THE CHALLENGES OF DAM REMOVAL: THE HISTORY AND LESSONS OF THE CONDIT DAM AND POTENTIAL THREATS FROM THE 2005 FEDERAL POWER ACT AMENDMENTS

BY

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Washington's Condit Dam is an important symbol in the struggle over the past two decades to restore fish passage past federally-licensed hydropower dams. Condit's history shows how provisions of the Federal Power Act that allow federal fish management agencies to impose fishway prescriptions on dam relicensing can lead to the outright removal of a project that is uneconomical to operate with the necessary fish passage. The Condit Dam experience also illustrates the complexity of the decommissioning process, which requires the approval of a host of federal, state, and, potentially, local regulatory agencies before a dam can be removed. For successful dam removal, it underscores the importance of leaving no governmental parties out of the settlement process, as the counties which Condit Dam straddles have vigorously opposed the dam's removal and have threatened litigation that may further delay its decommissioning. The 2005 amendments to the Federal Power Act will complicate future efforts to remove dams and to condition hydropower project relicensing on assured fish passage. This Article describes the new procedural rights which the 2005 Federal Power Act amendments grant to utilities which oppose fish passage at dams, and how early challenges to the federal agencies' fishway prescriptions may play out. The new regulations are procedurally burdensome for parties which advocate fish passage and will certainly lead to longer and more costly relicensing processes for many dams. However, the substantive standard in the amendments and regulations—that any alternative fishway prescription a utility proposes be no less protective than that proposed by the federal fish manager—should allow the agencies to prevail if they defend their prescriptions in the new administrative process. As a result, the new amendments will not prove to be an insurmountable barrier to future efforts to restore fish passage at, or to remove, federally-licensed dams.

"It's harder to take out a dam than you might think."[1]

I. INTRODUCTION

Beginning in the mid-1980s, federal legislators, agency officials, and river restoration advocates began to propose and promote dam removal to restore American rivers to their natural states.[2] Dam removal proponents

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[1] William Booth, *Fish, Rivers, Environmentalists Win in Dam Removal*, WASH. POST, Nov. 21, 2002 (quoting Julie Kiel, Director of Hydroelectric Licensing, Portland General Electric), *available at* http://www.citizenreviewonline.org/nov_2002/fish.htm.

[2] *See, e.g.*, ELIZABETH GROSSMAN, WATERSHED 6–7, 115 (2002); Phillip M. Bender, *Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 189, 196 (1997); Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism in Hydroelectric Licensing*, 26 COLUM. J. ENVTL. L. 81, 87–88 (2001).

recognized that the heavy environmental costs of blocking dwindling fish runs outweighed many dams' modest benefits for irrigation, flood control, recreation, or hydropower generation.[3] The latter half of 1999 was a heady time for the dam removal movement.[4] Maine's Kennebec River flowed freely for the first time in 162 years after a demolition crew breached the Edwards Dam in July 1999, marking the first time the Federal Energy Regulatory Commission (FERC) had ordered a utility to remove a major hydropower dam.[5] By the end of that year, agreements were in place that promised the removal of three hydropower dams in the state of Washington, including the Condit Dam on the White Salmon River.[6]

In September 1999, PacifiCorp, the owner of Condit Dam, reached an agreement with fifteen environmental groups, two tribal entities, and five government agencies to remove that dam.[7] The Condit Dam settlement represented a particularly significant success: not only would it be the tallest hydropower dam ever removed, but the agreement specified that its reservoir would be drained by October 2006 and set a detailed a timeline for obtaining the necessary permitting approvals.[8] However, seven years after the demolition of the Edwards Dam seemed to herald an era of significant dam removals, the promise of the Condit Dam settlement remains unfulfilled. By June 2006, only two of the agency parties to the settlement had given their definitive permission for the decommissioning of the Condit

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[3] *See, e.g.*, Bender, *supra* note 2, at 192–93.

[4] *See also* Michael Paulson, *One Dam Down, Others in Line*, SEATTLE POST-INTELLIGENCER, July 2, 1999, at A1, *available at* 1999 WLNR 1998896 (discussing removal of Edwards Dam and possible dam removals in the Pacific Northwest). *See generally* GROSSMAN, *supra* note 2, at 9–25, 155–64 (describing removal of Edwards Dam and efforts to remove the Elwha and Glines Canyon Dams in Washington's Olympic Peninsula).

[5] GROSSMAN, *supra* note 2, at 9; Paulson, *supra* note 4.

[6] *See* Condit Hydroelectric Project Settlement Agreement, Condit Hydroelectric Project, FERC No. P-2342-011 (Oct. 21, 1999), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=146919:0 [hereinafter Condit Settlement] (agreement between Condit Dam owner PacifiCorp and 22 intervenors in the relicensing process); *see also* GROSSMAN, *supra* note 2, at 163 (describing Congress's authorization of the purchase of the Elwha and Glines Canyon Dams in late 1999). Because the Elwha and Glines Canyon Dams are now owned by the federal government, they are not subject to the FERC relicensing process described in this article. Removal of these dams is scheduled for 2008. Jim Downing, *Elwha Dam Removal Gets Final Go-Ahead*, SEATTLE TIMES, Aug. 6, 2004, at A1, *available at* 2004 WLNR 1792318.

[7] Condit Settlement, *supra* note 6, at 1; *see* Charlton H. Bonham, *The Condit Dam Removal and Section 18 of the Federal Power Act: A Coerced Settlement*, 14 J. ENVTL. L. & LITIG. 97, 129–32 (1999) (describing reasons leading to settlement process). The parties to the settlement are: PacifiCorp, American Rivers, American Whitewater Affiliation, Columbia Gorge Audubon Society, Columbia Gorge Coalition, Columbia River United, Federation of Fly Fishers, Friends of the Columbia Gorge, Friends of the Earth, Friends of the White Salmon, The Mountaineers, Rivers Council of Washington, The Sierra Club, Trout Unlimited, Washington Trout, Washington Wilderness Coalition, Columbia River Intertribal Fish Commission (CRITFC), Yakama Indian Nation, United States Forest Service (Forest Service), U.S. Department of the Interior, National Marine Fisheries Service (NMFS), Washington Department of Ecology (Ecology), and the Washington Department of Fish and Wildlife. Condit Settlement, *supra* note 6, at 1.

[8] Condit Settlement, *supra* note 6, at Exhibit C (Schedule); *see* Michael Paulson, *A First for State: Big Dam to be Torn Down—It's Cheaper Than Price of Fish Ladders*, SEATTLE POST-INTELLIGENCER, Sept. 23, 1999, at A1, *available at* 1999 WLNR 1989697 (noting that Condit Dam would be the highest dam ever scheduled for removal).

Dam.[9] Moreover, all parties to the settlement agreed in February 2005 to defer the removal until the end of 2008, allowing additional time for project-removal permitting and giving PacifiCorp two more years to earn power generation revenue to cover $3.3 million in unanticipated permitting and mitigation costs.[10]

The Federal Power Act (FPA) governs FERC's licensing and relicensing of non-federal hydropower dams.[11] The FPA's provisions that require FERC to give equal consideration to fish and wildlife protection in its licensing decisions, and to accept as mandatory other resource agencies' license conditions, led directly to the successful removal of the Edwards Dam and the agreement to remove the Condit Dam.[12] In both instances, a renewed license would have required the utilities to construct fishways to allow access to the upstream reaches of the rivers, at a cost two to three times that of removing the dam.[13] In the case of Condit Dam, PacifiCorp would have had to spend over $30 million to retrofit the dam with fish ladders, compared with an estimated $17 million to remove the dam.[14]

But dam removal is no simple matter. A FERC order to decommission a dam involves a host of approvals from other agencies.[15] Three other federal agencies, the State of Washington, and, potentially, the local counties, Klickitat and Skamania, must pass judgment on some aspect of the proposed removal before FERC can issue its order decommissioning the Condit Dam.[16] The counties have been steadfast in their opposition to dam removal since before the 1999 settlement agreement,[17] and litigation related to

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[9] The Forest Service has advised FERC that the proposed dam removal is consistent with the relevant acts it administers, the Columbia River Gorge National Scenic Area Act and the Wild and Scenic Rivers Act. *See infra* notes 180–81 and accompanying text. The Department of the Interior's Fish and Wildlife Service (FWS), which is responsible for management of inland fish, has advised FERC that removal of Condit Dam is not likely to jeopardize the continued existence of bull trout and is not likely to destroy or adversely modify bull trout critical habitat. *See infra* notes 63, 151–58 and accompanying text.

[10] *Condit Dam's Life Extended 2 Years; Two Counties Still Oppose Removal*, COLUMBIAN (Vancouver, Wash.), Feb. 12, 2005, at 1, *available at* 2005 WLNR 2149885.

[11] Federal Power Act, 16 U.S.C. §§ 791(a)-825 (2000); *see* Blumm & Nadol, *supra* note 2, at 82 (discussing the significance of the FPA).

[12] 16 U.S.C. §§ 797(e), 803(j)(1), 811; *see* GROSSMAN, *supra* note 2, at 20–21(describing the development of the Edwards Dam removal plan as a result of relicensing); Blumm & Nadol, *supra* note 2, at 117–24 (discussing removal of Edwards and Condit Dams). *See generally id.* at 90–116 (discussing FPA licensing obligations).

[13] GROSSMAN, *supra* note 2, at 20; Paulson, *supra* note 8.

[14] *See* Paulson, *supra* note 8.

[15] *See* Matthew D. Manahan & Sarah A. Verville, *FERC and Dam Decommissioning*, 19 NAT. RESOURCES & ENV'T 45, 46 (2005) (describing extensive permit requirements for dam relicensing); Margaret B. Bowman, *Legal Perspectives on Dam Removal*, BIOSCIENCE, Aug. 31, 2002, at 739, *available at* 2002 WLNR 5586447 (listing and describing various permit requirements involved in dam removal projects).

[16] *See* Manahan & Verville, *supra* note 15, at 48–49 (describing the complex web of federal and state interactions involved in dam decommissioning).

[17] *See, e.g.*, Klickitat and Skamania Counties' Motion to Intervene and Comments at 4, Condit Hydroelectric Project, FERC No. P-2342-011 (Mar. 27, 2000), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8081971:0 [hereinafter Counties March 2000 Comments] (describing resolution adopted by Klickitat County Commissioners on July 27, 1998 opposing the complete or partial removal of Condit Dam); Kathie Durbin, *Fear and*

FERC's decision—such as challenges by the counties to the state's water quality certification, or over federal preemption of the counties' permitting requirements—could add years to the removal process.[18] These permitting and litigation hurdles remain potentially significant obstacles to finally achieving the removal of the dam, despite the agreement of the principal parties seven years ago. The experience of Condit Dam shows that proponents of dam removal at FERC-licensed dams must be prepared for a potentially long and arduous regulatory process, illustrates the danger to the process of not bringing significant institutional objectors within the settlement, and suggests the need for closer coordination with FERC throughout the settlement process.

In addition to the already daunting regulatory approvals necessary for dam removal, Congress has recently added new procedural requirements that threaten to slow and complicate further the FERC licensing process. In the Energy Policy Act of 2005, Congress amended sections 4(e) and 18 of the FPA, which require FERC to include in licenses any conditions and fishways prescriptions which federal land management agencies specify are necessary to protect a federal reservation or fish and wildlife affected by the dam.[19] The amendments enable any party to the licensing proceeding to propose alternatives to such mandatory conditions and seek trial-type hearings on disputed issues of material fact.[20] While the effect of these amendments and the agency regulations implementing them on an existing settlement like Condit Dam is unclear,[21] their implications for future efforts

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Loathing in Klickitat County: Development vs. Environment, COLUMBIAN (Vancouver, Wash.), June 24, 2001, at 1, *available at* 2001 WLNR 4433999 (reporting on tensions between environmental and development concerns in Klickitat County); Erik Robinson, *Counties Oppose Removal of Dam*, COLUMBIAN (Vancouver, Wash.), Mar. 30, 2000, at 1, *available at* 2000 WLNR 4109544 (reporting on Klickitat County's opposition to Condit Dam removal based on environmental concerns); *see also infra* notes 118–20, 199–204, 206–10 and accompanying text.

18 *See* Manahan & Verville, *supra* note 15, at 45, 49 (listing the variety of steps and constituencies involved in hydropower relicensing).

19 Energy Policy Act of 2005, Pub. L. No. 109-58, § 241, 119 Stat. 594, 674-77; *see also* Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772, 777 (1984) (holding that, under section 4(e) of the FPA, FERC must include in a license any conditions which the Secretary of the Interior prescribes that are reasonably related to the federal reservation within which the dam lies); Am. Rivers v. FERC, 201 F.3d 1186, 1210–11 (9th Cir. 2000) (holding that FPA section 18 requires FERC to adopt fishway prescriptions submitted by other federal agencies). *See generally* Blumm & Nadol, *supra* note 2, at 90–96, 108–16 (discussing *Escondido* and *American Rivers*).

20 Energy Policy Act of 2005 § 241.

21 As discussed in more detail *infra* section III-C, PacifiCorp filed requests for a hearing on a disputed issue of material fact regarding the fish passage facilities prescribed by NMFS and FWS at Condit Dam and proposed an alternative fishway prescription pursuant to the new regulations in December 2005. PacifiCorp's Request for Consolidated Hearing on Disputed Issue of Material Fact No. 1 at 1, Condit Hydroelectric Project, FERC No. P-2342-000 (Dec. 21, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10912099:0 [hereinafter PacifiCorp Hearing Request]; PacifiCorp's Proposed Alternative Prescription, Condit Hydroelectric Project, FERC No. P-2342-000 (Dec. 16, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10912098:0. PacifiCorp proposed a trap-and-haul system to truck migrating fish above Condit Dam as an alternative to the fish ladder the agencies prescribed for upstream passage. *See infra* notes 332–33 and accompanying text. Because of the pending settlement agreement, PacifiCorp requested that NMFS and FWS stay

to remove dams are ominous, potentially allowing a utility, or anti-removal intervenors such as the counties in the case of Condit Dam, to weaken or evade the environmental obligations which the FPA has long imposed on FERC's relicensing decisions.[22]

This Article examines the obstacles that remain before the Condit Dam may finally be removed, and analyzes the potential effects of the 2005 amendments to the FPA on efforts to provide fish passage and remove dams. Section I provides background on the 1999 Condit settlement agreement and the legal framework which led to the settlement. Section II assesses the prospects for overcoming existing regulatory obstacles and bringing the agreement's promise to fruition. Section III examines the 2005 FPA amendments, considering their potential effects on future efforts to prescribe fish passage at major non-federal hydroelectric dams. Section IV concludes that the Condit Dam removal will proceed because of the parties' strongly shared interests in overcoming the remaining obstacles, but that the 2005 FPA amendments are likely to make future dam decommissioning a more costly process for utilities and intervenors, although the amendments are unlikely to be fatal to future dam removal efforts because they do not offer a party opposed to dam removal a significant substantive ground for opposing resource agency fishway prescriptions during relicensing.

II. BACKGROUND

The licensing of dams under the Federal Power Act (FPA) has evolved significantly since Congress first authorized a central hydropower agency to issue licenses in 1920.[23] Condit Dam, built in 1913, did not come within the Federal Energy Regulatory Commission (FERC) licensing scheme until 1968.[24] By the time the dam was due t8 be relicensed in the early 1990s, the

any action on its hearing request until FERC issues a final decision on the proposal to remove Condit Dam. *See* U.S. Department of Commerce, National Oceanic and Atmospheric Administration's National Marine Fisheries Service's Hearing Notice at 2, Condit Hydroelectric Project, FERC No. P-2342-000 (Mar. 17, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10976652:0 [hereinafter NMFS Hearing Notice]; U.S. Department of the Interior's Notice of Schedule for Hearing Requested by PacifiCorp at 2, Condit Hydroelectric Project, FERC No. P-2342-000 (Mar. 15, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10974305:0 [hereinafter FWS Hearing Notice].

[22] *See, e.g.*, Hydropower Reform Coal., Hydropower and the Federal Energy Bill, http://hydroreform.org/energybill.asp (last visited May 30, 2006) (listing the Coalition's reasons for opposing the Energy Policy Act of 2005).

[23] *See* Blumm & Nadol, *supra* note 2, at 85–90 (describing the history of the FPA and FERC); *infra* section II.B.

[24] *See* Fed. Energy Reg. Comm'n, Office of Hydropower Licensing Final Envtl. Impact Statement at 3-57, Condit Hydroelectric Project, FERC No. P-2342-005 (1996) [hereinafter FERC 1996 FEIS]; Bender, *supra* note 2, at 209; Bonham, *supra* note 7, at 99 & n.13. In 1965, the Supreme Court expanded the interpretation of the FPA licensing provisions to reach hydropower dams on headwaters of navigable streams, holding that the 1935 amendments to the FPA were based on Congress's power under the Commerce Clause, rather than on its more limited power over navigation. Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 95–96 (1965). After *Union Electric*, the Federal Power Commission (FPC) encouraged unlicensed hydropower projects to file license applications, even if constructed before the enactment of the FPA in 1935. *See* Max J. Mizejewski, Comment, *FERC's Abdication of Jurisdiction over*

law had evolved to allow federal fish agencies to require fish passage as a condition of a new license for Condit Dam, ultimately rendering the project uneconomical.[25] This Section describes the history of Condit Dam, the potential benefits and costs of removing it, the FERC licensing process and mandatory fishway prescriptions which led to the dam's demise, and the terms of the settlement which promises removal of Condit Dam by the end of this decade.

A. Condit Dam and the Resources of the White Salmon River

The Northwestern Power Company, a predecessor of PacifiCorp, built Condit Dam in 1913 to provide hydroelectric power for local paper processing operations and to anticipate the energy needs of a growing regional population.[26] The dam—125 feet high and 471 feet long—sits just 3.3 miles above the confluence of the White Salmon River and the Columbia River.[27] Condit Dam, and the stretch of the White Salmon River below it lie within the Columbia River Gorge National Scenic Area.[28] By damming the White Salmon River, Condit Dam created Northwestern Lake, which extends more than a mile-and-a-half upriver behind the dam.[29] Condit Dam, Northwestern Lake, and the White Salmon River below River Mile (RM) 5.3 straddle the border between Klickitat and Skamania Counties, in south-central Washington.[30] Above Northwestern Lake, the White Salmon River flows freely for about forty miles from its headwaters on the southern slope of Mount Adams.[31]

The White Salmon River supported significant runs of wild fish before Condit Dam blocked their upstream passage.[32] Although there appears to be no extant quantification of the wild runs before 1913, anecdotal evidence, including the collection of over seven million fall chinook eggs at a hatchery at the mouth of the White Salmon River in 1906, as well as the historical existence of two native villages on the river supported through fishing, indicates the abundance of the natural runs.[33] Before the construction of Condit Dam, a variety of fish—steelhead trout, fall tule and spring chinook, coho, and possibly chum salmon—had access to spawning habitat in the upper White Salmon River.[34] The importance of these runs was evident at

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Hydroelectric Dams on Nonnavigable Rivers: A Potential Setback for Comprehensive Stream Management, 27 ENVTL. L. 741, 743 (1997) (describing the FPC's approach to unlicensed hydropower projects on nonnavigable waters after the *Union Electric* decision).

[25] *See* Bonham, *supra* note 7, at 129–30; *infra* notes 96–101 and accompanying text.

[26] *See* FERC 1996 FEIS, *supra* note 24, at 2-7; Bonham, *supra* note 7, at 109–10.

[27] FERC 1996 FEIS, *supra* note 24, at 2-4.

[28] *See id.* at 3-1; Bonham, *supra* note 7, at 105.

[29] FERC 1996 FEIS, *supra* note 24, at 2-1.

[30] *See* WASH. DEP'T OF ECOLOGY, CONDIT DAM REMOVAL, DRAFT STATE ENVIRONMENTAL POLICY ACT SUPPLEMENTAL ENVTL. IMPACT STATEMENT 1-1 and fig.1-1 (2005) [hereinafter Ecology 2005 DSEIS].

[31] *See id.* at Fig.1-1; FERC 1996 FEIS, *supra* note 24, at 3-1 to 3-2.

[32] *See* FERC 1996 FEIS, *supra* note 24, at I-38 (comments by Columbia Basin Fish & Wildlife Authority); Bonham, *supra* note 7, at 107 n.53.

[33] *See* Bonham, *supra* note 7, at 107 nn.53–54.

[34] *See Big White Salmon Subbasin Plan Prepared by the Yakama Nation* 1, *available at*

the time of construction. As originally built, Condit Dam included a wooden fish ladder to facilitate fish passage to the upper river.[35] This ladder was destroyed by spring run-off floods shortly after construction.[36] A replacement concrete ladder suffered the same fate, and in 1919 the dam owner absolved itself from responsibility for further fish passage by paying the Washington Fish Commissioner $5,000, to be used for a hatchery to mitigate the loss of fish access to the upper White Salmon.[37] Although fall chinook, coho, and steelhead continue to spawn in small numbers in the White Salmon River below Condit Dam, these species are no longer present above it, and even the fish that return to the lower river originate mostly in hatcheries.[38] By blocking access to the upstream spawning grounds, Condit Dam has almost completely eliminated the natural fish runs in the White Salmon River.

As a source of hydroelectric power, Condit Dam's generating capacity of just under fifteen megawatts (MW) is tiny when compared to the 1,077 MW rated capacity of nearby Bonneville Dam or the 6,779 MW rated capacity of Grand Coulee Dam, farther up the Columbia River.[39] Condit's contribution to regional power generation, and to PacifiCorp's own operations, is negligible.[40] In 1995, when FERC formally began to evaluate the removal of Condit Dam as an option in its environmental review process, the dam accounted for less than one-quarter of one percent of PacifiCorp's 6,647 MW company-owned power generating capacity, and just under 1.5% of the 1,015 MW capacity of PacifiCorp's hydropower projects.[41] Removal of Condit Dam

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http://www.nwcouncil.org/Library/recommend/big_white_salmon_trp.doc [hereinafter Big White Salmon Plan].

[35] *See* FERC 1996 FEIS, *supra* note 24, at 3-28; Bender, *supra* note 2, at 209 n.96; Bonham, *supra* note 7, at 110.

[36] *See* FERC 1996 FEIS, *supra* note 24, at 3-28.

