Approaching a Gordian Knot: The Ongoing State/Federal Conflict Over Hydropower

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FOREWORD

Tom Bahr[*]

In May 1991, the Western Governors' Association (WGA) and Western States Water Council (WSWC) organized the first in a series of three workshops, held in Park City, Utah, to address changing needs in water management in the West. Attendees included a broad, representative mix of water managers (federal, state, Indian, local and private), water interest groups, and academics. The outcome of this effort was agreement on a set of six principles which should be considered in western water resources management and policy development. These have come to be known as the "Park City Principles" among the water resources community. These principles and the process leading to their development is the subject of the first paper in this series.

Following the three Park City workshops, the WGA at their June 23, 1992 conference passed a resolution endorsing the Park City Principles, and issued a document entitled *Pioneering New Solutions: Directing our Destiny*. This report contained several recommendations, one of

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which asked cooperation with the university-based water research institutes to analyze federal statutes and clarify public interest requirements as they related to the Park City Principles.

The university-based water research institutes were authorized by Congress under the Water Resources Research Act of 1964 and comprise a nationwide network of institutes in each state, usually located at the land grant institution. Seven western institutes from the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming formed a consortium in the early 1970s to work on water resources problems of the Colorado River/Great Basin region and other areas of the west. This group, named the Powell Consortium, has an important research focus: to analyze water law and policy as vehicles for finding creative solutions to water planning and management in the region.

The Powell Consortium, as a participant in the Park City workshops, followed up on the WGA recommendation and began further discussions with staff of the WGA and WSWC to plan a study to examine federal statutes and their relationship to the Park City Principles. The project, titled the "Park City Federal Water Law Project," began in the fall of 1992 and was designed to prepare concise overviews of selected federal water policies and display their impact on the ability of states to manage and resolve conflicts by and between themselves.

The Powell Consortium project examined selected federal statutes, regulations and court decisions that impact the ability of non-federal entities (state and local government, interstate organizations, etc.) to manage water resources and resolve water conflicts involving competing interests. During the Park City workshops some participants observed that solutions to water conflicts which might make sense at the local, state, or regional level sometimes conflict with federal policy. Identifying these conflicts was an important task for the project. The project was not designed as a comprehensive analysis of all relevant water programs, but rather as a diverse sampling which might produce provocative talking points for focusing future discussion and debate in a workshop setting similar to those held in Park City.

The Powell Consortium selected a group of five legal scholars to prepare separate "White Papers" examining the following: 1) interstate issues; 2) water supply issues; 3) water quality; 4) hydropower; and 5) species protection. The study team included: Charles DuMars, University of New Mexico; Brian Gray, University of California; Lawrence MacDonnell, University of Colorado; George William Sherk, former Justice Department trial lawyer; and Mark Squillace, University of Wyoming. Frank Gregg of the University of Arizona provided valuable assis-

tance in the design of the overall study. Funding for the Powell Consortium "Park City Water Law Project" was provided by member institutes of the Consortium.

The five papers were presented by their authors at a WGA-sponsored workshop held in Newport Beach, California on February 18 and 19, 1993. Chuck DuMars presented three semi-hypothetical scenarios concerning interstate allocation of water specifically highlighting how present conflict resolution stacks up against the Park City Principles. Brian Gray put forth a provocative case study on the implications of transferring the Bureau of Reclamation's Central Valley Project to the State of California. Larry MacDonnell discussed the Clean Water Act and suggested ways for states to pursue their own objectives without the need to change federal law. George Sherk discussed conflicts between states and the Federal Energy Regulatory Commission. Finally, Mark Squillace covered the Endangered Species Act and suggested areas where states might become more involved. The papers and presentations sparked lively discussion and several participants were gratified to see the Park City Principles moving from "motherhood and apple pie" statements to something that could find application to the real world. This series includes four of the papers, updated to reflect developments in law and policy since the presentations.

These articles and the issues that they address are perhaps even more relevant today than when originally developed and discussed in 1993. Of course, recognizing the value of the Park City Principles to water resource management does not assure that these principles will be honored on the ground. But it is a necessary precondition. Recently, the Western Water Policy Review Advisory Commission began an analysis of federal water policy in the West, and this should offer an important opportunity for carrying the Park City Principles to a logical next step—the development of specific regulatory and legislative proposals that reflect those principles.

As the debate over the devolution of authority and responsibility to states continues, the Park City Principles offer a solid base upon which new approaches can be built. We hope that they help lead to constructive solutions to western water policy problems.

Approaching a Gordian Knot: The Ongoing State/Federal Conflict Over Hydropower

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I. INTRODUCTION

Rivers mean different things to different people. Rivers are home and habitat to fish and wildlife. They are a means both of transportation and of waste disposal. They can be a source of spiritual regeneration. They can also be a source of power production. They provide life and they can take it away.

Given the multitude of expectations associated with rivers and the institutional structures that have developed to fulfill those expectations, conflict is inevitable. At an institutional level, one of the more significant conflicts is between the states and the Federal Energy Regulatory Commission ("FERC" or "Commission"). Historically, states have held primacy over the management and allocation of water resources. Under federal law, the Commission has jurisdiction over hydroelectric power, the development of which requires the utilization of water resources.

This institutional conflict has become progressively more acrimonious as an increasing number of federal and state requirements affect the management and allocation of water resources. Addressed in this article is the ongoing state/FERC conflict over hydropower. The background of the conflict and an illustrative case are examined in Section II. Specific conflict areas are discussed in Section III. The state/FERC conflict is examined in the context of the Park City Principles in Section IV. Potential solutions are proposed in Section V and conclusions are presented in Section VI.

II. BACKGROUND

A. *The State Role*

There are numerous federal statutes that either provide for the primacy of state water laws or defer to such laws.[1] Perhaps the most frequently cited example is section 8 of the Reclamation Act of 1902:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.[2]

In construing this section, the Supreme Court has acknowledged a "consistent thread of purposeful and continued deference to state water law by Congress."[3]

B. *The FERC Role Regarding Water Rights*

With the enactment of the Federal Water Power Act of 1920,[4] Congress vested the Federal Power Commission (FPC, now FERC) with exclusive authority over the licensure of hydroelectric projects. The provisions of the 1920 Act were incorporated into the Federal Power Act of 1935 (FPA).[5]

Several provisions of the FPA are relevant to the present state/FERC conflict. With regard to water rights, section 9(b) requires license applicants to present to the Commission "[s]atisfactory evidence [of compliance] with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purpos-

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1. For example, see the Flood Control Act of 1944, 58 Stat. 887, in which Congress stated a policy of recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. § 701-1 (1994).

2. 43 U.S.C. § 383 (1988).

3. California v. United States (*New Melones*), 438 U.S. 645, 653 (1978). *See also* United States v. New Mexico, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

4. 41 Stat. 1063, repealed by the Federal Power Act of 1935, 49 Stat. 838.

5. 49 Stat. 838 (codified at 16 U.S.C. §§ 791a-828c (1994)).

es."[6] In section 27, Congress disclaimed any intent "to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[7]

For twenty-five years following enactment of the Federal Water Power Act, the FPC interpreted section 9(b) and section 27 as requiring it to defer to state water laws.[8] This changed in 1946 when the Supreme Court addressed these provisions in a case involving licensure of a project for which the license applicant had failed to obtain a state permit. In *First Iowa Hydro-Electric Cooperative v. FPC*, the Court concluded that "[t]he detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls."[9] The Court rejected Iowa's contention that section 27 required a contrary result, concluding that section 27 preserved only "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal uses."[10] It is the position of the Department of Energy that the *First Iowa* decision

> preserve[d] State authorities relating to the control, appropriation, use, or distribution of water for irrigation, for municipal use, or "other uses of the same nature." The Court emphasized that these state authorities apply to proprietary water rights. This is widely understood to mean that states determine who owns water, and how much each owner can consume, but that the FERC rules on use by hydropower projects, which do not consume water, but rather pass it through.[11]

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6. 16 U.S.C. § 802(a)(2).

7. 16 U.S.C. § 821.

8. The FPC refused "to issue licenses for hydropower projects if the applicants failed to acquire water rights under state law." Roderick E. Walston, *State Regulation of Federally Licensed Hydropower Projects: The Conflict Between* California *and* First Iowa, 43 OKLA. L. REV. 87, 91 (1990). *See also* Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After* California v. Federal Energy Regulatory Commission, 21 ENVTL. L. 113, 118 (1991).

9. 328 U.S. 152, 181 (1946) (citation omitted).

10. 328 U.S. at 176.

11. *Hearings on Amending the Federal Power Act Before the Subcommittee on Water and Power of the Senate Committee on Energy and Natural Resources*, 102d Cong., 1st Sess. 13 (1991) [hereinafter *1991 Hearings*] (testimony of Mr. Kevin A. Kelly, Director, Electricity, Coal, Nuclear, and Renewable Policy, Office of Policy, Planning and Analysis, Department of Energy). Though the Department of Energy (DOE) testified at these hearings, it should not be assumed that the DOE position on these issues embodies or reflects the position of the Commission. The FERC, an independent regulatory agency, is a part of DOE "solely for budgeting purposes." Letter from John Clements, Deputy Director, Federal Energy Regulatory Commission to George William Sherk 2 (March 9, 1993) (on file with the *Land and Water Law Review*) [hereinafter Clements].

The state/FERC relationship described in *First Iowa* is reflected in a number of subsequent cases.[12]

In 1990, the *First Iowa* decision was reaffirmed in *California v. FERC* (*Rock Creek*).[13] In a case involving the establishment of minimum stream flows, the Supreme Court (Justice O'Connor) refused to overturn *First Iowa*, concluding:

> As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development . . . . Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."[14]

The decision in *Rock Creek* was based on the principle of *stare decisis*.[15] As a result, "the Court failed to consider and apply the broad historical and policy themes that have persuaded the Court in other recent federal-state water cases to recognize broad state authority."[16]

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12. *See* Washington Dep't of Fish & Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954) (license applicant not required to demonstrate compliance with state law requiring a permit for the diversion of water prior to obtaining a federal permit); FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954) (clarifying the nature of proprietary rights); FPC v. Oregon (*Pelton Dam*), 349 U.S. 435 (1955) (state permits not required for projects located on reserved lands); Portland Gen. Elec. Co. v. FPC, 328 F.2d 165 (9th Cir. 1964) (the purpose of § 27 is to provide a means of compensation if water rights protected under state law are taken pursuant to the exercise of a federal permit); California v. FPC, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965) (license applicant must accept limitations on use of water for other purposes). *See also 1991 Hearings*, *supra* note 11, at 19 (testimony of Mr. William S. Scherman, General Counsel, Federal Energy Regulatory Commission).

