

Omnidirectional Range/Tactical Air Navigation (VORTAC) facility to the Toronto, ON, Canada, VORTAC via the Waterloo, ON, Canada, Very High Frequency Omnidirectional Range/Distance Measuring Equipment (VOR/DME). This action is necessary to realign the airway from the United States into Canadian airspace.

**EFFECTIVE DATE:** 0901 UTC, February 2, 1995.

**FOR FURTHER INFORMATION CONTACT:** Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9255.

#### SUPPLEMENTARY INFORMATION

##### The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) amends the airspace designation for VOR Federal Airway V-216 from the Peck, MI, 084° and the United States/Canadian border to Toronto, ON, Canada, via Waterloo, ON, Canada. Canada has completed restructuring their internal airspace system that affected several Federal airways within the United States. This action is necessary to realign the airway from the United States into Canadian airspace. I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary, because this action is a minor technical amendment in which the public is not particularly interested. Domestic VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.9B, dated July 18, 1994, and effective September 16, 1994, which is incorporated by reference in 14 CFR 71.1. The airway listed in this document will be published subsequently in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a

substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

#### PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

##### § 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9B, Airspace Designations and Reporting Points, dated July 18, 1994, and effective September 16, 1994, is amended as follows:

*Paragraph 6010(a)—Domestic VOR Federal Airways*

\* \* \* \* \*

##### V-216 [Revised]

From Lamar, CO; Hill City, KS; Mankato, KS; Pawnee City, NE; Lamoni, IA; Ottumwa, IA; Iowa City, IA; INT Iowa City 062° and Janesville, WI, 240° radials; Janesville; INT Janesville 076° and Muskegon, MI, 252° radials; Muskegon; Saginaw, MI; Peck, MI; INT Peck 084° and Waterloo, ON, Canada, 262° radials; Waterloo; INT Waterloo 057° and Toronto, ON, Canada, 278° radials; to Toronto. The airspace within Canada is excluded.

\* \* \* \* \*

Issued in Washington, DC, on December 21, 1994.

**Harold W. Becker,**

*Manager, Airspace-Rules and Aeronautical Information Division.*

[FR Doc. 95-75 Filed 1-3-95, 8:45 am]

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 2

[Docket No. RM93-23-000]

#### Project Decommissioning at Relicensing; Policy Statement

Issued December 14, 1994.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Policy statement.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is adopting a policy statement that addresses its authority to issue or deny new hydropower licenses at the time of relicensing, and its authority over the decommissioning of a licensed project when no new license is sought or a new license is rejected or denied, as well as pre-retirement planning and funding. The Commission stated that it has the authority to deny new licenses to hydroelectric projects when existing licenses expire. Such action would occur if the Commission concluded that the project, no matter how conditioned, could no longer meet the comprehensive development standard of the Federal Power Act. In the great majority of cases, decommissioning is likely to result from a license holder's desire to abandon an uneconomical facility rather than the Commission deciding it should be closed. The Commission also concluded that its authority over decommissioning extends to determining what project features, beyond the turbines and generators, should be removed, if the project is decommissioned. In issuing future licenses, the Commission may require that funding for decommissioning be provided in certain circumstances.

**EFFECTIVE DATE:** February 3, 1995.

**FOR FURTHER INFORMATION CONTACT:** Joanne Leveque, Office of the General Counsel, Federal Energy Regulatory Commission, 825 N. Capitol Street, NE., Washington, DC 20426, (202) 208-0961.

**SUPPLEMENTARY INFORMATION:** In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, 1200 or 300bps, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this document will be available on CIPS for 60 days from the date of issuance in ASCII and WordPerfect 5.1 format. After 60 days the document will be archived, but still

accessible. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, located in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

## I. Introduction and Summary

The Federal Energy Regulatory Commission (Commission) is adopting a policy statement that addresses issues related to relicensing and decommissioning<sup>1</sup> raised in its September 15, 1993 Notice of Inquiry (NOI) in the above-captioned proceeding.<sup>2</sup> In that Notice, the Commission invited comment on a series of fifteen questions dealing with the relicensing and decommissioning of licensed hydropower projects after the original license has expired. The individual questions, as well as a summary of the commenters' responses, are set forth in Appendix A to this Policy Statement.

There are three major areas of inquiry encompassed in the ensuing analysis and discussion. The first involves relicensing of a project. The second addresses what happens when no new license goes into effect for the project at the time of relicensing, and the project in question must be decommissioned. Finally, the discussion addresses pre-retirement funding of retirement costs that will be incurred upon decommissioning.

Regarding the first issue, generally, when the license for a project expires, the Commission issues a new license to the existing licensee. However, that is not the only option available. After examining the legislative history and the relevant statutory provisions, the Commission concludes that it has the legal authority to deny a new license at the time of relicensing if it determines that, even with ample use of its conditioning authority, no license can be fashioned that will comport with the statutory standard under section 10(a) of the Federal Power Act (the Act) and other applicable law. The Commission anticipates that, where existing projects

are involved, license denial would rarely occur.

At the time a license expires, the Commission will review any application for a new license in terms of current conditions and public interest considerations. There may be instances where a new license can be fashioned, but the terms will not be acceptable to the licensee, and so the license will be rejected. This is most likely to occur where the licensee of an already marginal project is confronted with additional costs at relicensing that render the project uneconomic. The Commission concludes that this possibility will not preclude it from imposing the environmental (and other) conditions it deems appropriate to carrying out its responsibilities under the Act.

In those instances where it has been determined that a project will no longer be licensed, because the licensee either decides not to seek a new license, rejects the license issued, or is denied a new license, the project must be decommissioned. The second subject involves the extent of the Commission's authority over decommissioning and the process to be applied when a project is to be decommissioned. The statutory language does not expressly address, in any comprehensive manner, the Commission's authority over decommissioning and the process to be applied in carrying it out. In such a situation, the Commission has the authority to fill in gaps left by the statute and to ensure that a project is decommissioned in a manner that is consistent with the public interest. The Commission will take a very flexible approach to the carrying out of this process.

Possible forms of decommissioning extend from simply shutting down the power operations to tearing out all parts of the project, including the dam, and restoring the site to its pre-project condition. Multiple concerns must be considered in determining which alternative is appropriate, and the solutions necessarily will vary from one situation to another. Judging from the Commission's experience with project license surrenders, interested parties should generally be able to negotiate the proper approach to decommissioning. The Commission strongly encourages all the interested parties to work together to accomplish a mutually acceptable resolution in each case.

The Commission, however, rejects the notion that it is without statutory power to act where negotiated solutions cannot be arranged. The Commission has concluded that it has the power to take steps necessary to assure that the public

interest is suitably protected, including, in the rare case, requiring removal of the project dam. Assuring protection of the public interest may involve the need to coordinate with other government bodies that will succeed to regulatory responsibility over certain aspects of the formerly-licensed projects.

The Commission will not generically impose decommissioning funding requirements on licensees. However, in certain situations, where supported by the record, the Commission may impose license conditions to assure that funds are available to do the job when the time for decommissioning arrives. The Commission will determine whether to impose funding requirements on a case-by-case basis, at the time of relicensing.

Further, even in situations in which the Commission does not impose a funding requirement at the time a project is relicensed, the licensee will ultimately be responsible for meeting a reasonable level of decommissioning costs if and when the project is decommissioned. The licensee should plan accordingly, and the Commission will not accept the lack of adequate preparation as justification for not decommissioning a project. Some provision for mid-course funding may become appropriate for a variety of reasons. The Commission encourages affected parties to develop creative solutions to pre-retirement funding in such situations.

The Commission will be receptive to proposals, concerning pre-planning and pre-funding of decommissioning costs, reached by mutual agreement during the course of individual licensing proceedings or during the term of a license.

Where the Commission includes a decommissioning funding provision in a license it issues, if the licensee is a public utility subject to the Commission's wholesale ratemaking jurisdiction, it may file to include an appropriate share of those costs in its rates. In situations where the Commission has not required pre-retirement funding in a license, and it is subsequently determined that decommissioning is necessary, a licensee that is a public utility may file to recover an appropriate share of decommissioning costs through wholesale rates, on a prospective basis.

Finally, the Commission is by separate order rescinding the reserved authority over decommissioning matters that routinely has been included in recent relicensing orders because of the pendency of this proceeding. The records in those cases demonstrate no current need to plan for, or expect,

<sup>1</sup> In this document, the term decommissioning is used broadly. Possible forms of decommissioning extend from simply shutting down the power operations to tearing out all parts of the project, including the dam, and restoring the site to its pre-project condition.

<sup>2</sup> Project Decommissioning at Relicensing; Notice of Inquiry, 58 FR 48991 (Sept. 21, 1993), IV Stats. & Regs. ¶ 35,526 (1993).

project retirement based on current conditions.

## II. The Commission's Options at Relicensing

### A. The Original Legislation

When the Federal Water Power Act (FWPA)<sup>3</sup> was enacted in 1920 after several years of consideration and debate, sections 14 and 15 were key parts of the legislation. There was a keen interest by some members of Congress in providing the opportunity for eventual Federal takeover of Commission-licensed power projects, and that became reflected in section 14. This section was designed as a vehicle that would permit the Federal government to own, maintain, and operate valuable water-power projects under terms which could make such takeover practical when the circumstances warranted.<sup>4</sup>

Congress further provided in section 15 of the FWPA that if Congress did not elect the first option of taking over and operating the project when a license expired, then the Commission was authorized to issue a new license either to the original licensee or to a new licensee. Because of concern about what would happen to service, and to the industries and communities dependent upon the project for service,<sup>5</sup> if Congress and the Commission had not acted by the time the license expired, Congress included a provision for annual licenses until the takeover/licensing issue had been resolved.

The focus during this period was plainly on the three options: Federal takeover and continued operation; a new license to a new licensee and continued operation; and a new license to the old licensee, who would also continue operation.<sup>6</sup> In the first two

cases, the entity taking over the operation would have to pay the existing licensee for the project, according to the formula established in section 14.

This did not, however, necessarily mean continuation of business as usual. The statute provided for license terms of up to 50 years on original licenses.<sup>7</sup> As has been recognized:<sup>8</sup>

By so limiting the duration for which these licenses could be granted, Congress intended to preserve for the Nation the opportunity of reevaluating the use to which each project site should be put in light of changing conditions and national goals.

During the license period, as reflected in sections 6 and 28 of the FWPA, licensees enjoyed considerable security. At the end of that period, the Commission would reexamine the statutory standard and make a new determination. Under section 10 of the FWPA, new licenses (except the interim annual licenses) could be issued only on the condition:<sup>9</sup>

That the project adopted \* \* \* shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial uses; and if necessary in order to secure such scheme the commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.

Any new license that the Commission issued would be pursuant to the terms of the then-prevailing laws and regulations and carry such further reasonable terms and conditions as the Commission then deemed appropriate to implement the statutory standard.<sup>10</sup> Each license was to be conditioned on acceptance of those terms,<sup>11</sup> and if the licensee did not accept the license, as

conditioned, its rights to an annual license would end, as well.<sup>12</sup>

There was no mention in the legislation of the possibility of denying a license, which would put the project out of business. At the same time, there was no discussion of what was to occur if, at relicensing, the Commission could not make the requisite finding under the comprehensive development standard. That is, there was no direction concerning how the Commission was to reconcile the potentially conflicting terms of sections 10 and 15.

### B. The Current Statutory Scheme

Section 14 remains on the books, although the Federal Government has never taken over a licensed project under its terms, nor has the Commission ever recommended that it do so. Section 15 likewise remains on the books. As the first licenses were about to expire, 50 years after initial passage of the FWPA, a term was added to section 15 of what was now the Federal Power Act,<sup>13</sup> authorizing the Commission to issue nonpower licenses.<sup>14</sup> No such license has been issued, either. In nearly every instance, existing licensees have applied for, and received, new power licenses when their old ones expired.

All of these decisions have been made in the context of the Commission's implementation of the comprehensive development standard of section 10(a) of the Act. At the same time, section 10(a) has evolved since 1920.<sup>15</sup> It no longer has the almost exclusively pro-development focus of the 1918–20 period, when the original legislation was propelled by the largely undeveloped status of the country's water-power resources and the power shortages that had existed during World War I.<sup>16</sup>

<sup>3</sup> Pub. L. 66–280, 41 Stat. 1063 (June 10, 1920).