[37] *See id.*; Bender, *supra* note 2, at 209 n.96; Bonham, *supra* note 7, at 110. Government fish managers have routinely embraced hatcheries as a means by which the Pacific Northwest could have salmon and hydropower dams, believing that hatcheries could compensate for loss of habitat. *See* Matthew Johnson, *What Would the Salmon Say? An Argument for Supplementation to Help Rebuild Naturally Reproducing Salmon Populations in the Columbia Basin*, 24 PUB. LAND & RESOURCE J. 45, 49–50 (2004). Despite the agreement absolving the dam owner from providing fish passage, in 1924 and 1925 Condit Dam was the site for tests of an experimental basket lift system—effectively an escalator for fish—conducted by John Nathan Cobb of the College of Fisheries at the University of Washington. But because migrating salmon could not be enticed to enter the wire baskets for transport up and over the dam, the tests proved a failure. *See* J. Richard Dunn, *John Nathan Cobb (1868-1930)*, 65 MARINE FISHERIES REV. 31 (June 22, 2003), *available at* 2003 WLNR 13715561.

[38] *See* Ecology 2005 DSEIS, *supra* note 30, at 4.3-2 & fig.4.3-2; FERC 1996 FEIS, *supra* note 24, at 3-17 to 3-21. A variety of studies in the 1980s and 1990s estimated the average annual return of fall chinook to the lower White Salmon River at 705 fish, of which about 10% were naturally produced, and a coho run of approximately 350 fish per year, of which 10% were wild fish. FERC 1996 FEIS, *supra* note 24, at 3-17, 3-19 to 3-20.

[39] *See* FERC 1996 FEIS, *supra* note 24, at 2-4; BONNEVILLE POWER ADMIN., BPA FAST FACTS 2 (May 2005), *available at* http://www.bpa.gov/corporate/about_BPA/Facts/FactDocs/BPA_Facts_2004.pdf. Condit Dam's rated capacity in 1996 was 14.7 MW. FERC 1996 FEIS, *supra* note 24, at 2-4.

[40] Bender, *supra* note 2, at 206; Bonham, *supra* note 7, at 110–11.

[41] *See* FERC 1996 FEIS, *supra* note 24, at 1-5 to 1-6. Condit Dam's contribution to PacifiCorp's operations was even less significant in 2005, with PacifiCorp's total generation

will have no appreciable effect on PacifiCorp's capacity to supply power to its customers in the Pacific Northwest.[42]

In contrast to the minimal contribution of the dam to the power grid, the aquatic, cultural, and recreational resources of a free-flowing White Salmon River would be substantial.[43] All of the species of salmon and trout that use the White Salmon River are listed as threatened or endangered under the Endangered Species Act, and the National Marine Fisheries Service (NMFS or NOAA Fisheries)[44] has designated the lower 3.3 miles of the river as critical habitat for threatened chinook, chum, and steelhead.[45] The Washington Department of Ecology (Ecology) estimates that removal of Condit Dam would open up fourteen miles of new salmon habitat and thirty-three miles of new steelhead habitat in the upper White Salmon River and its tributaries above where the dam now sits.[46] Production potential studies have estimated that up to 9,000 chinook and coho salmon and about 800 steelhead could reestablish themselves in the river, and that chum and pink salmon runs could return as well.[47]

Restoration of natural river flows and return of salmon and steelhead to the upper White Salmon River will also have important benefits for tribal fishing rights and cultural resources. Members of four tribes currently exercise treaty fishing rights at "usual and accustomed" fishing sites on the mainstem and tributaries of the Columbia River.[48] Traditional fisheries

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capacity having grown to 8,426 MW. *See* PacifiCorp, PacifiCorp Facts, http://www.pacificorp.com/Navigation/Navigation3877.html (last visited May 30, 2006).

42 *See* FERC 1996 FEIS, *supra* note 24, at 1-5 to 1-6; Bonham, *supra* note 7, at 116.

43 *See* Bender, *supra* note 2, at 206–07; Bonham, *supra* note 7, at 106–09.

44 NMFS, a subagency of the National Oceanic and Atmospheric Administration within the Department of Commerce, changed its name to "NOAA Fisheries" in 2000. *See NMFS Is Now: NOAA Fisheries*, 19/20 MMPA BULLETIN 1, 1 (2000) (describing reasons for name change). However, the agency continues to be known by both names, even styling itself on its internet home page as "NOAA's National Marine Fisheries Service (NOAA Fisheries Service)." *See* NOAA Fisheries Service, http://www.nmfs.noaa.gov (last visited May 30, 2006). This article uses the terms NMFS and NOAA Fisheries interchangeably to describe the agency, using a term in the text that is consistent with the term used to describe the agency in a particular cited document where possible.

45 Ecology 2005 DSEIS, *supra* note 30, at 4.3-12 to -13, C-17, C-21. The White Salmon River below Big Brother Falls (from RM 16.2 to the junction with the Columbia River) is designated critical habitat for threatened bull trout. *See id.* at C-21.

46 *Id.* at 4.3-9. Ecology assumes that BZ Falls, at RM 12.4 on the mainstem White Salmon, will block salmon passage, and that Big Brother Falls, at RM 16.2, will block steelhead passage. *Id.* Other studies have suggested that steelhead may be able to pass Big Brother Falls during high flows to reach additional upstream habitat. *See* Big White Salmon Plan, *supra* note 34, at 1.

47 *See* Columbia Basin Fish & Wildlife Authority's Joint Agency/Tribal Plan for Ecosystem Restoration of the White Salmon River at 13–16, Condit Hydroelectric Project, FERC No. P-2342-005 (Aug. 11, 1995), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8328181:0.

48 FERC 1996 FEIS, *supra* note 24, at 3-26. The tribes are the Confederated Tribes and Bands of the Yakama Indian Nation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes of the Umatilla Reservation of Oregon, and the Nez Perce Tribe of Idaho. *Id.* The Yakama Indian Nation tribal council changed the spelling of the Tribe's name from "Yakima" to "Yakama" in 1994 to match the spelling in its treaty with the United States government. David H. Getches, *Changing the River's Course: Western Water Policy Reform*, 26 ENVTL L. 157, 166 n.66 (1996).

existed at several places on the White Salmon River, and the tribes' right to harvest fish on the upper White Salmon River is still in effect, notwithstanding that no fish have passed up the river in over ninety years.[49] The management plans prepared by the United States Forest Service (Forest Service) for federally-protected portions of the White Salmon River expressly acknowledge that members of the Yakama Indian Nation are entitled to access to salmon and steelhead-bearing locations on the White Salmon River.[50] The Yakama Nation believes that the White Salmon River itself, along with burial grounds and camp sites in the area, are cultural resources of the tribe.[51]

Recreational use of the White Salmon River will be enhanced by removing Condit Dam. More than two-thirds of the river currently benefits from federal protection, including the 3.3 miles within the Columbia River Gorge National Scenic Area and another 27.7 miles in two segments upstream from Condit Dam designated as wild or scenic rivers.[52] If PacifiCorp is ultimately successful in removing Condit Dam, the entire White Salmon River may become federally-protected to preserve access to these recreational resources.[53] Kayakers and rafters believe that the uninundated parts of the White Salmon River above Condit Dam will offer some of the finest whitewater river running experiences in the Pacific Northwest.[54] Removal of Condit Dam will open up another seven miles of whitewater to paddling and floating, potentially benefiting local economies as more outdoor enthusiasts take advantage of the enhanced opportunities on the White Salmon.[55]

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[49] *See id.*

[50] *Id.* at 3-59.

[51] *Id.* The White Salmon River is part of the territory that the Yakama Indian Nation ceded to the United States in 1855 in exchange for, among other considerations, recognition that the Tribe reserved its rights to fish at "usual and accustomed" fishing sites. *See* Treaty Between the United States and the Yakama Nation of Indians art. III, June 9, 1855, 12 Stat. 951, 952–53; Press Release, Columbia River Inter-Tribal Fish Comm'n, Condit Dam Removal Study (Apr. 29, 1997), *available at* http://www.critfc.org/oldsite/text/29APR97.HTM. Prior to construction of Condit Dam, tribal members fished at Husum Falls, at about RM 8, where they maintained a longhouse—a religious gathering place. *Id.*

[52] Congress protected the White Salmon River below Condit Dam and designated the 7.7 mile segment of the river above Northwestern Lake as part of the National Wild and Scenic River System in 1986, and added the uppermost 20 miles of the White Salmon River in 2005. *See* Columbia Gorge National Scenic Area Act, Pub. L. No. 99-663 § 13(c), 100 Stat. 4274, 4294 (1986) (codified as amended at 16 U.S.C. § 1274(a)(61)); Upper White Salmon River Wild & Scenic Rivers Act, Pub. L. No. 109-44 § 2, 119 Stat. 443, 443 (2005) (codified as amended at 16 U.S.C. § 1274(a)(167) (2000)); FERC 1996 FEIS, *supra* note 24, at 3-42.

[53] A 1997 Forest Service report recommended designating the entire length of the river above Northwestern Lake as wild and scenic, but the 18.4 mile section between the stretches designated in 1986 and 2005 proved too difficult to include in the 2005 legislation because of concerns expressed by private land holders within that corridor. Designation of the entire length of the White Salmon River as wild and scenic remains a long-term goal. *See* American Whitewater, Extending Wild and Scenic River Status on the White Salmon River (WA), http://www.americanwhitewater.org/archive/article/553 (last visited May 30, 2006).

[54] *See* American Whitewater, Condit Dam (White Salmon River WA) Removal Agreement, http://www.americanwhitewater.org/archive/article/4 (last visited May 30, 2006) [hereinafter American Whitewater Settlement Article].

[55] *Id.*; *see* Bonham, *supra* note 7, at 108–09.

Although there are evident benefits to the fish, the tribes, and recreational users from the removal of Condit Dam, the possibility of a renewed White Salmon River exists only because non-federal dam owners must periodically renew their operating licenses, and the licensing process has evolved to require substantial protection of fish and wildlife as part of the renewed licenses.[56] The torturous process of deciding the conditions under which the Condit hydropower project would continue to operate—or whether it could continue at all—began in 1991, when PacifiCorp submitted an application to FERC to relicense Condit Dam.[57]

B. The Federal Power Act and Dam Relicensing

The FPA gives FERC the authority to license the operation of non-federal hydropower dams located on the navigable waters of the United States.[58] Although the FPA has authorized federal agencies responsible for the protection of fish and federal reservations to include license conditions to protect those resources since 1920,[59] the hydropower licensing agency and the statute it administered focused almost exclusively on the generation of hydroelectric power during the six decades after 1920, without giving serious consideration to the environmental effects of dams.[60] In the 1980s, Congress and the courts began to force FERC to balance environmental and power production interests in its licensing decisions.[61]

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[56] *See generally* Blumm & Nadol, *supra* note 2 (describing history of FPA and environmental protection now required as part of relicensing).

[57] *See* Ecology 2005 DSEIS, *supra* note 30, at 2-1.

[58] *See* Federal Power Act, 16 U.S.C. § 797(e) (2000). The congressional grant of authority extends to hydropower dams "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." *Id.* Congress originally enacted the FPA in 1920 as the Federal Water Power Act (FWPA), Pub. L. No. 66-280, 41 Stat. 1063 (1920), collecting hydropower dam licensing authority from among various federal agencies and centralized licensing decisions in a single new agency, the FPC. *See* Blumm & Nadol, *supra* note 2, at 85–86. In 1935, Congress amended the FWPA through Title II of the Public Utility Act of 1935, making the former FWPA Part I of the FPA and adding Parts II and III to the FPA, dealing with regulation of electric utility companies. Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (1935) (codified as amended at 16 U.S.C. §§ 791a–825); *see* Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 91 n.2 (1965). When Congress created FERC in 1977, the new agency assumed the functions of the FPC. Department of Energy Organization Act, Pub. L. No. 91-95, § 401, 91 Stat. 565, 582 (1977) (codified as amended at 42 U.S.C. § 7171 (2000)); *see* Blumm & Nadol, *supra* note 2, at 85; Sarah C. Richardson, Note, *The Changing Political Landscape of Hydropower Project Relicensing*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 499, 504 n.31 (2000).

[59] *See* Federal Water Power Act §§ 4(d), 18, 41 Stat. 1065-66, 1073. The 1935 amendments moved section 4(d) to section 4(e). *See* Public Utility Act, 49 Stat. at 840; *infra* note 67 and accompanying text.

[60] *See* Blumm & Nadol, *supra* note 2, at 86–87; Nancy K. Kubasek & Chaz A. Giles, *Dammed to Be Divided: Resolving the Controversy over the Destruction of the Snake River Dams and Providing a Model for Future Decision-Making*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 675, 682–83 (2001).

[61] *See generally* Blumm & Nadol, *supra* note 2 (describing legislation and judicial decisions that have eroded FERC's discretion to ignore environmental considerations in licensing decisions).

Congress amended the FPA in the 1986 Electric Consumer Protection Act[62] to require FERC to include license conditions to "protect, mitigate damages to, and enhance, fish and wildlife" affected by a hydropower project based on recommendations from the Department of Commerce through NMFS, the Department of the Interior's United States Fish and Wildlife Service (FWS), and state fish and wildlife agencies.[63] However, the 1986 amendments left FERC discretion to reject such recommendations if it determined that the recommendations were inconsistent with other FPA provisions.[64] Even in the face of clear congressional intent that the hydropower licensing process ensure the protection of fish and wildlife, FERC has failed to fully embrace environmental protection where the FPA allows it discretion over license conditions.[65]

Several judicial opinions have construed the FPA to eliminate FERC's discretion to reject certain environmental recommendations by certain resource management agencies.[66] In 1984, the Supreme Court held that section 4(e) of the FPA authorizes the agency responsible for managing a federal reservation, such as an Indian reservation or national forest, to impose license conditions on FERC hydropower projects that the land management agency deems "necessary for the adequate protection and utilization of such reservations,"[67] even where FERC disagreed with the agency's conditions.[68] Two subsequent decisions recognized that a state has the authority to enforce its water quality standards by requiring certification under section 401 of the Clean Water Act (CWA) as part of a FERC license, and that FERC has no discretion to reject state section 401 conditions.[69] Thus any FERC licensing or relicensing triggers the section 401 certification process, and any limitations contained in the state's certification become conditions of the FERC license.[70]

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62 Electric Consumer Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (codified in scattered sections of 16 U.S.C. §§ 792-828(c) (2000)).

63 16 U.S.C. § 803(j)(1) (2000); *see* Blumm & Nadol, *supra* note 2, at 87–88. The Department of the Interior generally exercises its authority to develop hydropower license conditions under the FPA through the FWS, which is typically responsible for management of inland fish issues, while the Department of Commerce exercises its fish conditioning authority through NMFS/NOAA Fisheries, which administers anadromous fish. *See* Bonham, *supra* note 7, at 117.

64 16 U.S.C. at § 803(j)(1) (2000).

65 *See* Blumm & Nadol, *supra* note 2, at 88 (observing that throughout FERC's history it often has failed adequately to consider fish and wildlife concerns).

66 *See generally id.* at 90–116 (discussing cases limiting FERC discretion to reject certain environmental conditions proposed by federal and state resource agencies).

67 16 U.S.C. § 797(e) (2000).

68 Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 777-79 (1984); *see* Blumm & Nadol, *supra* note 2, at 90–91.

69 Pub. Util. Dist. No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 722-23 (1994) (states may require certification that a hydropower project meets state water quality standards as part of the FERC licensing process); Am. Rivers v. FERC, 129 F.3d 99, 110-11 (2d Cir. 1997) (FERC lacks authority to reject state-imposed conditions pursuant to CWA section 401 water quality certification); *see* Blumm & Nadol, *supra* note 2, at 96–108 (discussing these two cases).

70 Blumm & Nadol, *supra* note 2, at 97. The Supreme Court upheld the states' authority to require section 401 certification of hydropower dams in S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 126 S. Ct. 1843, 1853 (2006). The 2005 FPA amendments, discussed *infra* section III, do not

Finally, section 18 of the FPA provides that FERC "shall require the construction, maintenance, and operation by a licensee at its own expense of such . . . fishways as may be prescribed by" FWS or NOAA Fisheries.[71] Congress has clarified that a "fishway" consists of "physical structures, facilities, or devices necessary to maintain all life stages" of fish which allow "the safe and timely upstream and downstream passage of fish" past a hydroelectric dam.[72] In 2000, the Ninth Circuit held that FERC lacks discretion to modify or reject resource agency fishway prescriptions under section 18.[73] As discussed in the following section, the ability of resource agencies to add conditions to hydropower licenses to protect fish resulted directly in the decision to remove Condit Dam.[74] And, as discussed below,[75] the mandatory conditioning authority of resource agencies is now threatened by the 2005 FPA amendments.

For environmentalists and government proponents of land and fish resource protection, the FERC relicensing process presents an important opportunity to minimize the detrimental effects of dams on the environment by adding protective conditions, as FERC must relicense nearly 300 hydropower projects by the year 2018.[76] In some cases, including Condit Dam, the costs of the necessary conditions for ensuring fish passage have made the hydropower projects uneconomical, and have led utilities to decide to remove their dams.[77] But, as in the case of Condit, the determination that a new license must include mandatory conditions to protect, mitigate, or enhance fish and wildlife may only be the beginning of a long and complicated process of negotiation and regulatory approval before a dam finally comes down.

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affect the CWA section 401 water quality certification requirement.

71 16 U.S.C. § 811 (2000).

72 Energy Policy Act of 1992, Pub. L. No. 102-486, § 1701(b), 106 Stat. 3008 (1992) (vacating FERC regulatory definition of "fishway" in 18 C.F.R. § 4.30(b)(9)(iii)). FERC's regulatory definition of "fishway" had included only upstream passage. *See* 56 Fed. Reg. 23,108, 23,146 (May 20, 1991). Congress also declared that the Secretaries of Interior and Commerce would have to concur in any future FERC regulatory definition of the term "fishway" for the definition to be valid. Energy Policy Act of 1992 § 1701(b); *see* Blumm & Nadol, *supra* note 2, at 109. FERC has not chosen to define fishway in the Code of Federal Regulations since Congress vacated its definition in 1992.

73 Am. Rivers v. FERC, 201 F.3d 1186, 1210 (9th Cir. 2000); *see* Blumm & Nadol, *supra* note 2, at 112–14.

74 *See infra* notes 96–101 and accompanying text.

75 *See infra* section III.

76 *Hydropower Provisions of the Energy Policy Act of 2005: Hearing on H.R. 1640 Before the Subcomm. on Energy and Air Quality of the House Comm. on Energy and Commerce*, 109th Cong. 4 (2005), *available at* http://energycommerce.house.gov/108/Hearings/02162005hearing1437/Hancock.pdf (testimony of James H. Hancock, Jr., Legislative Affairs Comm. Chairman, Nat'l Hydropower Ass'n). Sections 4(e) and 18 of the FPA create mandatory obligations for FERC to include federal management agency conditions not only in original hydropower license applications, but in applications for relicensing as well. *See, e.g.*, Blumm & Nadol, *supra* note 2, at 116 & n.227 (explaining how litigation has and will continue to change relicensing requirements).

77 *See* Manahan & Verville, *supra* note 15, at 46 (examining how these costs have affected projects); *infra* notes 96–101 and accompanying text.

C. Condit Dam Relicensing and the 1999 Agreement to Remove the Dam

PacifiCorp's predecessor, Pacific Power and Light Company, did not obtain a FERC license to operate the hydropower project at the dam until 1968 because Condit Dam predated the first hydropower licensing statute and did not directly affect river navigation.[78] The 1968 license required certain minimum flows from the dam to protect the operation of a federal fish hatchery at RM 2.0 on the White Salmon River, but made no provision for fish passage.[79] In 1982, the Northwest Power Planning Council (Council) adopted the Columbia River Basin Fish and Wildlife Plan, which called on FERC to order the construction of fish passage facilities at Condit Dam.[80] Neither FERC nor the utility acted on the Council's advice.[81] Echoing the Council's recommendation, federal and state resource management agencies, environmental groups, and the Yakama Indian Nation and Columbia River Inter-Tribal Fish Commission (CRITFC) began promoting either the removal of Condit Dam or the installation of full fish passage facilities to restore wild salmon and steelhead runs in the White Salmon River.[82]

With its FERC license for Condit Dam scheduled to expire in 1993,[83] PacifiCorp began the relicensing process in December 1991 against the backdrop of significant public opposition to continued operation of the dam without fish passage.[84] Despite the FPA's clear requirement that FERC was obliged to ensure that the new license would be the "best adapted . . . for the adequate protection, mitigation, and enhancement of fish,"[85] PacifiCorp's relicensing application included no provision for upstream fish passage.[86] Instead, PacifiCorp proposed increasing the capacity of the Condit project from 14.7 MW to 15.8 MW through power plant upgrades, setting target flows through the dam to enhance fishery conditions below the dam, and undertaking other projects to enhance recreational and cultural resources.[87] From the beginning of the application review process in early 1992, state and

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78 *See supra* notes 24, 58.

79 Bonham, *supra* note 7, at 114 & n.107.

80 NW. POWER PLANNING COUNCIL, COLUMBIA RIVER BASIN FISH & WILDLIFE PROGRAM 7–11 (1982); CHRIS WATSON, RELICENSING THE NORTHWEST: A STUDY OF THE CONDIT HYDROELECTRIC PROJECT 8 (1995); Bender, *supra* note 2, at 211.

81 WATSON, *supra* note 80, at 9; Bender, *supra* note 2, at 211.

82 *See* WATSON, *supra* note 80, at 16–26 (cataloging the reasons why various state and federal agencies and the tribes favored removal of the dam); *see also* FERC 1996 FEIS, *supra* note 24, at 4-59 to 4-60 (listing groups supporting the reintroduction of anadromous fish passage above Condit Dam).

83 The original FERC license for the Condit Hydroelectric Project expired on December 31, 1993. PacifiCorp's Motion to Stay Proceedings in Application for New License at 2, Condit Hydroelectric Project, FERC No. P-2342-005 (Jan. 17, 1997), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8422819:0 [hereinafter Motion to Stay].

84 *See* WATSON, *supra* note 80, at 9–10.

85 16 U.S.C. § 803(a) (2000).

86 *See* Bonham, *supra* note 7, at 126 & n.171 (citing Bender, *supra* note 2, at 211 and FERC 1996 FEIS, *supra* note 24, at 4-60, and explaining that PacifiCorp instead proposed a "trap-and-haul" solution).