13. 495 U.S. 490 (1990).

14. 495 U.S. at 506-07 (quoting California *ex rel.* State Water Resources Control Bd. v. FERC, 877 F.2d 743, 749 (9th Cir. 1989)).

15. In essence, the principle of *stare decisis* is the rule of precedent. In *Rock Creek*, the Court cited the rule as mandating its adherence to the *First Iowa* decision even if *First Iowa* had been decided incorrectly: "[F]or statutory determinations, 'it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.'" 495 U.S. at 500 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

16. Roderick E. Walston, California v. Federal Energy Regulatory Commission: *New*

The *Rock Creek* decision has been characterized as establishing "a broad and paramount federal regulatory role in hydropower development" preempting "conflicting state water regulations" that were thought to "have far-reaching implications on the tenuous balance between state and federal management of water and other natural resources."[17] These "far-reaching implications" can be seen in three FERC opinions that followed the *Rock Creek* decision in which the Commission ruled that it 1) "possess[ed] authority to impair significantly the private use of state water rights,"[18] 2) "may overrule state agency attempts to control the use of such water rights,"[19] and 3) "may ignore state law restrictions on who may hold an instream flow right and may direct a licensee to release water and guarantee minimum instream flows in a manner that is the functional—if not legal—equivalent of an instream flow right."[20] These types of rulings have led one commentator to conclude that the role of the states had been reduced to that of mere "supplicants in the regulatory process."[21]

This role changed dramatically with the decision of the Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (*Jefferson County*).[22] At issue was the relationship of the Clean Water Act (CWA)[23] to the Federal Power Act and the extent to which the exercise of state authority under the former could effect a limitation on FERC authority under the latter.

Pursuant to section 401 of the CWA, applicants for federal licenses or permits for activities that result in discharges into navigable waters are required to obtain certification from the state in which the activities will

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Roadblock to State Water Rights Administration, 21 ENVTL. L. 89, 110 (1991).

17. Peter J. Kirsch & J. Barton Seitz, *Environmental Protection Through Federal Preemption of State Water Laws*, 20 *Envtl. L. Rptr.* (Envtl. L. Inst.) 10438 (Oct. 1990). "FERC has taken the position that . . . the pervasive federal regulatory scheme and its comprehensive planning authority make it virtually impossible for a state law to survive FERC regulation." *Id.* at 10442. *See also* Blumm, *supra* note 8, at 126. *See generally* Rebecca L. Hill, Note, California v. FERC: *Federal Preemption of State Water Laws*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 216 (1992); Thomas D. Bridenbaugh, Comment, *FERC and the California State Water Resources Control Board: Too Many Chefs in Nature's Kitchen*, 5 ADMIN. L.J. 99 (1991); Jill K. Osborne, Note, California v. FERC: *Federal Supremacy in Hydroelectric Power Continues*, 80 KY. L.J. 353 (1991); Pamela S. Snyder, Note, California v. FERC: *State Designated Instream Flows Fall Prey to FERC Authority under the FPA*, 5 J. ENVTL. L. & LITIG. 127 (1990).

18. Kirsch & Seitz, *supra* note 17 at 10443, (citing *Brazos River Auth.*, 48 F.E.R.C. ¶ 62,190 (1990)).

19. *Id.* (citing *Henwood Assocs., Inc.*, 50 F.E.R.C. ¶ 61,183 (1990)).

20. *Id.* (citing *Central Neb. Pub. Power & Irrigation Dist.*, 51 F.E.R.C. ¶ 61,257 (1990) (order on rehearing)).

21. Robert H. Abrams, *Is the FERC Going with the Flow?: A Comment on the Upper Ohio Basin Litigation*, 3 RIVERS 202, 204 (1992).

22. 114 S. Ct. 1900 (1994).

23. 33 U.S.C. §§ 1251-1387 (1994).

occur that those activities are consistent with state water quality standards.[24] Federal licenses or permits may not be issued absent state certification. Any terms or conditions imposed by the state on the activities are included in the federal license or permit.[25]

The certification process requires the states to set forth in the certificates "any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . and with any other appropriate requirement of State law."[26] At issue in *Jefferson County* was the scope of the "other appropriate requirement" language of the CWA. Could a state go beyond water quality standards *per se* in order to protect designated uses of a water resource?

The factual basis for the *Jefferson County* decision is similar to the factual basis for the *Rock Creek* decision. In each case, the state sought to impose minimum instream flow requirements. In *Rock Creek*, California based its requirements on state water quantity law. In *Jefferson County*, Washington based its requirements on state implementation of the CWA.

After the decision of the Washington Department of Ecology had been challenged in state court, the Washington Supreme Court ruled that the state had authority to impose whatever conditions were necessary to protect the designated uses of the water resource and that the instream flow requirement was a permissible condition of certification under section 401 of the CWA.[27]

On appeal to the U.S. Supreme Court, this decision was affirmed. The Court, again per Justice O'Connor, ruled that section 401(d) authorized the states to set "effluent limitations and other limitations . . . necessary to assure that any applicant 'will comply with various provisions of the [Clean Water] Act and appropriate state law requirements.'"[28] As noted by one commentator, the decision stands for the proposition that

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24. 33 U.S.C. § 1341(a)(1). States are obligated under the CWA to develop water quality standards that are then subject to review and approval by the Environmental Protection Agency (EPA) prior to enforcement. 33 U.S.C. §§ 1311(b)(1)(C), 1313. State water quality standards may be more stringent that federal water quality requirements. 33 U.S.C. § 1370. Regulations implementing the CWA provide that the water quality standards are to define "the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2.

25. 33 U.S.C. § 1341(a)(1).

26. 33 U.S.C. § 1341(d).

27. State Dep't of Ecology v. PUD No. 1 of Jefferson County, 849 P.2d 646 (Wash. 1993). *See* Ralph W. Johnson & Berrie Martinis, *State Authority and Obligations Under the Clean Water Act*, 4 RIVERS 239 (1993).

28. 114 S. Ct. at 1909 (quoting section 401(a)).

"[s]tates may impose conditions on FERC-licensed hydroelectric projects based on state water quality standards—including instream flow requirements—through the water quality certification provisions of the Clean Water Act."[29]

In order to ensure compliance with the requirements of state law, particularly the water quality standards, could the state protect designated uses or was the state restricted to the imposition of certain numeric criteria? The dissent, Justices Thomas and Scalia, argued that only specific numeric criteria should be applicable.[30] The majority, however, ruled that designated uses could be protected. Water quality standards, the Court noted, "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses."[31] "For Justice O'Connor, this meant that [water quality standards] are made up of criteria and uses."[32]

In essence, given a discharge into navigable waters, a state may deny section 401 certification "for failure to meet water criteria, or because the discharge interferes with designated uses."[33] With regard to the development of hydropower, an applicant for a FERC license is obligated to obtain section 401 certification from the state in which the hydropower development will occur. The state may impose terms and conditions under the CWA to protect designated uses of the water resource. In general, these terms and conditions will become a part of the license issued by the Commission. As discussed in Section III.H, however, this relationship is both ambiguous and evolving.

C. The FERC Role Regarding Planning and Consultation

The FPA was amended in 1986 by the Electric Consumers Protection Act (ECPA)[34] in response to concerns that the Commission's power development orientation precluded adequate consideration of nonpower

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29. Katherine P. Ransel, *The Sleeping Giant Awakens:* PUD No. 1 of Jefferson County v. Washington Department of Ecology, 25 ENVTL. L. 255, 256 (1995) (citations omitted).

30. 114 S. Ct. at 1915. "Because Justices Scalia and Thomas avoided any discussion of the development of section 401 over its more than twenty-year history, it is easy to understand how they came to this conclusion." Ransel, *supra* note 29, at 266.

31. 114 S. Ct. at 1903 (quoting 33 U.S.C. § 1313(c)(2)(A)).

32. Troy A. Borne, PUD No. 1 of Jefferson County v. Washington Department of Ecology: *Expanding State Authority to Determine Clean Water Act Certification Standards*, 22 N. KY. L. REV. 139, 153 (1995).

33. *Id.* at 155.

34. Pub. L. No. 99-495, 100 Stat. 1243. The background and legislative history of ECPA are discussed in Lydia T. Grimm, *Fishery Protection and FERC Hydropower Relicensing Under ECPA: Maintaining a Deadly Status Quo*, 20 ENVTL. L. 929, 939-43 (1990).

issues. The essence of the amendments was to require the Commission to give equal consideration to nonpower interests.[35] As amended, section 4(e)[36] requires the Commission in making public interest determinations to give equal consideration to conservation interests.[37] Equal consideration, however, does not mean equal treatment.[38] The Commission need only document that it considered conservation interests.[39]

Section 10(a)(1) as amended requires the Commission to determine that a proposed project is "best adapted to a comprehensive plan for improving or developing" a river basin for navigation, water power development and other beneficial public uses.[40] Under section 10(a)(1), FERC is required "to balance what are sometimes competing uses of a waterway, including water power development, protection and enhancement of fish and wildlife, irrigation, flood control, water supply, recreation, energy conservation, and preservation of environmental quality."[41]

The Commission's capability to make such determinations has been challenged by a number of commentators. With regard to the Commission's success at balancing economic and instream flow require-

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35. *See* Judith A. Bearzi, *The Delicate Balance of Power and Nonpower Interests in the Nation's Rivers*, 2 RIVERS 326 (1991).

36. 16 U.S.C. § 797(e).

37. Public interest determinations are made by the Office of Hydropower Licensing. The process is described in Richard M. Zomnir & Kenneth J. Polk, *Hydro Relicensing: Battling the Environmental Bureaucracy*, PUB. UTIL. FORT., Dec. 1, 1991, at 29. According to Senator Bill Bradley, enactment of the ECPA amendments "did not forsake the first purpose of hydroelectric development which is power production." Bearzi, *supra* note 35, at 327 (quoting PUB. UTIL. FORT., Feb. 1, 1990, at 29).