<sup>4</sup> That was before the period of the large-scale construction of hydropower projects by the Federal Government that would mark future decades. At that point, proponents of Federal ownership faced considerable resistance to the concept (e.g., 53 Cong. Rec. 3416 (1916) [remarks of Sen. Shields]; 53 Cong. Rec. 3356 [remarks of Sen. Works]; 56 Cong. Rec. 9121 (1918) [remarks of Rep. McArthur]; Water Power—Hearings before the House Committee on Water Power, 65th Cong., 2d Sess. 235–36 (1918) (hereinafter cited as "1918 House Hearings") [remarks of Rep. Sims]). Nonetheless, they wanted to leave future possibilities open via takeover. See, e.g., 53 Cong. Rec. 3297 (1916) [remarks of Rep. Hustling]; 53 Cong. Rec. 3228 [remarks of Sen. Walsh]; 1918 House Hearings at 447–53 [testimony of Secretary of the Interior Lane].

<sup>5</sup> See, e.g., 54 Cong. Rec. 1008 (1917) [remarks of Sen. Shields]; 59 Cong. Rec. 1048, 1442–43, 1474 (1920) [remarks of Sen. Walsh]; 59 Cong. Rec. 1043, 1045 [remarks of Sen. Fletcher]; 59 Cong. Rec. 1049 [remarks of Sen. Myers].

<sup>6</sup> See, e.g., Water Power Bill to Provide for the Development of Water Power and the Use of Public Lands in Relation Thereto, and for other Purposes, Hearings on H.R. 14893 before the House

Committee on the Public Lands, 63d Cong., 1st Sess. 477 (hereinafter cited as "1914 Hearings before House Committee on Public Lands") [testimony of O.C. Merrill]; 51 Cong. Rec. 13037, 13623–24 (1914) [remarks of Rep. Ferris]; 53 Cong. Rec. 10469 (1916) [remarks of Rep. Adamson]; 1918 House Hearings 855 [letter from Secretary of Agriculture Houston]; *id.* at 451 [testimony of Secretary of the Interior Lane]; *id.* at 674 [testimony of Secretary of War Baker] (the Secretaries of Agriculture, War, and the Interior originally constituted the Commission and were instrumental in drafting the 1920 legislation).

<sup>7</sup> Section 6 of the FWPA.

<sup>8</sup> S. Rep. No. 1338, 90th Cong., 2d Sess. 2–3 (1968).

<sup>9</sup> Section 10(a) of the FWPA. This provision, with some additions, remains today as section 10(a) of the Federal Power Act, and is set forth at *infra* n. 46.

<sup>10</sup> Section 15 of the FWPA.

<sup>11</sup> Section 6 of the FWPA.

<sup>12</sup> 59 Cong. Rec. 6524 (1920) [remarks of Rep. Esch]; 59 Cong. Rec. 7779 [remarks of Sen. Jones].

It is Commission practice to issue annual licenses to permit it to complete certain actions, however. See 18 CFR 16.18(b)(1) and (2).

<sup>13</sup> 16 U.S.C. § 791a, *et seq.*

<sup>14</sup> Section 3 of Pub. L. 90–451, 82 Stat. 617 (Aug. 3, 1968).

<sup>15</sup> Section 10(a) now reads:

That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive scheme for improving and developing a waterway or waterways for the use and benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e) . . . .

Section 4(e) is set forth *infra*.

<sup>16</sup> See, e.g., H.R. Rep. No. 715, 65th Cong., 2d Sess. 15, 29 (1918); H.R. Rep. No. 61, 66th Cong.,

Environmental considerations evoked virtually no comment in the debates and reports immediately preceding adoption of the FWPA.<sup>17</sup> However, these considerations have become important factors since the 1950s, as experience with the effects of water-power project operation has grown. This has resulted in new license conditions that have generally increased the costs associated with running hydropower projects.

The first steps in this direction were taken by the Commission in various individual licensing orders it issued.<sup>18</sup> Then, as States began to challenge Commission environmental actions, and seek concurrent jurisdiction, the courts put their imprimatur on the matter. They generally upheld the Commission's preemptive authority in this area,<sup>19</sup> but underscored further the Commission's responsibilities for environmental protection.<sup>20</sup>

Finally, in 1986 changes were made to the Act which codified and extended the earlier actions.<sup>21</sup> This is reflected principally in sections 10(a) and 10(j). Section 10(a) was expanded to refer explicitly to fish and wildlife concerns. A new section 10(j) was added to require expressly that, in every license it issues, the Commission establish conditions for the adequate and equitable protection of, mitigation of damages to, and enhancement of fish and wildlife.

The 1986 legislation directed the Commission, when establishing license conditions, to reach an appropriate balance between power and other developmental interests and the protection of nondevelopment resources, such as fish and wildlife. It must consider, but need not give controlling weight to, the recommendations of various Federal and State resource agencies. There are however two long-standing provisions which authorize other federal agencies to promulgate license conditions. The

1st Sess. 4 (1919); 1918 House Hearings 5-15, 458-59; 56 Cong. Rec. 8929, 9120-22, 9614 (1918); 58 Cong. Rec. 1932 (1919).

<sup>17</sup> As discussed later, there were two provisions included in the 1920 legislation, involving fishways and Federal reservations, which have environmental overtones. However, both were carry-overs from predecessor legislation (requiring permits for projects on Federal lands or in navigable waters), and were not the subject of any significant attention at that time.

<sup>18</sup> The first time such considerations were reflected in the Commission's Standard Terms and Conditions for licenses was in 1964. See, e.g., 31 FPC 286, 530; 32 FPC 73, 841, 1116 (1964). However, such terms began to appear with increasing frequency in licenses issued during the 1950s.

<sup>19</sup> FPC v. Oregon, 349 U.S. 435 (1955).

<sup>20</sup> Udall v. FPC, 387 U.S. 428 (1967).

<sup>21</sup> Pub. L. 99-495, 100 Stat. 1243 (Oct. 16, 1986).

Secretaries of the Interior and Commerce have their own power under section 18 to require construction, maintenance, and operation of fishways. In many instances fishways were not required at the time of initial licensing, but are being mandated at the time of relicensing. Similarly, where the project is built in a National Forest or other Federal reservation, under section 4(e) of the Act the Secretary of the department responsible for supervision of the reservation is empowered to establish, at the time of licensing, conditions he or she believes to be necessary for the adequate protection and utilization of the reservation. These conditions may also be revisited at relicensing.

More recently, most States have been given implementation authority under the Clean Water Act.<sup>22</sup> If the State denies water quality certification for a hydropower project, the Commission cannot issue a license for the project. The States have broad authority under the Clean Water Act to impose terms and conditions on operation of the project; the Commission must include lawful terms and conditions they impose in any license it issues.<sup>23</sup> This responsibility permits the States on some occasions to establish conditions independent of the Commission that may alter the economic viability of a project.

### C. Discussion

As the Commission interprets the terms of the Act, the statutory scheme contemplates that normally the balancing between power and environmental interests can and will be accommodated through license conditions. If the licensee's proposal does not satisfy the comprehensive development standard of section 10(a), then the Commission will add terms that will bring it into compliance.<sup>24</sup>

To date, the Commission has not been confronted with any relicensing situation where its conditioning authority has been inadequate to do the job, i.e., where there was unacceptable environmental damage that proved irremediable. Nonetheless, if such a situation were to occur, the Commission does not read the Act as requiring it to issue a license. Such an approach would compel it to ignore the strictures of section 10(a), which the courts have long recognized rests at the core of the

<sup>22</sup> 33 U.S.C. § 1341(a)(1).

<sup>23</sup> See PUD No. 1 of Jefferson County v. Washington Department of Ecology, U.S., 114 S.Ct. 1900 (1994).

<sup>24</sup> See language quoted *supra* at p. 7.

Commission's licensing responsibilities.<sup>25</sup>

The principal support for perpetual licenses in 1920, which was before the advent of serious environmental concerns, rested on the idea that if the project had to close down, it could be a catastrophe to the community dependent on that power. Electricity was essentially local in nature, since it could generally be transmitted no more than 200-300 miles.<sup>26</sup> This tended to result in reliance on a single source that had been developed to serve its surrounding area.

Over the ensuing decades, this specter has been transformed by technological change. Today, power can be, and is, transported considerable distances, as communities are linked by an electric grid that crosses vast areas of the country. At the same time, rather than emphasizing retention of existing projects, as in 1920, the current regulatory focus is on fostering greater efficiency by expanding the opportunities to shop for power from distant projects.

Actually, by the time the first licenses began to expire, the concept of the inevitability of power operation from a particular project was eroding. In 1968, the statute was amended to provide for nonpower licenses. Section 15(f) of the Act states (emphasis added):

In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, *whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use.*

The underscored language shadows that of section 10(a), and recognizes that there can be situations where the standard embodied therein cannot be met and the Commission decides that a project should no longer be used for power purposes.

Later, in language added to section 4(e) of the Act in 1986, Congress further stated (emphasis added):

*In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and*

<sup>25</sup> FPC v. Union Electric Co., 381 U.S. 90, 98 (1965); First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 180-81 (1946).

<sup>26</sup> 51 Cong. Rec. 12753 (1914) [remarks of Rep. Sherley], 53 Cong. Rec. 546 (1916) [remarks of Rep. Ferris], 59 Cong. Rec. 243 (1919) [remarks of Sen. Jones].

development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Similarly, among other recent environmental legislation, the water certification requirements under the Clean Water Act could sometimes effectively quash an application for a new license.

Given this history, it is the Commission's view that, in those cases where, even with ample use of its conditioning authority, a license still cannot be fashioned that will comport with the statutory standard under section 10(a), the Commission has the power to deny a license.

The Commission rejects any suggestion that, rather than denying a new license, the United States would have to take over the property under section 14. It is abundantly clear from the legislative history of the FWPA that section 14 was designed to permit the Federal Government to take over and operate the property, not close it down.<sup>27</sup> Under such circumstances, the Government would get the output, which it could either sell or use for its own purposes, obviating the need to acquire power from other sources.<sup>28</sup>

As already noted, the FWPA was not drafted and passed with environmental concerns in mind.<sup>29</sup> There is nothing in that legislation that contemplates the prospect of requiring the Government to routinely bail out projects that can no longer pass muster under section 10(a)

<sup>27</sup> See, e.g., 51 Cong. Rec. 13623 (1914) [remarks of Rep. Ferris]; 54 Cong. Rec. 1008 (1917) [remarks of Sen. Shields]; 1918 House Hearings 235-36 [remarks of Rep. Sims]; *id.* at 25-26 [remarks of O.C. Merrill, instrumental in drafting the bill]. See also the statutory language of sections 14(a) and 15(a)(1).

<sup>28</sup> The suggestion of municipal licenses that Congress has barred denial of municipal licenses is wide of the mark. The 1953 legislation to which they refer precluded the Federal takeover of such projects under section 14. It also expressly stated that no provision of the Act was repealed or affected except as was specifically referred to in the 1953 legislation. See 16 U.S.C. §§ 828b-828c. This term was included at the Commission's request to ensure that such key provisions as sections 4, 10, and 18 were not affected. See S. Rep. No. 599, 83d Cong., 1st Sess. 5-6 (1953).

While the 1953 legislation prevented takeover under section 14, the Federal Government's paramount right to take over by condemnation remained. *Id.* at 3-5. See also H.R. Rep. No. 985, 83d Cong., 1st Sess. 2, 5 (1953).

<sup>29</sup> However, Congress did exhibit its concern with public safety (see Section 10(c)). There is nothing to suggest that the Commission could not deny a license on these grounds (see South Carolina Public Service Authority v. FERC, 850 F.2d 788, 793 (D.C. Cir. 1988)), but would instead have to buy out the dangerous properties in order to close them down.

because of serious and irremediable adverse public impacts. In individual cases, where the facts and circumstances indicate that in fairness the burden should fall on Federal taxpayers, rather than on the licensee, the language of section 14 is broad enough to permit the Commission to pursue that course. However, there is no reason to interpret section 14 as mandating that outcome.

To this point, the discussion has focussed on license denial, which is expected to be highly unusual. The more likely scenario is one in which the Commission is required to condition a new power license with environmental mitigation measures, and the licensee is unwilling to accept the license tendered. The licensee may prefer to take the project out of business, because the costs of doing business have become too high.<sup>30</sup> There is no merit to the suggestion by some industry commenters that a condition in a power license is *per se* unreasonable if, as a result of imposing the condition, the project is no longer economically viable. The statute calls for a balancing of various development and nondevelopment interests, and those commenters' position would elevate power and other development interests far above the environmental concerns. It would mean that severe environmental damage would have to be accepted in order to protect even a very marginal hydropower project. The Commission does not read the Federal Power Act to compel such a result. As the Court of Appeals for the Seventh Circuit recently observed:<sup>31</sup>

[T]here can be no guarantee of profitability of water power projects under the Federal Power Act; profitability is at risk from a number of variable factors, and values other than profitability require appropriate consideration.

