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Article

*81 THE DECLINE OF THE HYDROPOWER CZAR AND THE RISE OF AGENCY PLURALISM IN HYDROELECTRIC LICENSING

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***82** I. Introduction

Since 1920, the Federal Power Act (FPA) has governed the construction and operation of non-federal hydroelectric projects. [FN1] Although FPA-licensed dams often are the single largest influence on streamflows in watersheds, the FPA is not generally thought of as a statute worthy of study in environmental law classes. Indeed, none of the leading casebooks devote substantial attention to the FPA. [FN2] Even the water law casebooks neglect the FPA; where it is mentioned, it usually is cited for the proposition that the Supreme Court has construed the statute to authorize the federal licensing agency, the Federal Energy Regulatory Commission (FERC), to preempt conflicting state laws. [FN3] This neglect is unfortunate, given the considerable influence that FPA-licensed projects can have on water quality, fish and wildlife habitat, and water-based recreational opportunities. [FN4]

Some may miss the significance of the FPA and FERC licensing decisions by assuming that since there are hardly any new dams being built, ***83** hydroelectric licensing is largely an issue of a bygone era. This overlooks the fact that FPA licenses are issued for terms, and that when projects are relicensed, the FPA demands a new look at the project based on today's values

and regulations. [FN5] Thus, relicensing of FPA-regulated dams offers significant opportunities to restructure streamflows to improve water quality, fish and wildlife, and recreation areas. [FN6] Indeed, FERC's relicensing of existing dams is an issue of particular interest because in the coming decades, several hundred dams possessing expiring licenses will seek license renewal by FERC. [FN7]

For most of the 20th century, FERC and its predecessor agency, the Federal Power Commission (FPC), maintained that it alone controlled the contents of licenses issued under the FPA. [FN8] According to the Commission, its licensing process was the "comprehensive plan" to which the statute required all licenses to conform. [FN9] The Commission's success in convincing the Supreme Court to interpret the statute's preemption of ***84** state laws broadly encouraged the agency to construe its authority expansively. [FN10] However, in the last decade and a half, several court decisions have undermined FERC's position as the nation's unchallenged hydropower regulatory czar. These cases make clear that federal land managers, federal fishery agencies, and state water quality agencies have important roles to play in relicensing hydroelectric projects, [FN11] and that FERC must accept their license conditions even if it disagrees with the terms. In fact, since these conditions do not necessarily have to ensure that the project remains economically viable, their imposition has encouraged and will continue to encourage some licensees to remove their dams and to restore natural river conditions in the vicinity of their projects. [FN12] As a result, the decline of FERC as the nation's hydropower czar may produce substantial improvements in river flows in many watersheds.

Improved river flows will occur only if the federal and state agencies that play an important part in the FPA relicensing process understand their roles and seize the opportunities the decisions present them. This article aims to ensure that the agencies and the public are aware of the new era of agency pluralism in hydroelectric licensing by discussing the cases creating it and the opportunities it presents. Section II discusses the history of the FPA and FERC. Section III discusses the Supreme Court's 1984 decision in Escondido Mutual Water Company v. La Jolla Band of Mission Indians, [FN13] which began the decline of FERC as the hydropower czar by allowing the Department of the Interior to impose permit license conditions. Section IV analyzes the Supreme Court's 1994 decision in PUD No. 1 of Jefferson County v. Washington Departmentt of Ecology (Dosewallips), [FN14] in which the Court held that states may impose minimum stream flow requirements on FERC projects under the ***85** Clean Water Act's (CWA) certification process, [FN15] and then examines the Second Circuit's 1997 decision in American Rivers v. FERC [FN16] (American Rivers I), [FN17] in which the court dismissed FERC's authority to reject state water quality conditions. [FN18] Section V considers the most recent of the cases establishing the new pluralism in hydropower decision making: a 2000 American Rivers v. FERC [FN19] (American Rivers II) case, in which the Ninth Circuit relied on the earlier cases to conclude that federal fishery agencies have similar authority with respect to "fishways" as state agencies have concerning water quality standards. [FN20]

The net result of the agency pluralism created by these decisions will be to make some dams uneconomical to relicense, which will lead to their removal, a topic discussed in Section VI. Section VII considers the proposed Hydroelectric Relicensing Process Reform Act, a bill that, if enacted by Congress, would impose significant substantive and procedural hurdles to the use of the mandatory conditioning authority affirmed by the courts. The article concludes that the new era of hydropower licensing created by these decisions, if not overturned by Congress, will help ensure that FERC relicenses only those projects whose net social benefits exceed their net social costs. This result should not only produce more efficiency in hydroelectric decision-making, but also improve water quality, fish and wildlife habitat, and recreation areas as well.

II. Background: The Federal Power Act and FERC

A. History

The FPA, as implemented by FERC, governs the siting and operation of non-federal hydroelectric projects. When Congress

created FERC in 1977, the Commission assumed the functions of its predecessor, FPC. [FN21] Established in 1920 by the Federal Water Power Act (FWPA), FPC's ***86** primary responsibility was to issue and administer licenses for hydropower development in the nation's navigable waters. [FN22] Prior to the FWPA's enactment, the Secretaries of War, the Interior, and Agriculture were authorized to issue licenses for hydroelectric projects on land under their respective supervision. [FN23] This approach to licensing, characterized as "piecemeal, restrictive, [and] negative," was riddled with uncertainty and inefficiency. [FN24] FPC was created to centralize licensing decisions in an administrative agency with some expertise about hydropower. Even after the birth of FPC, the Secretaries of War, the Interior, and Agriculture continued to play a critical role in early FPC licensing determinations because they initially comprised the Commission membership. [FN25] However, in 1930, FPC was reorganized, and the newly created five-member body operated independently of the Secretaries. [FN26]

The use of energy resources in the First World War prompted enactment of the FWPA. By 1917, many coal and oil reserves vital to the United States were in decline, and legislation intended to encourage the use of alternative fuel sources proved ineffective. Therefore, in late 1917, President Wilson introduced legislation designed to spur development of American hydropower resources. [FN27] The eventual result was the FWPA. The FWPA's purpose was to "centralize previously fragmented hydroelectric licensing functions in [FPC] and thereby promote comprehensive water power development." [FN28] Although Section 10(a) of the FPA has always required the Commission to ensure that licenses are "best adapted" to comprehensive waterway plans, and FPC attempted to prepare such plans in the 1920's, it quickly abandoned that effort and began to claim that its licensing process was the comprehensive plan the statute demanded. [FN29]

The main concern in the development of dams was power generation, not fish and wildlife, since the serious damage caused by dams to the econsystem was not yet recognized. [FN30] Environmental considerations did ***87** not play a serious role in the original licensing decisions of FPC. As a result, many older dams licensed under the old statute operate to the detriment of fish and wildlife. [FN31] As scientists began to study ecosystems and the life cycles of various water dependent species, they came to realize the decline of certain fish and animal species could be traced to the dams, which can destroy entire river habitats. [FN32] For instance, the decline of salmon runs across the country has recently caught the attention of the public, a decline largely attributable to the dam blockage of several rivers important to their spawning and mating patterns. [FN33]

B. Environmental Considerations

Congress finally recognized the importance of fish and wildlife preservation in the 1986 Electric Consumer Protection Act (ECPA). [FN34] As one court noted, "[p]rior to the ECPA amendments, the FPA focused primarily on power concerns [during the] licensing [and relicensing process] with little mention of the attendant environmental consequences." [FN35] However, in the 1986 ECPA amendments, Congress "gathered specific substantive and procedural requirements for FERC to protect, mitigate, and enhance fish and wildlife from a variety of environmental statutes and imbedded them within the FPA." [FN36] Section 10(j) of the FPA, added by ECPA, requires FERC to balance non-power interests with developmental interests. Specifically, FERC must give due consideration to state and federal recommendations proposed to "protect, mitigate damages to, and enhance, fish and wildlife . . . affected by the development, operation and management of the project" and to ensure that each license issued includes conditions for the "protection, mitigation, and enhancement" of ***88** fish and wildlife. [FN37]

Under ECPA, FERC has an opportunity to ensure that dam relicensing plays a critical role in fish and wildlife preservation and restoration. Unfortunately, FERC historically has resisted not only ECPA's requirements, but also other statutory measures protective of environmental interests. [FN38] Prior to the ECPA's passage, FERC frequently failed to adequately consider fish and wildlife concerns. [FN39] The ECPA amendments attempt to safeguard fish and wildlife interests in dam licensing and relicensing decisions by imposing various substantive and procedural requirements on FERC. [FN40]

Extensive notice provisions, a requirement to accept comments, and consultation with other government agencies are also intended to enable the development of a more environmentally friendly plan.

Long before the 1986 EPCA amendments, Congress took special note of the serious damage that many dams can have on federal land reservations. Section 4(e), part of the FPA since 1920, requires that prior to issuing licenses for projects on federal land reservations, FERC must determine that such licenses "will not interfere or be inconsistent with the purpose for which such reservation[s were] created." [FN41] This Section authorizes the Secretary of the Interior to impose license conditions to protect Indian reservations under its supervision when project operations will occur, at least in part, on lands belonging to the reservation. [FN42] The Secretary of the Interior is not the only agency that can invoke Section 4(e) powers to impose conditions on FERC-issued licenses; other agencies, such as the United States Forest Service, may also use Section 4(e) to impose license conditions for the benefit of reservations under its supervision. This aspect of the licensing process was the center of attention in the Escondido decision, discussed in more detail in Section III.

***89** C. Traditional Authority

Congress gave FPC "sweeping authority" to license non-federal hydropower projects. [FN43] FPC's successor, FERC, has also enjoyed "pervasive" licensing power. [FN44] Historically, FERC not only possessed significant autonomy in hydroelectric licensing determinations but also extensive authority in prescribing project operations. [FN45] However, Congressional inclusion of other agencies in the FPA licensing and relicensing process indicates an intention to have other agencies influence the FPA relicensing process. [FN46] Nevertheless, FERC concluded that Section 10(a) of the Act, which grants broad authority to alter project proposals to ensure each project is "best adapted" to a comprehensive plan, includes the authority to modify and reject license conditions submitted by land management agencies under Section 4(e). [FN47] Thus, the Commission's position has traditionally been that

while the Commission gives great weight to the judgment and recommendations of the Department concerned, the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to ensure that the project, if licensed, meets the requirements of Section 10(a) of the Act. [FN48] In other words, by liberally construing the language in Section 10(a), FERC attempted to circumvent the requirements of Section 4(e), [FN49] concluding "that the broad general authorization of Section 10(a) is not only inconsistent with, but also overrides, the plain, specific limitation of ***90** Section 4(e)." [FN50]

In a landmark decision, the Supreme Court held that FERC's power even preempted states' rights to impose conditions on hydropower licensing determinations within their borders. [FN51] According to the Court, allowing states to impose licensing requirements separate from FERC's would create an unworkable dual licensing authority. [FN52] The Court cautioned that state licensing considerations would interfere with FERC's ability to balance competing interests in licensing decisions and would improperly provide states a veto power over federal projects. [FN53] The Court reaffirmed the First Iowa ruling in 1990 in California v. FERC, rejecting the state's attempt to impose conditions on a FERC license by requiring a hydroelectric project licensee to maintain higher in-stream water flows than those set by FERC. [FN54] The Court held that California's streamflow requirements impermissibly conflicted with FERC's authority to control project operations. [FN55]

In 1984, the Supreme Court changed course and dealt a blow to FERC's traditional authority. The balance of this article discusses the subsequent erosion in FERC's exclusive say in the hydropower licensing process.

III. The Escondido Decision: Requiring FERC to Accept License Conditions Imposed by Other Resource Agencies Under Section 4(e) of the Federal Power Act

As discussed in Section II, FERC's autonomy in hydropower licensing and relicensing decisions was virtually uncontested

until recently. [FN56] The first blow to FERC's seemingly exclusive authority in hydropower licensing was delivered in the 1984 United States Supreme Court decision, Escondido Mutual Water Company v. La Jolla Band of Mission Indians. [FN57] In Escondido, the Supreme Court interpreted Section 4(e) of the ***91** FPA to authorize the Secretary of the Interior to impose license conditions on FERC projects for the benefit of Indian reservations under the Department of the Interior's (DOI) supervision, even where FERC disagreed with those conditions. [FN58] The subsequent cases discussed in Sections IV and V of this article build on the Court's interpretation of the FPA in Escondido.

Escondido concerned FERC's relicensing of a California project diverting the flow of the San Luis Rey River, so that its waters could be used by two San Diego County communities, Vista and Escondido. [FN59] The project consisted of a diversion dam, a man-made canal, and two powerhouses; the diversion dam was on the La Jolla Indian Reservation, while the canal traversed the La Jolla, Rincon, and San Pasqual Indian Reservations. [FN60] The San Luis Rey River originally flowed through six Indian reservations (the Bands); as a result of the project, which traversed three of the six reservations, only one reservation received water from the river, and another received a token use charge from the project. [FN61]

***92** The Escondido Mutual Water Company (Mutual) and its predecessor in interest began diverting water from the river in 1895. [FN62] In 1924, FPC issued a fifty-year license to Mutual, which covered the diversion dam, canal, and two powerhouses. [FN63] In 1971, after Mutual applied for a new license, but before its original license expired, the Bands, acting under FPA Section 15(b), sought a "nonpower" license for the project to be supervised by DOI. [FN64] Section 15(b) of the FPA authorizes FERC to issue a "nonpower" license for a project when it finds that the project is no longer suitable for power production. [FN65] In addition, the Secretary of the Interior requested that FERC recommend to Congress a federal takeover of the project upon expiration of Mutual's original license. [FN66] The Secretary also prescribed twelve license conditions under Section 4(e) of the FPA, designed to ensure an adequate supply of water to all six Indian reservations affected by the project for irrigation, groundwater recharge, water quality, and fishery restoration. [FN67] FERC then ruled on the relicense ***93** application.

A. FERC Rejects Section 4(e) Conditions as Mandatory

FERC relicensed the project for a thirty-year term, denying the Bands' application for a nonpower license as well as DOI's suggestion for federal takeover of the project. [FN68] Most significantly, FERC rejected the license conditions recommended by DOI under Section 4(e) of the FPA. [FN69]

FERC's interpretation of Section 4(e) was that the provision did not require it to implement DOI license conditions, but merely to accord "great weight" to such conditions. [FN70] The Commission reasoned that the FPA's original purpose of centralized licensing determinations would be frustrated if other agencies could impose license conditions on a FERC project. [FN71] FERC concluded that Section 10(a) of the amended FPA required it to independently evaluate all license conditions made under Section 4(e), and to modify or reject those conditions it deemed inappropriate. [FN72] FERC also determined that DOI's conditions were improper because they related to not only the three reservations actually traversed by Mutual's project, but also to the other three downstream reservations affected by the loss of water caused by the project. [FN73]

DOI and the Bands challenged FERC's conclusions in the Ninth Circuit. [FN74] The Ninth Circuit reversed FERC's ruling, holding that Section 4(e) license conditions were indeed binding. [FN75] The court also held that FERC was required to include Section 4(e) license conditions relating to all six reservations, instead of just those relating to the three reservations traversed by the project. [FN76] Section 4(e)'s language states that conditions may be imposed on licenses that are "issued within any reservation." [FN77] The court reasoned the term "reservations" included tribal water rights and lands, and that since a project could not be "within" a water right, the term "within" must be ambiguous in the Section 4(e) context. [FN78]

Using canons of Indian treaty construction to resolve the ambiguity, the court ***94** construed the statute in favor of the tribes. [FN79] The court stated that a literal reading of the term "within" could result in a "potentially useful reservation [being turned] into a barren waste without ever crossing it in the geographical sense--e.g., by diverting the waters which would otherwise flow through or percolate under it." [FN80]

B. The Supreme Court Decides: The Mandatory Nature of Section 4(e) Conditions

The Supreme Court agreed that Section 4(e) license conditions were binding, but rejected the Ninth Circuit's conclusion that FERC was required to include license conditions relating to all six of the reservations. The Court held that the term "within" was quite clear on its face and that Congress intended Section 4(e) conditions to apply only to "projects located 'within' the geographical boundaries of a federal reservation." [FN81] The Court's Section 4(e) analysis centered on the plain language of the statute. [FN82] The Court determined that Section 4(e)'s language indicated clearly that Congress intended the Secretary's conditions to be mandatory. [FN83] The Court then rejected two FERC arguments attempting to show that Section 4(e)'s legislative intent is contrary to its plain language. [FN84]

First, the Court rejected the argument that the centralized hydropower decision-making authority Congress sought to create when it enacted the FWPA would be compromised if another resource agency, such as DOI, could impose conditions on FERC licenses. [FN85] The Court stated that the statute's legislative history "plainly supports" the Secretary of the Interior's authority to promulgate license conditions under Section 4(e) for the benefit of land reservations under his supervision. [FN86]