87 Fed. Energy Reg. Comm'n, Office of Hydropower Licensing Draft Envtl. Impact Statement at iii, Condit Hydroelectric Project, FERC No. P-2342-005 (1995) [hereinafter FERC 1995 DEIS].

federal fish management agencies, Indian tribes and environmental groups urged FERC to produce an environmental impact statement (EIS) that would take into account a variety of alternatives, including the addition of fish passage at Condit Dam or the dam's removal.[88] FERC agreed in its 1993 scoping document to consider these issues in the EIS.[89]

In 1994, even before FERC issued its draft EIS, PacifiCorp signaled potential flexibility on the issue of fish passage by commissioning a study by an independent biologist as to whether reintroduction of anadromous fish above Condit Dam would be practicable.[90] The study identified many uncertainties and recommended additional research.[91] PacifiCorp offered to fund this research, proposed that the federal and state fish agencies and Tribes conduct the research, and took the position that, if the agencies and Tribes concluded that fish passage at Condit Dam were the best means of enhancing fish production in the White Salmon River, PacifiCorp would install fish ladders.[92]

FERC issued a draft EIS (DEIS) on the Condit project relicensing in November 1995.[93] The DEIS considered the environmental impacts, economic costs, and ecological and social benefits of several alternatives, including PacifiCorp's proposal as well as that proposal with FERC staff and federal management agency enhancements.[94] At the request of the Yakama Indian Nation, FERC staff also developed and included a dam removal alternative.[95] In the DEIS, FERC recommended adoption of the PacifiCorp proposal with the staff and agency enhancements—the most significant of which were federal fish agency prescriptions, under section 18 of the FPA, requiring PacifiCorp to add upstream and downstream fish passage to Condit Dam, along with a regime of flow controls, to restore anadromous fish runs.[96] After public comment, FERC issued its Final EIS (FEIS) in October 1996, reiterating essentially unchanged the action recommendation in the DEIS that incorporated the upstream and downstream fish passage facilities which FWS and NMFS prescribed under section 18.[97]

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88 WATSON, *supra* note 80, at 2, 39–40; *see also* American Whitewater Settlement Article, *supra* note 54 (describing American Whitewater's 1992 comments to FERC urging that the Commission consider dam removal).

89 *See* WATSON, *supra* note 80, at 40 & n.161 (citing Fed. Energy Reg. Comm'n, Scoping Document 2: Condit Hydroelectric Project Environmental Impact Statement, FERC No. 2342-005, at 16 (1993)).

90 *Id.* at 12–13. A local newspaper editorial praised the company's shift from a position opposing fish passage at Condit Dam as a "more enlightened approach." *Id.* at 12 (quoting *Old Dams, New Prospects*, THE OREGONIAN, Aug. 7, 1994, at K2).

91 *Id.*

92 *Id.* at 13–14, 13 n.45 (citing PacifiCorp sources).

93 FERC 1995 DEIS, *supra* note 87.

94 *Id.* at vii; *see infra* note 96.

95 FERC 1996 FEIS, *supra* note 24, at 2-1. Several other dam removal proponents, including NMFS, the Washington Department of Fish and Wildlife, and CRITFC, also encouraged FERC to include an analysis of the dam removal option. WATSON, *supra* note 80, at 39–40.

96 FERC 1995 DEIS, *supra* note 87, at viii-x, 2-32 to 2-35. The prescription for upstream passage called for installation of an Ice Harbor fish ladder. *See id.* at 2-32 to 2-33.

97 FERC 1996 FEIS, *supra* note 24, at ix-xii, 2-35 to 2-38, H-9 to H-13. The only change was the addition of a fish counting station at the dam. *See id.* at xi. In the FEIS, FERC rejected a PacifiCorp proposal, in response to the DEIS, which offered to postpone the powerhouse

The section 18 prescriptions in FERC's adopted alternative doomed Condit Dam.[98] FERC estimated the cost of the required improvements to be close to $30 million, three times the cost of PacifiCorp's original capacity upgrade-plus-enhanced minimum flows proposal.[99] As a result of the mandatory fish passage prescriptions that would be included in a new license, Condit Dam changed from a project that provided marginal economic benefits to PacifiCorp into a money loser for the utility.[100] In comments on the DEIS, PacifiCorp acknowledged that operation of Condit project with the prescribed conditions would be "uneconomical," and that such requirements would require the utility to consider decommissioning the dam.[101] In response to the FEIS, PacifiCorp began informal discussions with several interested parties regarding potential dam removal and, in cooperation with the Yakama Indian Nation, engaged an independent consultant to study dam removal alternatives.[102] In January 1997, PacifiCorp asked FERC to stay the proceedings on its license renewal application while settlement negotiations proceeded.[103]

The settlement negotiations would take nearly three years. When the negotiations began, PacifiCorp estimated the cost of dam removal at between $18 million and $58.8 million.[104] As early as March 1997, at the initial meeting of the interested parties, PacifiCorp indicated that, although it considered the estimated cost of dam removal to be too high, removal might be possible if the Condit project could continue to operate for a period of time to generate receipts to fund the removal.[105] At the same meeting, the negotiating parties expressed support for either dam removal or fishway conditions, but there was no support for the two other alternatives the company suggested: a trap-and-haul fish passage system or a habitat trust fund.[106]

An initial study of dam removal alternatives, commissioned by PacifiCorp, the Yakama Indian Nation, and CRITFC, estimated removal costs

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enhancements, adopt a "trap and haul" system for upstream passage of fish, and install a screen bypass system for downstream passage, at a total cost of over $15 million. *See id.* at I-71 to I-74.

98 *See* Bonham, *supra* note 7, at 121–22, 132.

99 *See* FERC 1996 FEIS, *supra* note 24, at C-1 to C-2 (estimating total capital costs for upstream and downstream fish passage, spillway modification, gravel enhancement, and PacifiCorp's operational enhancements to be $28.59 million, and the capital costs for PacifiCorp's proposal alone to be $9.39 million).

100 Bonham, *supra* note 7, at 121 & n.146, 122 & nn.127–48.

101 FERC 1996 FEIS, *supra* note 24, at I-71.

102 *See* Motion to Stay, *supra* note 83, at 3.

103 *Id.* at 1–2.

104 PacifiCorp's Status Report Regarding Condit Project Activities, Condit Hydroelectric Project, FERC No. P-2342-005 (Apr. 15, 1997), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=9064065:0. The higher figure was the estimate for the removal method analyzed in FERC's FEIS, which involved dredging and land disposal of the sediments which had accumulated behind Condit Dam and sequential removal of portions of the dam, a process the Commission estimated might take five years. *Id.*; FERC 1996 FEIS, *supra* note 24, at B-1; *see also* Bonham, *supra* note 7, at 128 (noting that NMFS had estimated dam removal costs to be under $10 million).

105 Summary of Condit Hydro Project March 14 Meeting in Olympia, Washington at 2, attached to PacifiCorp's Status Report Regarding Condit Project Activities, *supra* note 104, 4–6

106 *Id.*

to be between $18 million and $37 million.[107] In May 1998, a revised engineering study estimated that PacifiCorp could remove Condit Dam for about $10.4 million by blasting a tunnel through the base of the dam, allowing river erosion to flush the approximately 1.57 million cubic yards of sediment from the reservoir, and then breaking up and hauling away the dam's 30,000 cubic yards of concrete.[108] This became the "selected approach" in the settlement agreement.[109]

Negotiations continued during late 1998 and 1999, as the parties sought a "middle ground" that would 1) allow PacifiCorp to continue to generate power at Condit to fund the dam removal and associated activities, 2) provide certainty to the environmental intervenors that PacifiCorp would remain responsible for and complete the dam removal, and 3) promise the utility, its customers, and its shareholders that it would be able to escape from an uneconomic project.[110] The settlement agreement, announced on September 22, 1999, included a removal plan using the selected approach and a $17.15 million cap on project removal costs.[111] If project removal costs should exceed this cap, the agreement released PacifiCorp from further obligation to finance removal of the dam.[112]

The settlement agreement called for PacifiCorp to cease generating power at Condit by October 1, 2006, begin project removal in October 2006, and complete dam removal by December 31, 2007.[113] Almost eight years after PacifiCorp applied to relicense Condit Dam, it had agreed with the vast majority of the interested parties—with the significant exceptions of Klickitat and Skamania Counties—to remove the dam and restore the natural flow of the White Salmon River.

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107 PacifiCorp et. al. Condit Hydroelectric Project Removal Initial Assessment at 1–3, Condit Hydroelectric Project, FERC No. P-2342-005 (Apr. 28, 1997), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=38469:0.

108 PacifiCorp's Condit Hydroelectric Project Removal Summary Report Engineering Considerations at 1–2, 7, Condit Hydroelectric Project, FERC No. P-2342-005 (June 19, 1998), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8132110:0.

109 Condit Settlement, *supra* note 6, at Removal Plan Summary 7–8.

110 American Whitewater Settlement Article, *supra* note 54.

111 *See* Condit Settlement, *supra* note 6, at 5–7 (including a breakdown of the cost cap allowing $13.65 million for engineering and demolition costs, $2 million for permitting costs, and an additional $1.5 million for use by the Yakama Indian Nation for fishery conservation and for the enhancement of regional native fishing sites); Blumm & Nadol, *supra* note 2, at 123 (discussing settlement agreement capping liability at $17.2 million).

112 Condit Settlement, *supra* note 6, at 8. FERC has questioned whether a utility attempting to remove a dam can agree to such a cost cap and whether the Commission would include such a condition in an amended license or a surrender order. PacifiCorp, 97 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,348, 62,627 (2001).

113 Condit Settlement, *supra* note 6, at 7. Notwithstanding the schedule in the settlement agreement, which called for power production to cease in October 2006 and complete dam removal by December 31, 2007, the settlement provided that PacifiCorp could continue to generate power until FERC issued an amended license, and that any party could withdraw from the agreement for any of several reasons, including FERC's failure to issue a timely amended license, or a failure to obtain necessary permits. *See id.* at 8–10 (specifying when withdrawal is permissible). If PacifiCorp withdrew, the settlement agreement would terminate, and the relicensing process which had been held in abeyance would be restored to its 1997 status. *Id.* at 10.

III. OBSTACLES TO DAM REMOVAL

The 1999 settlement agreement was only the beginning of a long and difficult process of obtaining the necessary regulatory approvals to actually remove the dam, a process that continues to drag on, and which has not produced final approvals from the relevant agencies. This section examines the obstacles that the settling parties have had to, and must yet, overcome to realize the settlement agreement's goal of a free-flowing river, and whether those obstacles could ultimately thwart that goal.

A. Opposition to the Settlement Agreement and FERC Inaction

PacifiCorp's first step implementing the settlement agreement was to present it to FERC, which had not been involved in the settlement process.[114] On October 21, 1999, PacifiCorp filed the settlement agreement with FERC, asking that the Commission approve it and amend the existing license to extend the license term through October 1, 2006, subject to the terms and conditions of the settlement agreement.[115] PacifiCorp optimistically requested that FERC approve the settlement by the end of 1999, so that FERC could proceed expeditiously to supplement its FEIS and engage in Endangered Species Act (ESA) section 7 consultation with the federal fish management agencies.[116] Instead, the process bogged down in the first of many lengthy agency delays.

In February 2000, FERC reopened the removal proceedings to intervention by interested parties after receiving comments opposing the proposed removal, including a submission by then Senator Slade Gorton (R-Wash.) on behalf of a constituent.[117] The principal objections to the removal proposal came from Skamania and Klickitat Counties, local residents along Northwestern Lake, and the White Salmon Conservation League and White Salmon River Steelheaders, expressing concern with the short-term environmental effects of the released sediment on the lower river, as well as aesthetic harms to riparian residents and the loss of the trout fishery in Northwestern Lake.[118] The counties contended that they had never been

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114 *See* Bonham, *supra* note 7, at 125–26 (discussing the collaborative settlement option).

115 Condit Settlement, *supra* note 6, at 1.

116 *See id.* at 6 (suggesting that FERC could engage in section 7 consultation after action on the settlement); *infra* section II.B.1.a (discussing federal fish management agencies' consultation requirements).

117 *See* Fed. Energy Reg. Comm'n, Office of Hydropower Licensing Final Envtl. Impact Statement at 4–5, Condit Hydroelectric Project, FERC No. P-2342-000 (2002) [hereinafter FERC 2002 DEIS]. [hereinafter FERC 2002 FSEIS] (listing parties that filed timely motions to intervene in the settlement proceeding); *see also* Letter from Sen. Slade Gorton (R-Wash.) to Don Chamblee, Dir. of Cong. Affairs, FERC (Nov. 22, 1999), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8420681:0 (enclosing letter from constituent property owner near Condit Dam objecting to limitation on comment period).

118 *See, e.g.*, White Salmon Conservation League et. al. Comments Contesting Amendment of License and Approval of Settlement Agreement at 4–12, Condit Hydroelectric Project, FERC No. P-2342-011 (Mar. 24, 2000), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8421013:0 (discussing concerns of counties). *See also* Becky Blanton, *PacifiCorp, State and Federal Agencies Accused of Conspiracy*, THE SIERRA TIMES, Nov. 30, 2001,

invited to participate in the "closed door" negotiations, that there had been no representatives of the local interest at the table, and that therefore "a significant public interest was missing during the settlement discussions."[119] In addition to listing reasons for not removing the dam, the counties urged FERC to require dredging and land disposal of sediments in the reservoir instead of the "blow and go" removal proposed by the settling parties if the Commission decided to order dam removal.[120] PacifiCorp and other parties to the settlement agreement, on the other hand, urged FERC to move forward quickly on their proposal, noting that invitations to participate in the settlement negotiations had been sent to the objecting parties, and that most of those parties' objections already had been addressed in the 1996 FEIS.[121] The absence of the counties from the settlement agreement and their subsequent opposition to dam removal and efforts to burden the process with local permitting requirements and potential litigation[122] illustrate the critical importance for expeditious dam removal of including in the settlement any governmental stakeholder with the capacity to obstruct the process, and the danger of delay and added costs of not obtaining unanimous governmental consent at the settlement stage.[123]

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http://www.sierratimes.com/archive/files/nov/30/columbia.htm (last visited Mar. 14, 2006) (describing opposition to dam removal). The counties and the two commenting organizations also became intervenors in the settlement proceeding. FERC 2002 FSEIS, *supra* note 117, at 4–5.

119 Counties March 2000 Comments, *supra* note 17, at 6, 27–28. The counties also claimed that the local communities were "shocked" when the settlement was announced, learning only then that the negotiations had shifted from deciding what the conditions of relicensing should be to actual dam removal. *Id.* at 6, 28.

120 *See id.* at 28 (requesting that excess sediment be removed if the dam were breached); Erik Robinson, *Plan to Remove Dam Runs into Delays*, COLUMBIAN (Vancouver, Wash.), May 18, 2001, at 1, *available at* 2001 WLNR 4674615 (discussing plan to use explosives to remove the dam).

121 *See* Response of American Rivers et al. to Comments Opposing the Condit Dam Relicensing Offer of Settlement at 2–6, Condit Hydroelectric Project, FERC No. P-2342-011 (Apr. 11, 2000), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8077500:0 (stating that most objectors had a chance to participate and that many of their objections were addressed in the EIS). Despite the settling parties' request, FERC did not begin its supplemental National Environmental Policy Act (NEPA) review of the proposed removal action until July 2000. *See* Letter from J. Mark Robinson, Dir., Div. of Envtl. and Eng'g Review, FERC, to Robert A. Nelson, Counsel for PacifiCorp (July 5, 2000), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8056480:0.

122 *See infra* notes 199–202, 206–12 and accompanying text.

123 The circumstances of Condit Dam contrasted with Portland General Electric's application in 2002 to decommission its Bull Run hydropower project in which the city nearest to the dams being removed—Sandy, Oregon—was a party to the settlement, there was no local government opposition, and the removal proposal was presented to FERC before the Commission performed any environmental review. *See infra* note 135. With unanimity of the parties, and more particularly of all the governmental entities involved, FERC granted a license surrender order within 18 months of receiving Portland General Electric's surrender application and settlement agreement. *See id.*

In another case, local opposition prevented the removal of a small dam in Maine, even after FERC authorized surrender of the hydropower license and removal of the dam. *See* Manahan & Verville, *supra* note 15, at 49. FERC granted a surrender order for the 150 kilowatt John C. Jones project in 2002, and included dam removal as a condition of that order. John C. Jones, 99 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,372, 62,582 (2002). However, after the towns of Winterport and Frankfort and local residents opposed the dam removal, and the towns

Just short of the one year anniversary of the settlement agreement, the settling parties wrote to the Commission, asking why approval of the settlement had stalled.[124] FERC seemed paralyzed bureaucratically by having to address a novel request by a licensee to operate a dam conditionally until dam removal, and by having to consider the opinions of the counties and other parties objecting to the project.[125] In contrast to the Edwards Dam, at which only the utility opposed FERC's own determination that removal was in the public interest,[126] FERC was confronting a dam removal proposal from Condit Dam's licensee which contradicted the Commission's 1996 recommendation that Condit Dam continue to operate with prescribed fish passage and vocal opposition to removal from local interests.[127] In addition, although FERC is an independent commission which does not report to any cabinet secretary, the awareness that the Bush Administration, assuming power in January 2001, was hostile to dam removal[128] may have contributed to bureaucratic inertia.

At a technical conference between FERC and the parties on May 17, 2001 (more than 18 months after FERC received the settlement agreement) the agency's staff expressed concern about several legal aspects of the agreement.[129] FERC worried that: 1) the settlement agreement made no provision for surrender of the amended license after dam removal, 2) PacifiCorp's proposal to use the additional life of the project to fund dam removal was not like any reason—such as a significant increase in generation capacity or environmental mitigation—that the Commission had

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began proceedings to acquire the dam by eminent domain, the project owner and the towns reached a settlement allowing the dam to remain in place, with FERC issuing an order deleting the removal requirement from its original surrender order. John C. Jones, 107 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,279, 62,308–10 (2004); *see also* Manahan & Verville, *supra* note 15, at 49 (discussing the agreement reached between the project owner and the towns, ultimately leading to FERC modifying its order).

124 Letter from Katherine P. Ransel, American Rivers, on behalf of all settling parties, to J. Mark Robinson, Dir., Div. of Envtl. and Eng'g Review, FERC (Sept. 18, 2000), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8038508:0.

125 *See* Editorial, *Make the Deal*, COLUMBIAN (Vancouver, Wash.), May 21, 2001, at 6, *available at* 2001 WLNR 4323247 (urging FERC to move beyond this "paralysis" for the sake of salmon); Robinson, *supra* note 120 (discussing the bureaucratic delays in removing the dam).

126 Edwards Dam Mfg. Co. & City of Augusta, Maine, 81 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,255, 62,201, 62,210 (1997).

127 *See supra* notes 96–97, 108–09, 118–20 and accompanying text. By comparison, in Portland General Electric's 2002 application to surrender its Bull Run hydropower project, there was no local government opposition and the removal proposal was presented to FERC before the Commission performed any environmental review. *See supra* note 123; *infra* note 135.

128 *See* Peter M. Lavigne, *Dam(n) How Times Have Changed . . .*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 451, 462–63 (2005) (discussing new rules promulgated by the Bush Administration that make dam removal more difficult); Sandra Sobieraj, *Gore, Bush Face Off in First Debate: They Clash Over Tax Cuts, Medicare and Finances*, THE OREGONIAN, Oct. 4, 2000, at A1 ("I'm against removing dams in the Northwest [then-candidate George W. Bush] said . . . . [T]hat's a renewable source of energy we need to keep in line."); *see also* Rich Landers, *Free-flowing Snake Still Best, IFG Says*, THE SPOKESMAN REVIEW (Spokane, Wash.), Oct 4, 2000, at C4 (reporting that "George W. Bush has clearly stated that if elected President he would never consider breaching four Snake River dams in order to save salmon and steelhead from extinction").

129 PacifiCorp, 97 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,348, 62,624 (2001).

ever previously accepted in granting a license extension, 3) the settlement agreement envisioned reinstatement of PacifiCorp's relicense application if the agreement were ever abrogated, and 4) incorporating the agreement into the license would make project retirement and removal a condition of the license.[130] At the May 2001 conference, FERC's staff suggested that a surrender application might be more appropriate than a license amendment application and recommended that PacifiCorp request a declaratory order from the agency to clarify its choices.[131]

PacifiCorp requested the declaratory order two weeks later, on May 31, 2001.[132] On March 15, 2002, in the second of two orders on PacifiCorp's pending amendment/settlement application, FERC finally clarified that it would, in fact, treat PacifiCorp's submission as an application to surrender the existing license at a future date in a subsequent order.[133] The Commission's clarification of how the application should be legally construed took over two years, but did not change the substance of the issue before the Commission: whether it should accept the result of the settlement process, and allow PacifiCorp to continue power generation for a period of time, and then allow the company to remove the dam. And even after this extended legal process, FERC expressly refused to answer whether it *could* issue a surrender order conditioned on PacifiCorp's performance of the terms of the settlement agreement, including the cost cap conditions, or, if PacifiCorp were unable to perform, whether the Commission would permit reinstatement of the relicensing process.[134]

Until PacifiCorp completes all of the necessary permitting in advance of FERC's final decision on the surrender order, neither the utility—nor any other utilities considering similar cost-capped settlements—will know whether FERC believes it *can* issue such an order. The perverse result of FERC's lengthy "clarification" is that a utility's voluntary settlement efforts, aimed at removing a dam on a schedule and within an acceptable cost range, will take substantially longer to obtain FERC's approval than an involuntary

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130 *Id.*

131 *Id.* ¶ 62,625. FERC noted that a surrender application would also present novel questions of law, including how far into the future the surrender could take place, and what FERC might have to do if another party were to apply for a new license for the Condit project in response to PacifiCorp's surrender of its license. *Id.*

132 PacifiCorp's Petition for Declaratory Ruling, Condit Hydroelectric Project, FERC No. P-2342-012 (June 1, 2001), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=13494:0. PacifiCorp argued that FERC had the authority to extend license terms, as well as the power to authorize the implementation of the settlement as written, without requiring an application for surrender or allowing other parties to submit applications for a new license. *PacifiCorp*, 97 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 62,625–26. The company analogized Condit Dam to the Edwards Dam, for which FERC denied a relicense application and ordered dam removal based solely on the Commission's determination that the public interest supported dam removal. *Id.* at ¶ 62,626 (citing Edwards Dam Mfg. Co. & City of Augusta, Maine, 81 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,255 (1997)). FERC disagreed, noting that at the Edwards Dam the Commission did not require a surrender application because it denied the relicense application, and concluded that, despite its "different packaging," PacifiCorp's request amounted to a proposal to surrender its license at a date several years in the future. *Id.*

133 PacifiCorp, 98 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,292, 62,293 (2002) (order on motion for clarification).