The Commission's approach to the conditions it establishes will be realistic and pragmatic. In assessing whether the terms it is considering are reasonable, the Commission looks at the costs to the licensee in complying with the terms of the license, as well as the environmental benefits from imposing them. Within those parameters, however, it must be recognized that meeting reasonable environmental costs is a part of today's cost of doing business.<sup>32</sup>

<sup>30</sup> As discussed in a later section, any decision to close down a project will generally involve decommissioning costs. That element would also be factored into the equation in determining whether the licensee elects to continue in operation or close down.

<sup>31</sup> Wisconsin Public Service Corp. v. FERC, 32 F.3d 1165, 1168 (7th Cir. 1994).

<sup>32</sup> H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986).

There may be some occasions where the obligation to pay increased environmental costs at relicensing will force a hydropower project to close down. With the increasing emphasis on competition in the electric power industry today, the prospect of shutting down certain power projects may increase. However, this is not unique to hydroelectric projects.

The possibility that a project may have to shut down is not a legitimate basis for the Commission to ignore its obligations to impose necessary environmental conditions. However, the Commission is required to balance a number of different factors under sections 4(e) and 10(a) of the Act in its licensing decisions. Should it be demonstrated that the environmental costs would be excessive or that loss of power supplied by the project would be significant, that evidence can be considered in assessing the power and development aspects to be weighed under section 10(a)'s comprehensive development standard, as can the renewable nature of water-power resources. Similarly, hydropower may carry significant environmental benefits over some of the alternate power sources that would be used instead, and that is a factor to be considered in weighing the nondevelopmental aspects of the equation.

As the foregoing discussion indicates, there are no definitive standards as to how the varying accommodations reflected in the statute are to be applied by the Commission in fashioning its license conditions. Environmental considerations are important, but so are developmental needs. Optimally, many of the conflicting concerns can be worked out through processes of consultation and negotiation during the licensing proceeding.<sup>33</sup> Experience has shown that this approach in fact usually does yield an acceptable result.

### III. The Decommissioning Process

#### A. Experience with Project Retirement

As discussed earlier, the emphasis in 1920 was on the continuation of licensed projects. Nonetheless, over the years various projects have in fact stopped producing power and closed down. Generally, the reasons have been grounded in economics—for one reason or another, it would simply be too

Hydropower projects, of course, do not stand alone in this regard. Other sources of electric generation must also meet costs of environmental compliance. For example, coal burning facilities must meet Clean Air Act standards (42 U.S.C. § 7651, et seq.) and nuclear facilities must incur the costs of disposing of spent nuclear fuel and project decommissioning (e.g., 10 CFR 50.75).

<sup>33</sup> See, e.g., sections 10(a) and 10(j) of the Act.

expensive to continue operating the project.

Rather late in the legislative process leading to the FWPA, Congress added to the other terms of section 6 a brief reference to surrender of licenses, without explanation or comment.<sup>34</sup> Shortly after passage, the Commission issued a regulation that paralleled the statute in providing that it was not simply the licensee's decision to surrender a license during the term, but that the Commission had to approve the surrender, as well. Furthermore, the regulation went on, if any project works had been constructed, the surrender had to be "upon such conditions with respect to the disposition of such works as may be determined by the Commission."<sup>35</sup>

Since those days, surrenders have been successfully worked out on many occasions. There are a myriad of considerations involved in determining what form the decommissioning will take. There was an occasional reference in the pre-FWPA debates to the fact that if a licensee decided not to continue with a project and instead rejected a new license, it would have to tear out the project.<sup>36</sup> This sort of remark, however, illustrates that no significant consideration was being given at the time to the intricacies of decommissioning a power project.

For example, there can be very great environmental consequences to tearing out a dam that is part of a licensed hydropower project. Over the life of the project huge amounts of silt may accumulate, and if the dam is removed, that silt may sweep downstream, causing major damage to other properties or resources.<sup>37</sup> The situation is even more serious where PCBs or other hazardous materials are embedded in the sediment. Equally significant, even if the project is no longer to produce power, the dam and related project works may serve other, nonpower functions worth preserving.

In some instances, power production is a very secondary element. The primary function of a project may be to

supply water for irrigation or domestic needs, but power production facilities were included to help with the costs of the project. Certainly, under those circumstances, tearing out a dam would be unwarranted. Another example of significant nonpower functions associated with a project occurs when property owners have built homes around the project's reservoir.

A review of prior Commission surrender cases would reveal examples of all of these situations. Commonly dams are retained,<sup>38</sup> but it is not unusual that they be breached or removed.<sup>39</sup> The determining circumstances vary with each case.

There is one factor which has consistently been reflected in the Commission's orders. If the dam is to remain in place or there are other aspects of the project left which may significantly affect public resources, the Commission generally wants to be satisfied that there is another authority to take over regulatory supervision. While this seems to be a matter of sound public policy, it is further buttressed by the terms of section 15(f) regarding what happens when the Commission issues a nonpower license:

Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license.

In other words, Congress anticipated a continuing system of supervision over public aspects of those project works that would remain.

#### *B. The Commission's Role in Decommissioning*

Sections 6 and 15(f) deal expressly with only two situations—surrenders during a license term and situations where the Commission has issued a nonpower license at the end of a license term. However, there is no evidence to suggest that Congress determined or intended that the Commission was to be left powerless to deal with other, analogous situations. As the Court of

Appeals for the District of Columbia Circuit has recognized:<sup>40</sup>

The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.

Likewise, the Supreme Court has observed:<sup>41</sup>

The power of an administrative agency to administer a congressionally created \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

The Commission is of the opinion that implicit in the section 6 surrender provision is the view that a licensee ought not to be able simply to walk away from a Commission-licensed project without any Commission consideration of the various public interests that might be implicated by that step. Rather, the Commission should be able to take appropriate steps that will satisfactorily protect the public interests involved.<sup>42</sup> Section 15(f) takes the approach one step further by suggesting that wherever nonpower activities are to continue, there should be another regulatory authority prepared to step in. Those principles have validity well beyond the particular contexts in which they are specifically referenced in the Act.<sup>43</sup>

<sup>40</sup> *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967). See also *Northern States Power Co. v. FPC*, 118 F.2d 141, 143 (7th Cir. 1941).

<sup>41</sup> *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), quoting from *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). See also section 309, empowering the Commission to "perform any and all acts, and to prescribe \* \* \* such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act."

<sup>42</sup> The Commission has extended the concept in section 6 to provide for annual licenses, during which the Commission takes appropriate action to properly close out its jurisdiction. See 18 CFR 16.18(b)(1)-(2).

On the other hand, the Commission rejects the suggestion of some industry commenters that section 6 gives the licensee a veto over what the terms of surrender are to be. Under section 6, it would be the licensee that sought an intra-term surrender, in order to be relieved of the obligations under the license. The Commission would be in the position to deny the surrender unless its terms were met.

<sup>43</sup> This policy statement focuses only on decommissioning at the time of relicensing. Licensees have occasionally raised concern that the Commission might unilaterally decide to decommission a project before the end of a license term. However, the terms of section 6 of the Act apply to that situation. The licensee can explicitly or implicitly (by its actions) apply for license surrender, and the Commission can agree to the surrender. The Commission can order surrender where the licensee has accepted a license whose terms expressly permit the Commission to order decommissioning within the license term. Finally,

<sup>34</sup> The relevant sentence reads: Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after \* \* \* public notice.

The words "or surrendered" were the late addition.

<sup>35</sup> FPC Order No. 9, Regulation 10(5), issued Feb. 26, 1921. See also 18 CFR 6.2; FPC Order No. 175 (Attachment p. 28) (1954); FPC, General Rules and Regulations in Force Jan. 1, 1948, § 6.2 (1948).

<sup>36</sup> 59 Cong. Rec. 1046, 1443, 1474-75 (1920) [remarks of Sen. Lenroot].

<sup>37</sup> *Niagara Mohawk Power Corp.*, 49 FPC 1352 (1973), 4 FERC ¶ 61,209 (1978).

<sup>38</sup> See, e.g., *Porcupine Reservoir Co.*, 62 FERC ¶ 62,074 (1993); *Kimberly-Clark Corp.*, 55 FERC ¶ 62,018 (1991); *Red Bluff Water Power Control District*, 7 FERC ¶ 61,295 (1979); *Pennsylvania Electric Co.*, 58 FPC 1749 (1977); *Central Vermont Public Service Corp.*, 56 FPC 2532 (1976).

<sup>39</sup> *Consumers Power Company*, 68 FERC ¶ 61,080 at 61,438-40 (1994); *American Hydro Power Co.*, 60 FERC ¶ 61,237 (1992); 64 FERC ¶ 62,097 (1993) [safety concerns]; *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986); *Duke Power Co.*, 43 FPC 265 (1970). The licensee itself, of course, may prefer this approach, rather than to continue to pay for maintenance and repairs on a project which is no longer generating any power revenues.

Some commenters in this docket have nonetheless suggested that the Commission should stay out of the picture when a license ends. They implicitly concede that the end of licensing, and of power production, does not necessarily mean the end of impacts on public resources and values. However, they contend, where Federal interests are involved, as with Federal lands and threats to navigation, other Federal authorities can simply take over. Otherwise, they contend, the States can do so.

As the system presently operates, the Commission staff and the licensees work with all of these groups to arrange a comprehensive resolution, and, until this is done, the Commission retains jurisdiction by issuing annual licenses. Overall Commission supervision of the process makes much more sense than a piecemeal approach that raises the chance of both overlaps and gaps in coverage.

The Commission consequently contemplates continuation of the existing procedure. Experience suggests that in nearly all instances the interested parties should be able to reach a resolution of the decommissioning approach among themselves. Where this is not possible, the Commission will impose reasonable terms appropriate to the situation, but this is not the approach the Commission favors.

#### C. The Role of Other Federal Agencies

Where project works at issue are located on Federal lands, the Commission's surrender regulations have for decades required the licensee to restore the lands to the satisfaction of the responsible agency when the licensee surrenders its license.<sup>44</sup> Most commonly those agencies are the U.S. Forest Service and the Bureau of Land Management, and both apply analogous principles in permits they grant for use of Federal lands.<sup>45</sup>

Absent specific authority by the Federal agency involved for continued use of Federal lands at the termination of Commission licensing, it is eminently reasonable that the licensee must restore the lands to that agency's satisfaction, at the licensee's expense.<sup>46</sup> No commenter

the Commission can initiate a revocation proceeding under sections 26 and 31 of the Act. In other instances, the licensee has security against mid-term surrenders.

<sup>44</sup> See FPC Order No. 175 (Attachment A p. 28) (1954). See also 18 CFR 6.2.

<sup>45</sup> See 36 CFR 251.60(j) and 43 CFR 2803.4-1.

<sup>46</sup> While the Commission's regulation does not expressly state that it will be at the licensee's expense, this is implicit. The Commission has no authority to subsidize the project by itself paying or requiring the other agency to do so. It might be

presents a persuasive case to the contrary.

The Army Corps of Engineers presumably would sometimes become involved where there are navigable waters. To the extent that new construction in navigable waters is proposed, as where dam removal or modification is in issue, permits are needed from the Corps under the River and Harbor Act.<sup>47</sup> Moreover, were project works to actually pose a serious threat to navigation, it can be assumed that the Corps would step in to protect that interest.

However, commenters have offered no comprehensive legal analysis of the Corps of Engineers' responsibility outside those relatively narrow contexts. Absent that, or a clear indication from the Corps that it intends to take a leading role in assuming broad responsibility for safety and other aspects of projects previously regulated by the Commission and believes that it has the authority to do so, there is little basis for the Commission to count on the Corps of Engineers' assuming significant additional responsibility.

#### D. The Role of States and Municipalities

There remains a relatively large gap in coverage left by Commission withdrawal. However, many States (though not all) have fairly comprehensive programs in effect governing dams and similar structures in their waters, especially in the areas of dam safety and the environment. It is thus important that the responsible State agencies be partners in any arrangement that is worked out at the time when Federal licensing ends.