38. Similar language is contained in the Fish & Wildlife Coordination Act, 16 U.S.C. § 662 (1994) and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(h)(11)(A)(i), (ii). For example, the FERC is required to consider the fish and wildlife plans of the Northwest Power Planning Council. It is not, however, required to follow those plans. National Wildlife Fed'n v. FERC, 801 F.2d 1505 (9th Cir. 1986).

39. Washington State Dep't of Fisheries v. FERC, 801 F.2d 1516, 1518 (9th Cir. 1986) ("[W]e conclude that the Commission erred by rejecting petitioners' proposals without stating reasons supported by the record."). FERC is *required* to adopt the recommendations of other federal agencies only 1) when a proposed project is located on a federal reservation and 2) from an agency with jurisdiction over the reservation. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 777 (1984) ("[T]he Commission 'shall' include in the license the conditions the Secretary [of the Interior] deems necessary."). When viewed in light of the *Jefferson County* decision, the *Escondido Mutual Water Co.* decision could stand for the proposition that "if the state concludes that . . . conditions are necessary to protect a waterbody, 'the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal.'" Ransel, *supra* note 29, at 274 (citing *Escondido Mutual Water Co.*, 466 U.S. at 778).

40. 16 U.S.C. § 803(a)(1).

41. *1991 Hearings*, *supra* note 11, at 18 (testimony of Mr. William S. Scherman, General Counsel, Federal Energy Regulatory Commission). *Accord* California v. FERC, 495 U.S. 490 (1990); Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), *cert denied*, 471 U.S. 1116 (1985); Udall v. FPC, 387 U.S. 428 (1967).

ments, for example, one commentator concluded that "FERC's track record reflects no institutional competence to make difficult biological and economic tradeoffs inherent in setting streamflow requirements."[42] In response, it has been noted that "[w]ith a single exception, the Commission has prevailed in every challenge to it's instream flow decisions for at least ten years."[43]

Section 10(a)(2)(A) as amended requires the Commission to consider the consistency of a proposed project with comprehensive plans prepared both by the states and by federal agencies.[44] Section 10(a)(2)(B)[45] as amended requires the Commission to consider the recommendations of state and federal agencies.[46] One commentator summarized the effect of the section 10(a) amendments as follows:

> The FERC has been barraged by comprehensive plans since it issued its notice soliciting plans in 1988. As a practical matter, several such plans could apply to the FERC's review of any given hydropower project. For example, in a recent licensing order, the FERC noted that at least eight comprehensive waterway plans would be applicable to a small project in Idaho.[47]

Consultation requirements are imposed by section 10(j)[48] which requires the Commission to consult with state fish and wildlife agencies. Despite this statutory requirement, one commentator concluded that the Commission has shown great resistance in accepting agency fish and wildlife recommendations.[49] Another argued that "[a] number of recent studies confirm FERC's consistent willingness to favor maximizing hydroelectric revenues at the expense of fish and wildlife protection."[50] Yet

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42. Blumm, *supra* note 8, at 117.

43. Clements, *supra* note 11, at 3. "The sole exception is LaFlamme v. FERC, 842 F.2d 1063 (9th Cir. 1988), where the court remanded to the Commission a license issued in 1983 for failure to prepare an environmental document." *Id.*

44. 16 U.S.C. § 803(a)(2)(A).

45. 16 U.S.C. § 803(a)(2)(B).

46. It was argued that the ECPA amendments to the FPA "substantially enhanced the *advisory* role of the states with respect to license conditions affecting fish and wildlife, instream flows, and other environmental values." Brief for Amici Curiae Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Paper Institute, National Hydropower Association, Public Utility District No. 1 of Chelan County, Washington, Public Utility District No. 1 of Douglas County, Washington, and Public Utility District No. 2 of Grant County, Washington at 15, *Rock Creek*, 495 U.S. 490 (1990) (No. 89-333) (emphasis in original).

47. Bearzi, *supra* note 35, at 329 (citations omitted).

48. 16 U.S.C. § 803(j).

49. *See generally* Grimm, *supra* note 34 and the cases cited therein.

50. Blumm, *supra* note 8, at 130 (citation omitted).

another concluded that "FERC has consistently ignored the recommendations of state and federal natural resource agencies on environmental issues pertaining to hydroelectric dams, and has all but excluded the public from its decision-making process."[51]

The validity of such criticism is open to question. In 1992, the General Accounting Office (GAO) analyzed a sample of licenses issued by the Commission between 1988 and 1991. The sample licenses contained a total of 191 resource agency recommendations. Analysis of the licenses indicated that the Commission had "accepted 77 percent of the recommendations, modified 18 percent, and rejected 5 percent."[52] These findings are consistent with a similar study conducted by GAO of licenses issued between 1982 and 1986 (prior to the enactment of ECPA). For that period, the Commission "accepted 66 percent of the agencies' recommendations, modified 26 percent, and rejected 8 percent."[53]

Section 10(j) requires the Commission "to include in licenses conditions to protect, mitigate damages to, and enhance fish and wildlife, based on the recommendations of state and federal fish and wildlife agencies, unless it finds the recommendation conflicts with applicable law."[54] The consultation requirement, however, does not subject FERC decisions "to the effective veto of every state or federal wildlife agency, and consensus is not required before the Commission can authorize a project to proceed."[55]

D. An Illustrative Case

At issue in *U.S. Department of the Interior v. FERC* (*Upper Ohio*) was the proposed issuance of twenty-four licenses for hydroelectric development projects at nineteen existing dams.[56] In its review process, the Commission considered water quality impacts, stream flow parameters,

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51. John Simpson, *Battle Looms Over Hydroelectric Dam Reliensing*, PUB. UTIL. FORT., Apr. 15, 1993, at 50 (characterizing the contentions of a former president of American Rivers).

52. GENERAL ACCOUNTING OFFICE, ELECTRICITY REGULATION: ELECTRIC CONSUMERS PROTECTION ACT'S EFFECTS ON LICENSING HYDROELECTRIC DAMS 19 (1992).

53. *Id.*

54. *1991 Hearings*, *supra* note 11, at 21 (testimony of Mr. William S. Scherman, General Counsel, Federal Energy Regulatory Commission). "Nearly 90 percent of these agencies' fish and wildlife recommendations are adopted. Under the existing statutory framework, therefore, the states have an important and effective role in the licensing process and a federal forum for resolving water use issues." *Id.* Whether the states wish to resolve water use issues in a federal forum is open to question.

55. National Wildlife Fed'n v. FERC, 912 F.2d 1471, 1482 (D.C. Cir. 1990).

56. 952 F.2d 538 (D.C. Cir. 1992). This case is discussed in greater detail in Abrams, *supra* note 21.

fish entrainment and public access to water resources. Draft and final environmental impact statements were prepared and distributed for review and comment.

The Commission's environmental analysis was based in part on a 1986 EPA study that addressed dissolved oxygen levels. The study concluded that dissolved oxygen levels for fish could be set at 6.5 mg/l. This study was characterized as being "marred by internal inconsistencies."[57] These inconsistencies were acknowledged by the Commission. The Commission also acknowledged, as previously discussed, that the states could set more stringent water quality standards under section 401(a)(1) of the Clean Water Act. None of the states had established more stringent standards.[58] If such standards had been established, they would have been controlling. Perhaps anticipating the *Jefferson County* decision, one commentator noted that, "[i]n those cases in which the states are willing to commit their water quality desires to the rigorous and enforceable contours of the Federal Clean Water Act, the states can call the water quality tune for the FERC licensees."[59]

Pursuant to its section 10(j) authority, the Commission established deadlines for the receipt of comments from state agencies. The states took the position that they could not comment until more thorough dissolved oxygen and entrainment studies had been completed. The Commission refused to conduct any additional studies and issued licenses for sixteen hydroelectric development projects at the nineteen sites.

When subject to judicial review, the Commission's decision was sustained. The court deferred to the agency's exercise of its discretion and expertise.[60] Perhaps more importantly, the court "endorsed FERC's deci-

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57. Abrams, *supra* note 21, at 204.

58. The standards in the states affected by the litigation were 5.0 mg/l. *Upper Ohio*, 952 F.2d at 541.

59. Abrams, *supra* note 21, at 207. *See also* Lori M. Rodgers, *Hydropower Licensing Authority Struggles*, PUB. UTIL. FORT. June 1, 1991, at 27. Any such standards imposed by the states, however, must be consistent among water users.

60. *Upper Ohio*, 952 F.2d at 543. The decision of the court reflected the rule established by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

467 U.S. 837, 866 (1984) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

sion to resolve uncertainties over fish mortality not by denying licenses, but by imposing license conditions."[61]

III. AREAS OF CONFLICT

By one estimate, at least forty federal statutes are applicable to the hydropower permitting and licensing process.[62] To this arena must be added the multitude of state laws and regulations that are also applicable. The result is a situation in which conflict is inescapable. This section examines twelve areas in which the state/FERC conflict has been ongoing.

A. Protected Rivers

Pursuant to the Wild and Scenic Rivers Act,[63] hydropower projects may not be developed on rivers designated for inclusion in the Wild and Scenic Rivers System. Rivers designated for inclusion in state river protection programs may also be exempt from hydroelectric development if the designation is enacted by the state legislature, recommended by the governor and approved by the Secretary of the Interior.[64]

These provisions have not prevented the Commission from considering a project on the Klamath River in Oregon despite the inclusion of the Klamath in the Oregon Scenic Waterways Program.[65] In Idaho, the Legislature designated the North and South Forks of the Payette River as a free-flowing river. The Governor signed the designation which was intended to prohibit hydropower development on certain stretches of the river. Despite the protection afforded by state law, there are hydropower projects on the Payette that the Commission may license.[66] It should be noted, however, that attempts to amend the FPA in 1986 and 1992 to "permit states to bar hydro development on state-designated wild and scenic river reaches" were not successful.[67]

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61. *FERC Grant of Ohio River Hydro Licenses Upheld*, PUB. UTIL. FORT., Mar. 1, 1992, at 35.

62. Upper Mississippi River Basin Association, *Nonfederal Hydroelectric Development and Licensing* 23 (1991) [hereinafter UMRBA] (citing *Hearing on the Hydropower Provisions of S. 341, the National Energy Security Act, Before the Senate Committee on Energy and Natural Resources*, 102d Cong., 1st Sess. (1991) (testimony of Mr. Richard T. Hunt)).