134 *Id.*

removal of a dam on FERC's order.[135] By contrast, despite the fact that the relicensing applications for Edwards and Condit were filed three days apart in 1991, FERC issued its order to remove the Edwards Dam 30 months before the Commission figured out what the Condit settling parties were asking it to do in their request for approval of their settlement agreement.[136] FERC's long delay in determining how to address the Condit settlement agreement was also at odds with its own regulations, which provided the option of an alternative licensing process[137] to encourage collaborative settlements among interested parties and accelerate the relicensing process.[138]

After FERC decided in March 2002 to treat PacifiCorp's filing as an application to surrender the existing license with a future effectiveness date, the Commission completed its environmental impact study of the proposed settlement agreement's dam removal alternative.[139] FERC issued its final supplemental final environmental impact statement (FSEIS) in June 2002, considering and recommending approval of the dam removal proposal in the

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[135] FERC subsequently granted a surrender order for Portland General Electric's 22 MW Bull Run hydroelectric project on the Sandy, Little Sandy, and Bull Run rivers near Sandy, Oregon without the extensive procedural delays which plagued the Condit Dam settlement. *See* Portland Gen. Elec. Co., 107 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,158 (2004) (order granting surrender application). However, the factual circumstances of the Bull Run surrender application were significantly different from those of Condit Dam. Portland General Electric and 23 parties agreed to a dam removal settlement on October 24, 2002, and the company filed the settlement agreement, along with the surrender application, with FERC on November 12, 2002. *Id.* The City of Sandy was a party to the settlement. Settlement Agreement Concerning the Removal of the Bull Run Hydroelectric Project at 76, Bull Run Hydroelectric Project, FERC No. P-477-024 (Oct. 24, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NV Viewer.asp?Doc=10031947:0 (navigate to page 76 of the FERC-Generated PDF for location of the settlement agreement) (agreement between Bull Run project owner Portland General Electric Co. and twenty-two intervenors in the relicensing process). Unlike the Condit settlement, the Bull Run settlement did not contain a cost cap, or cost-cap-related withdrawal provisions, and Portland General Electric filed the agreement along with the surrender application, rather than as an amendment to a pending relicensing application. *See id.*; *Portland Gen. Elec.*, 107 Fed. Energy Reg. Comm'n Rep. (CCH) at ¶ 61,159. Without the provisions that so vexed FERC in the Condit Dam proceedings, and with the city closest to the Bull Run project a party to the settlement, Portland General Electric was able to obtain the necessary environmental approvals, and a surrender order from FERC, in less than eighteen months. *Id.* ¶ 61,158–59.

[136] *Edwards Dam*, 81 Fed. Energy Reg. Comm'n Rep. (CCH) at ¶ 62,199; *see supra* note 84 and accompanying text. The experiences of Edwards Dam and the Bull Run project surrender order suggest that FERC is able to move more quickly to authorize dam removal under some circumstances, such as when it decides of its own accord to order removal, or is acting upon a settlement agreement which does not condition surrender on cost limits and involves no governmental opposition to the dam removal. *See supra* notes 123, 127, 135 and accompanying text (describing agreement and FERC approval to remove the Bull Run project).

[137] 18 C.F.R. § 4.34(i)(2) (2005).

[138] *Id.* § 4.34(i)(2)(i)-(v). *See generally* Avinash Kar, *Ensuring Durable Environmental Benefits Through a Collaborative Approach to Hydropower Re-Licensing: Case Studies*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 27, 31 (2004) (describing potential benefits of collaborative settlement regulations and illustrating the benefits with two case studies).

[139] FERC 2002 FSEIS, *supra* note 117, at xvii-xviii. FERC noted that it was deferring the relicensing process, in the event that the agency did not approve a surrender of the license, or in the event that it granted the surrender but PacifiCorp did not accept the surrender. *Id.*

settlement agreement, with minor modifications.[140] The Commission concluded that "the benefits to anadromous fish, wildlife, whitewater recreation, scenic area management, and aesthetics outweigh the costs associated with the loss of Condit dam and Northwestern Lake" and, in particular, that "removal of Condit dam and the associated benefits to anadromous salmonids are consistent" with fish management efforts in the White Salmon River subbasin and with salmonid restoration efforts throughout the Columbia River basin.[141] FERC's FSEIS specifically endorsed blasting a tunnel into the dam and using river erosion to remove accumulated sediment as the preferred removal alternative, concluding that the economic and environmental costs of sediment dredging outweighed any benefits.[142]

B. Permitting Obligations Prior to Dam Removal

Having reached a settlement and obtained FERC's preliminary approval in the FSEIS, PacifiCorp faced the task of obtaining the permits needed to remove Condit Dam, culminating in a FERC license surrender order.[143] Removing a dam requires federal, state, and local permits to ensure that the removal is done safely and minimizes damage to the river and riparian areas.[144] The settlement agreement provided that PacifiCorp would attempt to obtain the necessary permits in a timely manner, but the agreement did not set a specific timetable for obtaining the approvals.[145] Like the process for obtaining FERC's preliminary approval of the removal action, the permitting process has been longer, and more costly, than the settling parties anticipated.

1. Federal Agency Approvals for Dam Removal

The removal alternative FERC endorsed in the 2002 FSEIS will involve draining Northwestern Lake in about six hours and result in the discharge of over 1.5 million cubic yards of sediment from the reservoir during the first year after the dam is breached.[146] These activities will have significant

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[140] *See generally id.* at 181–89 (describing staff recommendations on surrender option, including its recommended modifications to the settlement agreement). The modifications included measures to protect environmental resources and public safety during the removal, including trapping and removal of western pond turtles (*Clemmys marmorata)* from Northwestern Lake, and a plan to capture adult chinook and coho salmon and steelhead prior to removal for spawning in a hatchery and post-removal upstream release of their progeny. *Id.* at 188–89. FERC estimated that the modifications would add about $50,000 to the cost of the settlement agreement. *Id.* at 189.

[141] *Id.* at 184.

[142] *See id.* at 186.

[143] *See* Federal Power Act, 16 U.S.C. § 799 (2000) (authorizing license surrender).

[144] Bowman, *supra* note 15, at 739.

[145] *See* Condit Settlement, *supra* note 6, at 4.

[146] U.S. Department of the Interior, Fish & Wildlife Service, Endangered Species Act Consultation at 6, 24, Condit Hydroelectric Project, FERC No. P-2342-000 (Sept. 6, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=9560365:0 [hereinafter FWS 2002 BiOp].

effects on the water quality and biology in the river, at least in the short term. As a result, several federal agencies have statutory obligations to review the proposed dam removal.

a. Federal Fish Management Agencies

Section 7 of the ESA prohibits federal actions that jeopardize the continued existence of listed species or that destroy or adversely modify critical habitat.[147] Before approving the removal of Condit Dam, FERC must consult with both FWS and NOAA Fisheries and obtain biological opinions (BiOps) from each concerning the effects of the dam removal on threatened and endangered species.[148] These agencies may identify reasonable and prudent measures to minimize harm to listed species,[149] which become virtually mandatory conditions for the permitted action.[150]

i. Fish and Wildlife Service

The FWS issued a BiOp on the effect of the Condit Dam removal on threatened bull trout and other listed species within its jurisdiction in September 2002.[151] The BiOp noted that Condit Dam was likely the main cause of the decline of bull trout in the White Salmon River because it separated upstream spawning and rearing habitat from foraging habitat in the Columbia River.[152] After identifying significant benefits to bull trout from better spawning and foraging habitat after dam removal and weighing these against the harm from suspended sediment, temporarily increased river flow, and loss of foraging habitat in Northwestern Lake, FWS concluded that dam removal would not likely jeopardize the continued existence of bull trout.[153] The 2002 FWS BiOp also identified reasonable and prudent measures for mitigating harm to bull trout and provided terms and conditions to minimize the incidental take of bull trout during the dam removal project.[154]

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147 Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000); Bowman, *supra* note 15, at 739.

148 16 U.S.C. § 1536(a)(2)-(3) (2000). The FWS has jurisdiction over wildlife and inland fish, while NOAA Fisheries has jurisdiction over anadromous fish. *See supra* note 63.

149 16 U.S.C. § 1536(b)(3)(A) (2000).

150 *See* Bennett v. Spear, 520 U.S. 154, 170 (1997) (noting that a BiOp has a "virtually determinative effect" in limiting another agency's discretion).

151 FWS 2002 BiOp, *supra* note 146, at 1.

152 *Id.* at 19.

153 *Id.* at 33.

154 *Id.* at 36–38. The terms and conditions included a requirement that the construction of a project staging area include a containment berm to control erosion and sediment release, limitations on the extent of woody debris removal from the reservoir and a requirement that woody debris be relocated in the former lakebed for bull trout habitat restoration, installation of fish screens on the water intake to prevent entrainment of bull trout, and the implementation of a protection plan for any bull trout trapped and collected as part of fish salvage efforts. *Id.*

In October 2004, FWS designated critical habitat for the species in the river.[155] Consequently, on December 1, 2004, FERC officially reinitiated formal consultation with FWS regarding the effects of dam removal on bull trout critical habitat.[156] FERC asked for a revised BiOp within 135 days of its request and, although that deadline passed in April 2005, FWS issued its revised BiOp on November 30, 2005.[157] Given FWS's determination in the 2002 FWS BiOp that dam removal would benefit bull trout, and its original conclusion that the loss of some foraging habitat and temporary harm to the fish were not likely to be significant, it is not surprising that the 2005 FWS BiOp concluded that dam removal is not likely to destroy or adversely modify bull trout critical habitat.[158]

ii. NMFS/NOAA Fisheries

After FERC issued the 2002 FSEIS, NMFS was supposed to issue its BiOp on the effect of the dam removal on federally listed anadromous fish in August 2002, but it failed to do so, citing "workload and scheduling conflicts."[159] The agency's failure to issue its BiOp on schedule was somewhat surprising because, immediately prior to the settlement agreement in September 1999, NMFS responded positively to FERC's request for informal consultation on the effects of continuing to operate the Condit project with fish passage.[160] In its September 1999 response, NMFS noted that it had listed five salmonid species in the White Salmon River as threatened or endangered during the prior two years, and that, contrary to FERC's determination, continued operation of Condit Dam, even with the proposed fish passage, would be likely to adversely affect the listed species.[161] NMFS also informally endorsed the then nearly completed agreement to remove the dam, stating that "[w]hile the proposed method of removal would also result in adverse impact to listed Pacific salmonid

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155 Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout, 69 Fed. Reg. 59,996 (Oct. 6, 2004).

156 *See* Letter from Ann F. Miles, Dir., Div. of Hydropower Licensing, FERC to Ken S. Berg, Manager, FWS (Dec. 1, 2004), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10322056:0 (discussing reinitiation).

157 U.S. Department of the Interior, Fish & Wildlife Service, Reinitiation of Consultation on Bull Trout (*Salvelinus confluentus*) and Bull Trout Critical Habitat for Condit Dam Removal and Dam Operations at 2, Condit Hydroelectric Project, FERC No. P-2342-000 (Jan. 23, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10938478:0 [herein–after FWS 2005 BiOp]. In response to FERC's formal request to reinitiate consultation, the FWS indicated that it planned to issue its BiOp no later than April 17, 2005. Letter from Ken S. Berg, Manager, FWS, to Magalie R. Salas, Sec'y, FERC (Jan. 28, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10406419:0.

158 FWS 2005 BiOp, *supra* note 157, at 57.

159 Memorandum from Nicholas Jayjack, FERC, to Sec'y, FERC 1 (Oct. 28, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10653816:0 (describing telephone conversation with Scott Carlton of NMFS).

160 Letter from Michael Tehan, NMFS, to David Boergers, Acting Sec'y, FERC 2 (Sept. 7, 1999), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=8114533:0 (regarding request for informal consultation for the Condit Hydroelectric Project).

161 *Id.* at 1.

species, the impacts would be short-term (two to ten years)."[162] NMFS, like FWS, signed the settlement agreement in September 1999.[163]

In August 2005, three years after NMFS advised FERC that its workload and scheduling issues were preventing it from issuing a BiOp for the dam removal, NOAA Fisheries had still not issued its BiOp.[164] Consequently, several of the settling parties wrote NOAA Fisheries, asking for an explanation.[165] The parties noted their understanding from agency staff that the BiOp was complete and awaiting the regional administrator's signature, urging him to issue the BiOp because it was necessary not only to complete the FERC consultation but also to inform Ecology's CWA section 401 water quality certification process.[166] It remains unclear as of this writing why NOAA Fisheries continues to withhold its final BiOp. However, if the fishery agency has been waiting to ensure that the factual bases or conclusions of its BiOp do not conflict with the findings of other agencies tasked with regulatory approval, Ecology's September 2005 issuance of its Draft Supplemental EIS (DSEIS) and FWS's November 2005 BiOp may provide the necessary prerequisites for NOAA Fisheries to finally issue its BiOp.[167]

b. Army Corps of Engineers

The United States Army Corps of Engineers (Corps) must evaluate the dam removal proposal under the CWA and the Rivers and Harbors Act.[168] Section 404 of the CWA regulates federally-approved activities which discharge dredged or fill material into waters of the United States, while section 10 of the Rivers and Harbors Act governs work in or affecting navigable waters of the United States.[169] Before issuing a permit for removal of Condit Dam, the Corps must evaluate the effects of the proposal on the public interest, balancing the benefit from the removal against its foreseeable detriments.[170] The Corps defines the "public interest" broadly to include over two dozen factors, including conservation, economics, aesthetics, wetlands, fish and wildlife values, and water quality.[171]

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162 *Id.* at 2.

163 *See* Condit Settlement, *supra* note 6.

164 *See, e.g.*, Letter from Olney Patt, Jr., Executive Dir., CRITFC to D. Robert Lohn, Reg'l Adm'r, NOAA Fisheries at 1, (Aug. 18, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10796527:0.

165 *See id.*

166 *Id.*

167 Ecology 2005 DSEIS, *supra* note 30; FWS 2005 BiOp, *supra* note 157. Although Ecology's DSEIS is not directly applicable to the federal consultation process, it will be the dam removal project's last comprehensive environmental impact review.

168 Rivers and Harbors Act, 33 U.S.C. § 403 (2000); Clean Water Act, 33 U.S.C. § 1344 (2000); *see* Bowman, *supra* note 15, at 743 (describing statutory requirements).

169 Rivers and Harbors Act, 33 U.S.C. §§ 403, 1344 (2000); *see* U.S. ARMY CORPS OF ENG'RS, PUBLIC NOTICE FOR PERMIT APPLICATION 3 (2004) [hereinafter CORPS NOTICE] (providing notice of application requirements).

170 CORPS NOTICE, *supra* note 169, at 4.

171 *Id.*

The Corps will not issue a permit for the Condit Dam removal until Ecology issues or waives a water quality certification under section 401 of the CWA.[172] As discussed below,[173] PacifiCorp first applied to Ecology for section 401 water quality certification in May 2001, but the state agency has yet to act on that application. PacifiCorp applied to the Corps for a combined sections 404 and 10 permit in July 2004, and submitted additional information at the Corps's request in May 2005.[174] Once Ecology has acted on PacifiCorp's application, the Corps may issue a permit for the removal project, even if it finds that there will be some detriment to the waters under its jurisdiction or fish resources in those waters.[175] For example, despite its policy of no net loss to wetlands, the Corps may still issue a permit for the dam removal if it determines that the benefits from dam removal outweigh the loss of 4.8 acres of wetlands.[176] The Corps may also include as conditions of its permit any reasonable and prudent measures and terms and conditions necessary to minimize the adverse effects on listed species which federal fish management agencies identify in their BiOps.[177]

c. Other Federal Agencies

Section 14(d) of the Columbia River Gorge National Scenic Area Act requires that the agency responsible for administering the scenic area to determine whether a federal action within the scenic area will protect and enhance the scenic area's natural, cultural, and recreational resources.[178] Because Condit Dam is located within the Columbia River Gorge National Scenic Area, the Forest Service must review the dam removal proposal.[179] In August 2002, the Forest Service determined that, based upon its review of FERC's 2002 FSEIS, the dam removal project was consistent with the Scenic Area Act and the scenic area management plan, so long as the project met certain conditions which other agencies were coordinating related to minimizing the effects of the dam removal on fish and wildlife habitat and cultural resources management.[180] The Forest Service determined separately

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172 *Id.* at 3.

173 *See infra* notes 187, 189 and accompanying text.

174 *See* Letter from Gail M. Miller, Condit Project Manager, PacifiCorp, to Magalie R. Salas, Sec'y, FERC 2 (Sept. 23, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10822576:0 (describing PacifiCorp's submission).

175 *See* Bowman, *supra* note 15, at 743–44.

176 *See id.*; *see also* CORPS NOTICE, *supra* note 169, at 3 (describing the affected wetlands).

177 *See* CORPS NOTICE, *supra* note 169, at 4.

178 16 U.S.C. § 5441(d) (2000).

179 *See id.*; U.S. Department of Agriculture, Forest Service, Condit Hydroelectric Project Consistency Determination: Columbia River Gorge National Scenic Area at 1, Condit Hydroelectric Project, FERC No. P-2342-011 (Sept. 9, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10697320:0

180 U.S. Department of Agriculture, Forest Service, Condit Hydroelectric Project Consistency Determination: Columbia River Gorge National Scenic Area at 2. The Forest Service's consistency determination endorsed the modifications which FERC had included in the FSEIS. *See id.*; *see also supra* note 140 and accompanying text (describing the FERC 2002 FSEIS).

that the dam removal proposal was consistent with the Wild and Scenic Rivers Act, which protects two sections of the White Salmon River.[181]

As indicated above,[182] FERC will make a final decision whether to issue a surrender order for PacifiCorp's license, and on what terms, after the other regulatory reviews are complete. In addition to its environmental impact review, which concluded with the 2002 FSEIS, FERC must consult with the Washington State Historic Preservation Officer (Preservation Officer) under the National Historic Preservation Act to manage historic properties potentially affected by the dam removal because Condit Dam is eligible for listing on the National Register of Historic Places.[183] FERC and the Preservation Officer entered into a Memorandum of Agreement in August 2002, in which PacifiCorp concurred and under which the utility agreed to prepare a cultural resources management plan in cooperation with the Preservation Officer and the Yakama Indian Nation, after FERC issues the order accepting surrender of the license.[184] Although the cultural resources management plan represents an additional regulatory obligation for the utility, the dam's eligibility for listing as a historic place will not interfere with its removal because adequate photographic documentation of the dam prior to its removal satisfies the regulatory requirement to preserve the historic value of the dam, even if the structure is subsequently demolished.[185]

2. State Permits

The Washington Department of Ecology must complete several reviews prior to FERC's decision on the surrender order. Because the Condit Dam removal will result in a significant discharge of sediments into navigable waters, PacifiCorp must obtain Ecology's certification under section 401 of the CWA that the "discharge will comply with the applicable provisions" of the CWA.[186] In May 2001, PacifiCorp applied to Ecology for section 401 water

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181 Letter from Linda Goodman, Acting Reg'l Forester, U.S. Forest Serv., to Magalie R. Salas, Sec'y, FERC 1 (Aug. 2, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=9653880:0; *see supra* notes 52–53 and accompanying text. Under Sections 7(a) and 7(b) of the Wild and Scenic Rivers Act, the Forest Service is required to determine that FERC licensing of projects on wild and scenic rivers or rivers that will potentially be designated as wild and scenic will not invade the river or unreasonably diminish the scenic, recreational, fish and wildlife values of those rivers. 16 U.S.C. § 1278(a)–(b) (2000).

182 *See supra* note 133 and accompanying text.

183 16 U.S.C. § 470f (2000); *see* 36 C.F.R. § 800.14(b) (2005) discussing National Historic Act programmatic agreements); Bowman, *supra* note 15, at 743.

184 PacifiCorp's Final Memorandum of Agreement at 3, Condit Hydroelectric Project, FERC No. P-2342-011 (Aug. 14, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10716933:0.

185 *See* 36 C.F.R. § 800.6 (2005) (discussing resolution of adverse effects); Bowman, *supra* note 15, at 743.

186 33 U.S.C. § 1341(a)(1) (2000); *see supra* notes 69–70 and accompanying text. Under the CWA, a state must develop water quality standards for intrastate waters, which contain both a designated use for a particular water body and water quality criteria for protecting those uses. *See* Blumm & Nadol, *supra* note 2, at 96–97 (citing *Pub. Util. Dist. No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704, 707, 714–15, 718). In addition, PacifiCorp also may need to obtain a CWA section 402 National Pollutant Discharge Elimination System (NPDES)

quality certification for the dam removal proposal in the settlement agreement.[187] Under FERC's regulations, if a state certifying agency does not act upon a request for certification within one year, the certification is deemed waived.[188] To allow Ecology sufficient time to act on the certification request beyond the one year deadline, PacifiCorp has dutifully withdrawn and resubmitted its request for section 401 certification for each of the last five years, most recently in May 2006.[189] As part of its application process, PacifiCorp has requested that Ecology modify "Washington water quality standards to allow intermittent exceedances of the standards within and downstream of the Project" during the first five years after dam breaching.[190] As discussed in more detail below,[191] Washington water quality regulations allow Ecology to issue a section 401 certification by allowing a short-term modification to state water quality standards, a likely requirement for the Condit Dam removal because of the large volume of sediment which will wash out of the reservoir when the dam is breached.

Because the section 401 certification will almost certainly require Ecology to allow a modification of water quality standards, Ecology first needed to address several issues under the Washington State Environmental Policy Act (SEPA) that it considered inadequately covered in the federal EISs.[192] These included the adverse effects to water quality and fish from turbidity and sedimentation resulting from the dam breaching.[193] In September 2005, Ecology issued a DSEIS for public comment.[194] The DSEIS concluded that the blasting of the dam, the rapid flushing of Northwestern Lake, and the suspended sediment as the river returns to a natural state

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permit from Ecology for storm water discharges associated with construction activities related to the dam removal, and hydraulic project approval from the Washington Department of Fish & Game. Ecology 2005 DSEIS, *supra* note 30, at ii.

187 FERC 2002 FSEIS, *supra* note 117, at 25.

188 *Id.*

189 Letter from Gail M. Miller, PacifiCorp Project Manager, to Loree Randall, Wash. Dep't of Ecology (May 17, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=11053169:0 (navigate to page 3 of the FERC-Generated PDF for location of the letter) (withdrawing and resubmitting application for section 401 water quality certification).

190 Letter from Gail M. Miller, PacifiCorp Project Manager, to Loree Randall, Wash. Dep't of Ecology, Condit Hydroelectric Project, FERC No. 2342 (May 19, 2005) (on file with author). This request is related to the litigation issues discussed below. *See infra* notes 206–10, 235–52 and accompanying text.

191 *See infra* notes 236–45 and accompanying text.