The attitudes of States (and municipalities) towards the prospect of taking over regulation may vary, depending on the circumstances. Where a project has multiple uses, State or municipal authorities may be willing to assume responsibility in order to keep major nonpower elements of the project in operation. Where this is the case, the Commission will entertain the request that it simply require the shut-down of power operations without further actions that could affect those other functions. It is unlikely that a dam or reservoir serving key municipal water needs, for example, is going to be shut down.

noted that the BLM and Forest Service rules (cited in the previous footnote) specifically state that:

If the holder fails to remove all such structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States, but the holder shall remain liable for the cost of removal of the structures and improvements and for restoration of the site.

<sup>47</sup> See 33 U.S.C. §§ 401, 403.

There could be other situations, however, where a State (or municipality) would be reticent to have responsibility for a project licensed by the Federal Government now transferred to it. This might include cases where there are presently serious problems associated with the project, and/or the project serves no useful function other than power production (which will be unauthorized once Commission licensing ends). Where a State makes a persuasive case as to why it ought not to have to bear the burden of future regulation, the Commission will consider the appropriateness of requiring the affected project works to be removed, thereby eliminating the need for future oversight.

Many factors would enter into such a decision, of course, including (but not limited to) the costs of removal,<sup>48</sup> the burdens on the State of continued supervision, what alternative approaches are available, and the environmental consequences of removal. The Commission will also look to whether it authorized the original construction (and thus was directly responsible for the project being there) or simply issued the original license on an existing project.

Where dams or other project works are left in place, the State may effectively be compelled to assume supervisory responsibility over remaining project works, however unwillingly, because the public interest demands that protection. Some State agencies have complained about any approach that leaves the States with the financial burden of dealing with no-longer-useful or abandoned power projects.

It is not clear that the specific examples cited in the comments are in fact under Commission regulation. Rather, it appears that in most, if not all, of these instances, the projects had never been federally licensed. Nonetheless, where the facts indicate that there may be a significant problem in terms of potential financial threat to State finances, it is a matter for the Commission to consider in deciding how far it will take its own

<sup>48</sup> In the past, the dam removal projects that have been carried out have generally involved relatively modest expenditures. However, that would not invariably be the case. For example, the projected costs of removing the Glines/Elwha dams and restoring the site and the resources impacted by the projects have ranged up to \$300 million, depending on the scope of the work undertaken and other factors. Dam removal costs alone are estimated at about a quarter of that total. Department of the Interior, *et al.*, The Elwha Report; Restoration of the Elwha River Ecosystem & Native Anadromous Fisheries: A Report Submitted Pursuant to Public Law 102-495, Executive Summary 13 (January 1994).

responsibility to deal with the decommissioning process for a particular project, especially with respect to assuring adequate resources for future maintenance of project works that are to be left in place.<sup>49</sup>

Several commenters noted also that a licensee might seek to transfer an increasingly marginal project to a new licensee that lacked the financial resources to maintain it or close it down in an appropriate manner. Through that process, the former owner relieves itself of the responsibility, which then may fall to State authorities or, at least when Federal lands are involved, on other Federal agencies. While the Commission is aware of no widespread problems on this score, it agrees that transfer applications should be scrutinized to foreclose this sort of situation, and where warranted, other authorities should be consulted before transfers are approved.

#### E. The Project After Decommissioning

When a project will no longer be licensed, the Commission's jurisdiction is going to end. The future operation of any remaining works is then the responsibility of whoever next assumes regulatory authority. The Commission does not believe that, at that point, it has the authority to require the existing licensee to install new facilities, such as fish ladders. Basically, the Commission issues a license for a particular period, subject to certain conditions. The licensee may have an opportunity to obtain a new license at the end of that term, subject to new conditions; but, if it elects not to do so, the Commission cannot go forward and require the same future steps to be taken anyway, as part of the decommissioning process.<sup>50</sup> That new facility is a step for any successor agency to take.

Similarly, while the Commission may require licensees to provide certain recreational opportunities in association with licensed activities, that obligation ends when the project is no longer licensed. If these opportunities are to continue at all, it will have to be as a result of the former licensee's voluntary action or the requirements of the new regulatory regime that follows.

On that score, once the Commission's jurisdiction has concluded, the preemption which earlier displaced any

State laws would be at an end. The State would then be at liberty to impose its own licensing or other regulatory regime, free from any restrictions imposed earlier by operation of the Federal Power Act. That is, projects left in place would have to meet State-imposed requirements. Where the owner could not do so, presumably it would have to remove the project or take other appropriate remedial action authorized or required under State law.

The Commission's goal is that generally matters of this type can and will be resolved to the satisfaction of the successor agency as part of the Commission's decommissioning process, obviating the need for any later other action. There could then be a smooth transition to the new regime with a minimum of interruption.

#### IV. Funding Decommissioning Costs

There may be some situations, as noted earlier, where the Commission decides to recommend Federal takeover, which could involve taxpayer funding of project retirement costs. There may also be situations where the level of costs involved is so large that some sort of cost sharing arrangement must be worked out if the retirement plan is to be effectuated.<sup>51</sup> Normally, however, the Commission anticipates that the licensee will be responsible for paying the costs (up to a reasonable level) of the steps needed to decommission the project, since the licensee created the project and benefitted from its operations.

A major focus of the NOI was on possible plans for funding of decommissioning costs over the life of the project. This step would help assure that the funds are available to do the job when the time for decommissioning arrives, thereby avoiding the possibility that State or Federal taxpayers might, by default, be compelled to pay them because the licensee lacks the resources. On the other hand, to require such prior funding in all cases could mean unnecessarily tying up substantial amounts of the capital of financially sound licensees in less than optimum investments for extensive periods.

In any event, there are several impediments to effectively carrying out such a funding program. First, there is the question of determining the proper

period for accumulating the funds. Some would argue that the license term is the proper period. However, it may be possible to anticipate that there is a substantial likelihood that a project will close down before the end of a license period. Poor physical condition, marginal economics, and similar factors may mark this potential situation. On the other hand, the prospect of a project closing down at the end of the license term cannot be assumed to reflect the general pattern, since physically, a hydropower project, with proper maintenance and replacement, may last far beyond the new term.

Secondly, there is the problem of measuring how much funding should be provided. This will depend, *inter alia*, on the scope of the decommissioning that is to occur. As discussed earlier, there are different possible decommissioning scenarios, for which the costs may vary markedly. Only at the time of decommissioning will the costs of that program actually be known.

The Commission's primary concern is that the licensee have the money available to carry out whatever decommissioning steps the Commission decides are appropriate if the project ceases to be licensed. In light of the practical problems involved in trying to deal with events far in the future, and because in many cases the time horizon and general financial strength of the licensee may be such that there is no substantial need for a pre-retirement funding program, the Commission will not act generically to impose such programs on all licensees. Accordingly, where the Commission has not required pre-retirement funding in a license, the licensee has no ongoing obligation to create a decommissioning fund as a contingency for the event that the project is required to be decommissioned at a later date.

There may be particular facts on the record in individual cases, however, that will justify license conditions requiring the establishment of decommissioning cost trust funds in order to assure the availability of funding when decommissioning occurs. The Commission would consider, for example, whether there are factors suggesting that the life of the project may end within the next 30 years, and would also look at the financial viability of the licensee for indications that it would be unable to meet likely levels of expenditure without some form of advance planning.

In other cases, licensees and others may wish to reach an agreement in the context of individual licensing cases concerning procedures for pre-retirement planning and funding. The

<sup>49</sup>The Commission contemplates that its role would end with seeing that the resources are made available at the time of decommissioning. The State would then be responsible for supervision of the future oversight and administration.

<sup>50</sup>On the other hand, during decommissioning negotiations, it might be mutually agreed that, rather than restoring fish passage by tearing down the existing facilities, a new fishway would be built instead.

<sup>51</sup>This may be because the costs reach a level which the Commission considers unreasonable. However, there is a very practical aspect as well. As the costs of decommissioning rise, they may reach a point where it is more economical for the licensee to continue to produce power in order to fund future decommissioning. Where others would like to see the project closed, this provides an impetus for them to share the costs.

Commission encourages creative solutions in this regard.<sup>52</sup>

Without advance planning, the financing of decommissioning costs may well cause problems at the time of decommissioning. Licensees have argued that the Commission should impose no funding requirements in its licenses. While the Commission has decided not to adopt any generic funding requirements, licensees should not view the Commission's decision as an impediment to ordering whatever decommissioning steps it deems appropriate when the time for decommissioning a particular project arrives.<sup>53</sup> The licensee has the responsibility for project retirement. In those situations where a licensee has not been required to undertake pre-retirement funding, and it determines on its own that decommissioning is probable and the costs can reasonably be estimated, a public utility licensee can file to recover such costs in rates.

If funding requirements have been established in a license issued by the Commission, licensees subject to the Commission's ratemaking jurisdiction can recover an appropriate share of funding amounts in subsequent wholesale rate filings.<sup>54</sup> In situations where the Commission has not required pre-retirement funding in a license, and it is subsequently determined that decommissioning is necessary, a licensee that is a public utility may file to recover an appropriate share of decommissioning costs through wholesale rates, on a prospective basis.

The foregoing discussion is directed to project-specific funding. The NOI also raised the possibility of establishing some type of industry-wide fund, financed by annual charges imposed by the Commission. In this instance, the licensee would not be pre-funding its own decommissioning costs but rather would be helping underwrite the costs of other licensees (presumably those lacking the resources to meet their own obligations). The Commission has

<sup>52</sup> See *Consumers Power Company*, 68 FERC ¶ 61,077 at pp. 61,380-83 (1994).

<sup>53</sup> By the same token, the establishment of a fund does not necessarily mean that a project will ultimately be decommissioned. Likewise, any planning and funding that does occur will not control the scope of the ultimate decommissioning, should that prove necessary. If funds prove inadequate, more will have to be supplied. There may also be more funds than are ultimately needed.

<sup>54</sup> If it turns out that costs actually incurred for decommissioning are greater than the funding amounts, the licensee may seek to recover the additional costs through rates. However, if it turns out that the costs actually incurred at the time of decommissioning are less than the funding amounts, the licensee and its shareholders may not keep those amounts; rather, the licensee will be required to refund them to ratepayers.

concluded at the present time that such a fund is inappropriate. There is little specific evidence concerning the need for such a fund,<sup>55</sup> while the practical problems of implementing the program fairly and administering it soundly would be formidable. Should later experience with decommissioning demonstrate a stronger need, the Commission can reassess the issue at that time.

#### List of Subjects in 18 CFR Part 2

Administrative practice and procedure, Electric Power, Natural gas, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Commissioner Bailey dissented with a separate statement attached.

**Lois D. Cashell,**  
*Secretary.*

In consideration of the foregoing, the Commission amends Part 2, Chapter I, Title 18 of the Code of Federal Regulations as set forth below.

#### PART 2—GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for part 2 continues to read as follows:

**Authority:** 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 792-825y, 2601-2645; 42 U.S.C. 4321-4361, 7101-7352.

2. Part 2 is amended by adding § 2.24, to read as follows:

##### § 2.24 Project Decommissioning at Relicensing.

The Commission issued a statement of policy on project decommissioning at relicensing in Docket No. RM93-23-000 on December 14, 1994.

**Note:** This Appendix will not be published in the Code of Federal Regulations.

#### Appendix A—Comment Summary

In response to the NOPR, the Commission received comments and reply comments from a great many commenters, including municipal and non-municipal licensees; federal, state, and local governmental organizations; national, regional, and local environmental, trade, or other organizations and associations; and private citizens. The more substantial comments are identified at the end of this comment summary, grouped by

<sup>55</sup> For example, the main support seems to come from those government authorities who otherwise fear they might have to absorb costs associated with abandoned projects owned by those without significant financial resources. However, those authorities have not shown that they have broadly implemented such a program for permittees within their jurisdictions, as might be expected if major problems had developed on this score.

category and showing the shortened names or acronyms used in this summary. In addition, there was a large volume of comments in the nature of one to three-page letters. Many were from individuals (including operators of small hydro projects) and many were from local or regional organizations or local branches of national organizations.

In general, the commenters fall into two distinct groups of roughly equal size. One group takes what might be loosely characterized as a "strict construction" approach to the legal issues, contending that the Commission's organic statutes do not authorize it to compel the decommissioning of a project except under narrowly prescribed procedures that entail reimbursement of the licensee. The advocates of this position include the licensees and their organizations.

The second group might be loosely characterized as taking a broader approach to statutory interpretation, contending that the Commission has considerable inherent authority to decline to relicense a project whose license has expired, and to compel the licensee to decommission the project (including, if appropriate, removal of a dam or other project facilities) at the licensee's expense. The advocates of this position include a broad array of national, regional, and local environmental groups, as well as federal and state agencies.