63. 82 Stat. 906, 16 U.S.C. §§ 1271-1287 (1994).

64. UMRBA, *supra* note 62, at 13.

65. *1991 Hearings*, *supra* note 11, at 31 (comments of Sen. Mark Hatfield); UMRBA, *supra* note 62, at 34.

66. *1991 Hearings*, *supra* note 11, at 104-05 (testimony of Mr. John D. Echeverria, Vice President and Conservation Director, American Rivers).

67. Clements, *supra* note 11, at 4.

Perhaps the most dramatic example of this state/FERC conflict arose in Pennsylvania where the Commission issued a license to a private entity to develop a hydroelectric project at the Nockamixon State Park Dam. "In that case, FERC went so far as to purport to allow the licensee to condemn the state-owned dam, park land, and waters, and then convey interests in those properties to third parties."[68] The accuracy of this statement is open to question. FERC contends that "the Commission has never allowed a licensee to sell a state park to anyone."[69] Nonetheless, in response to the outcry that followed, Congress has amended the FPA to preclude the use of eminent domain authority to acquire such property interests.[70]

Public and private interest in hydropower development on protected rivers is understandable. Rivers included in state and federal river protection programs have significant hydropower development potential. One FERC estimate indicates that there are at least 151 sites on such rivers having a total development potential of 32,000 megawatts.[71]

B. Exemptions

The FPA authorizes the Commission to exempt certain types of projects from licensing requirements. Under 16 U.S.C. § 823a, private project developers may request exemptions for conduit installations having a generating capacity of less than fifteen megawatts. For public entities, the threshold is forty megawatts. In addition, 16 U.S.C. § 2705(d) provides exemptions for projects located at existing facilities that have a generating capacity of less than five megawatts.[72]

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68. *1991 Hearings*, *supra* note 11, at 54, 57 (testimony of Mr. John McSparran, Director, Bureau of Water Resources Management, Pennsylvania Department of Environmental Resources).

69. Clements, *supra* note 11, at 4.

70. Section 1701(d) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, prohibits the exercise of eminent domain authority to acquire "any lands or other property . . . owned by a State or political subdivision thereof" that is "part of or included within any public park, recreation area or wildlife refuge established under State or local law." The limitation applies only to existing parks, recreation areas and wildlife refuges. For newly-designated areas, the FERC will determine whether eminent domain authority may be exercised. It should be noted that similar language protecting rivers included in state river preservation programs was included in § 3104 of H.R. 776, the version of Energy Policy Act passed by the House of Representatives. The conference committee that reconciled the House and Senate versions of the Energy Policy Act did not include § 3104 in the compromise bill because of the opposition of Senators Bennett Johnston (D-LA) and Malcolm Wallop (R-WY).

71. UMRBA, *supra* note 62, at 13 (citing FERC, *Hydroelectric Power Resources of the United States: Developed and Undeveloped* (1988)).

72. The five megawatt threshold reflects the enactment of the Public Utility Regulatory Policies Act of 1978 (PURPA), 92 Stat. 3117. One of the goals of PURPA was to encourage the development of small-scale hydroelectric facilities. Given the incentives provided by PURPA, a great deal of inter-

Projects for which exemptions have been granted are subject to the terms and conditions established by state and federal fish and wildlife agencies. As previously discussed, projects that require FERC licenses (those that are not subject to exemption) are not subject to otherwise mandatory fish and wildlife requirements. As more fully discussed in Section V, legislation was proposed that would authorize the states to regulate hydropower facilities having a capacity of less than five megawatts. Enactment of the legislation could result in a different system of regulations depending on the generating capacity of the hydropower facility.

C. *Consideration of Plans*

As discussed in Section II, the FPA requires the Commission to consider comprehensive state plans as well as the comprehensive plans of federal agencies authorized to prepare such plans. The Commission is not obligated to conform to either the state or federal plans. As one commentator has noted, the Commission "has consistently taken the position that it can determine whether a project is best adapted to a comprehensive plan for the beneficial use of a waterway on the basis of the record created in the licensing process, but it has often been criticized for failing to establish an adequate record."[73] It is the position of the Commission that there are few conflicts between FERC decisions and comprehensive state plans.[74]

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est was expressed in developing (or redeveloping) such facilities. Before the enactment of PURPA, the FERC had received only 100 permit applications for facilities having a capacity of less than 80 megawatts. Since the enactment of PURPA, the FERC has received over 2,000 permit applications for such facilities. Zomnir & Polk, *supra* note 37, at 29. In fact, since 1980 the FERC has received over 7,000 applications for permits, licenses or exemptions. Thomas J. P. McHenry & John D. Echeverria, *California v. FERC: State Regulation of Federal Hydropower*, NAT. RESOURCES & ENV'T, Spring 1990, at 26-27.

73. UMRBA, *supra* note 62, at 32, *citing* Harriet F. LaFlamme v. FERC, 842 F.2d 1063, *superseded on other grounds*, 852 F.2d 389 (9th Cir. 1988), for the proposition that the FERC record must be sufficient to determine whether the FERC has fulfilled it statutory requirements. The case involved issuance of a license for the Sayles Flat project in California. The language of the Ninth Circuit Court of Appeals is probative:

> [A]t no point was any reference made to the entire water system of which the Sayles Flat project constitutes a part, to the Sayles Flat project's impact on other projects in the basin, or to the other projects' impact on the Sayles Flat project. To fulfill its obligation of exploring all issues relevant to the public interest, *this type of comprehensive analysis must be performed on the record.*

842 F.2d at 1074 (citations omitted, emphasis added).

74. As discussed in Section II regarding the ECPA amendments to the FPA:

> [T]he Congress directed each State to develop comprehensive State plans over how in each State they wanted the water to be allocated and used. To date, we have had 522 of those plans . . . . Obviously the States have used them for different resources in different States.

D. *Preliminary Permits*

A preliminary permit issued by the Commission guarantees a project developer exclusivity in studying the hydropower potential of a given site. These permits are issued by the Commission "without any assessment of the project's viability or the factors that will shape the Commission's ultimate licensing decision."[75] At the permit issuance stage, neither the project developer nor state and federal agencies know whether the proposed project is economically or environmentally feasible. As a result, state and federal agencies are obligated to commit their resources to the study of projects that may never come to fruition. In fact, between 1980 and 1990, only thirteen percent of new preliminary permit, license or exemption applications approved by the Commission actually resulted in operational power plants.[76]

An excellent example was a proposed pumped-storage project on Lake Pepin in Minnesota. The proposed project was opposed by the states of Minnesota and Wisconsin, by the U.S. Army Corps of Engineers and by the U.S. Fish and Wildlife Service. In addition, the proposed project was vehemently opposed by local residents in both Minnesota and Wisconsin. The opposition was so great that the state of Minnesota requested the Commission to require the Southern Minnesota Municipal Power Agency (the applicant for the FERC permit) to conduct certain studies as a condition to issuance of the preliminary permit. On November 30, 1990, the Commission issued the preliminary permit but refused "as a matter of Commission policy" to require the requested studies.[77] The proposed pumped-storage project appears to have been abandoned by its proponents.

> We have had only two cases since ECPA where there was even an arguable licensing decision that was inconsistent with a State-filed comprehensive plan.

1991 Hearings, *supra* note 11, at 35 (comments of Mr. William S. Scherman, General Counsel, Federal Energy Regulatory Commission). *Accord*, Clements, *supra* note 11, at 4: "For the record, since ECPA was enacted in 1986, the Commission has issued well over 300 original licenses, capacity related amendments, and new licenses. There have been only three conflicts with a federal or state comprehensive plan."

75. UMRBA, *supra* note 62, at 35.

76. *Id.* (citing *Hearing on the Hydropower Provisions of S. 341, the National Energy Security Act, Before the Senate Committee on Energy and Natural Resources*, 102d Cong., 1st Sess. (1991) (testimony of Mr. Richard T. Hunt)).

77. *Id.* (citing FERC, *Order Issuing Preliminary Permit, Southern Minnesota Municipal Power Agency, Project No. 10941-000* (Nov. 30, 1990)).

E. Pre-Filing Consultation

Disputes over proposed hydropower facilities may be resolved through a pre-filing consultation process. In essence, this is an informal process in which a project developer consults with state and federal agencies having an interest in the proposed project. One of the purposes of this process is to determine the information needs that must be satisfied in order for the requisite license application to be complete. The process may also be used to resolve potential conflicts and to develop projects in a manner acceptable to all concerned.

The Commission, however, has been hesitant to participate in the consultation process, preferring to wait until the license application stage before considering the adequacy of studies regarding the proposed project.[78] There are two primary reasons. First:

> About 85% of the preliminary permits we issue to study hydro development never ripen into a license application. If the Commission staff were intimately involved in every one of these (plus the potential developments for which permit protection isn't sought) our resources would be quickly decimated. We therefore made a policy decision to let the potential applicants and local interests try to work these things out if possible in the first instance.[79]

Second:

> [FERC] rules specifically provide for pre-filing dispute resolution by the Director of [the Office of Hydropower Licensing] where the applicant and agencies can't agree on what data is needed. Unfortunately, neither agencies nor applicants have made must use of this. For instance, among the 157 Class of 1993 relicenses, only nine pre-filing dispute resolutions were brought to the Commission, notwithstanding the three years of pre-filing consultation.[80]

In fact, the Commission reserves the right to reject agreements reached during the consultation process.[81] "This is particularly troubling to partici-

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78. It is interesting to note that all sides of the issue would prefer the Commission to be involved at an early date. "Industry would like to see the FERC participate much earlier in the application stage, to reduce the lengthy review process that now takes up to 10 years on a 30-year license." W. Lynn Garner, *Federal Hydropower Policies in Flux*, PUB. UTIL. FORT. Aug. 1, 1994, at 36-37.

79. Clements, *supra* note 11, at 5.

80. *Id.* at 5-6.