192 A major action which significantly affects the quality of the environment triggers the requirement of an environmental impact review under SEPA. WASH. REV. CODE § 43.21C.030(2)(c) (2005). Under the SEPA regulations, the grant or denial of a section 401 water quality certification is categorically exempt from EIS review. WASH. ADMIN. CODE § 197-11-800(10) (2003). However, only the issuance of short-term water quality standards modifications, where water quality violations would last less than fourteen days, are exempt from EIS review. *Id.* § 197-11-855(3). Because the proposed release of sediments will affect water quality in the White Salmon River for significantly longer than two weeks, *see infra* notes 226–27 and accompanying text, Ecology must perform a SEPA EIS.

193 *See* Ecology 2005 DSEIS, *supra* note 30, at 2-5 to 2-8. Had Ecology determined that the federal EISs were adequate, it could have relied on those in lieu of preparing its own separate EIS. WASH. REV. CODE § 43.21C.150 (2005).

194 Ecology 2005 DSEIS, *supra* note 30, at 1-1.

would kill some fish.[195] This conclusion is hardly surprising, as both FERC and FWS acknowledged the same harmful short-term effects in their environmental reviews.[196] The DSEIS also discussed in some detail the benefits to the riverine ecosystem that will eventually follow from dam removal, noting that salmon and steelhead will begin to move into previously inaccessible habitat above the former dam site within six to nine months after the blast that empties the reservoir, and that species which are harmed by the immediate effects of the dam removal would be reestablished within several years.[197] The DSEIS did not expressly assess whether the benefits of dam removal outweighed the harms, but it did propose extensive mitigation measures for significant unavoidable adverse effects.[198]

3. Local Permits

Skamania and Klickitat counties are the only government entities which have opposed the settlement agreement and proposal to remove Condit Dam, but they have done so vigorously through numerous filings with FERC since 2000.[199] The counties are not parties to the settlement, and have advised FERC and PacifiCorp that the dam removal project must undergo county environmental impact, subdivision, and critical areas review, as well as obtain floodplain permits, zoning and shoreline permits, and noise and road permits.[200] Klickitat County noted that a list of necessary permits provided to PacifiCorp in August 2005 was only preliminary, and that other permits might be required, and hinted that the project review might be

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195 *See id.* at 1-8 to 1-9, 4.3–17 to 4.3–24, 4.2–26 to 4.3–28.

196 *See* FERC 2002 FSEIS, *supra* note 117, at 77–92; FWS 2002 BiOp, *supra* note 146, at 23–27. In contrast to the potential effects from the large amount of sediment due to be flushed from behind Condit Dam, the environment impact review prior to removal of the Edwards Dam concluded that effects on the environment would be insubstantial, "primarily because sediment build-up behind the low-head dam and the slope stability of the mostly undeveloped, wooded reservoir shoreline [were] not major concerns." Edwards Dam Mfg. Co. & City of Augusta, Maine, 81 Fed. Energy Reg. Comm'n Rep. (CCH) ¶¶ 61,255, 62,207 (1997).

197 *See* Ecology 2005 DSEIS, *supra* note 30, at 1-6 to 1-7, 4.3-18 to 4.3-20, 4.3-22, 4.3-26.

198 *See id.* at 1-12 to 1-22 (proposing mitigation measures). Proposed mitigation measures included dislodging unstable sediment and woody debris after breaching the dam to ensure the downstream transport of sediment and facilitate recolonization of the river by salmon and steelhead, using heavy equipment to cut through accumulated sediments at the mouth of Mill Creek, a tributary of the White Salmon River just above Condit Dam, allowing fish to more quickly return to that spawning stream, reinforcing the bridge over which Northwestern Lake Road passes to ensure against bridge failure while the reservoir is emptying, and equipping construction equipment with noise control devices and otherwise reducing construction noise to prevent annoyance to nearby residents and recreationists. *See id.* at 1-13, 1-17 to 1-20.

199 PacifiCorp's Petition for Declaratory Order on Preemption at 2, 7 & 7–8 n.5, Condit Hydroelectric Project, FERC No. P-2342-018 (Oct. 14, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10855144:0 [hereinafter PacifiCorp Preemption Petition] (listing twenty county filings with FERC objecting to implementation of the settlement agreement).

200 *See* Letter from Curt Dreyer, Klickitat County Planning Dep't to Gail Miller, PacifiCorp 1–3 (Aug. 2, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10744978:0 (describing Klickitat County permitting requirements for Condit Dam removal project).

delayed because the project application would not be "deemed complete until the Planning Department has issued a written statement to that effect."[201]

Based on the counties' comments to FERC and steadfast opposition to the Condit Dam removal, PacifiCorp advised FERC in October 2005 that it believed that the counties are unlikely to grant the local permits, or would grant them only with prohibitively expensive conditions, and petitioned for a declaratory order that the FPA preempts the counties' regulatory authority.[202] PacifiCorp simultaneously filed draft permit applications with the counties, pursuing a dual-track approach to overcoming this potential barrier to dam removal.[203] On May 18, 2006, FERC issued an equivocal order, declaring that the FPA preempts state and local laws in a license surrender proceeding, noting that FERC itself has the discretion to require a licensee to comply with selected local regulations to ensure that licensees are "good citizens" of their communities, and expressly declining to decide at this stage of the proceedings which local requirements FERC will require PacifiCorp to follow.[204] As discussed in the following section, the question of preemption of local ordinances is one of the issues that could generate litigation before the dam comes out.

C. Potential Litigation

The settling parties reached agreement on removal of Condit Dam in part to avoid costly litigation.[205] The impending litigation threat to dam removal comes from the counties, which did not join the settlement negotiations and have consistently opposed the settlement agreement since 1999.[206] After FERC released its FSEIS in 2002, the counties threatened to sue Ecology under state water quality rules if Ecology granted a CWA section 401 certification for the demolition project.[207] The counties' counsel

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201 *Id.* at 2.

202 PacifiCorp Preemption Petition, *supra* note 199, at 12. The counties have filed a response to PacifiCorp's petition with FERC, arguing that the FPA does not preempt local permitting and review requirements and that, as a matter of policy, FERC should require PacifiCorp to comply with those requirements. Klickitat & Skamania Counties' Response to PacifiCorp's Petition for Declaratory Order on Preemption at 1–12, Condit Hydroelectric Project, FERC No. P-2342-000 (Nov. 14, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10880936:0.

203 Press Release, PacifiCorp, PacifiCorp Initiates Permitting for Condit Dam Removal (Oct. 14, 2005), *available at* http://www.pacificorp.com/Press_Release/Press_Release57088.html.

204 PacifiCorp, 115 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,194, 2006 WL 1382381, at *2 (2006) (order on petition for decl. order). Klickitat County Prosecuting Attorney Tim O'Neill accurately noted that FERC "just punted to another time." Jesse Burkhardt, *FERC: PacifiCorp Exempt From State, Local Rules*, THE ENTERPRISE (White Salmon, Wash.), June 7, 2006, *available at* http://www.whitesalmonenterprise.com/ArcStoryPage.asp?Database=Story&StoryID=6843.

205 *See, e.g.*, Paulson, *supra* note 8; Press Release, PacifiCorp, American Rivers & Yakama Indian Nation, Historic Condit Dam Removal Agreement to be Signed (Sept. 22, 1999), *available at* http://www.doi.gov/news/archives/pacifi.html.

206 *See supra* notes 17, 118-20, 199-204, and accompanying text.

207 Kathie Durbin, *Counties Threaten to Sue Over Condit Dam Removal*, COLUMBIAN (Vancouver, Wash.), July 11, 2002, at 1, *available at* 2002 WLNR 5407726.

contended that the massive release of sediments proposed in the selected dam removal alternative would violate the state water quality anti-degradation standards, because there could be no "reasonable assurance" that the state standard could be met due to the uncertainty about the duration of sediment flush.[208] The counties have also argued that the anticipated impact on downstream turbidity levels are beyond state standards, and that short-term modification provisions do not allow for exceedances at levels projected for the dam removal.[209] The counties could bring their challenge immediately after Ecology issues its section 401 certification.[210]

The issue of federal preemption of the counties' state and local regulatory authority also may be on a path to litigation. Although FERC's May 2006 order holds that the FPA preempts state and local law unless the Commission itself requires a licensee to comply with state and local requirements,[211] FERC's refusal to rule conclusively that the counties may not exercise regulatory authority in this case leaves preemption open for future litigation. If FERC ultimately decides that no state and local regulations should apply in this case, the counties might appeal FERC's surrender order on the ground that FERC's preemption decision was erroneous. Alternatively, if FERC requires PacifiCorp to comply with certain local requirements, PacifiCorp might appeal on the grounds that the FPA completely preempts the counties' permitting authority and that FERC has exceeded its authority under the FPA in requiring PacifiCorp to comply with any local regulations.[212] In either case, as with a potential challenge to the

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[208] *See id.* The anti-degradation standards prohibit degradation of water quality which interferes with or injures existing beneficial uses, which the counties argue include existing fish in the lower river. *See* 40 CFR § 131.12 (2005); Written Comments of Klickitat & Skamania Counties at 3–4, Condit Hydroelectric Project, FERC No. P-2342-011 (Dec. 9, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10617583:0.

[209] *See* Written Comments of Klickitat & Skamania Counties at 3.

[210] State courts would have jurisdiction over a challenge to the appropriateness of the conditions of a state water quality certification, even if the conditions were incorporated in a federal license. *See* Am. Rivers, Inc. v. FERC, 129 F.3d 99, 106 (2d Cir. 1997) (discussing state authority under § 401). The counties could also challenge the adequacy of Ecology's final supplemental environmental impact statement (State FSEIS), arguing, for example, that it did not adequately examine the effects of the proposed dam removal on water quality. A challenge to the adequacy of the state SEPA review would be consolidated with any claim that the section 401 certification is invalid. *See* WASH. REV. CODE § 43.21C.075 (2004).

[211] PacifiCorp, 115 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,194, 2006 WL 1382381, at *2 (2006) (order on petition for decl. order).

[212] The counties could also appeal a FERC surrender order by challenging FERC's authority to allow the removal of Condit Dam or the reasonableness of the license conditions which allow the removal. FERC's legal authority to issue a surrender order involving dam removal has apparently never been litigated and is beyond the scope of this article. However, if a reviewing court found that FERC had the authority to issue a surrender order, the court would likely uphold the reasonableness of FERC's determination to issue the order, based on the enormous record created in the fifteen years since PacifiCorp applied to relicense Condit Dam, the clear evidence in the record supporting the environmental and economic benefits of dam removal, and the deference due to an agency making a choice among permissible options based on the evidence before it. *See* W. Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996) (upholding Forest Service special use permit).

state's section 401 water quality certification, litigation could add several additional years to the dam removal process.

D. Prospects for Overcoming Obstacles to Dam Removal

Despite PacifiCorp's efforts to obtain the many permits and approvals necessary for the Condit Dam removal, the parties to the settlement agreement recognized in 2004 that, due to permitting delays, the schedule for beginning removal of Condit Dam in October 2006 might be in jeopardy.[213] Accordingly, the parties signed a memorandum of agreement (MOA) in February 2005 amending both the implementation date and the cost cap for the project.[214] The amended terms contemplate delaying the project by two years, with cessation of hydropower production by October 1, 2008, removal of the dam beginning that same month, and completion of the project by the end of 2009.[215] The MOA increased PacifiCorp's total cost cap from $17.15 million to $20.40 million, reflecting an anticipated increase of $3.3 million in permitting costs.[216] The extension of the decommissioning date also allows additional time to generate revenue from hydropower production to cover the additional costs. Although many obstacles remain, PacifiCorp and the other parties to the settlement agreement remained optimistic that dam removal will still occur according to the revised schedule established by the MOA.[217]

1. Forthcoming Regulatory Approvals

By June 2006, about two years before dam removal is scheduled to begin, only the approvals of the Forest Service, the state Preservation Officer, and FWS which are necessary for dam removal are definitively in place. All remaining federal and state approval processes are under way, but all are short of completion. Nevertheless, several factors suggest that the necessary regulatory approvals will fall into place in time to allow the removal to proceed on schedule in 2008, unless, as discussed below,[218] there are further delays due to litigation.

First, there is some interrelationship, both formal and informal, among the various agencies' permit and approval processes, and this interrelationship may prompt agencies to complete their reviews once

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213 *See* PacifiCorp's Amendment of Decommissioning Application & Request for Continued Abeyance of Decommissioning & Licensing Proceedings, Condit Hydroelectric Project, FERC No. P-2342-000 (Feb. 25, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10428985:0.

214 *Id.*; *see* Ecology 2005 DSEIS, *supra* note 30, at 2-2.

215 Ecology 2005 DSEIS, *supra* note 30, at 2-2.

216 *Id.*

217 *See Condit Dam's Life Extended 2 Years; Two Counties Still Oppose Removal*, *supra* note 10; *see also* Kathie Durbin, *U.S. Agency Holds Sway on Dam Plan*, COLUMBIAN (Vancouver, Wash.), June 11, 2006, at C1, *available at* 2006 WLNR 11069157 (citing PacifiCorp spokesman Dave Kvamme's statement that the company still believes the October 2008 removal target date is realistic, despite the remaining red tape).

218 *See infra* section III.D.2.

others have finished theirs.[219] Ecology's September 2005 DSEIS began by noting that it was tiering off of the EIS documents FERC prepared on the project.[220] Ecology previously indicated that the SEPA process is a necessary prerequisite to the section 401 water quality certification, and that the two actions are closely bound together.[221] In November 2005, FWS issued its final BiOp, which tiered off the 2002 FWS BiOp.[222] Once Ecology issues the state's final supplemental environmental impact statement (State FSEIS), which like the 2005 FWS BiOp should provide additional data on potential adverse effects,[223] it may be easier for NOAA Fisheries to issue its final BiOp, because that agency would be assured that its conclusions will be consistent with the public position of the other resource agencies. The Corps, in turn, requires both the section 401 certification and the BiOps to precede its issuance of a combined section 404 and 10 permit.[224] Ecology also needs the BiOps to complete its section 401 water quality certification.[225] Thus, Ecology's State FSEIS could trigger a cascade effect in the regulatory approval process.

Second, the settling parties, including the resource agencies that are parties to the settlement agreement, have a common interest in seeing dam removal succeed in this case. That common interest should enable the federal and state agencies to overcome a fundamental difficulty, which has been clear since the 2002 FERC FSEIS: the proposed method of removing Condit Dam by flushing sediments will have severe, perhaps catastrophic effects on fish and the river in the short term, followed by much greater benefits for both in the long term.[226] The FWS's 2002 BiOp and Ecology's 2005 DSEIS indicate that the "long term" may start as soon as six to twelve months after the blast that empties Northwestern Lake, as fish begin to recolonize the stretches of the White Salmon River which the dam has prevented them from reaching since 1913.[227] Nevertheless, the agencies

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219 *See supra* notes 166–67, 172, 192–93, and accompanying text.

220 Ecology 2005 DSEIS, *supra* note 30, at i, 1-2.

221 *See* Letter from Gail M. Miller, *supra* note 189 (describing PacifiCorp's understanding that "Ecology has not yet completed its review of the pending section 401 application due to, among other things, the need to complete supplemental environmental review . . . under . . . SEPA"). Shortly after the FERC 2002 FSEIS, Ecology advised FERC that, once it issued its own DSEIS, it expected to issue a final supplemental environmental impact statement about three months later, and that "[t]he 401 Water Quality Permit decision would likely follow within a few weeks." Letter from Polly Zehm, Cent. Reg'l Dir., Wash. Dep't of Ecology, to Magalie R. Salas, Sec'y, FERC (Sept. 17, 2002), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10689184:0. In mid-June 2006, an Ecology spokeswoman stated that the agency was awaiting additional information from PacifiCorp, and that once the information is received the State FSEIS should take about seven weeks to complete. Durbin, *supra* note 217, at 3.

222 *See* FWS 2005 BiOp, *supra* note 157, at 1 (describing consultation history).

223 *See* Ecology 2005 DSEIS, *supra* note 30, at 1-6 to 1-22 (describing potential adverse effects of dam removal); FWS 2005 BiOp, *supra* note 157, at 37–57 (describing potential effects of dam removal on bull trout and bull trout critical habitat in the Columbia and White Salmon Rivers).

224 *See supra* notes 166, 172 and accompanying text.

225 *See supra* note 166 and accompanying text.

226 *See* Ecology 2005 DSEIS, *supra* note 30, at 1-7 to 1-11; *see also* FERC 2002 FSEIS, *supra* note 117, at 77–97.

227 *See* Ecology 2005 DSEIS, *supra* note 30, at 1-9; FWS 2002 BiOp, *supra* note 146, at 25.

approving this decision will be forced to acknowledge the short-term harms and justify their decisions approving dam removal based on the overwhelming longer-term benefits. In this regard, once one agency signals its approval, others can draw what amounts to "political cover" from the prior decisions, as well as using them as factual foundations upon which to base their own decisions. The long time which agencies are taking to issue their decisions may also reflect an effort to take as much care as possible in making their decisions in view of threatened litigation. The shared interest of the management agencies in the long-term restoration of the White Salmon River and its resources should eventually lead them to issue decisions carefully acknowledging and considering the adverse short-term effects but concluding that the environmental benefits of dam removal significantly outweigh these harms.

Third, the settling parties apparently recognize that removal of Condit Dam has become a cause *célèbre*, often compared in the popular and legal press with the thoroughly successful removal of the Edwards Dam in 1999.[228] Given the long delays and lingering uncertainties over Condit's removal, this comparison does not flatter the resource agencies involved, especially in view of their status as parties to the settlement and as early advocates of fish passage at the dam. The widely-reported success of the Edwards Dam removal in dramatically restoring the health of the Kennebec River to levels of biological productivity beyond what was imagined possible before breaching[229] should serve as an inspiration for the resource agencies as they balance short-term harms against long-term gains, particularly concerning the effect of Condit Dam removal on listed salmon and steelhead in the White Salmon River.

Taken together, these factors should produce the necessary regulatory approvals for removal of the Condit Dam. However, the agency delays to date and the extension of the life of the project by two additional years indicate that some time may yet pass before PacifiCorp can present the necessary approvals to FERC for its final approval of a surrender order.

2. Potential Litigation

The principal impediment to the removal proposal and its current schedule may be the threat of litigation involving the counties, including a challenge to a FERC decision to issue a surrender order to PacifiCorp. Based on federal preemption doctrine in the hydroelectric regulatory field,[230] FERC would have good grounds for issuing a surrender order for Condit Dam declaring that the counties have no regulatory authority to prevent or

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[228] *See, e.g.*, Lavigne, *supra* note 128, at 464–66; Rocky Barker, *Removing Dam Transformed a Maine River*, THE IDAHO STATESMAN, July 24, 2005, at M1, *available at* http://www.idahostatesman.com/apps/pbcs.dll/article?AID=2005507240352; Susan A. Cover, *River Revival: Kennebec Teems With Life 5 Years After Dam Breach*, KENNEBEC JOURNAL, June 27, 2004, *available at* http://www.maineenvironment.org/news_detail.asp?news=105.

[229] *See* Barker, *supra* note 228; Cover, *supra* note 228.

[230] *See, e.g.*, Michael A. Swiger, et al., *Hydroelectric Regulation Under the Federal Power Act*, *in* 4 WATERS AND WATER RIGHTS § 40.04 (Robert E. Beck ed. 2004) (describing FPA preemption of state laws).

condition that order, notwithstanding its May 2006 decision leaving open the possibility of requiring PacifiCorp to comply with as-yet-unspecified local ordinances.[231] Long-standing precedent, which the Supreme Court reaffirmed in 1990, holds that FERC's power to license hydropower projects preempts states' rights to impose conditions beyond those set by FERC in its license.[232] If FERC issues a surrender order approving dam removal, without requiring PacifiCorp to comply with any local regulations, the Commission's comprehensive authority "leave[s] no room or need for conflicting state controls," and permits based on state or local law are preempted on principles of field preemption.[233] Because of the Supreme Court's clear precedent on FPA preemption and because the counties' principal motivation in insisting on local permits is to thwart the project, it seems likely that a reviewing court would agree that the FPA preempts county reviews and permits.[234]

The outcome of a challenge to the state's water quality certification of the Condit removal project is less clear.[235] In 2003, Ecology amended its state water quality regulations, altering the provision for "short-term modifications."[236] Under the revised provision, Ecology may modify water quality criteria on a short-term basis to "accommodate essential activities" or "otherwise protect the public interest," even though such activities temporarily reduce water quality.[237] Ecology must approve a short-term modification in advance and, if authorized, the modification may degrade water quality only "if the degradation does not seriously interfere with or become injurious to existing or designated water uses or cause long-term harm to the environment."[238] The amended regulation also enables Ecology

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231 *See supra* note 210 and accompanying text.

232 California v. FERC, 495 U.S. 490, 496 (1990) (reaffirming First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 181–83 (1946)); *see* Blumm & Nadol, *supra* note 2, at 90.

233 First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 181 (1946); *see also* Sayles Hydro Assocs. v. Maughan, 985 F.2d 451, 453, 456 (9th Cir. 1993) (holding, on the principle of field preemption, that the FPA preempted a state requirement that a FERC licensee obtain a state water rights permit after "the State Board has required a shifting, expanding range of reports and studies, to assure that the project satisfies the State Board's concerns regarding recreation, aesthetics, archaeology, sport fishing, and cultural resources, and that the project meets the State Board's standards regarding cost of capital and estimated revenues").

234 *See First Iowa*, 328 U.S. at 181.

235 As noted *supra* note 210, the counties could argue that Ecology did not adequately examine the effects of the Condit Dam removal on water quality in its state FSEIS. However, it is highly unlikely that such a challenge would succeed, in view of the nearly 50 pages that Ecology devoted to water, aquatic, and wetlands resources issues in the 2005 DSEIS and the deferential "rule of reason" standard which Washington courts apply in reviewing a state agency's EIS. *See* Klickitat County Citizens Against Imported Waste v. Klickitat County, 860 P.2d 390, 399 (Wash. 1993) (defining the "rule of reason" as a broad and flexible standard through which an EIS may be viewed on a case-by-case basis, considering policy and factual issues); Ecology 2005 DSEIS, *supra* note 30, at 4.2-1 to 4.2-12 (water resources), 4.3-1 to 4.3-28 (aquatic resources), 4.4-1 to 4.4-9 (wetlands resources).

236 *See* WASH. ADMIN. CODE 173-201A-010 to 173-201A-612 (nonseq), Adopted Rule, July 1, 2003, Dep't of Ecology, Wash. St. Reg. 03-14-129, *available at* 2002 WA REG TEXT 20929 (showing administrative code amendments).