A second FERC argument the Court found unpersuasive was the contention***95** that a literal reading of Section 4(e)'s conditioning provision would give DOI "veto" power over FERC's decisions concerning whether a license is consistent with a reservation's purpose. [FN87] FERC argued that if Section 4(e)'s conditions were mandatory, inconsistencies with other parts of the statutory scheme would result because the same statutory provision authorizing the Secretary of the Interior to condition a license for the reservation's benefit also directs FERC to ensure the license is consistent with the reservation's purpose. According to FERC, binding Section 4(e) conditions would compromise its statutory duty to make an independent consistency decision and would enable DOI to "veto" its consistency finding. [FN88]

The Court held that limits on DOI's conditioning power preclude it from exercising final authority in licensing decisions. [FN89] Specifically, the Court noted that any conditions imposed by the Secretary of the Interior must be reasonably related to the reservation's protection. [FN90] According to the Court, FERC could refuse to issue a license if it found DOI's conditions objectionable. [FN91] But the Court held that FERC had no authority to reject the Secretary's conditions; only an appellate court had jurisdiction to review the reasonableness of the conditions. [FN92]

Requiring FERC to include Section 4(e) conditions in its licenses was a groundbreaking decision because before Escondido, FERC enjoyed almost unlimited hydropower licensing authority. [FN93] After Escondido, FERC was no longer the lone hydropower decision maker. As discussed ***96** in the following Section, a Supreme Court case decided ten years after Escondido, PUD No. 1 of Jefferson County v. Washington Department of Ecology (known as the Dosewallips decision, because it involved a dam on the Dosewallips River in Washington), built on the Escondido premise by holding that not only the FPA, but other federal statutes, can circumscribe FERC's ability to control hydropower license conditions. [FN94] Then, in 1997, in American Rivers v. FERC, [FN95] the Second Circuit further pluralized the licensing process, determining that FERC has no authority to review or reject license conditions imposed by other resource agencies under other federal statutes. [FN96]

IV. Requiring FERC Licenses to Include State Imposed Water Quality Standards

Under Section 401 of the Clean Water Act

After the Supreme Court handed down Escondido, states and environmentalists mounted new challenges to FERC's authority. Several challenges involved questions concerning the extent to which FERC projects were subject to state certification conditions under Section 401 of the Clean Water Act. [FN97]

Under the Clean Water Act, states must develop and implement "comprehensive water quality standards . . . for intrastate waters." [FN98] State water quality standards contain two components: 1) designated uses and 2) guidelines for protecting those uses, known as water quality criteria. [FN99] A "designated use" is a use specified by the state for a given water body. State water quality standards must also contain "antidegradation provisions," which maintain existing beneficial uses of specific water bodies and protect them from further degradation. [FN100] The CWA also requires states to enforce their water quality standards. [FN101] A mechanism for enforcing***97** water quality standards is the Section 401 certification process. Section 401 states in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . .that any such discharge will comply with the applicable provisions of [S]ections 1311, 1312, 1313, 1316, and 1317 of [the CWA].. . . No license or permit shall be granted until the certification required by this section has been obtained. . .. [FN102] Therefore, states must provide a water quality certification under Section 401 of the CWA "before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." [FN103] Any FERC licensing or relicensing event triggers the Section 401's state certification process. [FN104] The certification must provide effluent and other limitations, as well as monitoring requirements to ensure the applicant's compliance with the limitations. [FN105] The limitations contained in the certification "become a condition on any federal license." [FN106] The state has the authority to grant, condition, deny, or waive the certification. [FN107]

In PUD No. 1 of Jefferson County v. Washington Department of Ecology, a FERC license applicant unsuccessfully challenged a state's right to include state water quality standards containing minimum stream flow requirements in its FERC license. [FN108] Then, in American Rivers I, the Second Circuit ruled that FERC was not authorized to reject state-imposed Section 401 conditions. [FN109] Both cases demonstrate the growing role of state agencies in the licensing process.

A. Recognizing State 401 Authority to Condition FERC Licenses: Dosewallips

In Dosewallips, the city of Tacoma and a local utility district (the city) sought to build a hydroelectric power project on the Dosewallips River in ***98** Washington State. [FN110] The project would divert approximately seventy-five percent of the river's water for power generation, leaving only twenty-five percent of the water in the bypass reach. [FN111] The result would be to leave a minimum residual stream flow of between sixty-five and one hundred fifty-five cubic feet per second, depending on the season. [FN112] Before FERC could license the project, the city had to obtain a state water quality certification under Section 401 of the CWA. [FN113] Fearing the project's proposed water diversion would harm salmon and trout habitat, the state conducted a study to determine the minimum stream flows required to safeguard the fisheries. [FN114] On the basis of the study's findings, the state agreed to grant the Section 401 certificate, but only if the city agreed to maintain substantially higher minimum stream flows in the project's bypass reach than those originally proposed: between one hundred and two hundred cubic feet per second. [FN115] As a result, the city challenged the state's authority to impose minimum stream flows as a condition of a Section 401 certification in state court. [FN116] After the Washington Supreme Court held that the state could condition Section 401 certifications on minimum stream flow requirements, [FN117] the city appealed the state court's decision to the United States Supreme Court.

The Supreme Court agreed to hear the case to resolve growing conflicts among the states over Section 401's scope and affirmed the Washington Supreme Court. [FN118] First, the Court held that Section 401's certification***99** process authorized states to require FERC licensees to maintain minimum stream flows to satisfy state water quality standards. [FN119] Second, the Court liberally construed the basis upon which such flows may be imposed, granting the states broad authority to set streamflows for specific, numeric water quality criteria, as well as general, narrative water quality criteria. [FN120] The Court added that states could impose minimum stream flows to safeguard designated uses because water quality criteria did not always protect such uses. [FN121] Significantly, the Court also upheld state use of antidegradation policies as a basis for prescribing minimum stream flows. [FN122] In addition, the Court ruled that states may impose water quality conditions not only on pollutant discharges, but also on an entire activity, such as a water withdrawal from a river. [FN123] Finally, distinguishing its earlier ruling in California v. FERC, which rejected state attempts to set minimum flows under the FPA, the Court explained that FERC's preemptive authority under the FPA did not conflict with state authority to regulate water quality under the CWA. [FN124]

***100** Dosewallips was a landmark decision because it sanctioned the growing role states play in FERC's licensing scheme by authorizing them to impose Section 401 certification conditions on licenses. [FN125] However, the court did not rule directly on FERC's ability to review or reject state certification conditions because FERC was not a party to the suit. [FN126] The Second Circuit subsequently decided this issue in American Rivers v. FERC (American Rivers I), [FN127] ruling that FERC was not authorized to reject state water quality conditions created under the CWA's state certification authority. [FN128]

B. American Rivers I: the Conflict Between the States and FERC on Section 401 Certification Conditions

In American Rivers I, three corporations, Turnbridge Mill Corporation (Turnbridge), Green Mountain Power Corporation (Green Mountain), and Central Vermont Public Service Corporation (Central Vermont) attempted to obtain licenses from FERC for the operation of several hydroelectric projects in the state of Vermont. [FN129] The corporations also sought state certifications under Section 401 of the CWA. [FN130] Subsequently, ***101** Vermont's Agency of Natural Resources issued certifications containing numerous conditions. [FN131]

After receiving the certifications, the corporations petitioned FERC to issue project licenses to them under Section 4(e) of the FPA. [FN132] FERC issued the licenses, but refused to incorporate three of the state's eighteen certification conditions into them, claiming that the conditions exceeded the state's CWA authority. [FN133] The conditions, among other things, reserved state authority to review and approve significant project changes, oversee the operating conditions affecting water levels, and set construction deadlines for fish passage. [FN134] "Condition P" reserved the state's power to amend the certification as necessary for the duration of the project, such that it could "add and alter terms and conditions as appropriate to carry out its responsibilities during the life of the project with respect to water quality." [FN135] "Condition J" required Turnbridge to submit proposals for any significant project changes to the state for approval. [FN136] "Condition L" required Turnbridge to seek state approval before beginning construction of the project, thereby enabling the state to ensure the project provided erosion control and water flow management. [FN137]

Supporting its decision, FERC stated, "[t]o the extent that states include conditions that are unrelated to water quality, these conditions are beyond the scope of Section 401 and are thus unlawful." [FN138] FERC continued, "we have the authority to determine that such conditions do not become terms and conditions of the licenses we issue." [FN139]

***102** The state objected to FERC's licensing decisions and disputed FERC's authority to review and reject state Section 401 conditions, but FERC denied rehearing. [FN140] As a result, the state appealed FERC's rulings to the Second Circuit, arguing that Section 401(d)'s plain language prevented FERC from reviewing or rejecting state certification conditions. [FN141] The

court agreed, commenting on the clarity of Section 401's language and noting that FERC could prevail only if it could show that congressional intent differed from the plain language of Section 401. [FN142]

The Second Circuit explained that FERC's interpretations of the CWA did not receive judicial deference and were reviewed de novo. [FN143] The court then rejected FERC's argument that Section 401 of the CWA requires it to accept and incorporate only those state certification conditions that are reasonably related to water quality. [FN144] Although the court agreed with FERC that there were inherent limitations in the scope of Section 401 state certification conditions, [FN145] it held that the FPA did not ***103** authorize FERC to judge which conditions satisfied Section 401 and which did not. [FN146]

The court also rejected FERC's argument that Section 401(a)(3) prevented a state from changing certification conditions once they are incorporated into a federal license. Under Section 401(a)(3), state conditions are incorporated into federal licenses unless the
state, upon proper notice from the licensing agency [(FERC)] . . . inform [[s] the licensing agency, within 60 days of such notice, that because of some change in circumstance since the initial certification was granted, state officials believe . . . there are no longer reasonable assurances . . . the licensee will . . . abide by . . . applicable standards. [FN147] The court ruled that Section 401(a)(3) did not apply to the case because the provision generally applies where a licensee has already received a state certification, as well as a FERC construction license that incorporates the terms of the certification, but has not yet obtained a FERC operating license. [FN148] According to the court, these circumstances were not applicable in American Rivers I; instead, the case presented "the more general question whether a state has the authority to amend or revoke a Section 401 certification that has already been incorporated into a federal operating license." [FN149] Nevertheless, even assuming Section 401(a)(3) applied, FERC had not established its authority to determine which state conditions were consistent with Section 401(a)(3) and which were not. [FN150]

The court also rejected FERC's contention that Section 401(a)(5) limits the state's ability to amend or revoke a 401 certification once it is integrated into a federal license. [FN151] Section 401(a)(5) authorizes the licensing agency (FERC) to enforce its license--and if necessary, to suspend or revoke state certification conditions--after a judgment is issued decreeing that the licensee's activities or facility run afoul of specific CWA provisions. [FN152] Ultimately, the court noted, "[t]he Commission assumes the very question to be decided: whether FERC--and not a court of appropriate jurisdiction on appeal by an applicant--has the authority to review the legality of state-imposed Section 401 conditions ***104** in the first instance." [FN153]

The court also rejected FERC's argument that the District of Columbia Court of Appeals's decision in Keating v. FERC [FN154] recognized the Commission's authority to review and reject Section 401 conditions. [FN155] In Keating, the D.C. Circuit decided a much narrower question than the issue presented to the Second Circuit in American Rivers I. The D.C. Circuit held that prior to issuing a license, FERC may judge the validity of a state's Section 401 certification, but only to the extent that the state, in amending or revoking its certification, has properly complied with Section 401(a)(3)'s procedural requirements. [FN156] According to the Second Circuit, Keating merely allowed FERC to decide whether the state's declaration of revocation was timely and otherwise satisfied Section 401(a)(3)'s procedural requirements. [FN157] Thus, the Second Circuit concluded, "[n]othing in Keating supports [[FERC's] authority . . . to review a state's designation of certain conditions in the state's Section 401 certification." [FN158] The court determined that the Supreme Court's opinion in Escondido Mutual Water Company v. La Jolla Band of Mission Indians [FN159] was more on point than Keating, [FN160] and held that FERC's efforts to ***105** distinguish Escondido were "unavailing." [FN161]

Turning to FERC's arguments under the FPA, the court rejected the claim that Congress intended FERC to have the discretion to review and reject Section 401 certification conditions in its licenses. [FN162] The court similarly dismissed the

argument that FERC's power to set construction deadlines under Section 13 would be compromised if states could impose conditions prescribing alternate deadlines. [FN163] The court also rejected FERC's claim that conditions authorizing the state to remain active in the license after its issuance violated Section 6 of the FPA, [FN164] which lists situations which may cause a license to be amended or revoked. Finally, the court dismissed the argument that requiring FERC to include state license conditions would upset the carefully balanced approach to environmental interests in the 1986 ECPA amendments to the FPA. [FN165]

The court considered all of FERC's concerns to be "overblown." [FN166] After acknowledging FERC's expansive role in hydroelectric power production and describing the FPA's scope as "wide [and] preemptive," the court explained that Congress intended the CWA to limit the FPA's broad reach by authorizing states to prescribe water quality conditions in FERC licenses, and it gave detailed reasons why FERC's FPA mandates would not be compromised by the states' CWA conditioning authority. [FN167]

***106** First, the court observed that license applicants dissatisfied with state certification conditions could judicially challenge them, thereby preventing implementation of unlawful conditions. [FN168] Second, the court noted that FERC did not have to issue a license if it believed state certification conditions violated Section 401. [FN169] Third, the court ruled that FERC was required to observe state-imposed conditions because a clause in the CWA saving other federal laws did not apply to FERC's actions because FERC was not acting consistently with the CWA. [FN170]

The Second Circuit's decision, unanimously vacating FERC's orders, is significant for several reasons. [FN171] First, the decision denied FERC's authority to review or reject Section 401 conditions and required the agency to include conditions in its licenses, thereby enabling states to influence the content of the licenses. [FN172] Second, it allowed states to affect licenses already issued by FERC by recognizing the validity of state certification conditions requiring ongoing state review and approval of project changes. [FN173] Third, and most important, American Rivers I implemented Congress' intent in the CWA to diminish FERC's role as an exclusive hydropower decision-maker by authorizing other resource agencies to condition FERC licenses through statutory provisions like Section 401. [FN174]

***107** C. After American Rivers I: FERC's Response

In subsequent agency decisions, FERC narrowly construed the Second Circuit's ruling in American Rivers I. [FN175] The agency acknowledged that it was required to accept all state imposed Section 401 conditions, including those it believed were unlawful. In a number of cases, it incorporated all state certification conditions into its licenses. [FN176] However, in several other decisions, FERC concluded that state certification conditions fell outside of the scope of Section 401 or were problematic for other reasons. [FN177] Specifically, FERC disapproved "re-opener" provisions in state certification conditions, such as those allowing a state to review proposed changes to a project. [FN178] FERC contended that once it issued a license containing state water quality conditions, states may not oversee implementation of such conditions. [FN179] The judicial response to FERC's position remains to be seen.

Nevertheless, Dosewallips and American Rivers I clearly interpret the ***108** CWA to authorize states to use Section 401's certification process to condition FERC licenses. Moreover, Escondido clarifies that the FPA also gives conditioning authority to federal land managers. In the year 2000, the Ninth Circuit, relying on American Rivers I and Escondido, decided American Rivers v. FERC (American Rivers II), concluding that Section 18 of the FPA authorizes federal fishery agencies to require FERC licenses to include fishway provisions, thus taking another important step in pluralizing hydropower licensing. [FN180]

V. Compelling FERC to Incorporate Fishway Prescriptions: American Rivers II

In American Rivers II, environmentalists and the Oregon Department of Fish and Wildlife (referred to collectively as the conservationists) successfully challenged FERC's authority to re-classify, modify, and reject fishway prescriptions submitted by the Secretary of the Interior and the Secretary of Commerce under Section 18 of the FPA. [FN181] Relying on the analytical framework supplied by the Supreme Court in Escondido, the Ninth Circuit held that the mandatory language of Section 18 was analogous to Section 4(e)'s mandatory language, requiring FERC to adopt fishway prescriptions submitted by federal land management agencies. [FN182] ***109** Like Escondido, Dosewallips, and American Rivers I, American Rivers II is another example of courts implementing congressional intent to limit FERC's autonomy in hydroelectric licensing decisions.

The term "fishway" does not have a standard definition. In 1991, FERC promulgated a narrow definition of "fishway" that met with great public dissatisfaction. [FN183] As a result of public opposition, FERC broadened its definition one year later. [FN184] However, in 1992, Congress explicitly rejected FERC's new definition of what constituted a fishway. [FN185] Congress directed that "a 'fishway' under Section 18 for the safe and timely upstream and downstream passage of fish" consisted of "physical structures, facilities, or devices necessary to maintain all life stages" of fish by enabling fish to safely bypass dams. [FN186] Additionally, Congress stated that any future definitions of fishway promulgated by FERC would have no force or effect "unless concurred in by the Secretary of the Interior and the Secretary of Commerce." [FN187] The FPA has always authorized the Secretary of the Interior and the Secretary of Commerce to direct FERC to require fishway installations at hydroelectric facilities. [FN188] However, in 1992, Congress authorized the Secretaries to veto FERC's fishway definition.