81. "We can't simply rubber stamp settlements that may come in the door. We have an inde-

pants in the licensing process because FERC staff frequently do not visit project sites and are unfamiliar with the river systems that they regulate."[82]

F. Need for Energy/Capacity

As previously discussed, FERC's Office of Hydropower Licensing is required to determine whether a proposed project is in the public interest.[83] One aspect of its public interest analysis is whether there is a need for the energy and generating capacity that will be provided by the proposed project. The FERC studies regarding the need for energy/capacity have been subject to substantial criticism because of a perceived failure to consider the impacts of energy conservation.[84] Such criticism has been challenged as being "simplistic":

> [The Commission uses] the state and regional demand and resources forecasts made by utilities (and sometimes state energy offices) for th[e purpose of determining the need for energy/capacity]. Those forecasts incorporate the conservation requirements of the state legislatures and utility commissions. Thus, when a need for additional power is forecast, conservation has already been taken into account.[85]

The concern has also arisen in the context of Commission consideration of comprehensive state energy plans. FERC defends its position on this issue, noting that it "has no authority to impose energy conservation measures on utilities or their customers."[86]

G. Interagency Consultation

As discussed in Section II, the Commission is required to consider the views of other state and federal agencies. The Commission is not required to defer to such agencies. Nonetheless, according to one review, the "FERC accepted without modification 100 percent of resource agency recommendations on projects relicensed in 1990.

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pendent regulatory responsibility to do a NEPA analysis and draw our own conclusions." Clements, *id.* at 5 (citing The Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985) ("the court struck down the Commission's decision to rely on the recommendations of state and local agencies")).

82. UMRBA, *supra* note 62, at 36.

83. *See generally* Zomnir & Polk, *supra* note 37.

84. UMRBA, *supra* note 62, at 36-37.

85. Clements, *supra* note 11, at 6.

86. *Id.*

Since 1984, the Commission ha[d] accepted at least 70 percent of relicensing recommendations in each year."[87] Given the requirements of section 10(j) of the FPA,[88] there may be substantial negotiations between the Commission and both state and federal agencies over controversial recommendations. As a result, the ultimate recommendation to the Commission may be significantly different from the recommendation that the agency originally offered.[89]

H. Section 401 Certification

Though the Commission may not be obligated to comply with state decisions regarding water quantity, it is obligated to comply with state water quality requirements issued pursuant to section 401(a)(1)[90] of the Clean Water Act.[91] As previously discussed, the states have broad authority under this provision with the primary limitations being that section 401(a)(1) requirements 1) be applied uniformly and 2) regulate conditions relating to water quality.[92]

The Commission has been highly critical of many of the section 401(a)(1) certifications it has received[93] and invited the EPA to "review and monitor state certification programs to ensure that they are addressing

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87. UMRBA, *supra* note 62, at 38, (citing *Hearing on the Hydropower Provisions of S. 341, the National Energy Security Act, Before the Senate Committee on Energy and Natural Resources*, 102d Cong., 1st Sess. (1991) (testimony of Mr. Richard T. Hunt)).

88. "Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) *shall* attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies." 16 U.S.C. § 803(j)(2) (emphasis added).

89. UMRBA, *supra* note 62, at 39.

90. 33 U.S.C. § 1341(a)(1).

91. One commentator has noted, however, that "[t]he legal command of section 401(a)(1) and the seemingly deferential actions of the FERC do not tell the whole story. Other aspects of the legal landscape are distinctly inhospitable to the states and other federal agencies in the FERC licensure setting." Abrams, *supra* note 21, at 203.

92. In litigation involving proposed hydropower projects, at least three state courts have ruled that § 401(a)(1) requirements improperly attempted to regulate conditions unrelated to water quality. *See* Fourth Branch Assocs. v. Department of Envt'l Conservation, 550 N.Y.S.2d 769 (N.Y. Sup. Ct. 1989), Pennsylvania Dep't of Envt'l Res. v. City of Harrisburg, 578 A.2d 563 (Pa. Commw. Ct. 1990); Bangor Hydro-Electric Co. v. Board of Envt'l Protection, 595 A.2d 438 (Me. 1991). *See generally* Lisa M. Bogardus, *State Certification of Hydroelectric Facilities under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J. 43 (1992).

93. "[The FERC] continues to receive copies of 401 certifications that include a myriad of conditions that appear to have no direct or indirect nexus to water quality. For example, we commonly see conditions relative to access, recreation, fish screens and ladders, and fish and wildlife mitigative measures unrelated to water quality in state section 401 certificates." UMRBA, *supra* note 62, at 40 (quoting Letter from Mr. Fred Springer, Federal Energy Regulatory Commission to Mr. James Elder, Environmental Protection Agency (July 25, 1990)).

only those conditions related directly to water quality."[94] The EPA declined the invitation.[95]

It is unlikely that the *Jefferson County* decision will resolve the question. "Where the demands of the various uses of a waterbody conflict, *Jefferson County* says that the state water quality agency—not FERC—has the authority to determine the conditions necessary to comply with state water quality standards, including the many potentially conflicting use designations attributed to the same river or stream segment."[96] Shortly after the decision, however, the Commission appears to have adopted the position that it, not the states, will determine whether a condition in a section 401 certification is water-quality related.[97] The *Tunbridge Mill Corp*. decision raised questions about both the scope and basis for Commission review:

> In hydro licenses granted under the FPA, the FERC has until recently declared that it lacks authority to review conditions imposed by the states under the CWA. Apparently, the FERC has been shaken up by *Jefferson County*. Shortly after that decision, the FERC overruled its prior hydropower rulings and held that it has jurisdiction to consider and reject state section 401 water quality certifications and conditions that are unrelated to water quality . . . . In issuing this order, however, the FERC failed to discuss whether the state section 401 conditions that it allowed involved the application of EPA-approved standards. This is a critical legal distinction.[98]

There is caselaw to the effect that the Commission "may not review state section 401 water quality determinations, but also . . . that the FERC must interpret the CWA and the validity of a state water quality certificate under the CWA."[99] The uncertainty is as obvious as the certainty of future litigation.

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94. UMRBA, *supra* note 62, at 40.

95. "[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system." UMRBA, *supra* note 62, at 41 (quoting Letter from Ms. LaJuana S. Wilcher, U.S. Environmental Protection Agency to the Honorable Lois D. Cashell, Secretary, Federal Energy Regulatory Commission (Jan. 18, 1991)).

96. Ransel, *supra* note 29, at 273.

97. *Id.* (citing *Tunbridge Mill Corp.*, 68 F.E.R.C. ¶ 61,078, at 61,388-89 (July 14, 1994) (denying three state imposed conditions that the Commission determined to be unrelated to water quality)).

98. Jim Behnke & Harold Dondis, *The Clean Water Act and Federally Licensed Utilities*, PUB. UTIL. FORT., Nov. 1, 1994, at 42, 44.

99. *Id.* (citing Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991)). "In *Keating*, the court re-

An historic example of the state/FERC conflict over section 401(a)(1) certification is exemplified by Order No. 464, issued by the FERC on February 11, 1987 and promulgated as a final rule on February 23, 1987.[100] Through Order No. 464, the Commission "redefined the one-year period within which the state certifying agency must process a request as beginning on the date of receipt of the request, rather than the customary date on which a complete application was submitted."[101] The Commission then "applied Order No. 464 to all pending applications and retroactively waived the certification requirement."[102] As a result, section 401(a)(1) certification was waived for 227 projects in thirty-two states.

The Commission refused to reconsider Order No. 464. Subsequent attempts to reverse it legislatively were unsuccessful. The led the Western Governors' Association to conclude that the "FERC has basically ignored the states."[103]

I. National Environmental Policy Act (NEPA) Requirements

In terms of fulfilling the requirements of NEPA, the Commission has relied historically on environmental assessments (EAs) and findings of no significant impact (FONSIs).[104] During the 1980s, the Commission prepared an average of only two environmental impact statements (EISs) per year.[105] This pattern may have resulted from the limited resources of the Commission.[106] If so, conflicts related to inadequate resources are likely to intensify over the next fifteen years.[107]

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quired the FERC to review whether California had the right to revoke a validly issued water quality certification." *Id.*

100. 52 Fed. Reg. 5446 (1987).

101. *1991 Hearings*, *supra* note 11, at 52 (testimony of Mr. D. Craig Bell, Executive Director, Western States Water Council).

102. *Id.*

103. WESTERN GOVERNORS' ASSOCIATION, WHITE PAPER ON FEDERAL WATER POLICY COORDINATION 9 (May 11, 1989).

104. Grimm, *supra* note 34, at 945.

105. UMRBA, *supra* note 62, at 42.

106. "[W]e can't divorce our budget from the EA versus EIS decision; EIS' cost a minimum of $500,000." Clements, *supra* note 11, at 7. This may be changing:

> One concern about FERC's processes in recent years has been that the agency's resources have been inadequate to perform environmental reviews on a timely basis, thus unnecessarily delaying needed projects. FERC has recently taken action to address this problem by allowing . . . hydroelectric applicants to hire third-party contractors to perform environmental review work, subject to FERC staff supervision and to FERC's own ultimate responsibility for compliance with NEPA.

Charles H. Cochran, *Environmental Enforcement at FERC—A Bird's-Eye View*, NAT. RESOURCES & ENV'T, Spring 1994, at 14.

107. The Commission's workload is likely to increase as the licenses for larger facilities expire: The Class of '93 includes primarily small projects, mostly in the Midwest and Northeast,

A number of courts have now addressed the issue of NEPA compliance and have concluded that EISs for both licensing and relicensing decisions must be prepared.[108] For example, in *Confederated Tribes and Bands of the Yakima Nation v. FERC*, the Ninth Circuit Court of Appeals concluded that relicensing decisions required the preparation of an EIS:

> [T]he decision to relicense is to be based on the same inquiry as original licensing, including a consideration of all relevant harms and benefits to public uses related to the project . . . . Both the consideration of what conditions to attach to a new license and the questions involved in determining whether a non-power license is necessary necessitate the information prepared in an environmental impact statement . . . . Relicensing, then, is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo . . . . [A]n EIS must be prepared before a project is approved.[109]

It must be remembered that many of the projects subject to relicensing requirements were constructed long before the enactment of NEPA.[110] As a result, the environmental analyses prepared for the relicensing decisions may be the first such analyses ever performed for the hydropower facility.[111]

In *National Wildlife Federation v. FERC* and *Harriet F. LaFlamme v. FERC*, the Ninth Circuit Court of Appeals concluded that the Commission was required to consider the cumulative impact of licensing and

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> that produce 2,000 MW, or 4 percent, of the 50,000 MW of hydropower currently licensed by the FERC. These projects represent about two-thirds of the power that needs to be relicensed by 2000. The nation's larger hydro projects will be up for renewal between 2000 and 2010, when existing contracts for 20,000 MW of capacity will expire.