237 WASH. ADMIN. CODE § 173-201A-410 (2005).

238 *Id.* § 173-201A-410(1)(c).

to authorize a longer-duration modification, if the activity reducing water quality is part of a "restoration plan" developed through the SEPA process, in which case the water quality standards may be modified for up to five years.[239] Most significantly,

> [Ecology] may allow a major watershed restoration activity that will provide greater benefits to the health of the aquatic system in the long-term (examples include removing dams or reconnecting meander channels) that, in the short term, may cause significant impacts to existing or designated uses as a result of the activities to restore the water body and environmental conditions.[240]

This language gives Ecology specific regulatory authority to issue the water quality certification for the Condit Dam removal, which undoubtedly prompted the new regulatory language.

The problem, however, is that the new regulations do not apply to federal CWA actions, such as a section 401 water quality certification, until the federal Environmental Protection Agency (EPA) has approved the new rules.[241] Ecology's authority to issue a certification granting a short-term modification for the sediment discharge from the Condit Dam removal may hinge on whether EPA approves the revised anti-degradation regulations before Ecology certifies the Condit project.[242] Until EPA does so, the 1997 regulations remain in effect for certification of federal actions.[243] Although the earlier regulations also included a provision for short-term modifications,[244] they did not expressly authorize the sort of "restoration project" contemplated in the amended regulations. The prior standard allowed for a duration of the non-conforming activity for up to one year, but expressly prohibited any degradation of water if the degradation "significantly interferes with or becomes injurious to characteristic water uses or causes long-term harm to the environment."[245] As discussed below,[246]

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239 *Id.* § 173-201A-410(2).

240 *Id.* § 173-201A-410(3).

241 Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659, 670 n.6 (Wash. 2004); 40 C.F.R. § 131.5(a) (2005) (requiring EPA approval of state-adopted water quality standards).

242 EPA approved some of Ecology's revisions to the water quality standards in early 2005 and disapproved the state's revised use designations for aquatic life in March 2006, but has not taken action on the state's revised short-term modification provision of the anti-degradation standards. *See* EPA, Washington Water Quality Standards, http://yosemite.epa.gov/R10/WATER.NSF/webpage/Washington+Water+Quality+Standards (last visited July 1, 2006) (describing January 2005 approvals and March 2006 disapproval); Wash. Dep't of Ecology, Surface Water Quality Standards, *Water Quality Standards Rule, Which Version of the Rule Do I Use?*, http://www.ecy.wa.gov/programs/wq/swqs/rev_rule.html (last visited June 6, 2006) (showing that the 1997 anti-degradation rule is still in effect).

243 *Port of Seattle*, 90 P.3d at 670 n.6.

244 WASH. ADMIN. CODE § 173-201A-110 (2002).

245 *Id.* The provision of a short-term modification exception in the state water quality standards is consistent with the federal anti-degradation policy, which allows short-term, temporary reductions in water quality. *See* Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1127 (D.C. Cir. 1997) (citing 40 C.F.R. § 131.12 (1996)), which requires state water quality standards to designate uses for each body of water, set limits of pollutants necessary to protect those uses, and create an anti-degradation policy to protect existing uses.); EPA, Proposed Water Quality Guidance for Great Lakes System, 58 Fed. Reg. 20,802, 20,896 (Apr. 16, 1993) (noting

even though the short-term modification exception from the earlier regulations is less explicit than the new regulations in covering a river restoration project, it nevertheless should allow Ecology to certify the Condit Dam removal project.

If Ecology issues a water quality certification by determining that a short-term modification of water quality standards is permissible, the counties may argue either that Ecology has exceeded its regulatory authority or, if by that time EPA has approved the amended regulation, that Ecology's new regulation itself violates the CWA. There is reason to believe that Ecology's decision to grant a section 401 certification for the Condit Dam removal would survive a challenge. In issuing its water quality certification, Ecology must certify that there will be a "reasonable assurance" that the dam removal will not violate applicable state water quality standards.[247] In 2004, relying on the 1997 version of the state water quality regulations, the Washington State Supreme Court upheld Ecology's section 401 certification of a runway addition at SeaTac Airport against a challenge that there lacked reasonable assurance that the project would not violate water quality standards.[248] The court determined that there was reasonable assurance that the runway project would not violate these standards, in part because Ecology was entitled to rely on monitoring and adaptive management to mitigate the uncertainty inherent in a prospective reasonable assurance determination.[249] The decision also rested heavily on the court's deference to Ecology's interpretation of the statutes, regulations, and standards that the agency administers. The court noted that agency interpretations are entitled to "great weight," and defererred to Ecology on technical issues based on the agency's specialized expertise.[250]

A court applying this high level of deference likely would uphold an Ecology decision that concluded that the temporary reduction in water quality standards from the sediment flushing would not "significantly" interfere with the designated water uses in the river, based on the long-term benefits to follow. Given that the effect of dam removal on water quality in the White Salmon River will be positive in the long-run, the dam removal project would not violate the provision in the anti-degradation standard that any modification not cause "long-term harm to the environment."[251] Ecology likely also would include monitoring and adaptive management conditions in the certification to ensure that, after the initial six hour emptying of the reservoir, the agency can respond to water quality issues as the river flushes the sediment. These management conditions will allow Ecology to give the necessary reasonable assurance that water quality standards will not be violated beyond the short term. In addition, if EPA approves the new regulation endorsing major watershed restoration activities before Ecology

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that the federal anti-degradation policy allows short-term, temporary changes in water quality).

246 *See infra* notes 247–52 and accompanying text.

247 33 U.S.C. § 1341(a)(4) (2000); 40 C.F.R. § 121.2(a)(3) (2005).

248 *Port of Seattle*, 90 P.3d at 665, 670 n.5.

249 *Id.* at 678–79.

250 *See id.* at 672–73.

251 WASH. ADMIN. CODE § 173-201A-410 (2005).

certifies the Condit removal project, there should be no question that Ecology has the regulatory authority to issue the certification. Finally, a short-term exceedance of water quality standards that yields a fully-restored, undammed, forty-five mile long wild and scenic river with thriving populations of threatened and endangered fish surely is fully consistent with Congress's purpose in the CWA to "*restore* and maintain the chemical, physical and biological integrity of the Nation's waters."[252]

Although the prospects appear good for PacifiCorp to successfully obtain the necessary regulatory approvals and permits to allow FERC to definitively order the removal of Condit Dam, potential litigation over water quality certification or local permits could add several additional years to the dam removal process.[253] The litigation is likely only to delay further the removal and result in significant additional costs both to the litigants and to generations of the salmon and steelhead whose upstream passage remains blocked. And although eventually Condit Dam will be gone and the White Salmon River restored, it may end up having taken over two decades from the time PacifiCorp first filed for renewal of its license in December 1991.[254] The complexity and time involved in this dam removal are fairly staggering. Furthermore, Congress in 2005 amended the statute which set the Condit Dam on the road to removal, placing additional obstacles in the path of future dam removals by making it more onerous for fish agencies to require fish passage at FERC-licensed dams.

VI. THE 2005 AMENDMENTS TO THE FEDERAL POWER ACT

Condit Dam is scheduled for removal only because federal resource agencies prescribed fish passage at the dam under section 18 of the FPA.[255] The courts have interpreted the FPA to require FERC to include fishway conditions specified by federal fishery agencies under section 18 as well as federal land conditions specified by federal land management agencies and water quality conditions specified by state water quality agencies.[256] This limitation on FERC's authority has allowed other federal and state natural resource and environmental management agencies to require fish passage construction and operating conditions aimed at maintaining and restoring fish runs past dams.[257] However, in 2005, Congress succeeded in passing amendments to sections 4(e) and 18 of the FPA that may undermine the

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252 Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000) (emphasis added).

253 For example, in *Port of Seattle*, *supra* notes 248–50 and accompanying text, nearly three years passed from the time Ecology issued the section 401 water quality certification until the Washington Supreme Court issued its decision upholding Ecology's decision. *See Port of Seattle*, 90 P.3d at 668. It is also worth noting that *Port of Seattle* involved expedited, direct review to the Washington Supreme Court; thus, review by intermediate courts might add even more time to the litigation process.

254 *See supra* note 80 and accompanying text.

255 *See* Blumm & Nadol, *supra* note 2, at 123–24; Bonham, *supra* note 7, at 121–22, 132; *see also* discussion *supra* at notes 96–101 and accompanying text.

256 *See supra* section II.B.

257 *See generally* Blumm & Nadol, *supra* note 2 (describing the ability of other agencies to add environmental protection conditions to FERC licenses). *See also supra* section II.B.

ability of resource management agencies to ensure that FERC licenses are protective of federal reservations and fish passage. If the amendments prevent resource agencies from prescribing fish passage at FERC-licensed dams, it may become more difficult for proponents of dam removal to convince utilities to decommission marginally-economical hydroelectric projects, like Condit, that have devastating effects on migratory fish. This section describes the amendments and the new regulations which the resource agencies have developed to implement them, and considers what effect the amendments and regulations might have on future efforts to remove dams or condition hydropower licenses on fish protection.

A. History and Provisions of the 2005 FPA Amendments

The 2005 FPA amendments were the result of nearly ten years of effort by utilities to revise the licensing process to make it more difficult, both substantively and procedurally, for federal management agencies to impose mandatory conditions and prescriptions under sections 4(e) and 18.[258] In the run-up to the Energy Policy Act of 2005, the Senate and House of Representatives passed different versions of the 2005 energy bill that included amendments to the FPA hydropower licensing provisions.[259] As

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[258] The National Hydropower Association began lobbying for these changes in the mid 1990s. *See Comprehensive Energy Legislation Clears Congress*, FOSTER ELEC. REPORT, Aug. 3, 2005, at 1, *available at* 2005 WLNR 12719277. Senator Larry Craig (R–Idaho) proposed the Hydroelectric Licensing Process Improvement Act in 2000, which would have limited resource management agency conditions to "direct" project effects at the lowest possible cost, required agencies to submit mandatory conditions before the applicant was required to file for a license, and required extensive process for agencies to defend their conditions. Blumm & Nadol, *supra* note 2, at 124–25. The proposed act would also have prevented any agency but FERC from conducting an environmental review. *Id.* at 126. The Energy Policy Act of 2003, which died after a filibuster in the Senate, included FPA amendments similar to those that Congress adopted in 2005, authorizing trial-type hearings on disputed issued of material fact related to section 4(e) conditions and section 18 fishway prescriptions, as well as permitting the applicant to propose alternative conditions or prescriptions and setting out the process by which FERC and the appropriate agency must consider the proposed alternative. *See* EDISON ELEC. INST., SUMMARY OF HYDROELECTRIC-RELATED PROVISIONS, TITLE II – RENEWABLE ENERGY, H.R. 6 – ENERGY POLICY ACT OF 2003, CONFERENCE REPORT, NOVEMBER 18, 2003, *available at* http://www.eei.org/industry_issues/electricity_policy/federal_legislation/hr6_hydro_summary.pdf; *see also Energy Policy Act in House of Representatives Looks for Partnership in Senate*, FOSTER NAT. GAS REPORT, June 24, 2004, at 8, *available at* 2004 WLNR 16744910 (describing November 2003 filibuster of Act). The push to limit resource agency discretion also came at the administrative level, as both NMFS and the Department of the Interior proposed new rules which would have limited public participation in fishway prescription decisions and enlarged opportunities for industry appeals. *See* Procedures for Review of Mandatory Fishway Prescriptions Developed by the Department of Commerce in the Context of the Federal Energy Regulatory Commission's Hydropower Licensing, 69 Fed. Reg. 54,615 (Sept. 9, 2004); Procedures for Review of Mandatory Conditions and Prescriptions in FERC Hydropower Licenses, 69 Fed. Reg. 54,602 (Sept. 9, 2004); Lavigne, *supra* note 128, at 462–63. Neither of the proposed rules was finalized before the 2005 FPA amendments required new rulemaking on these issues. *See infra* notes 268–69 and accompanying text.

[259] *See* Hydropower Reform Coalition, *supra* note 22. The versions of the legislation that first passed the House and Senate included several provisions which the congressional conference committee modified or removed from the final reconciled bill. The House version of the

amended by the final reconciled bill, the FPA authorizes the applicant or any party to the licensing proceeding to propose an alternative to any condition or fishway prescription that the federal resource management agencies have imposed on the license under sections 4(e) and 18.[260] The agency that proposed the condition or prescription must accept the alternative if it "provides for the adequate protection and utilization of the reservation" (in the case of section 4(e) conditions), or is "no less protective than the fishway initially prescribed" (in the case of section 18 prescriptions), and the alternative will "cost significantly less to implement" or "result in improved operation of the project works for electricity production."[261]

The agency responsible for the section 4(e) condition or section 18 fishway prescription retains responsibility for determining whether the alternative condition meets the new statutory standard.[262] In making the decision, the agency must document in writing the basis for the condition it adopts as well as its reason for not accepting the proposed alternative, and must demonstrate that it "gave equal consideration" to the effect of both the condition adopted and alternative rejected on "energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality)."[263] Even after the resource agency has made its determination, the amendments return to FERC some authority to influence mandatory conditions and prescriptions which the Commission had lacked under the *Escondido* and *American Rivers* decisions.[264] If FERC determines that the agency's final condition or prescription "would be inconsistent with the purposes of this part, or other applicable law," FERC may refer the dispute to its Dispute

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hydropower licensing amendments provided that only license applicants could offer alternatives to section 4(e) and section 18 conditions and prescriptions which resource agencies impose during the FERC relicensing process, and allowed only applicants to request hearings to resolve factual disputes regarding the proposed conditions. Ben Geman, *Environmentalists Call Hydro, NEPA Language a 'Perfect Storm*,' ENV'T & ENERGY DAILY, Apr. 19, 2005, *available at* http://www.eenews.net/EEDaily/include/print.php?single=04190501. The House version also limited NEPA review of "renewable energy projects" to the project as proposed and a "no action" alternative—language that potentially could have precluded FERC from reviewing the environmental impact of a dam removal alternative or a modification to a proposal that adds fish passage, both of which the Commission considered in the FERC 1996 FEIS for the Condit project. *See* Geman, *supra*; *see supra* notes 88–89, 95–96 and accompanying text. The Senate version of the bill allowed tribes, states and other stakeholders to propose alternative conditions and seek a hearing on factual issues, but specified that the final conditions would be based on the "judgment" of the dam owners. Hydropower Reform Coal., Energy Policy Act of 2005: A Summary, http://www.hydroreform.org/energybill-summary.asp (last visited July 5, 2006). The final reconciled bill eliminated the Senate's language regarding the basis of the final decision, which had been characterized as an "industry veto," and also removed the House's restriction on NEPA review. Energy Policy Act of 2005 § 241, 119 Stat. 594, 674–77; *see also* Energy Policy Act of 2005: A Summary, *supra*.

260 Energy Policy Act of 2005 § 241(c).

261 *Id.*

262 *See id.*

263 *Id.* at 675.

264 Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 777–79 (1984); Am. Rivers v. FERC, 201 F.3d 1186, 1210 (9th Cir. 2000); *see supra* notes 19, 68, 73, and accompanying text.

Resolution Service, which in turn will issue a "non-binding advisory" within ninety days.[265] The resource agency then "may accept" the non-binding advisory, "unless" the agency "finds that the recommendation will not adequately protect" the federal reservation (for section 4(e) conditions) or "the fish resources" (for section 18 prescriptions).[266]

The 2005 FPA amendments also give the license applicant or any party to the proceeding the right to "an agency trial-type hearing of no more than 90 days" on disputed issues of material fact regarding section 4(e) conditions or section 18 fishway prescriptions imposed by the resource management agencies.[267] In November 2005, as required by the amendments,[268] the Departments of the Interior, Commerce, and Agriculture, in consultation with FERC, issued interim final rules for administering trial-type expedited hearings and alternative conditions and fishway prescriptions.[269] The new rules were effective immediately and allow parties to pending licensing proceedings to use the new hearing and alternative procedures in cases where a resource agency had filed mandatory conditions or prescriptions but a license has not yet been issued.[270] In December 2005, a coalition of

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265 Energy Policy Act of 2005 § 241(c).

266 *Id.* Although this statutory language appears to place the burden of proof on the resource agency to show that FERC's non-binding recommendation will not adequately protect the federal reservation or fish resources, the non-binding nature of the recommendation and the oddly-phrased provision that the agency "may" accept the recommendation "unless" it makes this showing ultimately may leave unfettered discretion in the resource agency after FERC has issued its advisory. *See* discussion *infra* note 291 and accompanying text.

267 Energy Policy Act of 2005 § 241(a)–(b).

268 *See id.* (requiring the agencies jointly to establish procedures for trial type hearings within 90 days).

269 Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804 (Nov. 17, 2005) (to be codified at 7 C.F.R. pt. 1 (Dep't of Agriculture), 43 C.F.R. pt. 45 (Dep't of the Interior), and 50 C.F.R. pt. 221 (Dep't of Commerce)). The Federal Register notice states that "[t]hree substantively identical rules are being promulgated—one for each agency—with a common preamble." *Id.* at 69,804. For clarity, and because this Article is concerned mainly with section 18 fishway prescriptions affecting anadromous fish, this section will reference and discuss the Department of Commerce's regulations applicable to NOAA Fisheries fishway prescriptions, except where referencing the common preamble to the new regulations.

270 *Id.* at 69,805, 69,809. Before the agencies issued the hearing and alternative rules, at least three utilities with pending license applications advised FERC that they believed they were entitled to a hearing based on the 2005 FPA amendments. *See* Letter from Robbin Marks, Chair, Hydropower Reform Coal., to Joshua Bolton, Dir., Office of Mgmt. & Budget et al. 6–7 (Nov. 4, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10890308:0 (describing FERC submissions by the Public Utility District No.1 of Pend Oreille County (Pend Oreille P.U.D.), City of Augusta, and Portland General Electric). Pend Oreille P.U.D. claimed that it had a right to invoke the new hearing procedures and submit an alternative prescription for a license that FERC issued in July 2005 for its Box Canyon hydropower project because the utility had filed a petition for a stay and rehearing. *Id.* at 6–7. However, because the new hearing and alternative rules apply only "to any hydropower license proceeding for which the license has not been issued as of November 17, 2005," Pend Oreille P.U.D. had no right to a hearing under the plain language of the new regulations. 70 Fed. Reg. at 69,829. In February 2006, FWS rejected Pend Oreille P.U.D.'s request for a hearing on this ground. Motion of Public Utility District No. 1 of Pend Oreille County, Washington, to Defer Consideration of Requests for Rehearing at 3, Box Canyon Hydroelectric Project, FERC No. P-2042-031 (Mar. 7, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10967770:0 [herein–

conservation groups filed suit challenging the new regulations, alleging that the rules were unlawful because the agencies promulgated them without allowing for notice and comment and because the rules applied retroactively to reopen conditions and prescriptions which had already been finalized in pending licensing proceedings, despite the fact that the FPA amendments did not provide for retroactive applications of their terms.[271]

The electric utility industry crowed that the Energy Policy Act of 2005 "improves the mandatory licensing conditions for hydropower."[272] A spawning salmon futilely seeking passage over a FERC-licensed dam might have a different view. Advocates of fish passage at dams described the process created by the FPA Amendments as "complex and unworkable," encouraging the lowering of environmental standards, delaying the licensing process, and further stretching limited agency resources, while giving unprecedented influence to dam owners in the licensing process.[273] FERC proceedings, as well as the new trial-type hearings on alternative conditions and prescriptions and, most likely, court challenges over the next several years, will determine just how much of an obstacle the 2005 FPA amendments present to efforts to add critical environmental protection provisions to hydropower licenses. The following sections suggest how some of the issues the 2005 FPA amendments raise for section 18 fishway prescriptions may play out.

B. Potential Effects of the 2005 FPA Amendments on Section 18 Prescriptions

The new procedural rules spawned by 2005 FPA amendments are likely to result in new and unwieldy hearing processes for determining factual issues regarding section 18 fishway prescriptions, raising the prospect of additional delays in the relicensing process and increasing the burden on fish management agencies prescribing fish passage in hydropower licenses. The new rules seem sharply skewed in favor of a utility challenging the factual basis of a resource agency prescription or proposing an alternative, potentially disadvantaging governmental and non-profit interested parties. However, the rule's short time limit for requesting hearings and proposing alternatives in pending licensing renewals, the potential interest of resource agencies in vigorously defending their institutional expertise, and the substantive requirement that any alternative prescription be "no less

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after Pend Oreille Motion]. The P.U.D. then filed suit challenging the hydropower regulations and seeking a declaration that FWS's rejection of its request for a hearing was arbitrary and capricious. *Id.* at 4.

271 *See* Complaint for Declaratory and Injunctive Relief ¶ 2, Am. Rivers v. U.S. Dep't of Interior, No. C05-2086 (W.D. Wash. Dec. 16, 2005), *available at* http://www.earthjustice.org/news/documents/12-05/05701_complaint.pdf. Three of the plaintiffs challenging the new hydropower rules (American Rivers, American Whitewater, and Trout Unlimited) are parties to the Condit settlement agreement. *See id.*; *supra* note 7.

272 Thomas R. Kuhn, *Another Perspective: No Substitute for Hard Work*, ELEC. PERSPECTIVES, Sept. 1, 2005, at 80 (comments of president of Edison Electric Institute), *available at* 2005 WLNR 14755019.

273 Hydropower Reform Coalition, *supra* note 22.

protective" than the section 18 prescription which the resource agency proposed, may temper the detrimental effects of these amendments on efforts to include fish passage as a condition of FERC licenses.

1. Procedural Effects of Hearing and Alternative Prescription Rules

Utilities and other parties to a licensing proceeding may now file a hearing request with the department whose prescription the party wishes to contest or propose an alternative fishway prescription.[274] A hearing request must list the issues of material fact[275] that the requesting party disputes, the basis of its opinion that the facts as stated by the agency are erroneous, citations to document in the license proceeding record and copies of documents not in the record, and a list of witnesses and exhibits the party intends to present at the hearing.[276] An alternative prescription proposal must include a description of the alternative, with a level of detail equivalent to the prescription filed by the resource agency, including an explanation of how the alternative will afford no less protection than the fishway prescribed by the resource agency.[277] The hearing process includes opportunities for discovery, including deposition and expert discovery, presentation of evidence, cross-examination, motions, and post-hearing briefs.[278] Whatever substantive effect the FPA amendments and new hydropower regulations have on the protection of imperiled fish in dam relicensing proceedings, they represent an extraordinary intrusion into an agency's process for arriving at sound scientific conclusions regarding resource protection measures, and, perhaps not coincidentally, a boon to any law firm looking to generate billable hours for its hydropower utility clients.