Many commenters addressed the specific questions posed in the NOPR. Other commenters expressed more general views. Some commenters expressed their legal analysis in broad terms, with their answers to the questions being framed as cross-references to their broader discussion.<sup>56</sup> Many commenters endorsed the more extensive comments of an association to which they belong, adding supplemental views or emphasizing particular points. Many of the shorter letters referred to the views expressed by organizations that filed lengthier comments. A limited number of commenters filed reply comments.

This summary discusses first the comments on the broader issues and then the comments in response to the specific questions posed by the NOPR.

<sup>56</sup> EEI, for instance, discussed the issues in one broad narrative; APPA divided its comments into separate responses to the specific questions; and NHA commented broadly in the first half of its submission and then responded to specific questions in the second half. Reform and Kennebec also split their comments between a general discussion and specific responses to questions.

### A. Broader Issues

As a preliminary matter, a number of commenters note the range of activities potentially includable within the scope of the word "decommissioning." Depending on the circumstances, it could mean simply ceasing to operate a project, without physically removing any project facilities. At the opposite end of the spectrum would be removing a dam and dredging out the accumulated silt in the reservoir, a potentially complex and costly process that could involve serious environmental impacts of its own. Environmental commenters find legal authority for the Commission to mandate physical removal of project works.<sup>57</sup> Licensees, on the other hand, contend that once a project's license ends and the project ceases to generate electrical power (and, perhaps, the generator is disconnected and removed), the Commission lacks jurisdiction to mandate anything further.<sup>58</sup>

Licensees suggest that hydroelectric projects, if properly maintained, may be physically and economically viable "indefinitely," such that decommissioning would be a rare occurrence.<sup>59</sup> These commenters stress the formidable structural integrity of dams, designed to last for "thousands" of years.<sup>60</sup> Environmental commenters, on the other hand, analogizing to mines, forests, nuclear plants, and landfills, etc., suggest that all hydropower projects have a finite "life-cycle"; that they all silt up in the end; and that plans for their decommissioning should be routinely considered from the outset of their operation.<sup>61</sup> Commenters of all persuasions agree that project facilities that become unsafe should be removed (if they can't be repaired) to alleviate the hazard.<sup>62</sup> Some licensees suggest that when projects become uneconomic the licensee will itself take the initiative of proposing decommissioning and surrender of the license.

Commenters who believe that the decommissioning of a hydropower project will be a comparatively rare event urge case-by-case analysis of the issues as they may arise, in the peculiar factual context presented by the case at hand.<sup>63</sup> Commenters who believe that

decommissioning is part of the inevitable life cycle of all hydropower projects prefer a more generic approach to determining the Commission's policy and practice.<sup>64</sup> These commenters advocate advance planning for decommissioning, contending that, absent a decommissioning policy by the Commission, the inevitable costs of decommissioning will be borne by taxpayers.<sup>65</sup>

As a preliminary matter, a number of commenters draw a distinction between shutting down project operations and removing project facilities, and, along with this, a distinction between the power to cause a project to cease operating and the power to cause someone (*i.e.*, the licensee) to incur the expense of removing its project's facilities. Licensees concede the Commission's authority to terminate a project at relicensing as long as the licensee is compensated for its investment. The compensation could come from either a government or a private purchaser.<sup>66</sup>

In this regard, several commenters suggest (but without legal discussion or citation) that an involuntary decommissioning of a project would constitute a taking of property without due process of law in violation of the U.S. Constitution.<sup>67</sup> Other commenters dispute that assertion, with extended discussion of legal precedent in support of their position. In general, they contend that a license is not a property right, and that the termination of a license does not constitute a taking of property even if the termination results in an economic loss.<sup>68</sup> They go on to contend that the FPA also does not provide an absolute right to compensation.<sup>69</sup>

Citing extensively to the legislative history of the FPA, including its amendments and precursors, licensees argue that Congress sought to encourage investment in hydro power projects by assuring investors that they would be able to recover the value of their project at the expiration of the license.<sup>70</sup> Also citing to that legislative history, environmental groups and government agencies respond that Congress sought to protect the investors' financial interests in the event that the project was taken over and operated by the government, or by another group of investors, after the license expired, but

did not intend to reimburse the investors if the project was decommissioned at the expiration of the license term; at that point, the investors would already have fully recovered their investment.<sup>71</sup>

The crux of the licensees' position<sup>72</sup> is that sections 14 and 15 of the FPA give the Commission four choices at relicensing, and *only* four choices.<sup>73</sup> EEI expresses it as follows:<sup>74</sup>

In a relicensing proceeding, FERC has authority to:

- issue a new license to the existing licensee or a new licensee;
- recommend a federal takeover in accordance with the provision of the FPA applicable to such action;
- issue a nonpower license to an applicant for such a license, or
- issue annual licenses to the existing licensee until a final decision is made.

A unilateral order of surrender to be followed by decommissioning or project removal at the licensee's expense are not options available to FERC under the FPA.

A corollary argument to this view is that the FPA section 15 authority to issue an annual license is mandatory and not discretionary. Thus, the Commission is compelled to issue annual licenses (in perpetuity if necessary) until such time as it either issues a new license or a nonpower license or recommends federal takeover; the FPA does not afford the Commission the option of issuing no license at all.<sup>75</sup>

Environmental groups and government agencies characterize this result as "absurd."<sup>76</sup> Discussing the standards in sections 4 and 10 of the

<sup>71</sup> See, *e.g.*, Wisconsin Department at 3-13; Washington Department at 1-2.

<sup>72</sup> See, *e.g.*, EEI at 16-20.

<sup>73</sup> Section 14 of the FPA, 16 USC 807, authorizes federal takeover of hydropower projects at the expiration of the license, pursuant to prescribed procedures, and provided that the United States pays the licensee its "net investment" in the project, not to exceed its "fair value." Section 15, 16 USC 808, prescribes the relicensing procedures in the event that there is no federal takeover under section 14. These procedures include issuance of a new license (to either the existing licensee or a new licensee), an annual license, or a nonpower license.

The compensation to be paid by the new owner to the prior owner is defined in section 14 to be "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken."

<sup>74</sup> EEI at 3-4. See also NHA at 7-8. EEI further contends (at 13-14) that nonpower licenses can only be used as the transitional authority pending assumption of jurisdiction by another agency, and cannot be used as a vehicle to implant an involuntary decommissioning.

<sup>75</sup> See *e.g.*, EEI at 25, 29; Chelan at 15-16.

<sup>76</sup> See, *e.g.*, Kennebec at 30-34; Kennebec reply comments at 6-7; Michigan at 8.

<sup>57</sup> See discussion and citations below; a variety of legal theories was advanced.

<sup>58</sup> See, *e.g.*, EEI at 12; APPA reply comments at 4-7.

<sup>59</sup> EEI reply comments at 13.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> See, *e.g.*, Reform at 5-6, 11-13.

<sup>62</sup> See, *e.g.*, NHA at 28; APPA at 9.

<sup>63</sup> See, *e.g.*, NHA at 5; EEI at 4; PG&E reply comments. (Reply comments are specifically identified as such; all other citations are to initial comments.) See also New England at 4-5.

<sup>64</sup> See, *e.g.*, Reform at 5-6, 11-13.

<sup>65</sup> Reform at 13-14.

<sup>66</sup> See discussion and citation below.

<sup>67</sup> See *e.g.*, Pacificorp at 3.

<sup>68</sup> Kennebec at 12-18; Walton at 7-8.

<sup>69</sup> Kennebec at 18-20.

<sup>70</sup> NHA at 11-16; EEI at 18, 20-33; Duke at 9-13; Mt. Hope at 4-5.

FPA,<sup>77</sup> as amended by the Electric Consumers Protection Act of 1986 (ECPA), they note that the Commission is required to conduct an extensive inquiry into the alternative, non-power uses of the water, and to consider those uses in deciding whether to issue a new license. They argue from this that Congress surely intended for the Commission to have the authority to conclude that issuance of any form of license (whether new, annual, or nonpower) would be inconsistent with the public interest, and to implement that conclusion by not issuing *any* license.<sup>78</sup> Citing the legislative history of the FPA and its predecessor, the Federal Water Power Act, these commenters contend that Congress intended licenses to be for a finite term with a definite end, implying that they need not be renewed or reissued.<sup>79</sup> They construe the provision for annual licenses as applying solely during the pendency of the relicensing proceedings; if those proceedings conclude with a determination to not issue a license, then there is no further obligation to issue annual licenses.<sup>80</sup>

Reform points out that licensees are required to obtain a water quality certification under section 401(a) of the Clean Water Act<sup>81</sup> as a prerequisite to receiving a new license. Reform contends that it would be absurd to construe the FPA as requiring issuance of an annual license in perpetuity in the event that the water quality certification was denied.<sup>82</sup>

Commerce contends that the authority to withhold permission is basic to and inherent in the concept of a license. Commerce construes the FPA, as amended, and its legislative history, as reserving "paramount rights" in the United States over navigable waters, and refers to "the generic powers and authority of the Commission set forth in section 4(e) to exercise discretion in determining whether or not to issue a license."<sup>83</sup> Commerce construes the nonissuance of a license as the "no action" alternative under the National Environmental Policy Act (NEPA), and seems to construe NEPA itself as supporting adoption of a decommissioning alternative.<sup>84</sup>

Licensees also contend that section 6 of the FPA<sup>85</sup> requires mutual agreement between the licensee and the Commission as a prerequisite to any Commission order requiring removal of project facilities.<sup>86</sup> Other commenters respond that section 6 applies only during the term of the license, and does not preclude unilateral Commission action to compel removal of facilities after the license has expired.<sup>87</sup>

Municipal licensees also emphasize the Act of August 15, 1953,<sup>88</sup> which made certain provisions of the FPA inapplicable to states and municipalities, including the section 14 authorization of federal takeover upon payment of the "net investment" in the project. Municipal licensees emphasize that the purpose of the 1953 legislation was "to provide greater certainty to state and municipal licensees that the public uses and benefits conferred by such projects will not be disrupted,"<sup>89</sup> and to assist state and municipal agencies in financing their projects through the sale of revenue bonds with amortization schedules beyond the term of the license. These commenters contend that Congress deliberately eliminated the possibility of federal takeover of municipal projects so as to encourage investment in them, and that requiring decommissioning at the end of the license term would be inconsistent with the purpose of the 1953 legislation.<sup>90</sup>

Environmental groups and government agencies suggest a variety of sources of legal authority to compel licensees to remove project facilities at the expiration of a license if a new license isn't issued. Some commenters suggest that the Rivers and Harbors Act of 1899 provides a source of authority with respect to the removal of project works on navigable waters.<sup>91</sup> Some commenters cite section 23(b) of the FPA,<sup>92</sup> which requires a Commission license as a prerequisite to construction, operation, or maintenance of hydropower facilities; they contend that the power to order removal of existing unauthorized facilities is inherent in the power to decline to authorize those facilities.<sup>93</sup> Some commenters cite

sections 4(g), 10(c), and 309 of the FPA.<sup>94</sup> Others point to historical precedent.<sup>95</sup> Kennebec suggests that the Commission can compel removal of facilities either by a direct order under FPA section 23(b) or by a "forced surrender."<sup>96</sup>

Licensees contend that their construction of the FPA is consistent with court and Commission decisions.<sup>97</sup> Environmental groups and government agencies cite judicial precedents supporting their more expansive interpretation of the statutory scheme.<sup>98</sup>

Licensees refer to the enactment by Congress in 1992 of the Elwha River Ecosystem and Fisheries Act,<sup>99</sup> which provides a scheme for compensation in the event of the decommissioning of projects on the Elwha River in Washington. Licensees contend that this legislation further confirms that the overall intent of Congress, and the overall scheme of hydro legislation, is that decommissioning and dam removal is a federal responsibility to be implemented through federal takeover with full reimbursement of the licensee.<sup>100</sup> Environmental groups respond that the Elwha River legislation is unique to the peculiar facts and circumstances of that river and its projects and has no dispositive or precedential value with respect to the rest of the legislative scheme.

Licensees stress that hydropower projects provide clean, renewable energy, and contend that the FPA was enacted to foster development of those resources. Licensees also emphasize the environmental and recreational benefits of their projects. Environmental groups, emphasizing the more recent amendments to the FPA that require consideration of fish and wildlife resources and other alternative uses of water, contend that hydropower projects inevitably alter the physical environment to its detriment, by blocking rivers and flooding land, etc.

comments at 5-6; EEI reply comments at 26; Duke reply comments at 3.