Congress' attempt to clarify what constitutes a fishway has failed to dispel confusion over the term. [FN189] Nonetheless, Congress did articulate one fundamental principle: FERC acting alone does not have the authority to establish what a fishway is. Instead, what comprises a fishway must ultimately be decided in conjunction with the Secretaries of the Interior and Commerce. [FN190]

American Rivers II involved a conflict over the relicensing terms of the Leaburg-Walterville project on Oregon's McKenzie River, outside ***110** Eugene, Oregon. [FN191] State and federal agencies proposed numerous conditions to the license under Sections 10(j) and 18 of the FPA. [FN192]

Under 10(j), state and federal agencies submitted fifty-six recommendations. [FN193] FERC ruled that twenty-one of these recommendations fell outside Section 10(j)'s scope, re-classified them, and included them in the license under Section 10(a). [FN194] In pertinent part, Section 10(a)(2)(B) states that FERC "shall consider . . . [t]he recommendations of Federal and State agencies . . . of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project." [FN195] FERC reclassifies Section 10(j) provisions under Section 10(a) because Section 10(a) provides FERC "broader latitude to balance environmental and development interests" than Section 10(j). [FN196] This latitude aggrieved conservationists in American Rivers II because FERC may reject state and federal recommendations under Section 10(a) more easily than under Section 10(j); namely, when FERC rejects a condition submitted under Section 10(j), it must follow a particular process, which includes making certain findings. [FN197] No such process or attendant findings are required when FERC rejects agency recommendations classified under Section 10(a). [FN198] Thus, FERC does not need to state reasons or document findings for rejecting state ***111** and federal Section 10(j) recommendations that it has re-classified under Section 10(a).

Federal agencies also submitted multiple fishway prescriptions under Section 18 concerning the Leaburg-Waterville relicense. [FN199] FERC adopted outright those conditions relating to the implementation of fish ladders and screens, but determined that the remaining conditions did not constitute fishway prescriptions, and therefore could not be imposed under

Section 18. [FN200] FERC reclassified the remaining conditions, modified them, and incorporated them into the license under Section 10(a). [FN201] As mentioned, FERC has greater latitude to reject Section 10(j) conditions when it re-classifies them under Section 10(a). [FN202] Likewise, FERC may more readily reject Section 18 prescriptions by re-classifying them as Section 10(a) or 10(j) conditions (even Section 10(j) provides FERC more "balancing" latitude than Section 18). Conservationists in American Rivers II opposed FERC's re-classification scheme because they were concerned that FERC would reject Section 18 prescriptions after re-classifying them under Sections 10(a) or 10(j). [FN203]

Dissatisfied with FERC's handling of the Section 10(j) recommendations and Section 18 conditions, the conservationists sought rehearing, which FERC denied. Subsequently, they appealed to the Ninth Circuit. [FN204] The court upheld FERC's interpretation of Section 10(j), but agreed with the conservationists' interpretation of Section 18. [FN205]

***112** A. The Ninth Circuit's Interpretation of Section 18

The Ninth Circuit's Section 18 analysis was based on simple principles of statutory construction. [FN206] Whether the FPA authorized FERC to reject or reclassify fishway prescriptions proposed by the Secretaries of Commerce and the Interior under Section 18 was central to the court's review. [FN207] The court held that Escondido was controlling in the Section 18 context; therefore, FERC had no authority to "modify, reject, or reclassify" any fishway prescriptions recommended by the Secretaries. [FN208]

The court reasoned that, unlike Section 10(j)(2), the text of Section 18 did not allow FERC to reject fishway prescriptions by stating its reasons for the rejection. [FN209] The court stated that "Section 18 . . . simply does not contemplate the two-pronged approach set forth in subsection 10(j)(2) . . . . [[T]he absence of a similar [approach] in Section 18 suggests more than mere legislative oversight. Clearly, if Congress had wanted findings under Section 18, it knew how to ask for them." [FN210] In light of this reasoning, the court held that no amount of documented explanation by FERC could justify its rejection of Section 18 fishway prescriptions. [FN211]

The Ninth Circuit also noted that the Energy Policy Act of 1992 provided FERC no authority to determine the validity of fishway prescriptions. [FN212] The court ruled that FERC's lack of authority to evaluate the legitimacy ***113** of a Section 18 prescription would not interfere with the FPA's statutory objectives, noting that FERC unsuccessfully raised similar arguments before other appellate courts and to the Supreme Court in Escondido. [FN213] The court explained that in Escondido the Supreme Court definitively settled that FERC's role under the FPA was not compromised by delegations of authority to other resource agencies. "[FERC's] argument is unpersuasive because it assumes the very question to be decided . . . . The real question is whether [FERC] is empowered to decide when the Secretary's conditions exceed the permissible limits . . . . [S]tatutory language and . . . legislative history conclusively indicate that it [is] not." [FN214] The court also noted that FERC maintained its prerogative to deny licenses containing objectionable fishway prescriptions which safeguarded its licensing role. [FN215] Finally, the court held that failure of the Secretaries of the Interior and Commerce to balance economic and environmental***114** interests when formulating fishway prescriptions did not give FERC authority to reject the prescriptions. [FN216]

Following Escondido, the court ruled that any disagreements between FERC and the Secretaries over the scope of a fishway prescription must be resolved by an appellate court. [FN217] Most important, the Ninth Circuit refused to limit the fishery agencies' conditioning authority by narrowly defining what constitutes a fishway. [FN218] Next, the court examined FERC's interpretation of Section 10(j).

B. The Ninth Circuit's Review of Section 10(j)

The court stated that the two-part test in Chevron U.S.A., Inc. v. Natural Resources Defense Council governed review of FERC's Section 10(j) interpretation. [FN219] The court's Chevron inquiry ended at step-one because Section 10(j)'s statutory language contained a clear congressional mandate that unambiguously provided FERC discretion over how to implement ***115** Section 10(j) recommendations, if at all. [FN220] The Ninth Circuit distinguished Section 10(j)'s permissive language from Section 4(e)'s mandatory language, employing the Supreme Court's Section 4(e) interpretation in Escondido as a guide. [FN221] The court explained that Congress assigned FERC quite different duties under Sections 10(j) and 4(e). [FN222] Specifically, Section 10(j) prescribes a process by which FERC may disagree with an agency recommendation, unlike Section 4(e), which provides FERC no comparable discretion to reject agency conditions. [FN223] The different language of Sections 10(j) and 4(e) convinced the court that FERC's interpretation of Section 10(j) was correct. [FN224]

***116** The court stressed two key points. First, noting the importance of Section 10(j)'s "pro-environmental" purpose, the court cautioned that FERC must give considerable deference to Section 10(j) recommendations submitted by fish and wildlife agencies. [FN225] Second, the court stated that FERC must comply with the statutorily prescribed process in Section 10(j) of making findings when disapproving, modifying, or reclassifying any recommended license conditions. [FN226]

The agency pluralism resulting from American Rivers II and the decisions discussed in this article has modified FERC's licensing and relicensing practices. It has also made some projects uneconomical to relicense. [FN227] Financial insolvency can lead to dam removal and project decommissioning, topics discussed in the next Section of this article. [FN228]

***117** VI. Alternatives to Relicensing: Dam Removal and Project Decommissioning

The cases discussed in this article clearly demonstrate that Congress intended state and federal resource agencies to protect fish, wildlife and other non-developmental values in hydropower decision making. Statutory provisions, some of which are eighty years old, reflect this desire. Further, Congress has changed the FPA's regulatory structure to prevent and rectify environmental damage. It has also passed numerous environmental statutes to protect natural resources and the environment. [FN229] These laws, old and new, affect hydropower licensing by giving other resource agencies increased authority in the licensing process and by requiring FERC projects to be less damaging to the environment. When it becomes more expensive to satisfy these legal standards than to decommission an existing hydropower project, the project is subject to license denial and decommissioning. The Edwards Project in Maine and the Condit Project in Washington, discussed in this Section, are examples of projects in which decommissioning proved a better choice than relicensing. [FN230]

A. The Edwards Project

The Edwards case involved a dispute over the relicensing of a 160- year-old dam on the Kennebec River in Maine. [FN231] The dam, built in 1837, operated for over forty years without fishways. By 1880, when inadequate fishways were installed, anadromous fish species above the dam had been destroyed. [FN232] State efforts to restore anadromous fish to the Kennebec River began in 1977; by the late 1980's, the state had enacted***118** legislation designed to restore almost all anadromous species to their historical range. [FN233] The original project license, issued by FERC in 1964, did not require fishway installation; however, the licensees began providing limited fish passage in 1989. [FN234] Nevertheless, state, federal and private interests sought removal of the dam. [FN235] While the dam's negative effects on fishery resources were of principal concern to dam removal advocates, the project also impaired recreational activities, such as whitewater rafting, swimming, and fishing. [FN236] The project's licensees applied for license renewal in 1991, shortly before the original license was due to expire in 1993. [FN237]

In a landmark decision, FERC denied the requested relicensing and ruled that the public interest required removal of Edwards

Dam. [FN238] The Edwards Dam removal represents the first time that the federal government ordered the destruction of a dam over the objection of its owner. [FN239] In reaching this conclusion, FERC considered the findings in its environmental impact statement (EIS) prepared on the project under NEPA and determined that only dam removal would mitigate the project's substantial adverse effects on fishery resources. [FN240] The EIS convinced ***119** FERC that certain fish species for which no effective fishways have ever been designed would not be restored without removal of the Edwards Dam. [FN241] FERC also conducted an economic analysis of the project, but determined that the economic analysis did not conclusively decide whether the dam should be relicensed, but economic considerations were a factor in the Commission's public interest review. [FN242] Under their Section 18 conditioning authority, the Secretaries of Commerce and the Interior required construction of "state-of-the-art" fishway facilities at the Edwards Project, should it be relicensed. [FN243] FERC's economic analysis considered the difference between the project's cost with Section 18 fishways and the cost of alternative power, [FN244] determining the project, if relicensed with the Section 18 prescriptions, would be more than $1.3 million annually more expensive than alternate power. [FN245] Further, installation of Section 18 fishways would cost $10 million, while the estimated cost of dam removal was about $2.7 million. [FN246] Project economics, coupled with the enormous environmental benefit of removing the dam, prompted FERC to support dam removal. [FN247]

FERC also conducted a legal analysis, in which it again concluded the public interest would be best served by dam removal. [FN248] FERC interpreted Sections 4(e), 10(a), and 15(a) of the FPA to require relicense denial ***120** and dam removal, [FN249] rejecting the licensee's argument that it had no authority to deny a project license. [FN250] FERC found nothing in the FPA requiring it to grant a license that could not be modified to ensure compliance with Section 10(a)'s standards, explaining that Section 10(a)'s standards would be violated if it relicensed the Edwards Dam without requiring restoration of anadromous fish runs. [FN251] Further, FERC held that the central purpose of the FPA would be frustrated if it lacked the power to deny a license and order dam removal. ***121**[FN252]

FERC's review of the project under the FPA's public interest standard concluded that Edwards Dam should be removed. [FN253] FERC not only considered the dam's significant negative effects on fishery resources, but also the legal implications of dam removal. [FN254] Most importantly, FERC compared the economics of relicensing the dam with Section 18 fishways to the economics of removing it, and concluded that dam removal made more financial sense than relicensing. [FN255] After determining that the FPA authorized it to order dam removal in the relicensing context, FERC ordered the Edwards Project to be decommissioned and the dam removed. [FN256]

Ultimately, the removal of the Edwards Dam came about as a result of a settlement agreement, so there was no judicial review of FERC's decommissioning order. [FN257] Under the 1998 settlement, operators of upstream dams on the Kennebec and Bath Iron Works funded removal of Edwards Dam. The upstream operators did so in exchange for a delay in imposition of fish passage requirements at their projects until there was sufficient fish restoration in the river to justify fish passage. Bath Iron Works did so as off-site mitigation for wetland fills in connection with its shipyard expansion. [FN258] A year after the dam's removal, the rebirth of the Kennebec River had exceeded all expectations: fish, birds, and insects had returned in great numbers; water quality improved dramatically; and recreationalists frequented the seventeen-mile stretch of the reborn river in droves. [FN259]

B. The Condit Project

The **Condit Dam,** located on the White Salmon River in Washington state, was built in 1913. [FN260] The wooden fish ladders included in the project's original design were destroyed by floods shortly after its construction. Soon after, concrete replacement ladders were also destroyed. [FN261] In 1919, the project owners negotiated a deal with Washington and paid the state $5,000 to be excused from providing further fish passage, or building***122** additional replacement ladders. As a

result, the dam has blocked anadromous fish migration since 1917, and anadromous fish runs upstream of the dam are essentially extinct. [FN262] The project's first FERC license, issued in 1968 for a thirty-year term, did not require the installation of fishways. [FN263] FERC did not order the project owner, Pacific Power & Light, to conduct a feasibility study for fish passage at the dam until 1980. [FN264] In 1982, the Northwest Power Planning Council directed FERC to require fishway installation at **Condit Dam** by November 15, 1985. [FN265] However, the fishways were never constructed. [FN266]

In anticipation of a 1998 license expiration, PacifiCorp, the successor to Pacific Power & Light, filed a relicense application with FERC in 1991. [FN267] However, the application failed to propose fishway construction. [FN268] Subsequently, NMFS prescribed fishway installation at the project under Section 18 of the FPA. [FN269] Although noting that the Section 18 prescriptions would substantially enhance anadromous fish populations upstream of the dam, the Commission stated that the prescriptions would devalue the project and cost an estimated $30 million. [FN270]

FERC issued a draft environmental impact statement (DEIS) under ***123** NEPA for the Condit Project in 1995. [FN271] The DEIS considered various relicensing alternatives for the project; of these alternatives, FERC selected relicensing with implementation of NMFS' Section 18 prescriptions. [FN272] FERC dismissed the alternative of dam removal as too expensive. [FN273] However, significant discrepancies existed between FERC's and NMFS' dam removal estimates, and resource agencies criticized FERC's NEPA analysis and relicensing decision. [FN274]

Unwilling to accept the financial losses relicensing the project with fishway prescriptions would generate, PacifiCorp rejected FERC's preferred alternative of relicensing and its estimates of dam removal costs and entered into negotiations concerning the removal of the Condit Project. [FN275] After two years of negotiations, the utility, state and federal regulators, the Yakima Indian Nation, and environmental groups reached an agreement under which PacifiCorp will remove the dam in seven years. The agreement caps PacifiCorp's liability at $17.2 million, including $13.7 million for dam removal, 2 million for permits and mitigation, $1 million for the Yakima Fishery Enhancement Fund, and $.5 million for enhancing a downstream tribal fishing site. [FN276] The principal benefits of dam removal are likely to be significant increases in salmon runs, including coho, chinook, and steelhead, and whitewater recreation. [FN277]

Many factors contribute to a decision to remove a dam and decommission a hydropower project. The factors prompting the decision to remove **Condit Dam** were slightly different than in the case of Edwards Dam, where FERC had ordered removal. [FN278] However, in both cases, ***124** Section 18's requirements were a primary impetus for decommissioning, because relicensing the projects with Section 18 fishways was more expensive than decommissioning them. [FN279]

The Condit and Edwards cases illustrate the influence FPA Section 18 prescriptions can have on relicensing decisions. Other sections of the FPA, as well as provisions of other statutes like the Clean Water Act, also affect hydropower decision making and limit FERC's licensing discretion. The new agency pluralism in hydropower decision making will help to ensure that the social benefits of hydropower licensing and relicensing are not exceeded by their social costs.

VII. The Hydroelectric Licensing Process Improvement Act

The pluralism in the hydroelectric licensing process brought by the decisions discussed in this article have not met with universal welcome. Utilities complained that the new pluralism gives resource agencies a "trump" card to play without regard to economics or other values and without requiring quantification of expected environmental benefits. [FN280] They found a sympathetic ear in Senator Larry Craig (R-Idaho), who introduced S. 740 in the 106th Congress, designed to respond to, in Senator Craig's words, "a number of environmental statutes, amendments to the Federal Power Act, Commission regulations, licensing and policy decisions, and several critical court decisions [which have] made the Commission's licensing process

extremely costly, time consuming, and, at times, arbitrary." [FN281] His bill, cosponsored by several other Republicans, [FN282] but opposed by the Clinton administration, Indian tribes, and environmentalists, would impose several substantive and procedural hurdles to agencies with mandatory conditioning authority, but it would not eliminate that authority.