Several provisions appear particularly burdensome for interested parties with limited resources, including conservation groups and

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274 *See, e.g.*, 70 Fed. Reg. at 69,843–44, 69,850 (to be codified at 50 C.F.R. §§ 221.21, .71) (procedures for requesting trial-type hearing regarding Department of Commerce fishway prescriptions and for proposing alternative prescriptions).

275 The resource agencies define "material fact" to mean "a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any preliminary condition or prescription." *Id.* at 69,809 (to be codified at 7 C.F.R. § 1.602, 43 C.F.R. § 45.2, 50 C.F.R. § 221.2). As an example, the preamble indicates that, for a fishway prescription, "issues of material fact could include but are not limited to issues such as whether the river has historically been a cold or warm water fishery or whether fish have historically been found above or below the dam." *Id.* However, "legal or policy issues would not qualify as issues of material fact." *Id.*

276 *Id.* at 69,810 (to be codified at 7 C.F.R. § 1.621, 43 C.F.R. § 45.21, 50 C.F.R. § 221.21).

277 *Id.* at 69,850 (to be codified at 50 C.F.R. § 221.71(b)). The term "no less protective" is not defined in the 2005 FPA amendments or the new hearing and alternative regulations. Although the rules do not say so expressly, the "equivalent level of detail" provision presumably requires the alternative to include a full study of the effects of the alternative on aquatic resources if the agency included such a study in its prescription, to give the agency a basis for comparing whether the alternative is no less protective than the agency's prescription. For example, the 1996 Condit Dam FEIS devoted nearly 40 pages to the section 18 fishway prescriptions and an analysis of their effect on fish resources, including productivity, mortality, restoration and management. *See* FERC 1996 FEIS, *supra* note 24, at 2-35 to 2-38, 3-28 to 3-32, 4-49 to 4-71.

278 70 Fed. Reg. at 69,807–8 (preamble describing components of trial-type hearing procedures common to all agencies).

government agencies. For example, once a party has filed a hearing request, other parties have only fifteen days to file a notice of intervention and response.[279] The intervenor may not raise issues of material fact beyond those raised in the original hearing request, and must list in the intervention notice any witnesses and exhibits the intervenor intends to present at the hearing.[280] In addition, discovery will occur by agreement of the parties or by motion to the administrative law judge conducting the hearing, but only if the ALJ determines that the discovery will not unreasonably delay the hearing process, and that the scope of discovery is not unduly burdensome.[281] Although ostensibly intended to "keep the discovery process within reasonable bounds, in light of the tight time constraints applicable to the hearing,"[282] a likely result could be that a utility will be successful in taking discovery of resource agency personnel, but that other interested parties will find it more difficult to obtain discovery from the utility and its experts.[283]

The new rule requires the hearing process to be concluded within ninety days from the date the agency determines that a hearing is necessary, including "an initial prehearing conference, discovery, an evidentiary hearing for the parties to present their evidence and cross-examine witnesses, the submission of post-hearing briefs, and issuance of a final decision."[284] Although the 2005 FPA amendments specified the ninety-day limit,[285] a three-month time frame for a trial-type hearing is fanciful, given the reality of contemporary administrative and civil judicial adjudication in which two to five years is typical for the resolution of disputed issues of fact through discovery and trial.[286] Indeed, for license applicants with pending prescriptions or conditions, the resource agencies' decisions in hearings

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279 *Id.* at 69,843 (to be codified at 50 C.F.R. § 221.22).

280 *Id.*

281 *See id.* at 69,812 (preamble describing discovery procedures common to all agencies).

282 *Id.*

283 *See* M. Patricia Thayer, *Rocket Dockets: What, When and Where*, 619 PRAC. L. INST. 51, 55 (2000) (expressing concern that expedited patent case proceedings favor the party with most resources); *cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (stating that "to the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit"); Mid-West Paper Prods. Co. v. Cont'l Group, Inc., 596 F.2d 573, 579 (3d Cir. 1979) (noting that "[p]rotracted discovery could be used by a wealthy party to coerce an adversary with limited resources into submission").

284 70 Fed. Reg. at 69,807.

285 Energy Policy Act of 2005 § 241(a)–(b), 119 Stat. 594, 674–75.

286 *See, e.g.*, 2004 DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. app. 1, tbl. C-5 (showing 21.9 month average time from filing to disposition after trial of cases in federal district courts); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 373 n.151 (2002) (citing studies showing that in 1988 the National Labor Relations Board took an average of 762 days to adjudicate an unfair labor practice charge and that the median for civil trials between the filing of the complaint and the beginning of trial was 2.5 years); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 884 (1996) (citing studies of state civil courts in which the average case took up to 59 months from filing to trial).

requested before the December 19, 2005 filing deadline[287] were scheduled—as of May 2006—to be issued between October 2006 and April 2007, far beyond the ninety-day limit.[288] The Departments of Interior and Agriculture have indicated that they will be able to schedule only one hearing per month because of a scarcity of administrative law judges.[289] The reality undoubtedly will be that trial-type hearings and proposed alternatives will further prolong the licensing process as utilities seek extensive discovery from agency personnel and due to the delays inherent in a complex administrative trial-type hearing.

These delays, and the prospect of subjecting resource agency personnel to deposition and cross-examination regarding their fishway prescriptions, will increase the administrative burden on agencies, which already struggle to prepare decisional documents in a timely manner.[290] The burden of trial-type proceedings and the intense scrutiny to which the new rules expose resource agency fishway prescriptions may chill those agencies from issuing protective fishway prescriptions in FERC licenses—a result the drafters of the FPA amendments probably sought.[291] In addition, the 2005 FPA amendments give FERC a modest amount of influence on fishway prescriptions by allowing the Commission to issue a non-binding advisory through its Dispute Resolution Service, in the event it disagrees with the resource agency's final prescription.[292] Although this places yet another procedural burden on the resource agency, the final decision on the fishway prescription remains with the agency because the amendments provide that it "may accept" FERC's recommendation "unless" it "finds that the recommendation will not adequately protect the fish resources."[293] FERC

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[287] *See infra* notes 297, 299 (describing the regulatory filing deadline and listing utilities which filed hearing requests in pending licensing proceedings).

[288] *See Hydroelectric Facilities: Hearing Before the S. Comm. on Energy and Natural Resources*, 109th Cong. (2006) (Table of Transition Project Schedules, attached to testimony of J. Mark Robinson, Dir., Office of Energy Projects, FERC) , *available at* http://www.hydroreform.org/SupportingFiles/documents/FERC_Retroactive_Projects.pdf (listing nine hydroelectric projects for which utilities requested trial-type hearings and for which decisions of the administrative law judge are due between October 3, 2006 and April 24, 2007).

[289] *Hydroelectric Facilities: Hearing Before the S. Comm. on Energy and Natural Resources*, 109th Cong. (2006) (testimony of J. Mark Robinson, Dir., Office of Energy Projects, FERC), *available at* http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1550&Witness_ID=4002 [hereinafter Robinson Testimony].

[290] *See, e.g.*, *supra* notes 151–57, 159–64 and accompanying text (describing delays in the ESA consultation process on the removal of Condit Dam).

[291] *Cf.* Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Users in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 889 n.49 (1998) (describing chilling effect of threatened litigation or legislation on agency action); Ann L. Renhard Cole, Note, *State Private Property Rights Acts: The Potential for Implicating Federal Programs*, 76 TEX. L. REV. 685, 721 (1998) (describing letter from EPA regional administrator to state resource commissioner cautioning that the threat of litigation associated with private property rights acts could chill federal agency enforcement of environmental programs and drain resources from agencies which get entangled in such litigation).

[292] Energy Policy Act of 2005 § 241(c), 119 Stat. 594, 675–77; *see supra* notes 264–66 and accompanying text (describing FERC advisory authority over fishway prescriptions under Energy Policy Act of 2005).

[293] *Id.*

thus gains some procedural ability to influence the resource agency's decision, but no authority to overrule that decision.[294]

Three considerations may mitigate the potential harm from the onerous hearing and alternative process to efforts to condition relicensing of hydropower projects and, by extension, to future efforts to remove dams like Condit that make little economic sense when weighed against the damage they cause to migrating fish. First, in pending license proceedings where FWS or NMFS had filed a fishway prescription before November 17, 2005,[295] parties to those proceedings had only until December 19, 2005 to request a hearing or file an alternative prescription.[296] This short deadline, and the substantial information required in a hearing request or proposed alternative prescription,[297] appears to have led to a relatively small number of filings. Utilities filed requests for trial-type hearings and proposed alternative conditions or prescriptions in a dozen pending proceedings, and

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[294] The unusual statutory language may also have the unexpected result that a resource agency need not actually make a determination whether or not FERC's recommendation adequately protects fish resources. The plain meaning of the provision that the resource agency "may" accept the advisory "unless" the agency finds that the recommendation does not adequately protect fish is that, if the resource agency assesses FERC's advisory and determines that FERCs recommendation will not adequately protect fish, then the resource agency *may not* accept FERC's recommendation. *Cf.* 10 U.S.C. § 2511(c)(2) (2000) ("Any such funds so used *may be considered* in calculating the amount of the financial commitment undertaken by the non-Federal Government participants *unless* the Secretary determines that the small business concern has not made a significant equity percentage contribution in the project from non-Federal sources.") (emphasis added). The provision does not oblige the resource agency to make any determination regarding FERC's advisory. *Cf.* 5 U.S.C. § 552(a)(2) (2000) ("an agency *may delete* identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case *the justification for the deletion shall be explained* fully in writing.") (emphasis added).

The effect of the statutory language is that the resource agency's discretion in submitting its final written determination is the same whether the resource agency assesses FERC's advisory and finds that it *will* adequately protect fish or whether the agency simply ignores FERC's recommendation. Ignoring FERC's recommendation would be within the resource agency's discretion under the courts' interpretation of section 18 which forbids FERC from modifying section 18 mandatory prescriptions. *See supra* notes 71–73 and accompanying text (discussing section 18 and Ninth Circuit interpretation). The awkward and ambiguous passage in the 2005 FPA amendments allowing FERC to issue advisory recommendations is insufficiently clear to constitute a repeal of the mandatory language of section 18. *See* Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995) (stating that repeal of legislation by implication is disfavored); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (noting that since repeals by implication are disfavored, to find a repeal by implication Congress's intent must be clear and manifest). Perhaps tellingly, the new hydropower rules do not include any provision for how resource agencies would review a FERC advisory recommendation.

[295] November 17, 2005, was the date the resource agencies promulgated the new hearing and alternative rules. Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804, 69,804 (Nov. 17, 2005).

[296] *See Id.* (to be codified at 50 C.F.R. § 221.4(a)-(b)(1)) (providing procedures for license applications with fishway prescriptions pending on Nov. 17, 2005). Interventions and responses from other parties to pending license proceedings in which a party requests a hearing or proposes a condition were due on January 3, 2006. *Id.* (to be codified at 50 C.F.R. § 221.4(b)(2)).

[297] *See supra* notes 275–77 and accompanying text (describing requirements for documentation accompanying hearing requests and alternative prescription proposals).

submitted alternative conditions or prescriptions for five more projects, without requesting hearings on issues of material fact.[298]

Second, the fact that the first hearings and alternative proposals under these new regulations will challenge previously proposed prescriptions and conditions may give agencies an incentive to defend their decisions more vigorously. Agency officials who have already prepared a detailed scientific justification for a protective fishway condition will have an institutional interest in defending that decision from a challenge that another condition might be equally protective but less costly.[299] Successful defense of existing proposals in the early challenges under the new system may ultimately deter other utilities from undertaking costly challenges if they are perceived as difficult to win.

Third, although the 2005 amendments and new rules grant a utility or other interested party the right to a hearing and to propose alternative conditions, these new procedures may not translate into the ability to show that, in substance, an alternative and less costly prescription is "no less protective" of fish than the prescription which the resource agency proposed. As discussed below, the hydropower regulations leave this

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[298] Hearing requests, along with alternative conditions or prescriptions, were filed for PacifiCorp's Condit hydroelectric project (FERC No. P-2342); FPL Energy Maine Hydro LLC's Bar Mills project (FERC No. P-2194); Pend Oreille P.U.D.'s Box Canyon project (FERC No. P-2042); Pacific Gas & Electric Company's Upper North Fork Feather River project (FERC No. P-2105), Spring Gap-Stanislaus project (FERC No. P-2130), Pit 3, 4, 5 hydroelectric project (FERC No. P-233), Poe hydroelectric project (FERC No. P-2107), and Kern Canyon project (FERC No. P-178); Public Utility District No. 2 of Grant County's Priest Rapids project (FERC No. P-2114); Public Service Company of New Hampshire's Merrimack River hydroelectric project (FERC No. P-1893); Garkane Energy Cooperative, Inc.'s Boulder Creek project (FERC No. P-2219); and Southern California Edison Company's Portal hydroelectric project (FERC No. P-2174). Hydropower Reform Coal., Joint Agency Rulemaking: Retroactive Case Studies, http://www.hydroreform.org/retroactivecases.asp (last visited July 16, 2006). Utilities filed alternative conditions or prescriptions, without requesting hearings, for five other projects: Southern California Edison's Borel project (FERC No. P-382) and Vermillion Valley project (FERC No. P-2086); Pacific Gas & Electric Company's Donnells-Curtis Transmission Line (FERC No. P-2118); Nevada Hydro Company's Elsinore project (FERC No. P-11858); and Chelan County P.U.D.'s Rocky Reach project (FERC No. P-2145). *Id.* Two other utilities which had earlier notified FERC that they believed they were entitled to hearings, see *supra* note 270, do not appear to have filed requests for hearings. The City of Augusta instead withdrew its license application for its Augusta Canal project. City of Augusta's Notice of Conditional Withdrawal of Application, Augusta Canal Project, FERC No. P-11810-004 (Dec. 15, 2005), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10906898:0. The FERC electronic docket for Portland General Electric's Clackamas hydropower project (FERC No. P-2195) shows no filing of a request for a trial-type hearing nor a submission of a proposed alternative prescription. *See also infra* note 355 and accompanying text.

[299] For example, in the Pend Oreille P.U.D. Box Canyon project proceedings, the FWS submitted a 123-page description and justification of its fishway prescription, including an administrative record on CD-Rom containing over 200 documents supporting the agency's prescription. U.S. Dep't of the Interior, Fish & Wildlife Serv., Prescription for Fishways Pursuant to Section 18 of the Federal Power Act, Box Canyon Hydroelectric Project, FERC No. P-2042-000 (May 21, 2004), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10154603:0; U.S. Dep't of the Interior, Fish & Wildlife Serv., Administrative Record for the Prescription for Fishways at 2–27, Box Canyon Hydroelectric Project, FERC No. P-2042-013 (June 16, 2004), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10170829:0.

fundamental question to the discretion of the resource agency, and a court reviewing an agency decision to reject a proposed alternative will give the agency's determination substantial deference.[300] If reviewing courts consistently defer to the agencies' determinations, the significant hurdle of showing that an alternative to a resource agency prescription is equally protective of threatened and endangered fish may also deter utilities from spending the resources necessary to propose and advocate the detailed alternatives required under the new rules.

2. Substance of the 2005 FPA Amendments—"No Less Protective" Prescriptions

Neither the Energy Policy Act of 2005 nor the new hydropower rules defines what it means for a proposed alternative to be "no less protective" than the agency's preliminary prescription.[301] The statute and rules likewise are silent on exactly what the agency's fishway prescription and the proposed alternative must protect, or how that protection should be achieved. Section 18 describes fishways as providing "safe and timely upstream and downstream passage for fish,"[302] while section 10(j) indicates that resource agency license conditions are meant to "protect, mitigate damages to, and enhance, fish and wildlife" affected by a dam.[303] Because of the ambiguity of the "no less protective" statutory language, and its inclusion without further definition in the regulations, the resource agency will have discretion to determine the substantive content of the term.[304] That interpretation will influence the agency's comparison of the utility's proposed alternative with the agency's own preliminary prescription.

The structure of the 2005 amendments makes that comparison a threshold question: if an alternative is less protective than the agency's prescription, the agency is not obligated to accept the alternative, no matter that the alternative is less costly or improves electricity production.[305] Because the amendments leave the resource agency with discretion to interpret the "no less protective" standard, and because the rules place the burden of proof on the party proposing an alternative to first show how the alternative is "no less protective" than the agency's prescription,[306] it may be difficult for a party proposing an alternative to meet the standard. First, because Congress has established that "the items which may constitute a 'fishway' under section 18 for the safe and timely upstream and downstream

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300 *See supra* notes 298–99 and accompanying text; *infra* notes 301, 308, 317 and accompanying text.

301 *See* Energy Policy Act of 2005 § 241(c), 119 Stat. 594, 675–77; 70 Fed. Reg. at 69,804.

302 16 U.S.C. § 811 (2000).

303 *Id.* § 803(j)(1).

304 *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation was entitled to deference); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 414 (1993) (holding that a permissible construction of an ambiguous statutory provision by the agency entrusted with implementing the statute was entitled to deference).

305 *See* Energy Policy Act of 2005 § 241(c), 119 Stat. at 675–77.

306 *See supra* note 277 and accompanying text.

passage of fish" are "limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish" and related operations and measures related to such structures, facilities, or devices,[307] alternatives which add only more fish to a river above or below a dam—such as a hatchery—cannot meet the "no less protective" test because they do not fit the definition of a "fishway."

Second, alternatives that involve only trapping and hauling of fish to achieve upstream and downstream passage are unlikely to be "no less protective" than a prescribed fish ladder which keeps fish in the river. Scientific studies and resource management agency experience illustrate that trap-and-haul systems are not as effective at protecting fish as in-current passage past a dam that approximates natural river conditions.[308] An agency acting within its discretion, and with a reasonable evidentiary basis, should be able to defend its conclusion that a trap-and-haul alternative is not as protective of fish as structures and facilities which more closely approximate a natural passage past an obstruction in the river.[309]

Third, it may also be difficult for alternative prescriptions that involve in-river structures at dams to meet the "no less protective" standard if they do not protect every aspect of the fish life-cycle and fishery resource which the agency's preliminary prescription considered.[310] The ambiguous term "no less protective" again leaves the determination of how to make the comparison between the proposed alternative and the agency's prescription to the agency's discretion.[311] Because an agency's prescription ordinarily

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307 Energy Policy Act of 1992 § 1701(b), 106 Stat. 3008, 3008.

308 *See* MICHAEL C. BLUMM, SACRIFICING THE SALMON 281–93 (2002) (describing eight scientific reports on truck and barge transportation of juvenile fish and concluding that "a significant part of the scientific community believes that the centerpiece of current recovery efforts, the trucking and barging of juvenile salmon, is a failure" and that a "growing scientific consensus" supports restoration of natural river conditions as the best option for saving salmon); FERC 1996 FEIS, *supra* note 24, at 4-60 (describing restoration of natural fish runs as the agencies' management goal and recognizing restoration of free-flowing streams as the optimal means of achieving this goal); FWS 2002 BiOp, *supra* note 146, at 22 (describing the restoration of habitat connectivity between the upper and lower White Salmon River as essential to the long-term recovery of bull trout); *cf.* Nat'l Wildlife Fed'n v. NMFS, No. CV 01-640-RE, 2005 WL 3576843, at *2, *8 (D. Or. Dec. 29, 2005) (noting that "[s]tudies do not establish, with absolute certainty, the relative benefits of spill versus transportation" but finding, with respect to out-of-stream transportation of fish from the Columbia River, that there was no evidence of benefit to salmon from the use of trucks and ordering NMFS on remand to justify the use of trucks instead of barges to transport fish).

309 *See* Wisc. Power & Light Co. v. FERC, 363 F.3d 453, 461 (D.C. Cir. 2004) (holding that fishway prescriptions were supported by substantial evidence and that party challenging fishway prescriptions bears a "heavy burden" to show they are arbitrary and capricious); *see also* Bangor Hydro-Elec. Co. v. FERC, 78 F.3d 659, 664 (D.C. Cir. 1996) (noting that FWS policy choice of in-river fishway passage over alternative escapement remedies was "entitled to a good deal of deference"). *But see id.* (holding that FWS failed to show any reasonable support for requiring fishways to permit alewife passage past dam and relied only on conclusory assertions for its prescriptions).

310 *See* Energy Policy Act of 1992 § 1701(b), 106 Stat. at 3008 (specifying that fishways must protect all life stages of fish).

311 *Cf.* Conservation Law Found. v. Evans, 360 F.3d 21, 28 (1st Cir. 2004) (holding that inclusion of word "practicable" in statutory provision directing agency to minimize adverse effects evidenced congressional intent to "allow for the application of agency expertise and

details both the prescription's effects on individual aspects of the fish resource and its cumulative effects, a proper comparison should analyze how the alternative protects each individual aspect, and not provide only a cumulative, qualitative judgment regarding the relative level of protection.[312] For example, in the prescription for fish passage at Condit Dam, the agencies examined the effect of the prescribed fish passage and flow regimes on the productivity of fish, fish mortality during downstream passage, the amount of habitat to which fish would gain access by passage, recreational fishing, and the cultural value of restored fish runs for the tribes who retain treaty fishing rights in the river.[313] Based on this analysis, the agencies concluded that the prescription would be the most beneficial option—short of dam removal—for promoting the genetic diversity, restoring habitat, and increasing productivity of salmon and steelhead in the White Salmon River.[314] Unless an alternative meets or exceeds the benefit to fish and fish-related cultural or recreational values for each of these criteria, as well as meeting or exceeding the aggregate protection which the agency's prescription offers, an agency could reasonably determine that the alternative is less protective than the fishway prescribed by the resource agency.

Finally, the "no less protective" substantive standard may be difficult for an alternative to meet because of the high degree of deference to the current approach due to an agency's expert determination. A court of appeals reviews a section 18 prescription under an arbitrary and capricious standard, placing a "heavy burden" on the party challenging the prescription to show that the resource agency's decision was not supported by substantial evidence.[315] Where the issue on review involves primarily questions of fact, the agency is entitled to rely on its own expertise, even where there is conflicting evidence.[316] As resource agencies have listed more

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discretion in determining how best to manage the fish resources").

312 *See, e.g.*, Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1175 (10th Cir. 2002) (describing NEPA's requirement for evaluating "all reasonably foreseeable project impacts"); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1286 (1st Cir. 1996) (holding that NEPA required evaluation of all reasonably foreseeable effects of federal action); 40 C.F.R. § 1502.16 (2005) (listing eight categories of environmental effects for discussion in NEPA evaluation, including direct effects, indirect effects, historic and cultural resources, and measures for mitigating adverse environmental impacts).