<sup>94</sup> Interior at 1; Reform at 16, 25-27; Kennebec at 22-23, 25-26. Section 4(g) of the FPA, 16 USC 797(g), authorizes the Commission to conduct investigations. Section 10(c) of the FPA, 16 USC 803(c), requires the licensee to maintain and repair the project. Section 309 of the FPA, 16 USC 825h, confers general authority on the Commission to implement the FPA. Licensees disagree. APPA reply comments at 2; EEI reply comments at 12.

<sup>95</sup> See, e.g., Kennebec at 20-21.

<sup>96</sup> *Id.* at 27-28.

<sup>97</sup> See, e.g., NHA at 9-11, 16; EEI at 39-43.

<sup>98</sup> See, e.g., Reform at 16-19, 22-24; Interior at 2. Licensees disagree. See, e.g., EEI reply comments at 30-31.

<sup>99</sup> Pub. L. No. 102-495.

<sup>100</sup> NHA at 18-20; EEI at 43-48; APPA at 14-15; James at 5-7.

<sup>77</sup> 16 USC 797 and 803.

<sup>78</sup> See, e.g., Reform at 20-24; Kennebec at 8-12; Kennebec reply comments at 5-8; Interior at 3-4; S'Klallam at 3-4.

<sup>79</sup> See, e.g., Kennebec at 5-7; Interior at 3.

<sup>80</sup> See, e.g., Reform at 24-25.

<sup>81</sup> 33 USC 1341(a).

<sup>82</sup> Reform reply comments at 15-16.

<sup>83</sup> Commerce at 1-3.

<sup>84</sup> *Id.* at 4.

<sup>85</sup> 16 USC 799. Section 6 provides that licenses "may be altered only upon mutual agreement between the licensee and the Commission \* \* \*"

<sup>86</sup> EEI at 33-38; NHA at 21-22; APPA at 5.  
<sup>87</sup> See, e.g., Interior at 6; Reform reply comments at 12.

<sup>88</sup> Pub. L. 83-278, 67 Stat. 587, codified at 16 USC 828-828b.

<sup>89</sup> Water at 9.

<sup>90</sup> Chelan at 7-10; Centralia at 4-5; Grant at 2-3.

<sup>91</sup> See, e.g., Reform at 27.

<sup>92</sup> 16 USC 817.

<sup>93</sup> Kennebec at 21-25, 27; Reform at 25-27; Walton at 11. Licensees disagree. NHA reply

### B. Specific Questions

The NOPR posed 15 specific questions. For convenience each question is reprinted here, followed by a summary of the comments received on it.

1. Does the Commission have the authority to determine that no project should be operated or maintained at the site of a project whose original license has expired? May the Commission decline to issue a new license for the project without issuing an annual license or a nonpower license or recommending federal takeover?

The comments on these issues were summarized above. With respect to the first sentence, licensees contend that the Commission's authority is limited to recommending federal takeover with full compensation to the original licensee. Environmental groups and government agencies disagree, finding implicit authority to decline to issue any license at all, neither a new license, nor a nonpower license, nor an annual license. Licensees contend that if the Commission does not issue a new license it must issue either an annual license or a nonpower license or recommend federal takeover. Environmental groups contend that once the relicensing proceeding has ended there is no further requirement to issue annual licenses (or anything else in lieu thereof).

2. Does the Commission have the authority to require the holder of an annual license to file an application to surrender it? Assuming no new application has been filed, can the Commission require the holder of an annual license to decommission the project and cease operating it?

NHA contends that FPA section 6 precludes involuntary decommissioning unless no application for a new license has been filed or the original licensee refuses to accept the terms of the new license tendered to it.<sup>101</sup> NHA believes the Commission could construe a refusal to accept a "reasonable" new license, or a cessation of project operations, as constituting an implied surrender, but with substantial legal restraints on the Commission's ability to compel particular actions (e.g., removal of facilities) after surrender has occurred.<sup>102</sup>

In addition to other statutory provisions discussed above, Reform contends that the Commission could issue a nonpower license, "on its own motion" under FPA section 15(f), that compelled a licensee to decommission its project, remove project facilities, and restore the project site.<sup>103</sup> Kennebec

finds such authority inherent in FPA section 309, and would use an annual license as the vehicle to compel decommissioning and site restoration.<sup>104</sup> Interior suggests that the Commission can use either a nonpower license or an annual license as a vehicle for mandating decommissioning.<sup>105</sup>

Commerce believes that the Commission can reasonably conclude that Congress left a gap in the statutory scheme, and that the Commission can utilize its "policymaking authority and expertise" to fill that gap by construing the FPA to authorize the Commission "to order the surrender of an expired license and require the decommissioning of the project by the license holder." Commerce "encourages the Commission to take further regulatory or interpretive action to provide a better foundation" for this position.<sup>106</sup>

3. Should the licensee's conduct and/or the particular circumstances of the case affect in any way the Commission's authority regarding decommissioning? For example, should it make any difference if the licensee requests or consents to project decommissioning? Should it make any difference if the decommissioning issue affects only part of a project (such as a reservoir, dam, or some other project facility)?

Interior and Commerce regard these factors as irrelevant to the Commission's authority to mandate decommissioning.<sup>107</sup> Kennebec suggests that the Commission's analysis under FPA sections 4 and 10 could result in a determination to omit authority at relicensing for some previously-licensed project facilities.<sup>108</sup> APPA agrees, provided that the new license as a whole is "reasonable."<sup>109</sup> Reform suggests use of FPA section 23(b) to remove those portions of a project that are located in navigable waters.<sup>110</sup>

4. Does question No. 1 pose an implicit choice between licensee responsibility and federal takeover, i.e., an implicit choice as to who is responsible for removing project works and who should bear that cost? If the Commission required the holder of an annual license to file an application to surrender it, would the Commission be required to ensure that the annual licensee received its "net investment" in the project and reasonable severance damages?

NHA contends that the choice is explicit, and is determined by the

FPA.<sup>111</sup> APPA distinguishes the federal takeover process under FPA section 14 from a voluntary "surrender" within the mutual agreement parameters of FPA section 6; notes that municipal license projects "are not subject to recapture or relicensing at the Section 14 price"; and contends that FPA section 15 requires issuance of annual licenses "until it receives the compensation to which it would be entitled in a federal takeover, paid either by the United States or a new licensee, or until it is offered a new license on reasonable terms" defined as "terms which yield a license that would be valued at no less than the takeover compensation."<sup>112</sup>

Reform distinguishes between the transfer of a project and the decommissioning of a project, contending that under FPA sections 14 and 15 the licensee is entitled to recover its net investment and reasonable severance costs only in the event of a federal takeover, third party takeover, or grant of a nonpower license, all of which involve a transfer of ownership of a project. In Reform's view, in the event of decommissioning of the project—either voluntary or involuntary—there is no change of ownership and, therefore, the "licensee does not qualify for the return of its net investment."<sup>113</sup>

Kennebec contends that the Commission has the legal authority to determine, in effect, who should most appropriately bear the cost of decommissioning: the "taxpayer" through federal takeover or the licensee. Kennebec believes those costs are most efficiently and appropriately borne by the licensee.<sup>114</sup>

Interior and Commerce agree that compensation of the licensee's net investment is required if the project is taken over, but not if it is decommissioned.<sup>115</sup>

5. Barring federal takeover or issuance of a non-power license or of a new license to a third party applicant, must an existing licensee be given a new license with whatever conditions are necessary for mitigation, enhancement, and protection of natural resources regardless of the effect of the conditions on the economic viability of the project? If such a new license were issued and the applicant declined the license, refused to comply with its terms, or indicated an intent to abandon the project, could the Commission construe the applicant/existing licensee's position as a *de facto* application to surrender the license? Could the Commission then order the decommissioning of part or all of the project (with or without removal of project facilities)?

<sup>104</sup> Kennebec at 38.

<sup>105</sup> Interior at 1.

<sup>106</sup> Commerce at 5-7.

<sup>107</sup> Interior at 6; Commerce at 8.

<sup>108</sup> Kennebec at 40.

<sup>109</sup> APPA at 6-7.

<sup>110</sup> Reform at 29.

<sup>111</sup> NHA at 30.

<sup>112</sup> APPA at 7-9.

<sup>113</sup> Reform at 30-31; see also Kennebec at 42.

<sup>114</sup> Kennebec at 41.

<sup>115</sup> Interior at 6; Commerce at 8-9.

<sup>101</sup> NHA at 22-25.

<sup>102</sup> *Id.* at 25-27.

<sup>103</sup> Reform at 25-28. EEI, at 26-27, disagrees.

NHA contends that FPA section 15 requires that new licenses must be issued "upon reasonable terms," and that this precludes issuance of a new license containing environmental mitigation measures whose costs render the project uneconomic.<sup>116</sup> NHA would also regard such a result as an impermissible balancing of developmental and nondevelopmental values under the ECPA amendments to the FPA.<sup>117</sup>

APPA contends that if the Commission does not recommend federal takeover, issue a nonpower license, or issue a new license "on reasonable terms," then it must continue issuing annual licenses; it cannot terminate the proceeding and stop issuing annual licenses if a licensee rejects an "unreasonable" new license. APPA then goes on to explore the potential applicability of the Rivers and Harbors Act, and sections 4(g) and 23(b) of the FPA, with respect to removal of facilities after a license has expired, and also explores the related ramifications of sections 26 and 31 of the FPA.<sup>118</sup>

Reform suggests a variety of legal authority to which the Commission might resort if a licensee declines to accept a new license, or accepts it but declines to implement the mitigatory measures that render it uneconomic.<sup>119</sup> Kennebec contends that sections 10 and 15 of the FPA provide adequate authority to impose reasonable environmental conditions on a new license even if those conditions render the project uneconomic. Kennebec further contends that the Commission has authority to compel the licensee to "remove the project" if the licensee declines to accept a new license so conditioned.<sup>120</sup>

Interior contends that the Commission must deny the relicense application if continued operation of the project is not in the national interest. Under the circumstances posited in the latter part of the question, Interior would have the Commission pursue the matter as a *de facto* license surrender or as an enforcement case under section 31 of the FPA.<sup>121</sup> Commerce, New York, and Michigan, would treat it as a *de facto* surrender.<sup>122</sup>

6. If the Commission has the authority to require the holder of an annual license to file an application to surrender it, and if the Commission requires that the project be decommissioned, may the Commission require an existing licensee to install new project facilities to protect the environment, such as fish screens or fish passage facilities, as part of the decommissioning process? May the Commission require the existing licensee to remove any project facilities as part of the decommissioning process or, alternatively, to maintain certain project facilities in perpetuity as part of that process? In particular, does the Commission have the legal authority to require removal of a dam as part of the relicensing process? Would the answers to any of the above be different if only part of the project were decommissioned?

NHA contends that, in a surrender or decommissioning situation, the Commission's jurisdiction terminates and passes on to relevant federal or state authorities once the license has been surrendered and the project has ceased generating electricity.<sup>123</sup> APPA notes that many licensees lease their dams but do not own them, and that the leases are not likely to permit removal of the dam.<sup>124</sup> APPA contends that the Commission's statutory responsibility is to regulate functioning hydropower projects, and that "ecosystem restoration" after decommissioning is the province of other governmental agencies.<sup>125</sup> Montana Power contends that the licensee's obligations are limited to making certain that the project is no longer capable of generating electricity and ensuring that the dam is left in a safe condition.<sup>126</sup>

Reform contends that the Commission has inherent authority to attach environmental mitigatory conditions at any stage, including decommissioning. Reform suggests that, in the long run, removal of a dam would be less costly than "perpetual" maintenance and rebuilding of it.<sup>127</sup>

Citing section 23(b) of the FPA, Kennebec also finds inherent authority to mandate environmental mitigation at decommissioning. Kennebec construes such measures as less costly than removal of the project, and therefore inherent in the authority it perceives for the Commission to mandate project removal.<sup>128</sup> Kennebec also contends that the Commission has authority to compel a licensee to remove its dam at the expiration of its license.<sup>129</sup>

Interior and Commerce believe that the Commission has inherent authority to mandate either partial or total decommissioning, with or without environmental mitigatory measures.<sup>130</sup> Commerce contends that the Commission should require installation of new fish passage facilities as part of a surrender or decommissioning process if the Commission deems such fishways necessary or if such facilities are prescribed by the Secretary of Commerce or the Secretary of Interior pursuant to section 18 of the FPA.<sup>131</sup>

7. May the Commission issue a new license to an existing licensee that prefers to continue operating a project that is no longer economical, rather than incur the one-time cost of decommissioning the project?