S. 740 would add a new Section 32 to the Federal Power Act that ***125** would expand the factors that conditioning agencies must account for in formulating their conditions to include economic and power values, electric generation capacity and system reliability, air quality, flood control, irrigation, navigation, recreation, drinking water supplies, and compatibility with other license conditions. [FN283] Conditions could address only "direct" project effects and do so at the lowest possible project cost. [FN284] Moreover, conditions would be subjected to "appropriately substantiated scientific review," meaning that they were based on current empirical or field-tested data and subjected to peer review. [FN285] Section 10(j) recommendations would also be subjected to analysis under the broadened factors mentioned above, limited to "direct" project effects and at lowest possible cost, and undergo scientific review. [FN286]

A number of new procedures would also be required by S. 740. Most prominently, proposed mandatory conditions would have to be submitted to FERC at least ninety days before the applicant is required to file for a license. [FN287] Further, the applicant has the option of demanding a review of the reasonableness and energy and economic effects of the conditions by an administrative law judge or "other independent reviewing body." [FN288] If this review is not completed within 180 days, the bill calls for the mandatory conditions to be transformed into advisory recommendations. [FN289] The bill would require FERC to establish a date by which mandatory conditions must be submitted, but not later than one year after the date which the application is ready for environmental review. [FN290] It also would require FERC to conduct an economic analysis of each condition submitted by a resource agency to determine whether the condition would make the project uneconomical. [FN291] FERC also is to make determinations as to whether the conditions are in the public interest, were subjected to adequate scientific review, relate only to "direct" project effects, are reasonable, are supported by scientific evidence, and are consistent with other license terms and conditions. [FN292]

***126** S. 740 would also add a new Section 33 to the FPA that would establish a new coordinated environmental review process with FERC as the lead agency. [FN293] Significantly, that provision would forbid any other agency from performing any environmental review. [FN294] FERC would also have the authority to set deadlines for any agency commenting on environmental documents, regardless of the otherwise applicable comment periods. [FN295]

Although both utility witnesses and the FERC Chair supported S. 740 at a hearing held on May 23, 2000, [FN296] the Department of the Interior opposed the bill vigorously enough that the Deputy Secretary of the Interior stated he would recommend that the President veto the bill. [FN297] He claimed that S. 740 "would interfere with the Department of the Interior's responsibilities under the Federal Power Act, add multiple delays to the licensing process, and make the Department's involvement in Federal Power Act licensing proceedings unworkable." [FN298] The Deputy Secretary objected to the bill's broadening the purposes of mandatory conditions without so much as mentioning the original purposes of the eighty-year old conditioning authority: to protect land reservations and facilitate fish passage. [FN299] He feared that the effect of the bill would be to

subordinate resource needs and trust responsibilities to a wide range of other factors. The current structure of the Federal Power Act requires that a license be issued only with conditions that ensure protection of underlying resources. Once this floor is established to protect against unreasonable resource damages, then the Commission balances various factors to determine whether and under what conditions to issue a license. This bill would turn that scheme on its head, allowing protection of underlying resources only if a laundry list of other needs were met. [FN300]

Also objectionable to the Deputy Secretary were the bill's redundant required findings by both the resource agency and FERC

that the mandatory conditions were in the public interest; singling out mandatory conditions for economic analysis without considering the economic ***127** benefits of the conditions, and when FERC does no economic analysis on the project itself; and new and cumbersome procedures, like scientific peer review, when the courts already require agency conditions to be grounded on substantial evidence. [FN301] The Deputy Secretary also complained that the bill's requirement that conditions be submitted in advance of the license application (and long before FERC conducts environmental assessments) was impractical. Finally, he suggested that the real reason for delays in hydroelectric licensing was the inability of applicants to adequately supply required information, not conditions imposed by other agencies. He warned that "mandated timelines and default provisions that would downgrade statutory authorities under the Federal Power Act will only serve to punish the resource agencies unfairly and hurt the resources we are obligated by law to protect." [FN302]

American Rivers, representing the environmentalists, and four Columbia River tribes echoed these sentiments. The environmentalists pointed out that of the 157 license applications submitted to FERC in 1993 only nine of them contained complete information. [FN303] Thus, the reason for delays was the lack of information from applicants, not delays imposed by conditioning agencies, for there have been only seven instances since 1992 in which conditioning agencies filed conditions after the time deadlines without the support of all parties. [FN304] There is, moreover, no incentive for resource agencies to delay in submitting conditions, for projects which experience licensing delays after their licenses have expired benefit from FERC's authority to issue annual licenses, which effectively preserves the status quo. [FN305] The environmentalists claimed that 1) no project has been abandoned as a consequence of mandatory conditions, 2) the Energy Information Administration projects only a one percent decline in hydroelectric generation over the next two decades, and 3) sales of hydroelectric projects average 1.5 to three times project book value. [FN306] Finally, the environmentalists asserted that FERC had the authority to solve the real problem of conditioning authority--staff shortages in the resource agencies--by employing its authority under the Energy Policy Conservation Act to reimburse agencies for the costs of their participation, ***128** funded by annual fees imposed on licensees. [FN307]

The tribes objected to S. 740's procedure of having FERC effectively second-guess the resource agencies on whether the conditions were in the public interest. [FN308] They also objected to requiring conditions to be submitted in advance of license applications, increased documentation requirements when conditions must already be supported by substantial evidence, and new economic and scientific review requirements, especially peer review. [FN309]

A companion bill in the House to S. 740, H.R. 2335, was marked up by the House Commerce Committee's Energy and Power Subcommittee on May 16, 2000. Chair Joe Barton (R-Tx.) offered an amendment to the bill, which was adopted by the subcommittee, and which modified the bill considerably. The modified House bill amended the factors that conditioning agencies must consider and eliminated their applicability to Section 10(j) recommendations, provided for public notice of draft conditions and an opportunity for public hearings on them, deleted FERC's proposed authority to supervise review of conditions, eliminated requirements for scientific peer review and the opportunity for the license applicant to invoke an administrative appeals process, and preserved the ability of resource agencies to conduct environmental reviews. [FN310]

American Rivers, the chief environmental group opposing the bill, considered the changes to be improvements but remained opposed the bill, noting that it
fails to acknowledge any of the impacts that dams and hydropower project operations have on river ecosystems; removes the floor of basic environmental protections that balance power and non-power values; generally duplicates FERC's role in analyzing the impacts of project alternatives; shifts the burden of proof and supplying information from the license applicant to the resource agencies (without providing any additional resources or expertise); fails to include fish and wildlife and water quality as beneficial public uses of water; fails to account for indirect and cumulative project impacts and provide for enhancement in addition to mitigation; requires agencies to submit conditions for comment before a license application is

filed with FERC, the most egregious element of the legislation; and lacks authority for resource agencies to reopen a license condition based on substantial new scientific evidence. [FN311] ***129** On the other hand, the National Hydropower Association welcomed the amended bill, contending that it would preserve the "fundamental purpose of restoring balance to the licensing process . . . [by] requir[ing] that federal resource agencies, when mandating operating condition of a hydro project, consider and document the impacts of their decision on a broad range of factors." [FN312] Rep. John Dingell (D-Mich.), the ranking minority member of the House Commerce Committee, however, accused the hydropower industry of attempting to cut the Federal Power Act into "tiny pieces" and warned that three cabinet secretaries would recommend a veto of the bill because "[r]ivers are a precious natural resource owned by all of the American people and managed for them by the resource agencies and the states. They are not swim clubs to be run by FERC for the exclusive benefit of our nation's utilities." [FN313]

As of this writing, prospects for passage of either S. 740 or H.R. 2335 in the 106th Congress were uncertain. However, it seems safe to assume that the hydropower industry and its congressional allies will again push for licensing reform in the 107th Congress.

VIII. Conclusion

All of the cases discussed in this article recognize the influence Congress intended fishery resource agencies to have on FERC's licensing and relicensing process. In Escondido, the Supreme Court explained that Section 4(e) of the FPA requires FERC to implement license conditions submitted by the Secretary of the Interior for the benefit of Indian reservations under DOI's supervision. In Dosewallips and American Rivers I, the Supreme Court and the Second Circuit, respectively, acknowledged that under the CWA's certification process, state agencies may not only require FERC to include state water quality conditions in FERC licenses, but may continue to review a licensee's compliance with such conditions after FERC has issued a license. Finally, in American Rivers II, the Ninth Circuit concluded that Section 18 of the FPA permits federal fishery agencies to impose fishway prescriptions on FERC's licenses and relicenses.

The resulting agency pluralism created by these cases and the statutory provisions they interpret will result in more efficient hydropower decision making, unless Congress decides to overrule them through misguided legislation such as the Hydroelectric Process Reform Act, which ***130** would simply allow continuation of FERC's longstanding practice of discounting fish and wildlife and water quality concerns. If the effect of mandatory condition authority leads to removal of some uneconomic dams, such as Condit and Edwards, society will benefit from improved water quality, enhanced fish and wildlife, and increased outdoor recreational opportunities. [FN314]

Epilogue

Just before this article went to press, the hydropower industry received an unexpected windfall, when a provision was added to the Energy Act of 2000 calling for FERC to submit a report to Congress within six months reviewing FPA relicensing policies, procedures, and regulations and suggesting legislative changes "to reduce the cost and time of obtaining a license." [FN315] FERC must consult with other agencies in compiling the report but, given the Secretary of the Interior-designate Gail Norton's pro-development philosophy, it would be surprising if Interior fought to maintain its Section 4(e) and 18 authorities. The report may lead to FPA amendments allowing the one-half of the nation's hydroelectric capacity scheduled for relicensing in the next ten years to proceed unfettered by serious fish, wildlife, clean water, and recreational concerns. [FN316] Such a resurrection of FERC as the nation's hydropower czar would be an unfortunate reminder that the mistakes of history can be repeated.

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[FN1]. 16 U.S.C. §§ 791-825 (1994). The FPA's predecessor was the Federal Water Power Act (FWPA). See Max J. Mizejewski, FERC's Abdication of Jurisdiction over Hydroelectric Dams on Nonnavigable Rivers: A Potential Setback for Comprehensive Stream Management, 27 Envtl. L. 741, 746 (1997).

[FN2]. See, e.g., Roger W. Findley & Daniel A. Farber, Cases and Materials on Environmental Law (West Pub. Co. 4th ed. 1995) (neglecting to mention the FPA in the environmental law context); Jackson B. Battle et al., Environmental Law (Anderson Pub. Co. 2d ed. 1994); Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy (Little, Brown & Co. 1992); Zygmunt J.B. Plater, Environmental Law and Policy: A Coursebook on Nature, Law, and Society (West Pub. Co. 1992). Even compilations of the major environmental laws do not include or reference the FPA. See, e.g., West Publishing Co., Selected Environmental Law Statutes (1999/2000 ed.).
Shortly before this article went to press, a new energy law text was published, which does include a chapter on the Federal Power Act. See Fred Bosselman et al., Energy, Economics and the Environment 199-230 (Foundation Press 2000). But even that text fails to feature the federal conditioning authority discussed in this article, although it does discuss the role of state water quality standards. See id. at 218-27.

[FN3]. For a discussion of the preemptive power FERC has historically enjoyed, see Section II.C. The terms "FERC" and "the Commission," as well as "the Federal Power Commission ('FPC')," which refers to FERC's predecessor, are used interchangeably throughout this article. For a brief review of FERC's evolution, see infra Section II.

[FN4]. The FPA, as implemented by FERC, governs the siting and operations of non-federal hydroelectric projects. See infra Section II.

[FN5]. H.R. Rep. No. 99-934 at 22 (1986) ("Projects must undergo the scrutiny of today's values."); Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 470-71 (9th Cir. 1984) (explaining that a relicensing is the functional equivalent of an initial licensing); Wisconsin Pub. Serv. Corp. v. FERC, 32 F.3d 1165, 1170 (7th Cir. 1994) (noting that there is "[n]othing to distinguish relicensing situations from the grant of original licenses... [w]here Congress intended provisions of the Act to apply only to original licenses, the statute clearly so provides").
The FPA limits licenses to fifty-year terms. 16 U.S.C. § 799 (1994). The FPA's relicensing terms are for a duration FERC determines to be in the public interest "but not less than thirty years, nor more than fifty years...." 16 U.S.C. § 808(e) (1994). FERC policy limits relicense terms to thirty or forty years, depending on the amount of new construction required. Georgia Power Co., 88 F.E.R.C. P 62,314, 1999 FERC LEXIS 2143, at *27 (1999) ("[FERC] issue[s] thirty-year relicenses for projects that include no substantial new construction, no proposed re-development or power-generating expansion. [FERC] issue[s] relicenses for forty years or more for projects that include substantial new construction, proposed re-development or capacity increases."). For a review of the main steps in the relicensing process, see infra note 59.

[FN6]. See Lydia T. Grimm, Fishery Protection and FERC Hydropower Relicensing Under ECPA: Maintaining a Deadly Status Quo, 20 Envtl. L. 929, 930 (1990); 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, 210 n.104 (1997) ("FERC... commented that '[w] hen these dams were put in people were thinking about power generation and not fish and wildlife." ') (alteration in original).

[FN7]. See Grimm, supra note 6, at 930.

[FN8]. For information on FPC, see infra Section II. Historically, FERC enjoyed not only significant autonomy in hydroelectric licensing determinations, but also extensive authority in prescribing project operations. See David B. Spence & Paula Murray, The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis, 87 Cal. L. Rev. 1125, 1150 n.126 (1999) ("[Congress] granted FERC broad power to set the terms and conditions of hydroelectric licenses.").

[FN9]. Although Section 10(a) of the FPA, 16 U.S.C. § 803(a) (1994), has always required FERC and FPC to ensure that licenses are "best adapted" to comprehensive waterway plans, and FPC attempted to prepare such plans in the 1920's, it quickly abandoned that effort and began to claim that its licensing process was the comprehensive plan the statute demanded. See 4 Waters and Water Rights, § 40.06 (Robert E. Beck ed., 1996) [hereinafter Waters and Water Rights].

[FN10]. See generally First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 181-83 (1946); California v. FERC, 495 U.S. 490, 506 (1990). See also infra notes 51-55 and accompanying text.

[FN11]. A variety of state and federal agencies, not just FERC, have power to influence the FPA relicensing process. For example, when CalTrout, a California based sportfishing organization, recently threatened suit to block the relicensing of several FERC-licensed hydropower projects, it notified "various... federal and state agencies involved in the relicensing process." Suit Threatened to Block Relicensing of Three Water Projects, 6 Cal. Envtl. Insider 13, Aug. 31, 1999. Also, plaintiffs now base their suits concerning licensing and relicensing decisions on a variety of laws, not just the FPA. To illustrate, CalTrout is threatening suit under the CWA, the Endangered Species Act, the California Fish and Game code, and the California public trust doctrine. Id.

[FN12]. See infra Section VI.B.

[FN13]. 466 U.S. 765 (1984).

[FN14]. 511 U.S. 700 (1994) [hereinafter Dosewallips] (pronounced Dosy . Wallips).

[FN15]. See id. at 722-23. See also infra Section IV.A.

[FN16]. 129 F.3d 99 (2d Cir. 1997).

[FN17]. For the sake of simplicity, the Second Circuit's decision in American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997) will be referred to as American Rivers I, while the Ninth Circuit's subsequent decision in American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 2000) will be referred to as American Rivers II. The Ninth Circuit's opinion was originally issued on August 11, 1999, 187 F.3d 1007 (9th Cir. 1999). An amended opinion was issued on January 14, 2000, but the amended opinion was substantially the same as the original opinion. Citations are to the amended opinion.

[FN18]. See infra Section IV.B.

[FN19]. 201 F.3d 1186 (9th Cir. 2000).

[FN20]. See infra Section V.A. For an explanation of the term "fishway," see infra note 181.

[FN21]. See generally 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 (1994)).

[FN22]. See Federal Water Power Act of 1920, Pub. L. No. 66-280, § 1, 41 Stat. 1063, 1063 (current version at 16 U.S.C. § 792 (1994)).

[FN23]. Katharine Costenbader, Damning Dams: Bearing the Cost of Restoring America's Rivers, 6 Geo. Mason L. Rev. 635, 646 (1998).

[FN24]. First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 180 (1946).

[FN25]. Costenbader, supra note 23, at 645-46.

[FN26]. Act of June 23, 1930, Pub. L. No. 71-412, ch. 572, 46 Stat. 797 (1930).

[FN27]. Mizejewski, supra note 1, at 746.

[FN28]. Michael C. Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Envtl. L. Rev. 1, 22, 28 (1986).

[FN29]. See Waters and Water Rights, supra note 9, § 40.06.

[FN30]. Bender, supra note 6, at 210 n.104 ("FERC ... commented that '[w]hen these dams were put in people were thinking about power generation and not fish and wildlife." ') (alteration in original).

[FN31]. See Grimm, supra note 6, at 930.

[FN32]. 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, 107- 10 (2000); see also Bender, supra note 6, at 192 (1997) ("the ecosystems and species dependent on the natural cycles of free-flowing rivers suffer ... greatly").

[FN33]. See Jonathan Brinckman, Author: Scientists Knew, Ignored Cause of Salmon Decline, The Oregonian, Oct. 22, 1999, at C4 ("[S]almon runs [are declining] because of ... dam construction...."); Michael C. Blumm et al., Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows, 28 Envtl. L. 997, 1038 (1998) (discussing the detrimental effects dams have on salmon populations).