313 FERC 1996 FEIS, *supra* note 24, at xi, 4-59 to 4-67, 4-78, 5-21, 5-24.

314 *Id.* at xi-xii.

315 Wisc. Power & Light Co. v. FERC, 363 F.3d 453, 461 (D.C. Cir. 2004). Substantial evidence need not even be a preponderance of the evidence. *See id.* Nothing in the 2005 FPA amendments altered this standard of review, although the amendments specified additional, detailed written findings that the resource agency must make in support of its decision. *See* Energy Policy Act of 2005, § 241(c), 119 Stat. 594, 675–77.

316 *Wisc. Power*, 363 F.3d at 463; *see also* United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving . . . scientific matters."); *cf.* Nat'l Wildlife Fed'n v. NMFS, 422 F.3d 782, 798–99 (9th Cir. 2005) (affirming preliminary injunction ordering additional spill of water over dams in Columbia River, notwithstanding the principle that "[d]eference to the informed discretion of the responsible federal agencies is especially important [when] the agency's decision involves a high level of technical expertise," where the agency had failed to consider factors essential to a reasoned analysis).

fish as threatened or endangered,[317] judicial review of prescriptions intended to protect fish has become more deferential to agencies' determination of the need for fishways.[318] Where an agency is charged under the FPA with adding conditions to a hydropower license to "protect, mitigate damages to, and enhance" fish, [319] as well as with administering the highly protective ESA,[320] a decision by that agency that its fishway prescription is more protective than an alternative, and therefore more consistent with the protective purposes of the statutes, will be accorded "substantial deference."[321] While the 2005 FPA amendments will be procedurally burdensome for the resource agencies, the amendments appear to offer opponents of fish passage prescriptions less substantive ground for preventing agencies from imposing fishways necessary for the protection of migrating fish than those opponents might have wished, *if* the agencies choose to defend the positions they have taken on fish passage prescriptions.[322]

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[317] For example, NOAA Fisheries reviewed 52 separate populations of West Coast anadromous salmon between 1994 and 1999 and concluded by listing 26 of these as threatened or endangered under the ESA. *See* NOAA Fisheries, Salmon Populations, http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Index.cfm (last visited July 15, 2006).

[318] *Compare Wisc. Power*, 363 F.3d at 465 (upholding fishway prescription based on substantial evidence despite FWS having not yet prescribed particular fishway devices) *with* Bangor Hydro-Elec. Co. v. FERC, 78 F.3d 659, 664 (D.C. Cir. 1996) (finding insufficient evidence to support fish ladder prescription).

[319] 16 U.S.C. § 803(j)(1) (2000).

[320] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 698–99 (1995) (holding that Congress's intent to provide comprehensive protection for endangered and threatened species through the ESA supported the reasonableness of the agency's definition of "take"); TVA v. Hill, 437 U.S. 153, 184 (1978) (stressing that Congress's intent in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost"); *cf. Nat'l Wildlife Fed'n*, 422 F.3d at 793–94 (noting that in deciding whether to grant injunctions in cases involving the ESA, the traditional preliminary injunction analysis is inapplicable because Congress in the ESA made it clear that endangered species should be afforded the highest of priorities); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.").

[321] *See* Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1178 (9th Cir. 2000) (holding that Forest Service's decisions regarding what uses were inconsistent with protection and enhancement of wild and scenic river values was entitled to "substantial deference" in view of standard of review and protection and enhancement purposes of Hells Canyon Act and Wild and Scenic Rivers Act).

[322] Although none of the requested hearings or alternatives thus far submitted has resulted in a ruling, see *supra* note 289 and accompanying text, there are preliminary indications the resource management agencies as currently constituted may not vigorously defend their prescriptions and conditions. After the new hydropower regulations appeared, the Bureau of Reclamation withdrew its section 4(e) mandatory conditions for the Priest Rapids project (FERC No. P-2114) and refiled them as section 10(a) recommendations, and NMFS withdrew its section 18 prescriptions for the Upper North Fork Feather River project (FERC No. P-2105) and the Poe project (FERC No. P-2107), substituting a reservation of authority to prescribe fishways in the future. Robinson Testimony, *supra* note 289. However, retrenchment has not been the agencies' only response: in March 2006, FWS and NMFS issued new prescriptions for fish passage at four dams on the Klamath River. Eric Bailey, *U.S. Acts to Help Wild Salmon in Klamath River*, L.A. TIMES, Mar. 30, 2006, at 1, *available at* 2006 WLNR 6955231.

C. The 2005 FPA Amendments and Condit Dam

Because of the unique posture of the case, Condit Dam falls into a grey area of the FPA amendments and new hydropower regulations. The case comes within some of the literal terms of the new hydropower rules, because the December 19, 2005 deadline for filing hearing applications and alternative prescriptions applied to "pending applications" in "any case" in which FWS or NMFS had filed a "preliminary prescription, or prescription with FERC before November 17, 2005," and in which FERC had "not issued a license as of that date."[323] However, the FPA amendments stress that hearings are available to the "*license* applicant," and that "[w]henever any person applies for a *license*" and an agency prescribes a fishway, that party may propose an alternative prescription.[324] FERC has declared that it is currently treating the Condit Dam case as an application to *surrender* a license, rather than a license application or relicensing process,[325] and consequently the December 19, 2005 regulatory deadline for pending applications would not apply. PacifiCorp nevertheless filed requests for a consolidated hearing and an alternative fishway prescription with FWS and NMFS on December 16, 2005.[326]

In its filings, PacifiCorp contended that its request for a FERC order authorizing removal of Condit Dam superseded the agencies' 1994 preliminary fishway prescriptions, and that, if the Commission grants the removal order, the hearing request and alternative prescription will be moot.[327] Accordingly, PacifiCorp asked the resource agencies to stay any action on the hearing request and alternative prescription until FERC takes final action on PacifiCorp's request for an order authorizing dam removal.[328] PacifiCorp made clear that it still intends to remove Condit Dam in 2008, and that, despite the new regulations, it considers dam removal to be in the best interest of its shareholders.[329] In March 2006, FWS and NMFS issued notices deferring action on PacifiCorp's hearing request and alternative prescription

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323 43 C.F.R. § 45.4(a)(1), (b)(1), (c)(1) (2005); 50 C.F.R. § 221.4(a)(1), (b)(1), (c)(1) (2005).

324 Energy Policy Act of 2005, § 241(b)-(c), 119 Stat. 594, 674–77 (emphasis added); *see supra* notes 260, 267 and accompanying text. In addition, the regulations define a "licensing proceeding" to which the hearing regulations are applicable as "a proceeding before FERC for issuance of a license of a hydroelectric facility under 18 C.F.R. part 4 or 5." 43 C.F.R. § 45.2 (2005); 50 C.F.R. § 221.2 (2005).

325 *See supra* notes 133, 139 and accompanying text.

326 PacifiCorp Hearing Request, *supra* note 21; PacifiCorp's Proposed Alternative Prescription, *supra* note 21. PacifiCorp filed consolidated hearing requests and alternative prescriptions simultaneously with both FWS and NMFS. *See* PacifiCorp Hearing Request, *supra* note 21, at 2 n.1. For ease of reference, this Article will consider only the versions of the hearing request and alternative prescription that PacifiCorp filed with NMFS, which contains references to both agencies' prescriptions.

327 PacifiCorp Hearing Request, *supra* note 21, at 2.

328 *Id.* PacifiCorp further requested that the agencies be prepared to lift the stay if FERC denied the removal order, or the settlement agreement is terminated for some other reason. *Id.*

329 *See* Kathie Durbin, *PacifiCorp Appeals Old Ruling on Dam*, COLUMBIAN (Vancouver, Wash.), Dec. 27, 2005, at C1, *available at* 2005 WLNR 22074480.

unless and until FERC issues an order reinitiating the evaluation of PacifiCorp's 1991 relicensing application.[330]

Although FWS and NMFS decided to defer consideration of PacifiCorp's hearing request and alternative prescription, these filings offer good illustrations of potential challenges under the new hydropower rules. PacifiCorp asked for a hearing on a single disputed issue of material fact: whether strays from other Columbia River tributaries transported above Condit Dam by trap-and-haul upstream passage would be left without safe egress back to the Columbia River. [331] Both NMFS and FWS answered this factual question in the affirmative in their 1994 prescription letters.[332] PacifiCorp argued that the agencies' conclusions were erroneous because the downstream passage facilities prescribed in conjunction with an upstream fish ladder would allow downstream passage of strays as well, and that there was no other stated reason for the agencies to reject the trap-and-haul facility.[333] While this argument would appear to have merit, a hearing on the issue might be unnecessary because, even if the justification given in 1994 for rejecting a trap-and-haul facility was erroneous, that error alone would not dictate that the agencies' prescription for upstream passage by way of a fish ladder was unjustified.[334] In any event, the agencies would have to re-consider their original rationale for rejecting a trap-and-haul facility in the context of PacifiCorp's proposed alternative prescription.[335]

PacifiCorp's proposed alternative fishway consisted of a trap-and-haul facility for upstream fish passage, in lieu of the fish ladder which FWS and NMFS prescribed under section 18 in 1994.[336] The utility calculated that the proposed alternative would cost approximately $22.3 million less than the

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330 NMFS Hearing Notice, *supra* note 21, at 2; FWS Hearing Notice, *supra* note 21, at 2.

331 PacifiCorp Hearing Request, *supra* note 21, at 3.

332 *Id.*

333 *Id.* at 3–4. In fact, NMFS also noted that a trap-and-haul facility, unlike a volitional fish ladder, would require personnel to be on-site much of the time, and suggested that the volitional fishway it was prescribing were "necessary" to provide "optimum passage conditions." *See id.* at Exhibit A (Nat'l Marine Fisheries Serv., Comments, Recommendations, Terms, Conditions, and Fishway Prescriptions at 5, 11–12, Condit Hydroelectric Project, FERC No. P-2342-005 (June 1, 1994)).

334 *See supra* notes 305–10 and accompanying text. The hearing might be unnecessary because the resource agencies could concede that PacifiCorp is correct regarding the disputed fact regarding stray fish from other sub-basins, and nevertheless conclude that the proposed trap-and-haul facility is not at protective of fish as a fish ladder in the separate determination regarding PacifiCorp's proposed alternative prescription, based on other evidence; *see also* Energy Policy Act of 2005, § 241(c), 119 Stat. 594, 675 (providing that the agency's determination whether an alternative prescription is "no less protective" may be based on "evidence provided for the record by any party to a licensing proceeding, or otherwise available to the [agency]").

335 *See* PacifiCorp's Proposed Alternative Prescription, *supra* note 21.

336 *See id.* at 1, 3–18; *supra* note 96. PacifiCorp again prefaced its filing with a request that the agencies stay consideration of its alternative prescription pending FERC's decision on the utility's petition for a dam decommissioning. *See* PacifiCorp's Proposed Alternative Prescription, *supra* note 21, at 2–3. The proposed alternative trap-and-haul facility would include an entrance pool below Condit Dam to attract migrating fish, a 21 foot high fishway leading to a holding pool, two secondary holding pools with systems to load fish into trucks, and an inflatable rubber barrier dam across the White Salmon River to funnel fish into the trap-and-haul facility during upstream migration. *See id.* at 8–15.

resource agencies' prescription.[337] To show that its alternative was no less protective than the agencies' prescription, PacifiCorp argued that trap-and-haul facilities at other dams had achieved greater than ninety-nine percent upstream passage survival rates, and that successful passage through a fish ladder required a transit time of less than six hours, limiting the effectiveness of fish ladders to dams less than ninety feet high.[338] However, in its 2004 draft fishway guidelines, NMFS expressed a clear preference for volitional fishways which avoid handling fish and removing them from the river, without indicating any limit on the height of a dam at which volitional fish passage facilities could be used.[339] This preference is consistent with the scientific consensus that trap-and-haul facilities are not as effective as in-river passage for protecting migrating fish.[340] In addition, despite its inclusion of data on survival of fish in the initial trap-and-haul process at other dams, PacifiCorp's alternative prescription was silent on the long-term effects of a trap-and-haul system on fish production in the White Salmon River.[341] If the resource agencies ever consider PacifiCorp's alternative fishway prescription for Condit Dam, there would seem to be sufficient grounds for the agencies to conclude that the proposed alternative is not as protective as the fish ladder they prescribed for upstream passage in 1994.[342]

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[337] *See* PacifiCorp's Proposed Alternative Prescription, *supra* note 21, at 18–20. Similarly, if the Pend Oreille P.U.D. is successful in convincing a court that it is entitled to a hearing on its Box Canyon project, see *supra* note 270, its argument on the merits will rely heavily on the FERC staff's opinion that the Department of the Interior's section 18 fishway prescription for bull trout passage at the Box Canyon dam, consisting of interim trap-and-haul facilities, followed by the installation of permanent fish ladders, would cost $3 to $4 million more than alternative measures available for fish passage. *See Owner of Box Canyon Hydro Project Uses EPACT Provision to Challenge Relicensing Conditions*, FOSTER ELEC. REPORT, Aug. 17, 2005, at 13, *available at* 2005 WLNR 13269940 (explaining the Pend Oreille P.U.D. challenge). FERC staff endorsed alternative fishway measures involving an interim trap-and-haul regime followed by studies to determine if permanent fish passage is warranted, in contrast to the FWS prescription which required the eventual construction of permanent fish passage as a condition of the license. *See* Final Environmental Impact Statement at 306–08, Box Canyon Hydroelectric Project, FERC No. P-2042-013 (Oct. 21, 2004), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10275941:0 (discussing potential fish passage alternatives).

[338] *See* PacifiCorp's Proposed Alternative Prescription, *supra* note 21, at 4–5. The single source cited for this premise was a personal communication from a Washington Department of Fish and Wildlife Fisheries engineer to a PacifiCorp consultant in May 2000. *See id.* at 5, 21. Condit Dam is 125 feet high. *Id.* at 5.

[339] *See id.* Exhibit C (Nat'l Marine Fisheries Serv., Anadromous Salmonid Passage Facilities Guidelines and Criteria at 1, Condit Hydroelectric Project, FERC No. P-2342-005 (Jan. 31, 2004) (external review draft)). NMFS's preference for volitional fish passage through fish ladders was based on the "risks associated with the handling and transport of migrant salmonids, in combination with the long term uncertainty of funding, maintenance, and operation of the trap and haul program." *Id.*

[340] *See supra* note 308 and accompanying text.

[341] The resource agencies' prescriptions, and the FERC staff's analysis of those prescriptions, included substantial discussion of fish production potential from the addition of a fish ladder and downstream fish passage. *See* FERC 1996 FEIS, *supra* note 24, at 4-59 to 4-67; *see also supra* notes 277, 310, and accompanying text.

[342] *See supra* section III.B.2.

V. CONCLUSION

Although the story of the Condit Dam and the White Salmon River eventually should have a happy ending, it is ironic and somewhat disconcerting that it will take at least ten years, and perhaps longer, to implement a dam removal agreement that FERC and virtually all the parties agree will have a net beneficial effect on the environment,[343] and that a full generation will have passed since the Northwest Power Planning Council first urged FERC to order fish passage at Condit Dam in 1982.[344] It is particularly ironic and disconcerting that an action that will have such an overwhelmingly positive long-term effect on the restoration of salmon species which have been moving rapidly towards extinction should take so long to come to fruition in an era of nationwide efforts to shorten or eliminate the review of environmental impacts on new development projects.[345]

The Condit removal story shows that obtaining the necessary regulatory approvals to remove a hydropower dam may become a costly and time-consuming process. One lesson is that it is not enough for environmentalists, with the benefit of mandatory licensing conditions and the support of the resource agencies, to convince a licensee to remove a dam. The vigorous opposition of the counties,[346] which did not participate in the settlement process, their threats of litigation,[347] and the novelty of a relatively large dam removal, using a cost-effective but temporarily harmful approach,[348] has produced an apparent caution on the part of resource agencies, delaying the regulatory approvals necessary for the removal well beyond the deadlines contemplated in the original settlement.

In view of FERC's apparent ambivalence to settlements that involve dam removal, it is critical to find some way to bring potentially adverse government parties into the settlement process to prevent their opposition from imposing lengthy and costly delays on the removal process (either directly through litigation or intervention with FERC, or indirectly by forcing more painstaking review upon agencies that should otherwise enthusiastically support ecosystem restoration, or by raising the political stakes of their environmental certifications).[349] Just as PacifiCorp agreed in the Condit settlement to pay $1.5 million to one governmental party, the

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343 *See supra* notes 43–55, 153, 158, 197–98, 226–27, and accompanying text.

344 *See supra* note 80 and accompanying text.

345 *See, e.g.*, ROBERT G. DREHER, GEORGETOWN ENVTL. L. & POL'Y INST., NEPA UNDER SEIGE 7–11 (2005), *available at* http://www.law.georgetown.edu/gelpi/news/documents/NEPAUnderSiegeFinal.pdf (describing statutory and regulatory proposals to weaken NEPA and avoid environmental review of certain categories of federal projects); Lavigne, *supra* note 128, at 462–63 (describing proposed 2004 regulations to limit public participation in fishway prescription decisions); *see also supra* note 259 (describing House version of Energy Policy Act of 2005 which contained a provision limiting NEPA review of renewable energy projects to the proposed alternative and a "no action" alternative that was ultimately eliminated from the final reconciled bill which Congress adopted).

346 *See supra* notes 17, 118–20, 199–204, and accompanying text.

347 *See supra* notes 206–12 and accompanying text.

348 *See supra* notes 108–09, 142, 146, 153–54, 195–96, 226, and accompanying text.

349 *See supra* notes 122–23 and accompanying text.

Yakama Indian Nation, for projects to mitigate the effects of the dam and its removal on native fisheries,[350] a utility may find it prudent, and ultimately cost-effective, to offer similar financial incentives or mitigation projects to other governmental entities whose constituents—like the residents and recreationists on Northwestern Lake—are directly and negatively affected by a proposed dam removal.[351] Although it seems likely that the counties' efforts to stop the removal of Condit Dam ultimately will fail, their opposition, after making no effort to join the settlement negotiations and after the settling parties made no significant effort to include them,[352] has been a major factor in bogging down the already complex process necessary to remove the dam, increasing the costs and uncertainty surrounding its eventual removal.[353] Reaching a consensus settlement with all parties that have a significant ability to block, delay, or drive up the costs of decommissioning a dam seems a prerequisite for quick and cost-effective dam removal.[354]

The 2005 FPA amendments provide a heavy procedural hammer for parties who oppose the inclusion of fish passage facilities at dams, or who might resist removal of a dam that would be uneconomical if resource agencies prescribed fish passage in the course of relicensing. The amendments and the new hydropower rules favor a party opposing a resource agency's conditions or prescriptions and afford a cumbersome hearing process which will undoubtedly result in delays in relicensing by forcing resource agencies to defend their fishway prescriptions in a trial-like setting.[355] These difficulties may have the effect of chilling resource agencies from proposing protective fishway prescriptions in the course of future relicensing proceedings,[356] but this chilling effect could be tempered if agencies are successful in defeating the early challenges to existing prescriptions in pending relicensing cases,[357] and as the costs of mounting such challenges become evident to objecting utilities.

Despite the position some utilities have taken regarding the applicability of the 2005 FPA amendments to their pending relicensing proceedings,[358] the fact that other hydropower project owners continue to pursue relicensing settlements that involve adding or improving fish passage suggests that the practical difficulty of proposing an alternative to fish passage that is "no less protective" of endangered fish may be too great in many instances. For example, Portland General Electric signed a settlement agreement with thirty-two other parties in March 2006 under which the company will spend $200 million on fish passage and habitat upgrades at its four hydropower dams on the Clackamas River, in exchange for new forty-

350 *See supra* note 111.
351 *See supra* note 118 and accompanying text.
352 *See supra* notes 119, 121, and accompanying text.
353 *See supra* notes 118–20, 125, 127, 199–202, 206–12, 216, and accompanying text.
354 *See supra* note 123 and accompanying text.
355 *See supra* notes 273, 275–76, 278, 281–87, and accompanying text.
356 *See supra* note 288 and accompanying text.
357 *See supra* notes 296–317 and accompanying text.
358 *See supra* notes 270, 295, and accompanying text.

five year licenses.[359] That same month, FWS and NMFS prescribed fish passage by ladders at four PacifiCorp dams on the Klamath River, at an estimated cost of $175 million.[360] These examples give reason for hope that fish passage or dam removal remain viable possibilities at federally licensed dams, notwithstanding the new hydropower regulations.

While the effect of the 2005 FPA amendments will almost certainly be to add more delays and costs to the relicensing process—affording opponents of fish passage additional procedures for influencing agency decisions on developing and imposing section 4(e) conditions and section 18 prescriptions[361]—the "no less protective" standard presents a significant hurdle for utilities seeking to have their alternative proposals adopted over an agency's conditions or prescriptions.[362] Despite the remaining obstacles, it is likely that Condit Dam will come down within the next few years, and there are grounds for cautious optimism that the 2005 FPA amendments ultimately may not prove an insurmountable barrier for agencies and advocates to use sections 4(e) and 18 as vehicles for enhancing and restoring natural fish runs through protective conditions, fish passage prescriptions, and dam removal.

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[359] *See* Jim Kadera, *PGE Nears Deal on Dams*, THE OREGONIAN, Nov. 28, 2005, at B1 (describing anticipated settlement agreement and noting that the $200 million of environmental improvements is similar to the amount that PacifiCorp will pay to relicense its hydropower projects on the North Umpqua River in Oregon and the Lewis River in Washington); Letter from Julie A. Keil, Dir., Hydro Licensing, Portland Gen. Elec. Co., to Magalie R. Salas, Sec'y, FERC (Mar. 29, 2006), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10988946:0 (advising FERC that the settlement was signed on March 2, 2006). With the settlement imminent, Portland General Electric did not file a request for a trial-type hearing or propose an alternative prescription for this project under the new hydropower regulations prior to the December 19, 2005, deadline. *See supra* note 295.

[360] Bailey, *supra* note 322. PacifiCorp filed an alternative prescription calling for a trap-and-haul system, rather than fish ladders, to truck salmon past the Klamath dams. Jeff Barnard, *Power Firm Would Rather Truck Fish Than Build Ladders*, COLUMBIAN (Vancouver, Wash.), Apr. 29, 2006, at C7, *available at* 2006 WLNR 7440442.

[361] *See supra* notes 274–91 and accompanying text.

[362] *See supra* section III.B.2.