mitigated, they should recommend that the project not be licensed at the application stage. But such a proposal is not a section 10(j) recommendation. Numerous opportunities exist to object to the license at the pre-filing or post-filing stages of the application process.¹³⁸ However, at this critical stage of the licensing process it is essential for the overall benefit and welfare of the fish and wildlife that specific mitigating factors be implemented into the license.

In addition, it is highly possible that if all comments were viewed as recommendations, applicants would find themselves bound by recommendations having only remote ties to the actual effects of the project. This could jeopardize the economic viability of the applicants,¹³⁹ which would in turn severely limit the small hydroelectric producer who operates on a marginal profit base.

The capacity for environmental harm is high in hydropower generation. But a recent FERC decision shows that the Commission is taking terms and conditions set by fish and wildlife agencies seriously.¹⁴⁰ As a

133. *Id.*

134. *Id.*

135. *Id.* at n.20.

136. *Id.*

137. *Id.* at 23,112.

138. *Id.*

139. *See* PacifiCorp, 51 F.E.R.C. ¶ 62,316 (1990). The FERC established minimum stream flows to develop the habitat of cutthroat trout. Although the studies showed habitat improved, the annual revenue loss to the company was estimated at \$123,000. *Id.* at 63,545.

140. Richard E. Akin, 56 F.E.R.C. ¶ 62,157 (1991).

condition in a hydropower license, the California Department of Fish and Game required the Akin-Cola hydropower water project to automatically and continuously release a minimum flow of 0.25 cubic feet per second or the natural flow, whichever is less.¹⁴¹ When these conditions were not met, the FERC ordered the hydropower project to immediately cease operation and spill all inflow into the project bypass.¹⁴²

Fish and wildlife agencies must provide affirmative hydropower licensing limitations by submitting valid recommendations. The FERC then has the opportunity to incorporate these in the license. If no recommendations are given, the FERC has very limited resources with which to implement strategies on its own.¹⁴³

D. *The FERC's Uncertain Reign*

Since the overall concern of the licensing process should be to accommodate regional and local interests as efficiently as possible, perhaps the licensing process should be within state, not federal, control.¹⁴⁴ In *California v. FERC*,¹⁴⁵ the Supreme Court upheld the FERC's exclusive authority to set operating conditions for hydroelectric projects on interstate and navigable waterways. However, legislation submitted by the Department of Energy proposed the implementation of a National Energy Strategy (NES), and Title II of the NES Act contains provisions to abolish the FERC as an independent agency and create instead a Natural Gas and Electricity Administration (NGEA) subject to DOE control.¹⁴⁶

The analysis proffered by the DOE does not explain why the FERC restructuring rationale was proposed. A memorandum prepared by the Council on Competitiveness, headed by Vice President Quayle, described several problems within the current FERC infrastructure, including (1) lack of an ordered electric policy; (2) deficient implementation of existing policy; (3) "unwieldy and time-consuming" procedures; (4) inadequate accountability; and (5) delayed decision making.¹⁴⁷

141. *Id.* at 63,189.

142. *Id.*

143. The FERC employs numerous experts in developing energy and environmental policy. However, ascertaining the biological characteristics of each river system in the country should be left to local experts. 55 Fed. Reg. 9,894, 9,905 (1990).

144. See Vencill, *supra* note 124, at 232-33.

145. 495 U.S. 490 (1990).

146. At Secretary Watkins' request, the National Energy Strategy Act was introduced on March 6, 1991, in the Senate by Senators Bennett Johnston and Malcolm Wallop and in the House by Representatives John Dingell and Norman Lent. S. 570, 102d Cong., 1st Sess. (1991); H.R. 1301, 102d Cong., 1st Sess. (1991).

147. *Department of Energy Submits Proposed Legislation to Congress To Implement National*

Whether the FERC will exist much longer is unsettled. Obviously, the FERC has not been perceived as a smoothly operating agency. Creating a more flexible and streamlined development policy will assure that the nation's overall energy, environmental, and economic policies are represented.

V. CONCLUSION

The Commission has the responsibility under the FPA to establish a reasonable approach to licensing hydropower project applications.¹⁴⁸ Consequently, the Commission must seek to strike an appropriate balance between the interests of affected parties. These interests will often be at opposite ends of a spectrum. The FERC faces a future of massive relicensing of current hydropower programs.¹⁴⁹ The recent Gulf War focused our nation's attention once again on increased domestic energy production. In combination, these two factors should only serve to heighten the problems between both public and private hydropower developers and the representative environmental coalitions.

The Commission must carefully construct consultation and hearing procedures¹⁵⁰ that will protect fish and wildlife and preserve the environmental quality of our nation's waters.¹⁵¹ The FERC regulations specify what powers a fish and wildlife agency may exercise. The FERC ruling also provides the Commission with a method of review that should prove to be both timely and cost effective, yet balance fish and wildlife concerns with a reasonable opportunity for hydropower development. Finally, the *National Wildlife* decision illustrates the latitude courts are willing to grant the Commission in interpreting section 10(j) in hydropower licensing decisions.¹⁵²

Therefore, hydropower applicants should be aware of the environmental consequences of their proposals and must consider reasonable measures to minimize adverse environmental impacts from hydropower

Energy Act and Abolish FERC; Legislation Introduced in Senate and House, FOSTER NAT. GAS REP., March 7, 1991, at 4.

148. *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1310-12 (1990).

149. See 52 Fed. Reg. 4,648 (1987).

150. Submittal of Proposed Hydropower License Conditions, IV F.E.R.C. ¶ 32,470, at 32,373 (1990).

151. 16 U.S.C. § 797(e) (1988).

152. See *supra* text accompanying notes 89-94.

projects. For their part, fish and wildlife agencies must timely recommend workable measures that will mitigate adverse effects, improve environmental conditions, or enhance fish and wildlife in general.

An affirmative burden rests upon both sides of the conflict to consider the environment and to implement protective measures. The section 10(j) process can work. However, as with any administrative scheme, competing interests must cooperate to implement the best course of action to protect the fish and wildlife and the overall public interest.

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