[FN34]. Electric Consumer Protection Act of 1986 (ECPA), Pub. L. No. 44- 495, 100 Stat. 1243 (codified in various sections of 16 U.S.C. §§ 792-828(c)).

[FN35]. American Rivers v. FERC, 201 F.3d 1186, 1192 n.6 (9th Cir. 2000).

[FN36]. Grimm, supra note 6, at 931. See also Electric Consumer Protection Act of 1986 (EPCA), Pub. L. No. 44-495, 100 Stat. 1243.

[FN37]. 16 U.S.C. § 803(j)(1).

[FN38]. See generally Grimm, supra note 6; Waters and Water Rights, supra note 9, § 40.08(e)(2) & n.402 (discussing FERC's attempts to frustrate licensee compliance with state water quality requirements under the CWA, as well as FERC's efforts to convince Congress to eliminate state authority to enforce licensee compliance with state water quality standards).

[FN39]. See, e.g., Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 473-74 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985) (noting that FERC failed to consider fishery issues before licensing a project, as required by the FPA).

[FN40]. See ECPA, 16 U.S.C. §§ 792-828(c).

[FN41]. 16 U.S.C. § 797(e) (1994).

[FN42]. "[Licenses] within any reservation ... shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U.S.C. § 797(e) (1994).

[FN43]. Charles R. Sensiba, Who's in Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing, 70 U. Colo. L. Rev. 603, 614-15 (1999) (quoting Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 613 (2d Cir. 1965)).

[FN44]. See id. at 615.

[FN45]. Spence & Murray, supra note 8, at 1150 n.126 ("[Congress] granted FERC broad power to set the terms and conditions of hydroelectric licenses."). See also infra notes 47-48 and accompanying text.

[FN46]. For example, when CalTrout, a California based sportfishing organization, recently threatened suit to block the relicensing of several FERC-licensed hydropower projects, it notified "various ... federal and state agencies involved in the relicensing process." Suit Threatened to Block Relicensing of Three Water Projects, 6 Cal. Envtl. Insider 13, Aug. 31, 1999.

[FN47]. Section 10(a)(1) states, in pertinent part:
That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing ... waterways ... for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife ... and for other beneficial public uses .... The Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.
16 U.S.C.A. § 803(a) (1994) (emphasis added).

[FN48]. Quoting the Commission's statement in Pacific Gas & Elec., 53 F.P.C. 523, 526 (1975).

[FN49]. Blumm, supra note 28, at 28 n.144.

[FN50]. See Escondido Mut. Water Co. v. FERC, 692 F.2d 1223, 1235 (9th Cir. 1982), rev'd in part & aff'd in part sub nom. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984).

[FN51]. First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. at 181-83.

[FN52]. Id. at 168.

[FN53]. See Waters and Water Rights, supra note 9, § 40.07(a).

[FN54]. California v. FERC, 495 U.S. at 496.

[FN55]. Id. at 506.

[FN56]. Congress gave FPC "sweeping authority" to execute hydropower licenses. See supra notes 43-44 and accompanying text.

[FN57]. 466 U.S. 765 (1984). This article discusses three separate decisions in this case: The Commission's, the Ninth Circuit's, and the Supreme Court's. To avoid confusion, the agency's decision, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 6 F.E.R.C. P 61,189 (1979), will be cited as La Jolla Band; the Ninth Circuit's decision, Escondido Mut. Water Co. v. FERC, 692 F.2d 1223 (9th Cir. 1982), rev'd in part & aff'd in part sub nom. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), will be cited as EMW; the Supreme Court's decision, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), will be cited as Escondido.

[FN58]. Escondido, 466 U.S. at 775-77 (The Bureau of Indian Affairs is under the authority of the Interior Department, and "the Commission [now FERC] 'shall' include in the license the conditions the Secretary [of the Interior] deems necessary.").

[FN59]. Id. at 768-70. There are several steps involved in a FERC relicensing. First, the licensee must file an intent to seek license renewal at least five years prior to the expiration of the original license if the project's license is due to expire on or after October 17, 1992. 18 C.F.R. § 16.6(d) (1998). Second, FERC publishes the notice of intent and related documents for review by interested parties. Id. §§ 16.6(d), 16.7(b)- (d). Third, the applicant engages in a consultation process, in which it must consult with various federal, state, and interstate agencies, including the United States Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the United States Environmental Protection Agency (EPA), and the National Park Service. Id. § 16.8(a). This process begins before the application is submitted and lasts throughout the relicensing. Id. §16.8(b)- (d). During this time, interested parties are permitted to intervene in the proceedings, which preserves rights to appeal FERC's decision. Id. § 385.214(a)(3). Fourth, FERC publishes a notice of completed relicensing application for review by interested agencies and parties. Id. §16.9(d). Fifth, FERC begins its required National Environmental Policy Act (NEPA) analysis of the relicensing, preparing a draft environmental impact statement and identifying a favored alternative to the relicensing option. 18 C.F.R. §§ 380.5-380.7 (1998). Sixth, FERC issues a final environmental impact statement. Id. § 380.2(e). Finally, FERC issues the relicense. Dissatisfied parties are free to appeal FERC's issuance of the relicense in any federal circuit court of appeals. 16 U.S.C. § 825(l)(b) (1994).

[FN60]. Escondido, 466 U.S. at 768 (explaining that the powerhouses generated electricity by flowing diverted river water through the man-made canal).

[FN61]. Blumm, supra note 28, at 22. The three reservations not traversed by the project "are within the river's watershed." Escondido, 466 U.S. at 768. The six Indian reservations were established by the Mission Indian Relief Act of 1891 (MIRA), 26 Stat. 712 (1891).

[FN62]. See Escondido, 466 U.S. at 768.

[FN63]. Id. at 769.

[FN64]. Id.

[FN65]. 16 U.S.C. § 808(b) (1994). The Bands also sought an increase in the annual payments due them under Mutual's original license, and the Commission awarded them readjusted annual dues. Escondido, 466 U.S. at 770 n.6.

[FN66]. Escondido, 466 U.S. at 769. DOI supported a federal takeover of the project because it believed Mutual had violated its license terms. Blumm, supra note 28, at 23. The nonpower license proposed by the Bands, as well as federal takeover of the project recommended by DOI, would have resulted in the licensed facilities being used primarily "for agricultural and recreational development of the Reservations, not for the generation of electricity." EMW, 692 F.2d at 1227. "[DOI] proposed federal takeover under §§ 7(c) and 14 of the Act, 16 U.S.C. §§ 800(c), 807 (1982), in order to accomplish the same overall purpose sought by the Bands in their nonpower license application, namely to give the Bands primary responsibility for operating and managing the project." Blumm, supra note 28, at n.126.

[FN67]. See discussion of Section 4(e), supra note 41 and accompanying text; see also 16 U.S.C. §. 797(e) (1994). In La Jolla Band, the Bands and DOI argued that FERC could not make a consistency finding prior to re-licensing the project because the project necessarily interfered with the reservations' water use by diverting water away from the reservations. 6 F.E.R.C. P 61,189, at 61,411 (1979). Nevertheless, FERC made the finding. It determined the project's consistency with the reservations' purpose could be assured by imposing a license condition requiring Escondido to provide water to portions of two of the six reservations, as well as to all of a third. Blumm, supra note 28, at 27. Therefore, FERC included license conditions only for the benefit of the three reservations traversed by the project. See EMW, 692 F.2d at 1228 (noting that the conditions "require the delivery of water to the La Jolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses"). Although FERC's Section 4(e) consistency finding was not addressed on appeal, the Ninth Circuit required FERC to include license conditions for the benefit of all six reservations on other Section 4(e) grounds. See generally id. at 1235-37. The Supreme Court, however, overruled the Ninth Circuit on this point, stating that license conditions asserted under Section 4(e) apply only to projects located "within" reservations, rather than projects affecting but not traversing reservations. Escondido, 466 U.S. at 780-81.

[FN68]. See La Jolla Band, 6 F.E.R.C. at 61,394-99, 61,400-01.

[FN69]. Id. at 61,411-14; see also Escondido, 466 U.S. 765, 770 (1984).

[FN70]. Blumm, supra note 28, at 27.

[FN71]. See Escondido, 466 U.S. at 772; see also Blumm, supra note 28, at 27-28.

[FN72]. See supra notes 48-50 and accompanying text.

[FN73]. La Jolla Band, 6 F.E.R.C. at 61,411.

[FN74]. See EMW, 692 F.2d at 1229.

[FN75]. Id. at 1234-35.

[FN76]. Id. at 1235-37.

[FN77]. 16 U.S.C. § 797(e) (1999) (emphasis added).

[FN78]. EMW, 692 F.2d at 1235-36.

[FN79]. Id. at 1236 ("'Statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'") (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)).

[FN80]. Id.

[FN81]. See Escondido, 466 U.S. at 765, 780, 783-84 (1984).

[FN82]. Id. at 772 ("Congress expresses its purposes through the ordinary meaning of the words it uses").

[FN83]. Id.

[FN84]. Id. at 772-79.

[FN85]. Id. at 773.

[FN86]. Id. at 775. The Court, examining statements by the Secretary of Agriculture, Senator Walsh of Montana, and the Act's chief draftsman, O.C. Merrill, Chief Engineer for the Forest Service who later became the first Commission Secretary, concluded that "[t]he legislative history concerning § 4(e) plainly supports the conclusion that Congress meant what it said when it stated that the license 'shall... contain such conditions as the Secretary... shall deem necessary for the adequate protection and utilization of such reservations." ' Id.

[FN87]. Id. at 777.

[FN88]. Id. at 776.

[FN89]. Id. at 777. The Court made two additional rulings. First, the Court held that Congress did not intend FERC's conclusions regarding the Secretary's 4(e) conditions to be included in a license or to receive judicial deference on review. Id. Second, the Court held that requiring Section 4(e) conditions was not contrary to FPA Section 10(a) because "conflict between the Commission and Secretary with respect to whether the conditions are consistent with the statute must be resolved initially by the Courts of Appeals, not the Commission." Id. at 779 n.21. For a discussion of FERC's argument concerning the conflict between Sections 4(e) and 10(a), see supra notes 48-50 and accompanying text.

[FN90]. Escondido, 466 U.S. at 777.

[FN91]. Id. at 779 n.20.

[FN92]. Id. at 777. Under Section 313(b) of the FPA, licenses and license conditions are reviewable "in the United States court of appeals for any circuit wherein the licensee... is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 16 U.S.C. § 8251(b). The Supreme Court noted that a reviewing court must sustain Section 4(e) conditions if they are "reasonably related" to the protection of the reservation and are "supported by substantial evidence." Escondido, at 466 U.S. at 778. Under the FPA, only a license applicant (or licensee), not FERC, may bring suit to resolve the viability of Section 4(e) conditions. Id. at 779 n.20. However, the Court noted that "the Commission is not required to argue in support of the conditions if it objects to them." Id.

[FN93]. See supra Section II.

[FN94]. 511 U.S. 700, 722-23 (1994) (holding that states may condition FERC licenses with minimum stream flow requirements under Section 401 of the CWA).

[FN95]. 129 F.3d 99 (2d Cir. 1997).

[FN96]. Id. at 111-12.

[FN97]. See generally Dosewallips, 511 U.S. 700; American Rivers I, 129 F.3d 99. Today, hydroelectric power is commonly recognized as one of the major areas subject to Section 401 certification. See Kevin Beaton et al., The 1998 Idaho Water Quality Symposium, 35 Idaho L. Rev. 453, 459 (1999).

[FN98]. Dosewallips, 511 U.S. at 704 (citing §§ 1311(b)(1)(C), 1313).

[FN99]. Id. at 714-15.

[FN100]. Id. at 707, 718 (noting that Washington's antidegradation policies protect, among other things, designated beneficial uses, waters lying in scenic areas like national parks and wildlife refuges, and waters otherwise affecting the environment). See also § 1313(d)(4)(B); 40 C.F.R. § 131.12 (1993).

[FN101]. See Dosewallips, 511 U.S. at 707 (citing § 1319(a)).

[FN102]. 33 U.S.C. § 1341(a)(1) (1988) (emphasis added).

[FN103]. Dosewallips, 511 U.S. at 707.

[FN104]. Beaton et al., supra note 97, at 546.

[FN105]. Dosewallips, 511 U.S. at 708 (citing § 1341(d)).

[FN106]. Id.

[FN107]. Dosewallips, 511 U.S. at 709. For an in-depth discussion of Dosewallips, see Katherine P. Ransel, The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology, 25 Envtl L. 255 (1995).

[FN108]. Ransel, supra note 107, at 260.

[FN109]. See infra notes 144-46 and accompanying text.

[FN110]. Dosewallips, 511 U.S. at 708. Also known as the "Elkhorn Project," the proposal consisted of a penstock, powerhouse, and diversion dam. Ransel, supra note 107, at 256. Notably, FERC was not a party to the case and did not object to the state's Section 401 certification conditions. Id. at 722.

[FN111]. Dosewallips, 511 U.S. at 709. A bypass reach constitutes the section of river between the diversion point and the point at which the diverted water rejoins the river. See American Rivers v. FERC, 201 F.3d at 1191.

[FN112]. Dosewallips, 511 U.S. at 709.

[FN113]. Id. at 711. See also 33 U.S.C. § 1341(a)(1) (1988).

[FN114]. Dosewallips, 511 U.S. at 709. As defined by the Supreme Court in California v. FERC, minimum instream flows represent the quantity "of water that must remain in the bypassed section of the stream and that thus remains unavailable to drive the generators." 495 U.S. at 494. Washington's designated uses for the Dosewallips River included the maintenance of fish habitat for salmon and other fish, so that the river would be capable of supporting fish spawning, rearing, migration, and

harvesting. Id. at 714.

[FN115]. See id. at 709.

[FN116]. Washington Dep't of Ecology v. PUD No. 1 of Jefferson County, 849 P. 2d 646, 648-49 (Wash. 1993), aff'd, 511 U.S. 700 (1994).

[FN117]. Id. at 648. See also Ransel, supra note 107, at 263.

[FN118]. Dosewallips, 511 U.S. at 723. The Court cited two opposing state court decisions as the basis for the grant of certiorari: Georgia Pac. Corp. v. Dep't of Envtl. Conservation, 628 A.2d 944 (Vt. 1992), cert. vacated, 114 S. Ct. 2670 (1994) (upholding state imposed Section 401 conditions) and Power Auth. of New York v. Williams, 457 N.E.2d 726 (N.Y. 1983) (upholding the Commission's jurisdiction to preempt state licensing and permitting activities). Dosewallips, 511 U.S. at 710. The Court's 7-2 opinion was written by Justice O'Connor. Id. at 703. Justices Thomas and Scalia dissented. Id. at 724-737.

[FN119]. Dosewallips, 511 U.S. at 723.

[FN120]. Id. at 714-18. See also Waters and Water Rights, supra note 9, § 40.08(e)(2). Numerative criteria includes "pollutant-specific[,] numerical, biological, [and] hydrological" standards. Ransel, supra note 107, at 263. General criteria are "open-ended" and "broad" and include "aesthetic values." Dosewallips, 511 U.S. at 715-16 (quoting Washington Administrative Code 173-201-045(1)(c)(viii) (1986)). All water criteria measures, whether narrative or numeric, are designed to protect designated uses. Ransel, supra note 107, at 263.

[FN121]. Dosewallips, 511 U.S. at 716-18. In Dosewallips, the Court stated that water quality criteria "cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies." Id. at 717. Sometimes water quality criteria do not protect designated uses like salmon spawning and rearing. Waters and Water Rights, supra note 9, § 40.08(e)(2). Thus, the Court recognized the importance of authorizing states to set minimum flows to protect designated uses that would not otherwise be protected.

[FN122]. Dosewallips, 511 U.S. at 718. Washington's antidegradation policies included protection for waters affecting the environment, scenic waters, such as those in wildlife refuges and national parks, and waters for general beneficial use. Id. The Court dismissed the argument that the CWA does not apply to water quantity standards, stating that the distinction between water quantity and water quality is "artificial" because quantity is "closely related" to quality and without sufficient water, many state designated uses would be destroyed. Id. at 719 ("[A] sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.").

[FN123]. Id. at 712. Specifically, the Court concurred in the "EPA's conclusion that activities--not merely discharges--must comply with state water quality standards." Id. See also 40 C.F.R. § 121.2(a)(3)(2000). In this case, the city's diversion of water from the river had to comply with Washington's water quality standards.

[FN124]. Dosewallips, 511 U.S. at 722. In California v. FERC, the Supreme Court held that FERC's authority under the FPA preempted state minimum flow requirements higher than those set in the license. See generally 495 U.S. 490 (1990). In Dosewallips, the Court distinguished California v. FERC on two grounds. First, the Court noted that, in Dosewallips, FERC had not yet acted on the license application, while in California v. FERC, it had. Dosewallips, 511 U.S. at 722. Second, the Court explained that FERC had not objected to any of the state's minimum flow requirements in Dosewallips, as it had in California v. FERC. Id. ("[I]t is quite possible, given that FERC is required to give equal consideration to the protection of

fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification.").