Garner, *supra* note 78, at 37.

108. The importance of adequate environmental review during the consideration of relicensing applications can not be overstated. As one commentator has concluded, imposition of current environmental mitigation requirements on existing hydropower facilities "will restructure the nation's waterways." Randal G. Buckendorf, *FERC Interaction with Fish and Wildlife Agencies in Hydropower Licensing Under the Federal Power Act Section 10(j) Consultation Process*, 27 TULSA L.J. 433, 437-38 (1992).

109. 746 F.2d 466, 476 (9th Cir. 1984) (citations omitted). Despite the clear language of this decision, however, the FERC has continued to rely on the preparation of EAs for relicensing decisions. Grimm, *supra* note 34, at 948-51.

110. Kirsch & Seitz, *supra* note 17, at 10438, 10443; Thomas F. Berg, *Hydro Relicensing Heats Up as Deadline Draws Near*, PUB. UTIL. FORT., Feb. 1, 1992, at 25.

111. The scope of the task confronting the FERC may be daunting. A total of 167 licenses involving 231 dams expired in 1993. In fact, for a variety of reasons, only 157 license applications were filed. Clements, *supra* note 11, at 7-8. Even this "reduced" number would impose a burden on the resources of the Commission.

relicensing decisions in its NEPA process.[112] Nonetheless, for a variety of reasons, the Commission has been hesitant to grant requests for the preparation of cumulative EISs. For example, there are twenty-one storage reservoirs and twenty-six dams with hydropower generation on the Wisconsin River. Of these, the licenses for ten of the generating facilities and for all twenty-one of the storage reservoirs will be subject to renewal between 1993 and 1998. The Wisconsin Department of Natural Resources requested repeatedly that a cumulative EIS be prepared for the Wisconsin River facilities.[113] The Commission declined to do so until it had "had an opportunity to examine the relicense applications and review them for deficiencies and additional information."[114] Once this review had been completed, the Commission decided that a "multi-project, cumulative EIS" was appropriate.[115]

J. Interim Licenses

Delays are inherent in FERC procedures.[116] Because of the delays, the Commission exercises authority granted it under the FPA to issue interim annual licenses. The Commission does not impose new conditions on hydropower projects when it issues interim licenses.

This procedure was challenged in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*.[117] The Court of Appeals

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112. "Cumulative impacts" are defined in Council on Environmental Quality regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

113. UMRBA, *supra* note 62, at 47.

114. Clements, *supra* note 11, at 8.

115. *Id.* FERC policies regarding cumulative impacts have been changing. On December 14, 1994, the Commission issued a Policy Statement on the "Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts," Docket No. RM-93-25-000, 59 Fed. Reg. 66714. It is now the policy of the Commission to consider all aspects of the cumulative environmental impacts of a project at the time of relicensing. If this is not possible, the Commission will reserve the right to address the environmental impacts at a later date. Such "license reopener" provisions have proven to be quite controversial. Inclusion of such provisions puts "the industry and environmental community in a debate about the nature of project owners' rights under their licenses and the certainty required to finance and operate hydroelectric projects." Judith A. Johansen, *Is Hydropower an Endangered Species?*, NAT. RESOURCES & ENV'T, Winter 1994, at 13, 15.

116. At the present time, the relicensing process takes five to ten years to complete. Zomnir & Polk, *supra* note 37, at 29. At least one year is required to process a simple, uncontested application. James H. McGrew, *Let's Streamline, Not Abolish FERC*, PUB. UTIL. FORT., June 15, 1992, at 12. These delays were one of the reasons that the Council of Competitiveness headed by former Vice President Dan Quayle recommended that the FERC be abolished and replaced by a "Natural Gas and Electricity Administration." Buckendorf, *supra* note 108, at 450.

117. 876 F.2d 109 (D.C. Cir. 1989).

concluded that the FERC failed to appreciate "[t]he importance of assessing the need for interim protection—not necessarily resolving the ultimate environmental/power issues but considering temporary, 'rough and ready' measures to prevent irreversible environmental damage pending relicensing."[118] Furthermore, given the facts that 1) the Commission knew of the need for new environmental protection conditions and 2) the U.S. Fish and Wildlife Service had raised the issue of the need for such conditions, the court ruled that the Commission's failure "to undertake any form of assessment of environmental issues in connection with its issuance of the annual licenses" constituted an abuse of discretion.[119]

K. Water Rights

The issue of water rights was discussed in Section II in the context of the *First Iowa/Rock Creek* decisions. That discussion need not be repeated here. Suffice it to say that the conflict between state water rights systems and the FERC permitting and licensing process, one of the most divisive state/federal conflicts on the contemporary political landscape, may be worsening. As one familiar with the conflict has noted:

> An even more troubling aspect of FERC's recent decisions is its assertion that when it licenses a hydropower project, it retains a "general reserved authority" to decide whether other water uses on the same river system may be accommodated. In some instances, FERC has required that before state water agencies may approve diversions upstream of FERC-licensed hydropower projects, the state must petition FERC for amendment of the hydropower license. In other instances, FERC had refused to include protection for existing water users when establishing water rights for hydropower facilities. Instead, FERC requires the water users to petition FERC for a reduction in use of water by the licensee,

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118. *Id.* at 116 (emphasis in original).

119. *Id.* at 119. It is interesting to note that the Commission did establish interim instream flow requirements following the decision of the Court of Appeals. The interim requirements were then challenged by the Central Nebraska Public Power & Irrigation District which relied on the project at issue in the proceeding for water supply. Four months after they had been issued, the interim regulations were suspended indefinitely. UMRBA, *supra* note 62, at 49. It is the Commission's position that the interim requirements were suspended because they were unenforceable and because the Central Nebraska Public Power & Irrigation District, as authorized by § 6 of the FPA (16 U.S.C. § 799), refused to cooperate. Clements, *supra* note 11, at 8. With regard to the conflict between instream flow requirements and the needs of downstream irrigators, the FERC has the authority to require licensees to use eminent domain authority to acquire water rights the exercise of which would conflict with FERC requirements. Kirsch & Seitz, *supra* note 17, at 10445-46. *See also* Blumm, *supra* note 8, at 126.

with such reduction to be granted only if FERC decided that the existing uses are in the public interest.[120]

The *Jefferson County* decision did not resolve the issue. At issue in *Jefferson County* was water quality, not water quantity. The Supreme Court seems to draw a distinction between the two. As hydrologically absurd as this distinction might be, it is a significant legal distinction. It is also a distinction that will continue to be the a source of conflict over hydropower.

L. Dam Removal

One of the options that the Commission may consider in a relicensing proceeding is dam removal. It is quite possible that older facilities may no longer be economically viable given likely environmental mitigation requirements.[121] For example, during the relicensing proceeding, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the State of Maine requested the Commission to require the removal of Edwards Dam on the Kennebec River.[122]

On December 14, 1994, the Commission addressed this issue in a Policy Statement on "Project Decommissioning at Relicensing."[123] In this Policy Statement, the Commission "concluded that it has the authority to deny a new license at the time of relicensing if it determines that no license can be written that will satisfy the statutory standard for issuing a license."[124] The Commission also concluded that "the licensee should be responsible for paying the reasonable costs of decommis-

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120. *1991 Hearings*, *supra* note 11, at 41 (testimony of Mr. Larry EchoHawk, Attorney General, State of Idaho, on Behalf of the Conference of Western Attorneys General).

121. By one estimate, 10% of existing hydropower projects will not be relicensed because of environmental problems. Zomnir & Polk, *supra* note 37, at 29. "[T]he costs of dam removal may be a reasonable expense given the alternatives." Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 STANF. ENVTL. L.J. 97, 112 (1995). This article is recommended for its review of the Elwha River Ecosystem & Fisheries Restoration Act of 1992, Pub. L. No. 102-495, 106 Stat. 3173, through which Congress authorized the removal of the Glines Canyon and Elwha Dams on the Elwha River.

122. Ted Williams, *Freeing the Kennebec River*, AUDUBON, Sept.-Oct. 1993, at 36, 38 (1993). The "single useful function [of Edwards Dam] is to provide a case study of how Americans have looked on their rivers in the past and how they perceive them today." *Id.* at 36. Fish and wildlife issues are of importance in the relicensing process because the impacts on fish and wildlife were generally ignored when the hydropower facilities were constructed. Grimm, *supra* note 34, at 930-31. This is of particular concern with regard to the establishment of instream flow requirements. Blumm, *supra* note 8, at 114-15. *See also* Pyle, *supra* note 121, at 105-07.

123. Docket No. RM 93-23-000, 60 Fed. Reg. 339 (Jan. 4, 1995).

124. Pyle, *supra* note 121, at 125 (citing Federal Energy Regulatory Comm'n, Project Decommissioning at Relicensing, Policy Statement 15 (Dec. 14, 1994) (Docket No. RM93-23-000)).

sioning 'since the licensee created the project and benefited from its operations.'"[125]

IV. APPLICATION OF THE PARK CITY PRINCIPLES

A. *Recognize Diverse Interests in Water Resource Values*

At one level, there is no question but that the FERC permitting and licensing procedures recognize diverse interests. There is serious question whether the FERC procedures do anything more than merely recognize such interests. The FERC statutory mandate requires the "equal consideration" of power and nonpower interests. Equal consideration, however, does not equate with equal treatment.[126]

B. *Problemshed Approach*

Despite its statutory mandate, the Commission has been criticized for being myopic. The state/FERC conflict over water rights, especially the suggestion that the Commission may exercise a "general reserved authority" to subordinate other water uses in a state to the needs of FERC licensees, indicates an inability (or unwillingness) to take a "problemshed" approach. The Commission has advocated its policies and procedures by arguing that a federal entity is needed to provide for comprehensive hydropower development within interstate river basins. Such a "watershed" approach is not a "problemshed" approach and will not be one as long as the Commission perceives its role as being an advocate for the development of hydroelectric power.

C. *Economic, Social and Environmental Consideration: Flexibility, Adaptability and Predictability*

The Commission is predictable. When confronted with a range of alternatives, the alternative that will encourage the development of hydropower will be preferred. Flexibility and adaptability would not be considered Commission strengths. Economic considerations that do not favor the development of hydropower, such as the consideration of energy conservation as an alternative to increased generating capacity, have not been favorably received.[127]

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125. Pyle, *supra* note 121, at 141 (citing (citing Federal Energy Regulatory Comm'n, Project Decommissioning at Relicensing, Policy Statement 32 (Dec. 14, 1994) (Docket No. RM93-23-000)).