NHA points out that the cost of decommissioning a project must be factored into the determination of which alternative is the most economical. In other words, it may be less costly to operate the project than to shut it down or remove it. NHA encourages the Commission to defer to market forces to determine the future economic viability of existing, operating projects.<sup>132</sup>

Reform contends that since all projects have a finite life, the one-time cost of decommissioning is inevitable and does not justify operation of an otherwise uneconomic project.<sup>133</sup> Several commenters point out that a project may have beneficial flood control or recreational purposes that justify continuation of its operations even if its electric generating functions are not, by themselves, economic.<sup>134</sup>

The Western Urban Water Coalition stresses the importance of not decommissioning hydropower projects that serve municipal water supply purposes, which is often a vital primary or secondary purpose of projects that also generate electricity. In this regard, it refers to FPA section 15(f) as providing a mechanism for municipal licensees, through the use of nonpower licenses, to temporarily ensure the continued operation of projects that are needed for water supply purposes.<sup>135</sup> It also recommends preparation of an environmental impact statement that analyzes the impact, of any proposed decommissioning of a project, on water supply and existing water supply

<sup>116</sup>NHA at 31.

<sup>117</sup>NHA at 31-33.

<sup>118</sup>APPA at 9-12. Sections 26 and 31 of the FPA, 16 U.S.C. 820 and 823b, generally pertain to violation of the terms of a license and Commission remedies in response thereto. See also EEL at 27.

<sup>119</sup>Reform at 32.

<sup>120</sup>Kennebec at 44-46.

<sup>121</sup>Interior at 7.

<sup>122</sup>Commerce at 9-10; New York at 2; Michigan at 9.

<sup>123</sup>NHA at 34; see also Central Maine at 4.

<sup>124</sup>APPA at 13.

<sup>125</sup>*Id.* at 15.

<sup>126</sup>Montana Power at 10.

<sup>127</sup>Reform at 33-34.

<sup>128</sup>Kennebec at 45-46.

<sup>129</sup>Kennebec reply comments at 8-11.

<sup>130</sup>Interior at 7-8; Commerce at 11.

<sup>131</sup>Commerce at 10. Section 18 of the FPA, 16 USC 811, requires the Commission to include the Secretaries' fishway prescriptions in any license it issues.

<sup>132</sup>NHA at 35-37.

<sup>133</sup>Reform at 34-35.

<sup>134</sup>Kennebec at 47; Nebraska at 3-4; New York at 2; Brazos.

<sup>135</sup>Water at 3-5, 10.

facilities and the feasibility and costs of alternative water supply facilities.<sup>136</sup>

Mines urges the Commission to consider the socioeconomic impact of decommissioning hydropower projects, pointing out that electricity can account for as much as one third of the cost of smelting aluminum. Thus, the loss of a source of affordable electricity could lead to a loss of jobs and social dislocation.

New York suggests that if a decision is made to continue operation of an uneconomic project because of its other benefits, then long-term maintenance costs could be shared by government agencies or financed out of a decommissioning trust fund.<sup>137</sup>

Central Maine states that, because the cost of applying to surrender a license is the same as the cost of applying for a new license, under certain circumstances there is a financial incentive to seek a new license for an uneconomic project.<sup>138</sup>

8. What are the existing licensee's responsibilities with respect to decommissioning, if the existing licensee does not apply for a new license and wants to abandon the project? In such a situation, is a licensee responsible for decommissioning the project, with or without removal of facilities, at the end of the term of the license or of the project's useful life? If so, how should "useful life" be defined?

NHA states that there is no means of predicting a project's useful life; it can only be determined after the fact on a case-by-case basis. NHA refers to U.S. projects that have been in operation since the previous century, and dams in India and Ceylon that have stored water for irrigation for over 2000 years. NHA states that projects can be damaged or destroyed by natural events (e.g., earthquakes, landslides, or floods), or can be rendered obsolete by improper or outmoded design or construction, or by improper maintenance or operation. A project's useful life could also be affected by economic circumstances, or by the conditions imposed in a license and their related costs.<sup>139</sup>

Reform states that "useful life" has been defined as "the number of years as a baseload facility plus the number of years as an indeterminate load facility."<sup>140</sup> Wisconsin Electric suggests a definition based on "useful economic life" measured in terms of the project's capacity, the value of its energy, and its projected future costs.<sup>141</sup> Walton defines

"useful life" as the length of time during which the project is profitable, but with profitability adjusted to include "social and environmental costs" including the costs of dam removal and associated sediment control.<sup>142</sup>

Interior believes that it is reasonable to require the licensee to bear the cost of decommissioning after it has enjoyed the economic benefits of the license.<sup>143</sup> Commerce urges the Commission to require prompt removal of project facilities within a "reasonable period" after expiration of the license "rather than allowing projects to remain abandoned until the end of a 'useful life' threshold."<sup>144</sup>

New York notes that the "useful life" of a hydropower project could run much longer than that of a nuclear plant, and that the project could be abandoned well before it reaches the end of that useful life. Therefore, New York would require that decommissioning planning take place at the midpoint of the term of the license.<sup>145</sup>

Susquehanna recommends that "the Commission should commission a comprehensive study to develop guidelines to determine the useful life and projected cost of decommissioning a 'typical' or generic project." Susquehanna recommends that licensees submit decommissioning studies 20 years in advance of license expiration; Susquehanna believes this would provide adequate time for planning.<sup>146</sup>

Oregon advises that the Oregon Public Utility Commission has the authority to allow rate recovery for project decommissioning for regulated utilities. Oregon suggests that unregulated project owners could treat decommissioning as a cost of doing business.<sup>147</sup>

Alabama Power points out that if the Commission determines that the public interest mandates relicensing a project after a trust fund has been accumulated to decommission it, then the trust will have increased the operating cost of the project for no useful purpose.<sup>148</sup>

9. Assuming that project facilities removal/decommissioning is the project owner's responsibility, how should the appropriate time to begin recognition of this liability be determined in light of the fact that most projects continue to be economic when the original license expires? Would it be appropriate to impose such a requirement at the time the first new license is issued?

NHA reiterates its view that the useful life of a project cannot be determined in advance, and that licensees cannot be compelled to decommission their projects without their consent. Therefore, it rejects any generic rule on this subject.<sup>149</sup>

APPA points out that decommissioning in the sense of shutting down project operations without removing the dam is relatively inexpensive, and contends that removing a dam is too speculative to warrant collection of funds in advance. APPA would allow licensees flexibility to determine when and how to accumulate funding for decommissioning, noting that project costs are frequently front-loaded in the earlier years of the project.<sup>150</sup>

Interior and Reform advocate inclusion in all licenses of a condition reserving the Commission's right to mandate decommissioning of the project if it ceases to be in the public interest to continue operating it.<sup>151</sup> Commerce would review the propriety of decommissioning at license expiration.<sup>152</sup>

10. Can the Commission condition new licenses (if so requested) to require a reserve or trust fund that could be used to finance the cost of decommissioning and/or the removal of project facilities when the new license expires? If so, under what circumstances should it do so?

NHA contends that, since in its view the Commission lacks statutory authority to compel decommissioning, it also lacks legal authority to mandate a trust fund for that purpose.<sup>153</sup> APPA finds legal authority for a trust fund only with respect to minor licenses when sections 14 and 15 of the FPA are waived.<sup>154</sup>

Reform finds legal authority for mandating trust funds in section 10(c) of the FPA, and would have the Commission issue regulations requiring the creation of trust funds. Reform would also require licensees to submit decommissioning plans.<sup>155</sup>

Referring to regulations governing the decommissioning of nuclear facilities, Susquehanna believes that a decommissioning trust fund requirement would fall within the scope of the Commission's authority, but does not elaborate on the source of that legal authority.<sup>156</sup>

<sup>136</sup> *Id.* at 12-13.

<sup>137</sup> New York at 3.

<sup>138</sup> Central Maine at 3.

<sup>139</sup> NHA at 37-40.

<sup>140</sup> Reform at 35-36.

<sup>141</sup> Wisconsin Electric at 8.

<sup>142</sup> Walton at 13.

<sup>143</sup> Interior at 8.

<sup>144</sup> Commerce at 11-12.

<sup>145</sup> New York at 3.

<sup>146</sup> Susquehanna at 1-3.

<sup>147</sup> Oregon at 4.

<sup>148</sup> Alabama Power at 8-9.

<sup>149</sup> NHA at 40-41.

<sup>150</sup> APPA at 17.

<sup>151</sup> Interior at 8-9; Reform at 36-37.

<sup>152</sup> Commerce at 12.

<sup>153</sup> NHA at 42.

<sup>154</sup> APPA at 18-19.

<sup>155</sup> Reform at 38-39.

<sup>156</sup> Susquehanna at 2-3.

Oregon notes that its Energy Facility Siting Council has adopted regulations that require site certificate applicants to demonstrate their ability to pay for decommissioning.<sup>157</sup>

Michigan contends that "by requiring the establishment of funding mechanisms, FERC will ensure that a marginally-funded prospective licensee is only issued a license if it has the funds to eventually retire the project."<sup>158</sup>

Public Pool contends that the Commission cannot mandate involuntary decommissioning, but states that in the event of voluntary surrender or abandonment the licensee would be responsible for ensuring public health and safety, including removal of facilities if necessary, and that a funding mechanism may be appropriate for this purpose.<sup>159</sup>

Consolidated contends that establishing mandated reserve funds for decommissioning places a disproportionate burden on independent non-utility licensees and industrial owners because investor-owned utilities and municipalities can recover the additional cost of decommissioning from their respective ratepayers and taxpayers.<sup>160</sup> Washington Water believes that, as an investor-owned utility, it would be required to pay income taxes on the revenues collected for such a fund, and would therefore have to charge its customers more than the direct cost of the fund.<sup>161</sup>

Wisconsin Electric suggests that the revenues allocated to a trust fund for decommissioning might otherwise be used to finance "upgrades, replacement, repair and redevelopment" of a project, suggesting that the requirement for a trust fund would shorten the useful life of the project by reducing its level of maintenance. Wisconsin Electric further suggests that, if the Commission mandates a trust fund, it should reduce its maintenance standards commensurately.<sup>162</sup>

11. There are licensees over which the Commission does not have ratemaking jurisdiction. Should the Commission establish accounting or other requirements and undertake to audit these entities to ensure the availability of funds for decommissioning?

NHA contends that, since in NHA's view the Commission lacks authority to mandate decommissioning, it also lacks

authority to establish accounting requirements to implement decommissioning.<sup>163</sup> Several commenters state that under the Act of August 15, 1953, 16 USC 828b, states and municipalities cannot be required to comply with the Commission's records and accounting procedures.<sup>164</sup> Reform would find legal authority under section 10(c) of the FPA to impose accounting requirements regardless of the status of the licensee, and would have the Commission impose such requirements.<sup>165</sup> Walton distinguishes between ratemaking regulatory functions, on the one hand, and accounting requirements that implement trust fund or other license requirements that are designed to protect "the public's interest in health, safety, navigability, and environmental quality."<sup>166</sup>

12. Can and should the Commission include, in either a new or an original license, a requirement that the licensee accumulate a fund or reserve that can be used to retire or decommission the project, including removal of project facilities, at the termination of the license? Would the propriety of such a condition depend either (1) on whether there is some particular threshold of evidence in the present record indicating that project decommissioning may or would be appropriate in the future, or (2) on the agreement of the license applicant to accept such a condition in a new license?

APPA would impose a trust fund requirement only on minor licensees whose licenses require removal of the dam at the expiration of the license.<sup>167</sup> Reform would impose a trust fund requirement in all licenses, with the cost of the project's decommissioning to be determined in the environmental assessment or environmental impact statement at the time of licensing.<sup>168</sup> EPA states that decommissioning is a reasonable alternative that should be explored in the environmental analysis associated with the relicensing process. This exploration should include the potential impact of decommissioning on water quality because the release of stored sediments could adversely affect aquatic resources.<sup>169</sup>

Michigan contends that if there is evidence in the record that decommissioning is likely to occur within 50 years it would be "arbitrary

and capricious" for the Commission not to require a decommissioning fund.<sup>170</sup>

13. What alternatives would there be to requiring individual licensees to contribute to a project-specific fund? Would it be feasible and appropriate to have a program-wide fund, funded through a collection of charges for that purpose from all licensees?