[FN125]. See Beaton et al., supra note 97, at 548 (noting that the Dosewallips decision resulted in states having an increased role in FERC's licensing and relicensing processes).

[FN126]. Philip Weinberg, 1997-98 Survey of New York Law, 49 Syracuse L. Rev. 453, 470 (1999). See also Robin Stafford, Hydropower and Wetlands: Can Vermont use its Wetlands Rules to Place Conditions on Federal Hydroelectric Licenses?, 22 Vt. L. Rev. 679, 706 (1998) (noting that the Supreme Court failed to address what the outcome would be of a "showdown" between FERC and a state agency over Section 401(d) conditions). Shortly after Dosewallips was decided, one commentator noted that Dosewallips "leaves FERC with no discretion to impose conditions that conflict with state water quality certification conditions" because the CWA specifies that "'[a]ny certification... limitations... shall become a condition on any Federal license.'" Waters and Water Rights, supra note 9, § 40.08(e)(2) (quoting Section 401(d) of the CWA). Ultimately, the Second Circuit agreed. American Rivers v. FERC, 129 F.3d 99, 102 (2d Cir. 1997).

[FN127]. This article refers to the Second Circuit's American Rivers v. FERC decision as American Rivers I, and the Ninth Circuit's American Rivers v. FERC decision as American Rivers II. See supra note 17.

[FN128]. American Rivers I, 29 F.3d at 112. Unlike in Dosewallips, FERC was a party to the action in American Rivers I, arguing that it was authorized to reject state CWA conditions.

[FN129]. American Rivers I, 129 F.3d at 102.

[FN130]. Id. Hydropower releases are "discharges" under Section 401. See Beaton et al., supra note 97, at 546; see also supra notes 102-03 and accompanying text (re-stating Section 401 in pertinent part).

[FN131]. American Rivers I, 129 F.3d at 102-05.

[FN132]. Id. at 103-05. See supra note 41 and accompanying text (discussing Section 4(e)).

[FN133]. American Rivers I, 129 F.3d at 102.

[FN134]. See id. at 103-05 & nn. 5-12, 14-17.

[FN135]. Id. at 103 n.1.

[FN136]. Id. at 103 n.2.

[FN137]. Id. at 103 n.3.

[FN138]. 68 F.E.R.C. P 61,078, 61,387 (1994), reh'g denied, 75 F.E.R.C. P 61,175 (1996).

[FN139]. Id; see generally Green Mountain Power Corp., 70 F.E.R.C. P 61,205 (1995), reh'g denied, 75 F.E.R.C. P 61,250 (1996); Central Vt. Pub. Serv. Corp., 69 F.E.R.C. P 62,197 (1994), reh'g denied, 75 F.E.R.C. P 61,263 (1996). Interestingly, in Turnbridge Mill, 68 F.E.R.C. P 61,078, (1994), reh'g denied, 75 F.E.R.C. P 61,175 (1996), the ruling reversed FERC's long-held position that "review of the appropriateness of [state Section 401 certification] conditions is within the purview of state courts and not the Commission." Town of Summersville, 60 F.E.R.C. P 61,291, 61,990 (1992); Accord, Central Me.

Power Co., 52 F.E.R.C. P 61,033, 61,172 (1990); Carex Hydro, 52 F.E.R.C. P 61,216, 61,033 (1990). The EPA has also held the view that FERC is not authorized to review Section 401 conditions. See American Rivers I, 129 F.3d. at 106; see also 40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the state...."); Roosevelt Int'l Park Comm'n v. U.S. Envtl. Prot. Agency, 684 F.2d 1041, 1055-56 (1st Cir. 1982) (noting EPA's view that 401 conditions are reviewable only in state courts). Also, in Dosewallips, FERC did not dispute state court review of state imposed Section 401 conditions. 511 U.S. at 722.

[FN140]. American Rivers I, 129 F.3d at 103-05. According to FERC, "whether certain state conditions are outside the scope of Section 401(d) is a federal question to be answered by the Commission." Turnbridge Mill, 68 F.E.R.C. at 61,387. After intervening in the licensing proceedings, Vermont submitted motions for rehearing, which FERC denied. See American Rivers I, 129 F.3d at 103-05. Judicial review of FERC orders must be preceded by petitions for rehearing. See 16 U.S.C. § 8251(a) (1999).

[FN141]. American Rivers I, 129 F.3d at 103-05; see also supra note 57. American Rivers, an environmental group, intervened in FERC's Turnbridge Mill decision and, like the state, subsequently appealed the result to the Second Circuit. American Rivers I, 129 F.3d at 103.

[FN142]. See id. at 107 ("[A]bsent a clearly expressed legislative intention to the contrary... 'Congress expresses its purposes through the ordinary meaning of the words it uses...." ') (citing Escondido, 466 U.S. 765, 772 (1984)).

[FN143]. Id. (explaining that FERC's interpretations of the CWA receive substantially less deference than the EPA's because the EPA is the agency empowered by Congress to administer the CWA) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

[FN144]. Id.

[FN145]. Id. See also Sharon M. Mattox et al., Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Essential Issues, 23 A.L.I.-A.B.A. 831, 860 (1999) ("The court found that it was 'plainly true' that Section 401 restricted the conditions that states could impose to those affecting water quality in one manner or another ... [however,] it declined to find whether the specific conditions at issue in the case related to water quality.") (quoting American Rivers I, 129 F.3d at 107). In Dosewallips, the Supreme Court held that if Section 401 conditions related to designated uses, they necessarily related to water quality, authorizing states to impose them. Mattox et al., supra at 861. See also Dosewallips, 511 U.S. at 714-15. As Mattox explained:

This construction appears... to significantly broaden states' certification authority to the point where all certification conditions related in any way to a water's designated use are authorized even if they have no actual effect on the quality of the water. If, however, a state considers broad environmental, economic, or oversight factors that do not relate to a water's designated use or imposes conditions that do not enforce a water's designated use or water quality criteria, a state may exceed its authority under Section 401.

Mattox et al., supra, at 861. In American Rivers I, the Second Circuit had an opportunity to clarify the ambiguous relationship between designated uses and certification conditions, but refrained from doing so "because courts have consistently held that the proper forum to review the appropriateness of a state's certification is the state court." Id. at 861-62.

[FN146]. American Rivers I, 129 F.3d at 107.

[FN147]. 33 U.S.C. § 1341(a)(3) (1999); see American Rivers I, 129 F.3d at 108 n.18 (citing Keating v. FERC, 927 F.2d 616, 621-22 (D.C. Cir. 1991)).

[FN148]. American Rivers I, 129 F.3d at 108 n.19 ("[Section] 401(a)(3) governs a rather narrow class of cases of which this one is not a member....") (emphasis added).

[FN149]. Id.

[FN150]. Id. at 108. See also Mattox et al., supra note 145, at 860.

[FN151]. American Rivers I, 129 F.3d at 108.

[FN152]. 33 U.S.C. § 1341(a)(5) (1999).

[FN153]. American Rivers I, 129 F.3d at 108.

[FN154]. 927 F.2d 616 (D.C. Cir. 1991).

[FN155]. American Rivers I, 129 F.3d at 108-09.

[FN156]. Keating, 927 F.2d at 625.

[FN157]. American Rivers I, 129 F.3d at 109 (explaining that FERC's authority was limited to deciding "whether the state's assertion of revocation satisfies Section 401(a)(3)'s predicate requirements--i.e., whether it is timely and motivated by some change in circumstances after the certification was issued").

[FN158]. Id.

[FN159]. 466 U.S. 765 (1984). For a discussion of Escondido, see supra Section III.

[FN160]. See American Rivers I, 129 F.3d at 109. The Second Circuit, stating that Escondido's factual and legal scenario was "strikingly analogous" to the facts and laws in American Rivers I, described the similarities between the two cases. Id. First, the court explained that in both cases clear statutory language required FERC to incorporate license conditions imposed by other resource agencies, noting that in Escondido, DOI imposed the conditions, while in American Rivers I, a state agency imposed the conditions. Second, the court observed that in each case, FERC ignored the statutory requirements and supplanted the other resource agency's judgment with its own. Third, in both cases, the critical issue was whether Congress authorized FERC to decide the legitimacy of the conditions, and in each case the courts concluded that Congress did not intend FERC to judge the legitimacy of the conditions. Finally, concerning this last argument, FERC argued that its ability to fulfill its statutory mandate under the FPA would be compromised if it did not have discretion to reject externally imposed conditions. With regard to this last argument, the Second Circuit noted that in Escondido, the Supreme Court explained that if a license applicant did not judicially challenge the conditions FERC opposed, FERC could refuse to license the project. In addition, the appellate court stated: "Congress apparently decided that if no party was interested in the differences between the Commission and the Secretary... the dispute would best be resolved in a nonjudicial forum." Id. at 109-10 (quoting Escondido, 466 U.S. at 778 n.20).

[FN161]. The court stated that the portion of Escondido on which FERC relied "has no bearing on this case," adding that nothing in Escondido supported the assertion that Congress authorized FERC to decide the legality of state-imposed conditions under Section 401. Id. at 110-11 ("While the Commission may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the Commission does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.").

[FN162]. Id. at 111. FERC argued that requiring it to accept state conditions would be tantamount to allowing the state to "veto" its licensing process. See id. at 112 ("In short, the Commission is concerned that it would be 'held hostage' to every state imposed condition...."); see also 2nd Cir.: FERC is Obliged to Incorporate State Conditions into Hydro Licenses, 1998 Andrews Util. Indus. Litig. Rep. 12912, 12912 (Jan. 1998) [hereinafter Andrews] (quoting FERC's position that "[t]o accept the conditions proposed would give the state the kind of governance and enforcement authority that is critical and exclusive to the Commission's responsibility to administer a license under the Federal Power Act, a power that the courts have repeatedly concluded belongs exclusively to the Commission").

[FN163]. American Rivers I, 129 F.3d at 111 (citing 16 U.S.C. § 806 (1999)).

[FN164]. Id. (citing 16 U.S.C. § 799).

[FN165]. Id. See also Electric Consumer Protection Act of 1986 (EPCA), Pub. L. No. 44-495, 100 Stat. 1243 (codified in various sections of 16 U.S.C. §§ 792-828(c)). In American Rivers I, FERC argued that states could impair the delicate balancing scheme required by Section 10(j) (discussed in Section II), by labeling all recommendations as certification conditions. American Rivers I, 129 F.3d at 112.

[FN166]. American Rivers I, 129 F.3d at 111.

[FN167]. Id. at 111-12. See also Weinberg, supra note 126, at 471 (commenting on American Rivers I and noting that "[t]o allow a federal agency to overrule a state's finding that conditions are necessary to protect that state's water quality would do violence to the carefully balanced federal-state mechanism created by Congress in writing the Clean Water Act").

[FN168]. American Rivers I, 129 F.3d at 112.

[FN169]. Id. FERC argued that license denial was an impractical and economically untenable option, especially in the relicensing context. However, the court said that FERC's dissatisfaction with this option was an inadequate basis upon which to judicially grant FERC review powers that Congress had denied. See id. at 111. In a subsequent agency decision, FERC stated that the license denial option endorsed in American Rivers I was "extreme." Kennebec Water Power Co., 81 F.E.R.C. P 61,254, 62,181 (1997).

[FN170]. American Rivers I, 129 F.3d at 112. Section 511(a) of the CWA applies only in cases where an agency is acting under a law consistent with the CWA. See 33 U.S.C. §1371(a) (1999) ("[The Act] shall not be construed as... limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act.").

[FN171]. See American Rivers I, 129 F.3d at 112; Andrews, supra note 162.

[FN172]. Fifteen years before American Rivers I, the First Circuit noted that states with stringent water quality guidelines may use the Section 401 process to impose a broad range of restrictions on federally licensed projects, restrictions which the states would not otherwise have jurisdiction to require. Roosevelt Campobello Int'l Park Comm'n v. U.S. Envtl. Prot. Agency, 684 F.2d 1041, 1056-57 (1st Cir. 1982).

[FN173]. See supra notes 147-153 and accompanying text.

[FN174]. See American Rivers I, 129 F.3d at 111 (noting that the CWA "has diminished" the FPA's "preemptive reach"). See also id. at 107 (explaining that Congress' grant of power to states to impose water quality certification conditions on FERC

licensing is explicit in the CWA).

[FN175]. See, e.g., Holyoke Water Power Co., 88 F.E.R.C. P 61,186, (1999); Norwich, Dep't of Pub. Util., 88 F.E.R.C. P 62,299, (1999); Georgia Power Co., 88 F.E.R.C. P 62,314, (1999); Lockhart Power Co., 88 F.E.R.C. P 62,301, (1999); Kennebec Water Power Co., 81 F.E.R.C. P 61,254, (1997); Central Me. Power Co., 82 F.E.R.C. P 61,187, (1998). In each of these decisions, FERC either uses the following phrase or something akin to it: "Under Section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license for a hydroelectric project unless the certifying agency either has issued a water quality certification for the project or has waived certification...." Georgia Power Co., 88 F.E.R.C. P 62,314 at 64,658.

[FN176]. See, e.g., Central Me. Power Co., 82 F.E.R.C. P 61,187 at 61,685 (noting that American Rivers I required FERC to "accept all conditions in a water quality certification as conditions on a license even if we believe that the conditions may be outside the scope of Section 401"); Kennebec Water Power Co., 81 F.E.R.C. P 61,254 at 62,180 ("Based on American Rivers [[I], we must include in the license all of the conditions contained in [a] certification, even though... we do not agree that all of those conditions are appropriate."); see also Summit Hydropower Inc., 87 F.E.R.C. P 62,031, 62,031 (1999) (explaining that under American Rivers I, "the Commission is required to include as license conditions all conditions of a water quality certification issued pursuant to Section 401 of the Clean Water Act"); Norwich, Dep't of Pub. Util., 88 F.E.R.C. P 62,299, 64,551 (1999) ("The state certification conditions are included as part of the license....").

[FN177]. See, e.g., Kennebec Water Power Co ., 81 F.E.R.C. P 61,254 at 62,180 (noting that in FERC's view, state-imposed certification conditions exceeded their Section 401 authority); Central Me. Power Co ., 82 F.E.R.C. P 61,187 at 61,685 n.19 ("Certain aspects of the conditions in the water quality certification and the agreements could, in our opinion, create problems with the Commission's administration of its [license]."); Holyoke Water Power Co ., 88 F.E.R.C. P 61,186, at 61,608 ("In our judgment, a number of the certification conditions, which do not reflect a balancing of developmental and environmental considerations, entail measures that are very costly in light of their benefits or current need.").

[FN178]. Central Me. Power Co ., 82 F.E.R.C. P 61,187 at 61,685 n.19 (noting that some of the state certification conditions could prove problematic, especially those that allow the state to "order modification of project facilities or operations, and [those] requiring review and approval by the [state] and other agencies of schedules set and plans submitted under the license").

[FN179]. Seneca Falls Power Corp., 78 F.E.R.C. P 62,113, 64,396-97 (1997).

[FN180]. American Rivers II, 201 F.3d 1186 (9th Cir. 2000).

[FN181]. See id. at 1190, 1205-06. The organizations involved in the suit included Friends of the Earth, Pacific Rivers Council, Oregon Natural Resources Council, American Rivers, and WaterWatch of Oregon. Id. at 1190 n.1. Federal intervenors in the case included DOI, the Department of Commerce (DOC), the National Oceanic and Atmospheric Administration (NOAA), EPA, and NMFS. Id.
Section 18 states in relevant part: "The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such... fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." 16 U.S.C. § 811 (1999). Section 18 applies to all projects that may affect the upstream or downstream passage "of any fish species present in the project area.... Section 18 also applies when a project may affect passage of a species planned for introduction into the area." Bonham, supra note 32, at 118 (citations and footnotes omitted). A fish passage prescription is intended "'to maintain all life stages' of the fish." Id.
Congress limited fishways to "physical structures, facilities, and devices." See infra note 186 and accompanying text. Thus,

although FERC does not have the authority to independently define the term "fishway," it claimed that the Secretaries' Section 18 conditioning powers are restricted to the imposition of physical objects and argues that non-physical mitigation measures, such as the imposition of water temperature controls or minimum stream flows, cannot be included in Section 18 conditions. FERC also contended that the Secretaries may not monitor fishways, review final project design, implement inspection programs, review fish mortality rate guidelines, or delay project construction under Section 18. See Bonham, supra note 32, at 117 n.121 (citing 4 Waters and Water Rights, supra note 9, § 40.09(b)).

[FN182]. See American Rivers II, 201 F.3d at 1210-11. The two main federal agencies advancing fish concerns in FERC licensing are the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Serivice (NMFS). NMFS typically is responsible for administering anadromous fish issues. See Bonham, supra note 32, at 117. When the Secretaries of the Interior or Commerce exercise fish conditioning authority under Sections 4(e) or 18 or make recommendations under Section 10(j), USFWS and NMFS often formulate and submit the conditions and recommendations to FERC. See id. The conditions and recommendations can be costly to implement. See id. at n.148. For example, the estimated cost of installing fishways at **Condit Dam** was $30 million. See id. at 121. Similarly, Niagara Mohawk Power spent about $33 million to satisfy federal prescriptions when it recently relicensed 32 hydropower projects. See id. at n.148.