126. Clements, *supra* note 11, at 8-9.

127. "[A]lthough the FPA calls for balanced and multiple use of streamflows, the FERC licensing process can produce results that are heavily biased toward applicant visions of economic viability at the expense of fish and wildlife protection." Blumm, *supra* note 8, at 130 n.105.

With regard to environmental consideration, the FERC Chairman has expressed a need to "develop an energy policy that balances economic and environmental needs."[128] Such a policy indicates that the Commission is willing to accept long-term costs for short-term gains.

D. Decentralize to the States

The FERC statutory and regulatory procedures suggest that the states play an important role in FERC decision-making. The Western Governors' Association, however, has concluded that the Commission basically ignores the states. In essence, the Commission treats the states as advisors. It does not share decision-making authority with them. Given that the Commission has protected its prerogatives with vigor, it is highly unlikely that decision-making concerning hydropower issues will be decentralized voluntarily.

There are, however, a growing number of exceptions to this rule. The *Jefferson County* decision interpreting the requirements of section 401 of the Clean Water Act provides one such exception. Another exception is provided by the Coastal Zone Management Act.[129]

E. Negotiation and Market-Like Approaches are Preferred Over Command and Control Approaches

The Commission has been criticized for failing to utilize market-like approaches in its decision-making processes. It is interesting to note that this concern has been raised both by those who favor the development of hydropower and by those who oppose it.[130] In fact, it has been argued that a "market-like approach" would hinder the development of hydropower because the market does not "recognize the multiple benefits that hydro provides."[131]

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128. Martin L. Allday, *Challenges at FERC in the 1990s*, NAT. RESOURCES & ENV'T, Fall 1991, at 29.

129. *See* discussion *supra* at Section V.C.

130. "It would certainly make things easier [for the Commission] if we could simply reduce all public interest considerations to dollars and put them on developmental and nondevelopmental sides of a scale." Clements, *supra* note 9, at 9. Mr. Clements also noted that "there is zero agreement on how to value non-developmental resources from a market perspective." *Id.* This issue is being addressed. *See, e.g.*, John Loomis & Marvin Feldman, *An Economic Approach to Giving 'Equal Consideration' to Environmental Values in FERC Hydropower Relicensing*," 5 RIVERS 96 (1995).

131. Thomas N. Russo, *Making Hydro Sustainable*, PUB. UTIL. FORT., Jan. 1, 1995, at 14, 18. "[T]he most serious [challenge facing the hydroelectric industry] is the move toward market-oriented regulatory structures in the United States and overseas." *Id.* For example:

> Hydropower projects provid[e] nonpower benefits as well. Many hydropower projects are congressionally authorized as multipurpose facilities for recreation, flood control, naviga-

Though there have been some recent changes, FERC decisions have been made without thorough consideration of the economics of specific projects. This is particularly true with respect to inclusion of the costs of environmental mitigation in analyzing total project costs. As discussed in the context of state and federal agency recommendations to the Commission, negotiation is possible. In essence, however, the Commission retains a command and control approach that is implicit in the FERC contention that conflicting state laws are preempted by the FPA. Given these contentions, the success of negotiation and market-like approaches in resolving state/FERC conflicts will be limited.

F. Joint Policy Participation

Once again, a distinction must be drawn between procedure and substance. FERC statutes and regulations provide numerous opportunities for participation in FERC proceedings. It is the position of the Commission, however, that such participation is advisory. While the Commission is obligated to consider the concerns of the states and other federal agencies, FERC actions are not constrained by those concerns. As a result, the state/FERC relationship is characterized by conflict and mistrust. Neither characteristic suggests that the goal of joint policy participation is likely to be achieved.

V. POTENTIAL SOLUTIONS

Over the past several years, there have been a number of legislative proposals to resolve the state/FERC hydropower conflict. In general, the legislative approaches have favored either increased authority for the states or for the Commission. Those approaches favoring an increase in state authority are fairly consistent with the Park City Principles.

A. Increased State Authority

Legislation was introduced on January 14, 1991, to reverse the *First Iowa/Rock Creek* decisions. S. 106 provided that nothing in the FPA

> nor in any other Act may be construed to constitute a preemption or intent to preempt the procedural and substantive requirements

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tion, and irrigation. Often, license conditions imposed on nonfederal projects by FERC or its predecessor spell out nonpower uses that project owners must fund and accommodate such as visitor parks, recreational flow regimes, fish and wildlife facilities, and flood control regulations to protect local communities.

Johansen, *supra* note 115, at 13-14.

> of State Law with respect to the acquisition of water rights and administration of the use of water or with respect to any terms, conditions, limitations, or other restrictions which a State may attach to any such water rights for such project.[132]

S. 106 and H.R. 649 were favored by a number of entities representing the interests of the states. The proposed legislation was opposed by the Commission, by hydropower developers and by the environmental community. The Energy Policy Act[133] does not contain the provisions of either bill.[134]

Similar (and equally unsuccessful) legislation has been introduced before. For example, during the debate over ECPA in 1986, an amendment was offered that would have required the Commission, in the issuance of licenses, to comply with state water law.[135] "The amendment was withdrawn when its sponsor was promised that the Senate Committee on Energy and the Environment would hold hearings on the subject."[136]

Legislation was introduced in 1985[137] that would have authorized the states to formulate watershed protection plans. In general, these plans would have been binding on the Commission.[138]

One area in which an expansion of state authority may not encounter substantial opposition has been the suggestion that the states assume jurisdiction over hydropower facilities having a generating capacity of less then five megawatts. At the present time, these facilities qualify for exemptions under the FPA. The Department of Energy favors transferring responsibility over such facilities to the states.[139]

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132. 102d Cong., 1st Sess. (1991). The companion bill in the House of Representatives was H.R. 649, 102d Cong., 1st Sess. (1991).

133. Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776.

134. Apparently Senator Bennett Johnston, former Chairman of the Senate Committee on Energy and Natural Resources, opposed the legislation and refused to include it in the mark-up of S. 341, the National Energy Security Act (discussed *infra* at Section V.B.). Rodgers, *supra* note 59, at 28.

135. Bridenbaugh, *supra* note 17, at 116.

136. *Id.* (citation omitted).

137. S. 870, 99th Cong., 1st Sess. (1985).

138. Bridenbaugh, *supra* note 17, at 116. The legislation "died in Committee." *Id.* at 115 n.132.

139. *1991 Hearings*, *supra* note 11, at 30 (comments of Mr. Kevin A. Kelly, Director, Electricity, Coal, Nuclear, and Renewable Policy, Office of Policy, Planning and Analysis, Department of Energy). Legislation to effect such a delegation has been introduced before. H.R. 6198, 98th Cong., 2d Sess. (1984) would have authorized the Commission to delegate authority over small hydropower projects to the states. It is interesting to note that, "[h]ad it been adopted, this bill would have conclusively resolved the question in [*Rock Creek*] since the project in question was a small hydropower project." Bridenbaugh, *supra* note 17, at 115 n.132.

A precedent for expanding state authority may have been established in the Energy Policy Act. Section 2408 authorizes the Commission in consultation with the state of Hawaii to study the feasibility of transferring authority over hydropower development to that state. The study was to be completed within eighteen months of enactment.

B. Increase FERC Authority

On November 15, 1994, Senator Malcolm Wallop introduced legislation to reverse the *Jefferson County* decision. This legislation, S. 2566, was offered as an amendment to the Federal Water Pollution Control Act (Act) in order to "restore State control over the allocation and granting of water rights and FERC control over the licensing of hydroelectric projects."[140]

The operative provisions of S. 2566 appear to have been intended to embody the *Rock Creek* decision. With regard to the relationship between the Act and the authority of the states to manage and allocate water resources, the bill would have amended section 101(g) of the Act. As amended, the Act would have provided:

> (1) The authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act.
> (2) Nothing in this Act shall supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.
> (3) Nothing in this Act authorizes the regulation of quantities of water, or impairs or affects any right or authority of a State with respect to the allocation of water (including boundary waters) by such State.
> (4) Nothing in this Act authorizes an action which impairs or affects any water right established by State law, an interstate compact, or a Supreme Court decree.
> (5) Nothing in this Act authorizes an action with respect to other matters, including, but not limited to, aesthetics, not directly related to water quality.[141]

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140. Preamble to S. 2566, 103d Cong., 2d Sess. (1994).
141. S. 2566, § 1.

S. 2566 would have amended the section 401 certification process by providing that "such certification shall not regulate water use or water quantities."[142] Section 401 would also have been amended to provide:

> Nothing in this Act authorizes the regulation of quantities of water, or impairs or affects any right or authority of a State with respect to the allocation of water (including boundary waters) by such State. Nothing in this Act authorizes an action which impairs or affects any water right established by State law, an interstate water compact, or a Supreme Court decree. Nothing in this Act authorizes an action with respects to other matters, including, but not limited to, aesthetics, not directly related to water quality.[143]

In essence, the bill embodies the *Jefferson County* dissent of Justices Thomas and Scalia.

Senator Wallop addressed the need for this legislation on November 30, 1994.[144] Many commentators viewed the *Jefferson County* decision as a victory for the states.[145] Senator Wallop did not share this view.[146] Legislation such as S. 2566 was needed, he said, "to restore the jurisdiction of the 50 States over decisions with respect to the allocation of water and [to] reassert the proper role of the Federal Government and the States within the framework set forth in the Constitution."[147] Senator Wallop characterized the *Jefferson County* decision as threatening "[s]tate water law and the integrity of the FERC hydroelectric licensing process."[148] It appears to have been Senator Wallop's fear that the states would impose "onerous or even project-breaking conditions by section 401 certifications."[149]

The Senator seems to have found irrelevant the fact that the water quality standards at issue in *Jefferson County* are developed by the

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142. S. 2566, § 2(a). With regard to the requirements of § 401, the "not including water use or water quantities" language is repeated at § 2(b) and § 3.

143. S. 2566, § 3.

144. 140 Cong. Rec. S15237-S15240 (Nov. 30, 1994) (statement of Sen. Wallop).