[FN183]. Id. at 1208 (citing 56 Fed. Reg. 23,108, 23,146 (1991)).

[FN184]. Id.

[FN185]. See Energy Policy Act of 1992 (EPA), Pub. L. No. 102-486, § 1701(b), 106 Stat. 3008.

[FN186]. Id.

[FN187]. Id.

[FN188]. See 16 U.S.C. § 811 (1999).

[FN189]. See generally American Rivers II, 201 F.3d at 1208.

[FN190]. EPA § 1701(b).

[FN191]. The Leaburg and Walterville projects began operating in 1930 and 1911, respectively, and were first licensed individually by FERC's predecessor, FPC, in 1968 and 1967, respectively. See American Rivers II, 201 F.3d at 1190. Subsequently, the projects' licensee, the Eugene Water and Electric Board (EWEB), sought consolidation of the two projects, so that only one license was necessary to operate both facilities. Id. at 1190 n.3. FERC agreed; the project is now termed the Leaburg-Walterville Hydroelectric Project No. 2496. Id.

[FN192]. See id. at 1192. Section 10(j) allows federal fish agencies, such as USFWS and NMFS, as well as state fish and wildlife agencies, to submit license recommendations to FERC under the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (1999). See 16 U.S.C. § 803(j) (1999).

[FN193]. See American Rivers II, 201 F.3d at 1192.

[FN194]. Id.

[FN195]. 16 U.S.C. § 803(a)(2)(B).

[FN196]. American Rivers II, 201 F.3d at 1192.

[FN197]. "Whenever the Commission believes that any recommendation... may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies... shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):... a finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law [and a] finding that the conditions selected by the Commission [protect and mitigate damage to fish and wildlife]."
16 U.S.C. § 803(j)(2)(A)-(B).

[FN198]. See generally id. § 803(a).

[FN199]. See American Rivers II, 201 F.3d at 1192.

[FN200]. See id.

[FN201]. See id.

[FN202]. See supra note 196 and accompanying text.

[FN203]. See American Rivers II, 201 F.3d at 1202-05 . FERC's reasons for reclassifying and rejecting the conditions for the Leaburg-Walterville project were specified in the record. For example, FERC concluded that twenty-one of fifty-six recommendations submitted under FPA Section 10(j) for the Leaburg-Walterville project exceeded the scope of Section 10(j) because they gave "final authority over... project operations to [fish and wildlife] agencies rather than to the Commission." Eugene Water & Elec. Bd., 78 F.E.R.C. P 62,207, 64,701 (1997) (noting that although it rejected such recommendations under Section 10(j), it nonetheless "considered" each recommendation under Section 10(a)). Similarly, FERC held that although fish screen systems for the project were within the ambit of DOC's and DOI's Section 18 conditioning authority, accompanying fish screen mortality standards and automatic canal flow reduction to ensure satisfaction of such standards were not. Id. P 62,207 at 64,699 (indicating that DOC and DOI could not prescribe automatic flow reduction because only "the Commission retains authority over the final design and monitoring of fishways, and enforcement of the licensee's duty to maintain fishways"). Likewise, FERC concluded that tailrace barriers recommended by the Secretaries of Commerce and Interior to protect migrating fish populations did not constitute Section 18 fishways "because they do not provide for the active movement or guidance of fish past an obstruction." Id. P 62,207 at 64,700. Nevertheless, the Commission subsequently adopted the barriers under FPA Section 10(a). Id.

[FN204]. See American Rivers II, 201 F.3d at 1193.

[FN205]. See id. at 1211. The court noted that both the Section 10(j) and Section 18 issues were issues of first impression in the Ninth Circuit and that both had significant "bearing... on the hydropower re-licensing process." Id. at 1201.

[FN206]. The pertinent language of Section 18 appears supra note 181.

[FN207]. American Rivers II, 201 F.3d at 1206. FERC has routinely rejected proposed fishway prescriptions and reclassified them under Sections 10(a)(1) and 10(j) of the FPA. See, e.g., Edwards Mfg. Co., 81 F.E.R.C. P 61,255, 62,203 (1997) ("The

Commission staff concluded that some of the prescriptions were beyond the scope of FPA Section 18, but should be adopted by the Commission pursuant to FPA Sections 10(a)(1) and (j).").

[FN208]. American Rivers II, 201 F.3d at 1210 ("[T]here is no escaping the simple fact that Escondido has set forth the analytic framework which authoritatively animates the statutory scheme....") (citing Wisconsin Pub. Serv. Corp. v. FERC, 32 F.3d 1165, 1170-71 (7th Cir. 1994), and Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659, 663 (D.C. Cir. 1996)).

[FN209]. See id. at 1206.

[FN210]. Id.

[FN211]. On the Section 10(j)(2) process, see supra note 197.

[FN212]. See American Rivers II, 201 F.3d at 1208-10. In 1992, Congress explicitly rejected FERC's definition of the term "fishway," and directed that any fishway definition promulgated by FERC would have "no force or effect unless concurred in by the Secretary of the Interior and Secretary of Commerce." EPA § 1701(b); see also supra note 187. In American Rivers II, FERC unsuccessfully argued that Section 1701(b) was ambiguous because it failed to identify which agency was authorized to evaluate Section 18 prescriptions. See American Rivers II, 201 F.3d at 1208. FERC cited legislative history in an attempt to prove that Congress intended Section 1701(b) to grant this authority to FERC. See id. at 1208-09. First, FERC presented comments made by Senator Wallop indicating the Commission had the right to review fishway prescriptions; however, the Court accorded the senator's remarks "no interpretive weight" because, as the remarks of a single legislator, they were "not controlling in analyzing legislative history." Id. at 1209 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979)). Second, FERC argued that a passage from a House of Representatives' conference report proved that Congress did not intend to nullify FERC's fishway interpretations prior to Section 1701(b)'s enactment. See id. at 1209. The court ruled that FERC "ha[d] gone too far" in using this rationale to create an extensive body of agency law that would allow the Commission to "reject and reclassify 'improperly prescribed' Section 18 fishways." Id. at 1209-1210 (stating also that the House conference report did not possess interpretive significance). Thus, ultimately, the court stated that FERC could not "free itself from the shackles of Escondido." Id. at 1209.

[FN213]. See id. at 1206-07.

[FN214]. See id. at 1207 (quoting Escondido, 466 U.S. at 777). The Ninth Circuit rejected FERC's attempt to distinguish Escondido's holding. See id. In Escondido, the Supreme Court concluded that FERC was not required to incorporate Section 4(e) conditions submitted by the Secretary of the Interior necessary for the "adequate protection and utilization" of a reservation if the hydropower facilities were not located on reservation lands. Escondido, 466 U.S. at 780-81; see also supra note 81 and accompanying text. The Ninth Circuit flatly rejected FERC's argument that this part of Escondido authorized it to reject Section 18 conditions, clarifying that Escondido's Section 4(e) interpretation merely allowed FERC to reject agency conditions that exceeded statutorily defined geographical limits. See American Rivers II, 201 F.3d 1186 at 1207 (noting that FERC's reliance on this aspect of Escondido was misplaced because it carried no weight in the Section 18 context).
The court in American Rivers II also ruled that Section 18's plain language demonstrated a "clear congressional delegation" of power to the Secretaries of the Interior and Commerce, thereby requiring only a one-step Chevron analysis and conclusion. Id. The Supreme Court devised the Chevron test to determine the validity of an agency's statutory interpretation:
First... is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however... the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [[interpretation] is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43.

[FN215]. See American Rivers II, 201 F.3d at 1210.

[FN216]. See id. The court acknowledged that DOI and DOC failed to promulgate regulations necessary to guide interested parties, such as license applicants, through the fishway implementation process, but said this omission was immaterial because Congress, "acutely aware" of these omissions when it passed Section 1701(b), nevertheless provided the Secretaries sole authority to prescribe fishways. Id.

[FN217]. See id. For Section 18 conditions to withstand judicial scrutiny, the agencies recommending them must develop an administrative record that provides "substantial evidence" of the reasonableness of the conditions. Bonham, supra note 32, at 119.

[FN218]. See American Rivers II, 201 F.3d at 1208-10.

[FN219]. See id. at 1202. On the Chevron standard, see supra note 214. The court also used the Chevron standard to decide another issue in the case, one that falls outside of this article's scope, but which involves an important principle and deserves brief mention. The issue was whether FERC's failure to use an "environmental baseline" to evaluate relicensing proposals was permitted by law. A baseline is used "to identify the environmental consequences of a proposed agency action." American Rivers II, 201 F.3d at 1195 n.15. ("'[W] ithout establishing... baseline conditions... there is simply no way to determine what effect [an action] will have on the environment....'") (quoting Half Moon Bay Fisherman's Mktg. Ass'n. v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)). FERC used an "existing-project baseline" to assess relicensing proposals, analyzing the environmental consequences of the proposals by measuring the project's affects on the environment's current condition. Id. at 1195.
The court rejected the conservationists' argument that the FPA required FERC to evaluate relicensing proposals by measuring them against a theoretical environmental baseline, in which a river basin is hypothetically reconstructed to reflect what the basin would be like if it had never been altered by a FERC project. Under step one of Chevron, the Ninth Circuit determined that the FPA's plain language was silent concerning the concept of an environmental baseline and that its legislative history was not conclusive. Id. at 1196-97. Under step two of Chevron, the court held that FERC's interpretation of the FPA authorizing use of an existing-project baseline was a permissible statutory construction. Id. at 1197-99 ("It defies common sense and notions of pragmatism to require [FERC] or license applicants to 'gather information to recreate a 50-year-old environmental base upon which to make present day developmental decisions." ') (quoting 54 Fed. Reg. 23756, 23776 (1989)).

[FN220]. See id. at 1202 ("'[W]hile the Commission must pay due regard to such recommendations, [Section 10(j)] cannot be read to force upon the Commission the burden of strict acceptance of each and every proper recommendation.") (quoting Nat'l Wildlife Fed'n v. FERC, 912 F.2d 1471, 1480 (D.C. Cir. 1990)).

[FN221]. See id. at 1203-04. In Escondido, the Supreme Court required FERC to accept conditions from the Secretary of Interior submitted on behalf of Indian reservations under DOI's supervision. For a discussion of the Supreme Court's interpretation of Section 4(e) in Escondido, see supra Section III.

[FN222]. See id.

[FN223]. The court explained that Congress intended the two clauses of Section 10(j) to be interdependent, noting that Section 10(j)(1) is "subject to" Section 10(j)(2). Id. at 1204. Thus, the mandatory language of Section 10(j)(1), which states

that FERC "shall include [agency prescribed] conditions," is qualified by Section 10(j)(2), which authorizes FERC to reject agency submitted conditions if it makes certain findings. 16 U.S.C. § 803(j)(1) & (2) (1999). Under Section 10(j)(2), FERC must first give "due weight" to each recommended condition. Id. § 803(j)(2). After due consideration, if FERC fails to adopt a condition, it must publish findings explaining why the condition is inconsistent with the FPA or other provisions of applicable law, as well as findings demonstrating that the alternate conditions it selects will protect and mitigate damage to fish and wildlife. See id. § 803(j)(2)(A) & (B); see also § 797(e) (requiring FERC to give "equal consideration to the... protection, mitigation of damage to, and enhancement of, fish and wildlife" in deciding whether to issue a license).

[FN224]. See American Rivers II, 201 F.3d at 1203-05. The court examined the legislative history of Section 10(j), but found that it "mirror[ed] the plain language of subsection 10(j)(2) and reconfirm[ed] that Congress intended to vest the Commission with ultimate authority to reject agency recommendations improperly lodged under Section 10(j)." Id. at 1204.
The court also ruled in favor of FERC on another issue that is not within the scope of this article. Namely, under NEPA, FERC is required to examine the environmental effects of a proposed licensing, as well as alternatives to the licensing, including the "no action" alternative. See 40 C.F.R. §§ 1502.14, 1502.14(d) (2000). The Council on Environmental Quality (CEQ) has defined the no action alternative as "no change" from existing management goals and policies. See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (1981) [hereinafter Forty Questions].
The court held that FERC's no action alternative did not violate NEPA. Id. at 1199 (noting that FERC's no action alternative was the continued operation of existing projects under original licensing terms, instead of relicense denial). See also 42 U.S.C. §§ 4321-4370d (1994). The court explained that "defining a logical 'no action' alternative is difficult [in a relicensing] because [Section 15 of the FPA requires FERC] to take some action on the application for a new license." American Rivers II, 201 F.3d at 1200 (quoting Eugene Water & Elec. Bd., 81 F.E.R.C. P 61,270, 62,326 (1997)). The court questioned whether "license denial could appropriately be considered 'no action' in the case of a relicensing... [as d]enial would require action, rather than inaction...." Id. (alteration in original) (quoting Eugene Water & Elec. Bd., 81 F.E.R.C. P 61,270 at 62,326) (other citations omitted). The court concluded that FERC correctly defined the no action alternative as continued project operation. Id. at 1200-01 ("'[N]o action' is 'no change' from current management... Therefore, the 'no action' alternative may be thought of in terms of continuing with the present course of action until that action is changed.") (quoting Forty Questions, 46 Fed. Reg. at 18,027). But cf. Bonham, supra note 32, at 127 n.178 (noting that the EPA rejects FERC's no action definition, claiming that it results in a "highly unbalanced" environmental baseline that does not provide adequate deference to fish and wildlife issues).
Finally, the court also held that FERC's failure to consider dam removal and project decommissioning as a project alternative did not violate NEPA. American Rivers II, 201 F.3d at 1200. The court explained that NEPA required FERC to consider only reasonable alternatives, not "an infinite range of alternatives." Id. (quoting City of Carmel-By-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)). The court stated that "license denial and dam removal will... not be considered a reasonable alternative by anyone." Id. at 1201 (quoting Eugene Water & Elec. Bd., 81 F.E.R.C. P 61,270 at 62,327). But cf. Edwards Mfg. Co., 81 F.E.R.C. P 61,255 at 62,201 (explaining that despite the licensee's objections, FERC selected the alternative of dam removal for Maine's Edwards Project, rather than relicense the project); see also Bonham, supra note 32, at 104 (describing the negotiated settlement process for the Pacific Northwest's **Condit Dam,** in which the licensee and other interested parties chose dam removal and project decommissioning instead of relicensing).

[FN225]. American Rivers II, 201 F.3d at 1205.

[FN226]. See id. The Ninth Circuit emphasized that FERC's reclassification, rejection, or modification of agency recommendations must survive a "substantial evidence" review. Id. at 1203 n.23 (noting that FERC "failed to speak with clarity [when rejecting] several recommendations that might be within the scope of Section 10(j)"). For an explanation of the

process required of FERC by Section 10(j), see supra note 197.

[FN227]. "Faced with mitigation requirements, such as building truly effective fish ladders, many owners are reexamining the economic factors and re-licensing proceedings will be a fertile ground for both litigation and creative settlements." Bruce Babbitt, Restoring Our Natural Heritage, 14 Wtr. Nat. Resources & Env't 147, 148 (2000).

[FN228]. Dam removal has received greater attention recently as an alternative to relicensing because of the economic burdens of complying with environmental standards imposed by the FPA and other applicable environmental statutes. See Bonham, supra note 32, at 102-03. For cases in which a project was decommissioned and its dam removed, see Edwards Mfg. Co., 81 F.E.R.C. P 61,255 (1997) (discussing the removal of a hydroelectric project in Maine along the Kennebec River); see also Bonham, supra note 32, at 102 (discussing the negotiated settlement leading to the decision to remove **Condit Dam);** see also infra Sections VI.A & B.

[FN229]. The FPA has experienced "significant" change in recent years, largely as a result of increased interest in environmental preservation. Edwards, 81 F.E.R.C. P 61,255 at 62,207. There are numerous environmental statutes that can potentially affect the hydropower licensing process, including the CWA, the Endangered Species Act, NEPA, and the Clean Air Act. Indeed, according to FERC, "[a]s society's concerns with environmental damage grew in recent decades, Congress passed numerous statutes to address that situation, and many of these... affect the Commission licensing process." Id. The CWA in particular often plays a critical role in the relicensing process: "When the [Snake River] dams went in fifty years ago, there were no water quality standards or water quality certifications. But there are now [[and they are] a powerful tool [that can be used] to shape FERC's decision [[s] about these dams." Beaton et al., supra note 97, at 546.

[FN230]. See generally Edwards, 81 F.E.R.C. P 61,255; Bonham, supra note 32 (discussing the negotiations that led to the **Condit dam's** removal).

[FN231]. Id. at 62,199.

[FN232]. Id. at 62,202.