145. *See generally* Ransel, *supra* note 29; Borne, *supra* note 32. *See also* Seth Handy, Note, *Resurgence of the River Treasure: Jefferson PUD and a Comprehensive Plan for Hydroelectric Power*, 20 VT. L. REV. 201 (1995); Laura Underwood, Note, *Better Late than Never: States Regain the Right to Regulate Streamflows under the Clean Water Act:* PUD No. 1 of Jefferson County v. Washington Department of Ecology, 26 TEX. TECH. L. REV. 187 (1995).

146. The decision in *Jefferson County* both surprised and dismayed him. *Supra* note 144, at S15238 (statement of Sen. Wallop).

147. *Id.* at S15237.

148. *Id.*

149. *Id.*

states subject to EPA approval.[150] Instead, he viewed the Court's decision as allowing "EPA to bootstrap impermissible requirements from the Fish and Wildlife Service under the guise of a mandatory condition from section 401."[151] Senator Wallop concluded that the *Jefferson County* decision was "in derogation of State authority and private property rights."[152]

Had George Orwell been retained by the National Hydropower Association to convert the *Jefferson County* dissent of Justices Thomas and Scalia into legislation, he could have done no better than S. 2566. The bill was referred to the Senate Committee on Energy and Natural Resources from which it did not emerge. From a trial attorney's perspective, however, it is a shame that S. 2566 was not enacted. It would have been a source of virtually endless litigation.

Senator Wallop has introduced similar legislation before. On February 5, 1991, he and Senator Bennett Johnston sponsored S. 341, the National Energy Security Act.[153] Section 4201 of the proposed bill would have limited state authority under section 401(a)(1) of the Clean Water Act and would have authorized the Commission to review section 401(a)(1) certifications. Section 4202 would have limited the authority of the Secretary of the Interior and the Secretary of Agriculture to impose mandatory conditions on the development of hydropower facilities on federal reservations within their jurisdiction. In addition, the Secretary of the Interior and the Secretary of Commerce would have lost their authority to require the construction, operation and maintenance of fishways. Section 4203 would have required the Secretary of Energy, in consultation with the Secretary of the Army and the Secretary of the Interior, to study opportunities to increase hydropower generation at existing federal facilities. These studies, which were to be done by river basin, were to have been completed within two years of enactment. Section 10003 would have designated

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150. His protestations to the contrary are not convincing. *Id.* at S15238-S15239.

151. *Id.* at S15239. It appears to be Senator Wallop's belief that EPA "is not concerned with health or safety, but with controlling another Federal agency's recommendations." His particular concern is that FERC will be required to "blindly accept" EPA recommendations. *Id.*

152. *Id.* Senator Wallop waxed eloquent on this point:

> It is evident that under the new Federal laws and water use planning scheme envisioned by the EPA, the States' role will be rendered secondary and subordinate to EPA's centralized control. They [the states] will merely be the instrument of the EPA. It is also clear that EPA's water use determinations under the Clean Water Act will be made with little or no consideration of economic impacts or balancing or competing uses such as irrigation, water supply, and hydropower.

Id.

153. 102d Cong., 1st Sess. (1991).

FERC as the lead agency for the purposes of compliance with NEPA and would have authorized the Commission to establish time limits for the receipt of comments from state and federal agencies.

The proposed legislation was supported by the Commission and the hydropower industry. The legislation was opposed by the states and the environmental community.

Though S. 341 was not enacted, certain provisions are included in the Energy Policy Act.[154] Section 2403 authorized the Commission to contract with third parties for the preparation of environmental impact statements and environmental assessments. Section 2404 embodies the provisions of section 4203 of S. 341 requiring the Secretary of Energy, in consultation with the Secretary of the Army and the Secretary of the Interior, to study opportunities to increase hydropower generation at existing federal facilities. These studies are to be done by river basin and should be completed within two years of enactment. It is interesting to note that the consultation provisions of section 2404 make no reference to the states.

Section 2405 authorizes the Secretary of the Interior to study the feasibility of increasing the amount of hydroelectric energy available for marketing by reducing "the consumptive use of such power for federal reclamation project purposes or as a result of an increase in the amount of water available for such generation because of water conservation efforts on federal reclamation projects or a combination thereof." The Secretary is also authorized to study the feasibility of using conserved water for fish and wildlife purposes. This section of the Energy Policy Act provides specifically that any action proposed by the Secretary must be consistent with state law[155] and that the Secretary is to consult with "affected State, local and Indian tribal interests."[156]

C. *Expansion of State Authority Subject to a Condition Subsequent*

A compromise proposal to resolve the state/FERC conflict may be to authorize an expansion of state authority subject to a condition subsequent. Such an approach could require the Commission to defer to the states unless the deference requirement was inconsistent with other statutory requirements. In essence, this approach would embody the decision of the Supreme Court in *New Melones*, in which the Court concluded that

154. Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776.
155. *Id.* § 2405(a)(5).
156. *Id.* § 2405(b).

the Secretary of the Interior was obligated to conform to the requirements of state water law unless state requirements were inconsistent with "clear congressional directives."[157]

This approach is reflected in a number of federal statutes. For example, the legislation authorizing the Delaware and Susquehanna River Basin Commissions provides that the exercise of FERC authority "shall not substantially conflict" with the comprehensive plans of the Commissions unless the President determines that the "national interest so requires."[158]

A similar approach was adopted when the Safe Drinking Water Act was amended in 1986.[159] With regard to state wellhead protection area programs, the amendments provided that federal agencies

> shall be subject to and comply with all requirements of the State program[,] both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable charges and fees. The President may exempt [federal agencies from the requirements of this provision] if the President determines it to be in the paramount interest of the United States to do so.[160]

An alternative approach not requiring a Presidential finding was enacted in the Coastal Zone Management Act (CZMA).[161] In relevant part, the CZMA provides that "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[162]

D. New Regional Entities

A number of commentators have suggested that water management decisions should be made by multistate entities having jurisdiction over entire river basins.[163] In fact, one of the arguments advanced by the Com-

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157. 438 U.S. at 672.

158. *1991 Hearings*, *supra* note 11, at 99 n.11 (testimony of Mr. Jerome C. Muys on behalf of the National Hydropower Association). *See also* Jerome C. Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RESOURCES LAW. 153, 160-63 (1973).

159. Pub. L. 99-399, 100 Stat. 642.

160. 42 U.S.C. § 300h-7(h).

161. 16 U.S.C. §§ 1451-1464 (1994).

162. 16 U.S.C. § 1456(c)(1)(A).

163. For an example, see Recommendation 34 of the Long's Peak Working Group on National

mission in defense of its preemptive authority is the inability of the states to manage and allocate water resources on a basin-wide basis.[164]

There are a number of models for such an entity ranging from the existing river basin commissions to the Northwest Power Planning Council. One of the better regional models may be the Great Lakes Charter. Irrespective of which model is used, new regional entities may be one means of resolving the state/FERC conflict. Establishment of such an entity, however, may require the consent of Congress.[165]

E. Memoranda of Understanding

Memoranda of understanding are agreements between different public entities regarding specific issues in which the entities share common interests. It might be possible for such memoranda to be executed between the states (either individually or collectively as a regional entity) and the Commission.

In fact, the Commission initiated negotiations in 1991 with the Western Governors' Association and the Western States Water Council. The goal of these negotiations was the development of a memorandum of understanding. An initial result was a change in procedures that was intended to facilitate an exchange of information as well as consultation between the Commission and state agencies. Draft and final license applications were to be sent to the states. The negotiations have addressed a number of key issues, including 1) the role of state water rights decisions and water plans in the Commission's comprehensive development decisions, 2) Commission recognition of the Columbia River Fish and Wild-

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Water Policy:

> The new Administration, working through the Department of the Interior, EPA and the U.S. Army Corps of Engineers, and in consultation with the states and tribes, should encourage and facilitate the formation of new watershed management organizations for the purpose of integrating water management at the "problemshed" level.

America's Waters: A New Era of Sustainability 11 (1992).

164. "A central part of the Commission's responsibility under the FPA is to ensure that a licensed project's use of the waterway is consistent with a comprehensive plan that reflects an appropriate balancing of all the various uses of the waterway in the public interest." *1991 Hearings*, *supra* note 11, at 21 (testimony of Mr. William S. Scherman, General Counsel, Federal Energy Regulatory Commission).

165. For example, the provisions of the Great Lakes Charter prohibiting the diversion of water from the Great Lakes were ratified by Congress after the Charter had been ratified by the states of the Great Lakes Basin. *See* 42 U.S.C. § 1962d-20(d) (1988 & Supp. V 1993). Absent ratification by Congress, the Charter could have imposed an otherwise impermissible burden on interstate commerce. *See* Blumm, *supra* note 8, at 127; Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982) (state restrictions on the export of water held to impose an impermissible burden on interstate commerce).

life Program, 3) data gathering and information requirements, 4) pre-filing consultation procedures, 5) the need for "a state water right" permit, 6) participation by state agencies in the FERC licensing process, 7) state intervention in Commission proceedings, 8) resolving conflicts arising under state and federal law, 9) compliance with license requirements, 10) recognition of future upstream water demands and the need to balance such demands against the licensee's investment in the hydropower facility and 11) dam safety.[166] Apparently, concern has been expressed both by other federal agencies and by the hydropower industry that the Commission will "'sell-out' to the state water rights agencies."[167]

It is possible that such memoranda will require either the consent of Congress or amendments to the FPA. Any memoranda that purported to delegate a duty to the states would be subject to judicial challenge if the duty was not capable of delegation.

VI. CONCLUSIONS

There are a number of other possibilities not requiring Congressional action that should be considered to resolve the state/FERC conflict. One commentator has argued that the Commission needs a clearly stated environmental protection mandate.[168] It has also been recommended that President Clinton "appoint Federal Energy Regulatory Commission (FERC) commissioners . . . who are sensitive to ecological and non-power interests for hydropower licensing and marketing."[169]

Irrespective of how the state/FERC conflict is resolved, it should be resolved. An application of the Park City Principles demonstrates the inconsistency of current FERC policies and procedures with those Principles. Legislation amending the FPA to bring FERC policies and procedures into compliance with the Principles should be considered. Absent such legislation, the ongoing state/FERC conflict over hydropower can only intensify.

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166. Clements, *supra* note 11, at 1-2.

167. *Id.* at 2.

168. Abrams, *supra* note 21, at 205.

169. Recommendation 13 of the Long's Peak Working Group on National Water Policy, *supra* note 163, at 9.