[FN233]. See id. The Kennebec River Resource Management Plan, part of the Maine Comprehensive Rivers Management Plan, identified the Edwards Dam as a "major obstacle to anadromous fish restoration in the Kennebec River Basin." Id. Historically, the Kennebec River was home to every anadromous fish species native to the northeastern United States. The only anadromous species the state plan did not intend to restore to its historical range in the Kennebec was the lamprey. Id.

[FN234]. Edwards, 81 F.E.R.C. P 61,255 at 62,202. The fishways, primarily benefiting alewives, consisted of a vacuum-pump fish lift for upstream passage and a bypass for downstream passage. Id.

[FN235]. Id. at 62,201. State advocates of dam removal included the governor, the Maine Department of Marine Resources, the Maine Department of Inland Fisheries and Wildlife, and the State Planning Office. The federal advocates were comprised of NMFS, DOI, and EPA. A public interest group, the Kennebec Coalition, also sought removal of the dam. Id. Maine's Governor King called for removal of the Edwards Dam as early as 1990 in his inaugural speech. Id. at 62,208.

[FN236]. See id. at 62,203.

[FN237]. Id. at 62,200.

[FN238]. Id. at 62,210. Section 15(a)(2) requires FERC to issue licenses to applicants whose plans are "best adapted to serve

the public interest." 16 U.S.C. § 808(a)(2) (1994).

[FN239]. See Christine A. Klein, On Dams and Democracy, 78 Or. L. Rev. 641, 641 (1999).

[FN240]. Edwards, 81 F.E.R.C. at 62,202. NEPA requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (1994). The EIS must include alternatives to the proposed action. Id. § 4332(c)(iii). FERC's licensing or relicensing of a project is considered a major federal action with significant environmental effects, requiring FERC to prepare an EIS containing alternatives to the licensee's proposals.
FERC evaluated four alternatives to the proposed action when drafting the final EIS: "(1) a new license as proposed by the licensees; (2) the licensee's relicense proposal as conditioned with additional mitigation and enhancement measures...; (3) continuation of project operation under the same conditions as the prior license; and (4) denial of the license and removal of the dam." Edwards, 81 F.E.R.C. at 62,205 (footnotes omitted). FERC rejected the first and third alternatives because they failed the FPA's public interest test. Id. at 62,205. Then, FERC stated that although the second option mitigated some of the issues posed by the dam, dam removal was the only alternative that would resolve all of the problems caused by the dam. Id. at 62,205-06. FERC also noted that the negative environmental effects of removing the dam would not be significant according to the final EIS. Id. at 62,206.
The Commission staff determined that dam removal would ultimately create more recreational benefits in the project area than relicensing. Id. at 62,204. For example, the final EIS estimated that dam removal would result in significant financial gains because of increased commercial and sport fishing in the area. Id.

[FN241]. Edwards, 81 F.E.R.C. at 62,206. No known fishway facilities provide effective passage for Atlantic sturgeon, shortnose sturgeon, striped bass, and rainbow smelt. Id. at 62,203, 62,206.

[FN242]. Id. at 62,206-07.

[FN243]. Id. at 62,203. For a review of Section 18, see supra note 181. FERC concluded that while some of the prescriptions were "beyond the scope" of Section 18, they should be adopted under Sections 10(a)(1) and 10(j). Edwards, 81 F.E.R.C. at 62,203. Edwards was decided before the Ninth Circuit's American Rivers II decision; under that decision, FERC would be required to adopt the Section 18 prescriptions as proposed. See supra Section V.A.

[FN244]. Edwards, 81 F.E.R.C. at 62,206 ("[W]e employ an analysis that uses current costs to compare project costs to the likely costs of alternative power....").

[FN245]. Id. at 62,207. FERC also determined that if the project continued to operate without fishways, it would still cost $497,000 more annually than the cost of alternate power. Id.

[FN246]. Id. See also Costenbader, supra note 23, at 644.

[FN247]. See Edwards, 81 F.E.R.C. at 62,210. FERC noted that the power produced by the project could be replaced by alternate power sources in the region. Id. at 62,201.

[FN248]. Id. at 62,204.

[FN249]. Id. Section 4(e) requires FERC to give "equal consideration to... the protection, mitigation of damage to, and enhancement of, fish and wildlife" when deciding whether to issue a license. 16 U.S.C. § 797(e) (1994). Section 10(a)(1) requires FERC to license projects "best adapted to a comprehensive plan for improving or developing a waterway... for the

adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for... recreational... purposes." Id. § 803(a)(1). See also supra note 47. Section 10(a)(2)(A) requires FERC to assess the extent to which a proposed project is consistent with a comprehensive plan. 16 U.S.C. § 803(a)(2)(A)(1994). The project's final EIS assessed which licensing alternative would satisfy the proposed comprehensive plans for the Kennebec River Basin, and only the dam removal alternative was consistent with all of the comprehensive plans FERC examined. Edwards, 81 F.E.R.C. at 62,204.

[FN250]. Edwards, 81 F.E.R.C. at 62,208. The licensee argued that FERC could either grant a new license for the project, or Congress could take over the project under Section 14 of the FPA. Id. FERC held that Section 14 applied only when Congress wanted the federal government to acquire, maintain, and operate a licensed project, and that it was unreasonable to conclude that Congress wanted the government to acquire projects, such as the Edwards Project, "whose maintenance and operation is contrary to the public interest and opposed by the state." Id.

[FN251]. Id. "[A] key part of the Section 10(a) analysis in this case called for restoring the anadromous fish to the river... [a]s already discussed, no condition can be fashioned under existing technology that will allow adequate fish passage past the project dam." Id. FERC noted that dam removal would unquestionably benefit anadromous fish populations. Id. at 62,210 "[O]ur decision will not result in the elimination of a valuable, operating hydropower facility on the basis of an opinion that [anadromous] species 'may' or 'could' return." Id.

[FN252]. Id. at 62,208-09.

[FN253]. Id. at 62,210.

[FN254]. Id. at 62,205-09.

[FN255]. See id. at 62,206-07. "There are [two reasons for removal of Edwards Dam]: Section 18 and money." Bonham, supra note 32, at 132.

[FN256]. Edwards, 81 F.E.R.C. at 62,208, 62,211. A dissenter, FERC Commissioner Vicky A. Bailey, argued the FPA did not allow FERC to order project decommissioning, adding that the "decision will increase the pressure to order the removal of additional and much larger dams." Id. at 62,211- 12. "[Today's demolition of Edwards Dam] is the beginning of something that will affect the entire nation." Klein, supra note 239, at 641 (quoting Bruce Babbitt, Secretary of the Interior) (alteration in original). "[T]he Edwards Dam breaching was indicative of a new era of environmental policy, representing the fundamental reversal of a national philosophy that had endured for most of the century." Id.

[FN257]. FERC ordered the owners of the dam to remove the dam against their will and at their own expense. Peter J. Carney, Comment, Dam Removal: Evolving Federal Policy Opens a New Avenue of Fisheries and Ecosystem Management, 5 Ocean & Coastal L.J. 309, 325 (2000) (citing Edwards Mfg. Co. v. City of Augusta, Me., 81 F.E.R.C. 61, 255 (1997)). Edwards Manufacturing planned to contest the order in court, but ultimately did not sue FERC after Bath Iron Works, a major shipbuilding company at the mouth of the Kennebec River, and the state of Maine agreed to pay the removal costs. Bath Iron Works agreed to pay as part of its mitigation to dredge part of the river, and Maine agreed to pay for extra costs. Id. at 326.

[FN258]. See 4 Waters and Water Rights § 40.13 (Robert E. Beck ed. 1999 Supp.).

[FN259]. See Dieter Bradbury, A Year After Dam Demolition, River Surges With Life, Maine Sunday Telegram, July 2,

2000, at 1; Kennebec River Dam Removal in Maine Deemed a Success, Land Letter, July 18, 2000, at 9.

[FN260]. Bonham, supra note 32, at 98.

[FN261]. Id. at 110.

[FN262]. Id. at 110. See also Brent Foster, The Failure of Watershed Analysis Under the Northwest Forest Plan: A Case Study of the Gifford Pinchot National Forest, 5 Hastings W.N.W. J. Envtl. L. & Pol'y 337, 356 (1999) (noting that "[w]hen the **Condit Dam** was constructed in the early 1900's it blocked salmon and steelhead runs"). Studies estimated that anadromous fish were plentiful in the White Salmon River before the Condit Project was constructed: "[P]re-Condit anadromous fish [runs were estimated to] produce 5,489 coho, 625 chinook, and 763 steelhead. [Today,] native anadromous runs above the dam are functionally extinct." Bonham, supra note 32, at 107-108. Most of the fish existing downstream of the dam are hatchery fish. Id. at 108.

[FN263]. Bonham, supra note 32, at 114.

[FN264]. Id. FERC's public interest authority allows it to reserve the right to re-visit and amend issued licenses to require construction of fish passage facilities. Id. at 118 (citing Wisconsin Pub. Serv. Corp. v. F.E.R.C., 32 F.3d 1165, 1170 (7th Cir. 1994)).

[FN265]. Id. at 116. The Northwest Power Planning Council ("the Council") was created by the Pacific Northwest Power Planning and Conservation Act. 16 U.S.C. § 839b(a) (1996). The Council was created to act "as an interstate policy-making and planning body for electrical power development and fish and wildlife resource protection in the Columbia Basin." Bonham, supra note 32, at 115.

[FN266]. See Bonham, supra note 32, at 116. Perhaps the fishways were not installed because the Council failed to attempt to enforce its own directive. See Michael C. Blumm & Andy Simrin, The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin, 21 Envtl. L. 657, 737-38 (1991) ("The [Council is unable or unwilling] to recognize its responsibility to enforce its own program.... [T]he Council possesses a good deal more authority than it thinks it has (or perhaps wants).").

[FN267]. Bonham, supra note 32, at 116.

[FN268]. Id. ("Regardless of PacifiCorp's statements of purpose and goals for the Condit relicensing, the company failed to mention one factor--fish passage.").

[FN269]. Id. at 119-20.

[FN270]. Id. at 121.

[FN271]. Id. at 126. For a discussion of NEPA's requirement to consider alternatives, see supra note 224. The DEIS examined five project alternatives.

[FN272]. Bonham, supra note 32, at 127.

[FN273]. Id. at 127.

[FN274]. Id. at 127-28. FERC's estimated removal costs ranged from $52- 58 million, while NMFS' were between $8.7 million and $10 million. Id. at 128. Another observer commented that the removal would cost about $14 million. Klein, supra note 239, at 706. But see Costenbader, supra note 23, at 664 ("Removing the **Condit Dam...** could easily cost more than $30 million.").

[FN275]. Bonham, supra note 32, at 129-30. "Quite simply, Condit, with the attached fish passage prescriptions, became a money loser for PacifiCorp." Id. at 122.

[FN276]. Jonathan Brinckman, Utility Plans To Remove **Condit Dam,** The Oregonian, Sept. 23, 1999, at A1; PacifiCorp Reaches Agreement to Remove **Condit Dam,** Clearing Up, Sept. 27, 1999, at 14 [hereinafter Pacific Corp Reaches Agreement].

[FN277]. Pacific Corp Reaches Agreement, supra note 276, at 15.

[FN278]. Project economics, public pressure, state pressure, the importance of the Kennebec River's fishery resource, and the availability of alternate power sources were among the factors that led FERC to conclude that the public interest required removal of the Edwards Project. Costenbader, supra note 23, at 641. The economic consequences of Section 18's requirements were the primary factors leading to **Condit Dam's** decommissioning, but public pressure to save the White Salmon River's fishery was also a factor. See Bonham, supra note 32, at 102, 133.

[FN279]. Bonham, supra note 32, at 132-33 ("[W]ithout the factor of fish passage prescriptions and Section 18, neither Condit nor Edwards Dam would attract attention... without Section 18 pressure neither the White Salmon nor the Kennebec rivers, today, could poss[ibly] regain their natural splendor as free-flowing rivers.").

[FN280]. See, e.g., The Hydroelectric Licensing Process Improvement Act of 1999: Hearing on S. 740 Before the Senate Comm. of Energy and Natural Resources, Subcomm. on Water and Power, 106th Congress (May 23, 2000) [[hereinafter cited as Senate Hearings] (statement of Terry Hudgens, Senior Vice President, PacfiCorp), at http://energy.senate.gov/hearings/hearings_ frames.htm.

[FN281]. Statement of Senator Craig on the introduction of the Hydroelectric Licensing Process Improvement Act.

[FN282]. Cosponsors included Senators Crapo (R-Idaho), Burns (R-Mont.), Thomas (R-Wyo.), Grams (R-Minn.), Helms (R-N.C.), and Thurmond (R-S.C.). See Western States Water, no. 1355 (May 5, 2000).

[FN283]. S. 740, 106th Cong., § 4 (adding new § 32(b)(1) to the FPA).

[FN284]. Id. In the case of 4(e) conditions, the consulting agency would have to determine that each condition is "directly and reasonably related to the impacts of the project within the Federal reservation." Id. (adding new § 32(d) to the FPA).

[FN285]. Id. (adding new § 32(c)).

[FN286]. Id. (adding new § 32(g)(2)).

[FN287]. Id. (adding new § 32(e)).

[FN288]. Id. (adding new § 32(e)(1)).

[FN289]. Id. (adding new § 32(e)(2)(B)).

[FN290]. Id. (adding new § 32(f)). FERC may make one 30-day extension. Id. (adding new § 32(f)(4)).

[FN291]. Id. (adding new § 32(g)).

[FN292]. Id. (adding new § 32(h)).

[FN293]. Id. § 5 (adding new § 33(a)).

[FN294]. Id. (adding new § 33(b)).

[FN295]. Id. (adding a new § 33(b)(2)). In addition, the bill would order FERC to perform an 18-month study on the feasibility of establishing a separate licensing process for small projects of five megawatts or less. Id. § 6.

[FN296]. Senate Hearings, supra note 280 (testimony of FERC Chair James Hoecker; Dennis Lewis, Petersburg (Ak.) Municipal Power and Light; Terry Hudgens, PacifiCorp (Or.); Lionel Topaz, Grant County (Wash.) Public Utility District).

[FN297]. Id. (testimony of David Hayes, Department of the Interior).

[FN298]. Id.

[FN299]. Id.

[FN300]. Id.

[FN301]. Id. See Bangor Hydro-Elec. Co. v. FERC, 78 F.3d 659, 663 (D.C. Cir. 1996) (explaining substantial evidence standard). See also Bangor Hydro-Elec. Co. v. Bd. of Envtl. Prot., 595 A.2d 443 (Me. 1991) (requiring conditions to be based on substantial evidence).

[FN302]. Senate Hearings, supra note 280 (testimony of David Hayes).

[FN303]. Id. (testimony Andrew Fahlund, American Rivers).

[FN304]. Id.

[FN305]. Section 16.5 of FERC's FPA regulations authorizes issuance of annual licenses. 18 C.F.R. § 16.5.

[FN306]. Senate Hearings, supra note 280 (testimony of Andrew Fahlund).

[FN307]. 16 U.S.C. § 803(e)(1).

[FN308]. Senate Hearings, supra note 280 (testimony of Randy Settler, Columbia River Inter-Tribal Fish Commission).

[FN309]. Id.

[FN310]. The marked up bill is discussed in Western States Water, special report no. 1358 (May 27, 2000).

[FN311]. See id.

[FN312]. See id.

[FN313]. See id.

[FN314]. According to a recent study, some 465 dams have been removed, but almost none of those have been hydroelectric dams. For example, removal of the Sandstone Dam on Minnesota's Kettle River opened up 30 miles for fish migration and revived recreational opportunities. Study Opens Floodgates on Dam Removal, Environmental News Network, Dec. 15, 1999, at http://www.enn.com/enn-news-archive/1999/12/121599/damremoval_8225.asp.
One dam targeted for removal under § 4(e) by the U.S. Forest Service is PacifiCorp's Soda Springs Dam on Oregon's North Umpqua River, although the utility is opposed. See Talks on Soda Springs Dam Resume, The Oregonian, July 27, 2000, at D2. On the other hand, Portland General Electric has agreed to remove its Little Sandy and Marmot Dams in the Sandy River drainage, near Portland. John Hughes, Relicensing Decisions May Mean Changes--Or End--For Dams, The Bulletin (Bend), April 13, 2000, at C5. And in California, Pacific Gas and Electric has agreed to remove five of its dams by 2001, freeing up 42 miles of salmon habitat on the Battle Creek drainage, near Mount Lassen. California To See Five Dams Removed For Fish Recovery, Land Letter, Nov. 18, 1999, at 6. Other dams targeted for removal include three hydroelectric dams on Maine's Penobscot River. Hughes, supra.

[FN315]. Energy Act of 2000, Pub. L. No. 106-469 § 603, 114 Stat. 2029.

[FN316]. See Lynn Francisco, Potomac: FERC To Review Relicensing, Clearing Up, Oct. 30, 2000, at 17 (50% of hydroelectric capacity to be relicensed in the next 10 years, quoting the executive director of the National Hydropower Association).

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