APPA contends that there is no legal authority for compelling licensees to contribute to a program-wide fund, and that such a fund would be quite impractical to establish. APPA contends that such a fund would inevitably be inequitable, penalizing either small or large projects, and raising a host of complex accounting questions, some of which APPA poses back to the Commission.<sup>171</sup>

Reform proposes a two-tiered system under which each licensee would be responsible for its own decommissioning costs but would also make modest contributions to a program-wide "insurance fund" to finance decommissioning of projects whose licensees lack the necessary funds.<sup>172</sup>

Kentucky suggests that the Commission consider "the need for a national decommissioning fund, supported by annual fees paid by licensees, to address abandoned projects." It believes that these costs should be borne by "those who build the dam and reap the benefits of it."<sup>173</sup>

EPA suggests that "the Commission consider the approaches to site restoration responsibility in mining operations as possible models for developer funding of dam removal and site restoration."<sup>174</sup>

Interior encourages the Commission to explore the bonding formulae used by the mining and nuclear energy industries to calculate and administer decommissioning and site restoration funds. Interior recommends that the Commission "consider pooling funds within certain geographical units, perhaps by watershed or geographical regions. A reserve or trust fund supported by a single project or a group of projects in a river basin could receive annual monies based on a percentage of construction or removal costs, profit margins, generating capacity, or other project features."<sup>175</sup>

Commerce suggests consideration of a program-wide fund administered by either the Commission or an independent authority analogous to a

<sup>157</sup> Oregon at 8-9.

<sup>158</sup> Michigan at 12.

<sup>159</sup> Public Pool at 8-9.

<sup>160</sup> Consolidated at 6.

<sup>161</sup> Washington Water at 10-11.

<sup>162</sup> Wisconsin Electric at 9-10.

<sup>163</sup> NHA at 43.

<sup>164</sup> APPA at 20; Chelan at 10, 20-21; Centralia at 6-7. Centralia goes on to contend that the lack of legal authority to prescribe accounting requirements means that the Commission also lacks legal authority to audit municipal licensees' books.

<sup>165</sup> Reform at 39-40.

<sup>166</sup> Walton at 15.

<sup>167</sup> APPA at 20-21.

<sup>168</sup> Reform at 41-42.

<sup>169</sup> EPA at 2.

<sup>170</sup> Michigan at 12.

<sup>171</sup> APPA at 21-23.

<sup>172</sup> Reform at 43.

<sup>173</sup> Kentucky at 1.

<sup>174</sup> EPA at 2.

<sup>175</sup> Interior at 9.

public utility commission, but believes project-specific funds would be preferable.<sup>176</sup>

New York suggests that new projects be required to establish a trust fund, but that existing projects contribute to a statewide or regional pool of funds. New York expresses concern that a nationwide pool of funds might lead to inequitable use of the funds by different regions.<sup>177</sup>

Oregon notes that a program-wide fund would finance decommissioning of "orphaned" projects, but believes the problems inherent in administering it would outweigh the benefits in that it would likely be contentious, burdensome, and inequitable. Oregon also suggests that part of a fund could be used "as an endowment" to help finance maintenance. Oregon states that it might "be willing to assume responsibility for some projects that no longer generate power."<sup>178</sup>

Walton proposes a "multi-faceted approach" that includes project-specific funds, regional funds, watershed funds, and multi-project single owner funds, as appropriate.<sup>179</sup> S'Klallam suggests individual performance bonds backed up by an industry-wide fund.<sup>180</sup> Seattle suggests a national decommissioning insurance fund financed through fees assessed on all licensees.<sup>181</sup>

14. With respect to both a project-specific fund and a program-wide fund, what mechanisms would be used for collecting and administering the money? Would such a fund be administered by the licensees (jointly or severally), by State government agencies, or by the Commission? Who would determine how much money to collect, and pursuant to what guidelines? Who would determine how and when to allow monies from the fund to be dispersed, and what findings would be needed to make those determinations? What accounting standards would be utilized?

APPA suggests that there are no good answers to these questions, and that a program-wide fund would be inconsistent with sound regulatory policy.<sup>182</sup>

Reform would require each licensee to establish a segregated fund for each of its projects, administered by a corporate trustee appointed by the licensee, and subject to periodic audit by the Commission. The Commission would determine the amount of money to be collected in the fund, based on its environmental analysis at relicensing of

the cost of restoring preproject conditions at the project site. The money would be accumulated either through prepayment and appreciation or through periodic payments into an external sinking fund. The Commission would oversee the fund's investment strategy through promulgation of regulations. The Commission would determine when to decommission the project, and would require periodic financial accounting.<sup>183</sup>

Vermont contends that "[l]icensees should be required to project the cost of decommissioning and create a decommissioning fund through an annual set aside that would enable decommissioning by the end of the license term."<sup>184</sup> The estimated cost could be based on either dam retention or dam removal, with due consideration to any flood control purposes served by the dam. Vermont would also include a national fund to cover license surrenders by project owners who can't afford decommissioning costs. Vermont suggests use of a standard license article to implement whatever policies are adopted.

Commerce suggests that project-specific trust funds could be administered by the licensee under strict guidelines established by the Commission, either in the license or generically, including minimum funding requirements and restrictions on investment interests, with Commission monitoring during the course of the license.<sup>185</sup>

New York prefers that decommissioning funds "be controlled at the state level. FERC could ultimately determine the amount of money to collect, based on the recommendations of consulting agencies and based on estimates provided as part of decommissioning plans submitted by the licensee."<sup>186</sup>

Michigan believes that the licensees should administer project-specific trust funds, and that the states, "on behalf of the ratepayers, as appropriate, and as guardians of the public trust, as well as their citizens' health, welfare, and safety, should be the beneficiaries."<sup>187</sup> Washington Department advocates control of the fund by the Commission, to best assure that the money will be available when needed.<sup>188</sup>

New England suggests a case-by-case approach, fine tuning the trust fund mechanism to the peculiar facts and

circumstances of each project.<sup>189</sup> PG&E also emphasizes the project-specific nature of decommissioning procedures and costs, ranging from removal of generating equipment to removal of a dam.<sup>190</sup>

Northern proposes, as an alternative to trust funds, that licensees incorporate estimated dam removal costs into depreciation for each specific project, so that the project owner would "carry a negative value for each project." Northern also suggests use of an internal account similar to an amortization reserve. A further alternative would be allowing the licensee to demonstrate that "the current net worth of all company assets" is large enough to cover any estimated project removal costs. All of these alternatives would be subject to verification through periodic Commission audit.<sup>191</sup>

Peninsula suggests that some licensees might want to cooperate on a funding pool for a trust fund, perhaps with an insurance company, while others may prefer to self-finance through project-specific funds.<sup>192</sup>

15. Would it be appropriate for the Commission to propose new regulations, license articles, or a policy statement that address any of the above matters? If so, what new regulations, license articles, or policy clarification should the Commission consider?

As noted above, licensees and their associations generally favor a case-by-case approach to decommissioning issues as they arise. APPA proposes elimination of certain existing regulations that it believes to be inconsistent with the FPA.<sup>193</sup> A number of commenters recommend that the Commission establish a decommissioning policy through the adoption of new regulations and standard license articles.<sup>194</sup> Interior suggests that the articles set forth the Commission's policy on decommissioning including requirements for advance planning and for funding mechanisms.<sup>195</sup>

Commerce urges the Commission to promulgate decommissioning standards in a policy statement, with implementing regulations to clarify that the Commission will mandate decommissioning when it finds that it would best serve the public interest. Commerce also suggests adding license

<sup>189</sup> New England at 7-9.

<sup>190</sup> PG&E at 7.

<sup>191</sup> Northern at 4-5.

<sup>192</sup> Peninsula at 13.

<sup>193</sup> APPA at 24.

<sup>194</sup> Reform at 48; Interior at 10; Michigan at 13-14; Washington Department at 3; New York at 4; see also Walton at 19-20.

<sup>195</sup> Interior at 10.

<sup>176</sup> Commerce at 13-15.

<sup>177</sup> New York at 3.

<sup>178</sup> Oregon at 5-6.

<sup>179</sup> Walton at 17.

<sup>180</sup> S'Klallam at 16.

<sup>181</sup> Seattle reply comments.

<sup>182</sup> APPA at 23.

<sup>183</sup> Reform at 43-47; see also Walton at 17-19.

<sup>184</sup> Vermont at 1-2.

<sup>185</sup> Commerce at 14; see also Walton at 17-19.

<sup>186</sup> New York at 4.

<sup>187</sup> Michigan at 13.

<sup>188</sup> Washington Department at 2.

articles to establish a decommissioning reserve fund.<sup>196</sup>

Kennebec recommends issuance of a policy statement clarifying the Commission's authority to mandate decommissioning, removal of project works, and "returning the site to its natural state." Kennebec also suggests the possibility of new regulations, or of new license articles, but in such a manner as to avoid restricting the Commission's flexibility to mandate decommissioning even absent such articles in the license.<sup>197</sup>

The U.S. Forest Service supports adoption of regulations on decommissioning, but believes that new legislation may be needed to clarify the Commission's legal authority. In particular, the Forest Service seeks clarification as to its own responsibilities, and that of other federal land management agencies, in the event that a licensee "abandons" a project but can't afford to remove project facilities. The Forest Service suggests that the Commission ascertain, during the licensing process, what it will cost to decommission such projects; require a trust fund for that purpose; and clarify these procedures and requirements in new regulations.

#### Commenters

##### Federal Agencies

National Marine Fisheries Service (NMFS)  
U.S. Department of the Interior (Interior)  
U.S. Department of the Interior, Bureau of  
Mines, Western Field Operations Center  
(Mines)  
U.S. Environmental Protection Agency (EPA)  
U.S. Forest Service

##### State Agencies

Kentucky Department for Environmental  
Protection (Kentucky)  
Michigan Department of Natural Resources  
(Michigan)  
New York Department of Environmental  
Conservation (New York)  
State of Oregon (Oregon)  
State of Vermont (Vermont)  
Washington Department of Wildlife  
(Washington Department)  
Wisconsin Department of Natural Resources  
(Wisconsin Department)

##### Associations

American Forest and Paper Association  
(Paper)  
American Public Power Association and  
Certain Public Systems (APPA)<sup>198</sup>  
American Whitewater Affiliation  
(Whitewater)  
Appalachian Mountain Club (Appalachian)  
Edison Electric Institute (EEI)<sup>143</sup>  
Elwha S'Klallam Tribe (S'Klallam)

Friends of the Earth (Earth)  
Hydropower Reform Coalition (Reform)<sup>143</sup>  
Industrial Licensee Group (Industrial)  
Izaak Walton League (Walton)  
Kennebec Coalition (Kennebec)  
Natural Hydropower Association (NHA)<sup>143</sup>  
Northwest Hydroelectric Association  
(Northwest)  
Pacific Rivers Council (Pacific)  
Public Generating Pool (Public Pool)  
Public Power Council (Public Power)  
Trout Unlimited (Trout)  
Western Urban Water Coalition (Water)

##### Municipal Licensees

Brazos River Authority (Brazos)  
City of Centralia, Washington (Centralia)  
City of New Martinsville, West Virginia (New  
Martinsville)  
City of Saint Cloud, Minnesota (Saint Cloud)  
City of Seattle, Washington (Seattle)<sup>143</sup>  
Nebraska Public Power District (Nebraska)  
Ketchikan Public Utilities (Ketchikan)  
Oroville-Wyandotte Irrigation District, Friant  
Power Authority, and Tri-Dam Project  
(Oroville-Wyandotte)  
Public Utility District No. 1 of Chelan  
County, Washington (Chelan)  
Public Utility District No. 2 of Grant County,  
Washington (Grant)

##### Non-Municipal Licensees

Alabama Power Company and Georgia Power  
Company (Alabama Power)<sup>143</sup>  
Allegheny Power System (Allegheny)  
Bangor Hydroelectric Company (Bangor)  
Central Maine Power Company (Central  
Maine)  
Consolidated Hydro, Inc. (Consolidated)  
Duke Power Company (Duke)<sup>143</sup>  
Idaho Power Company (Idaho Power)  
James River Corporation (James)<sup>143</sup>  
Montana Power Company (Montana Power)  
Mt. Hope Hydro Inc., United Energy  
Corporation, and Liberty Power  
Corporation (Mt. Hope)  
New England Power Company (New  
England)  
Northern States Power Company (Northern)  
Pacific Gas and Electric Company (PG&E)<sup>143</sup>  
PacifiCorp  
Pennsylvania Electric Company and York  
Haven Power Company (Penelec)  
Public Service Company of Colorado  
(Colorado Company)  
Puget Sound Power & Light Company (Puget)  
Simpson Paper (Vermont) Company  
(Simpson)  
Southern California Edison Company  
(California Edison)  
Susquehanna Electric Company  
(Susquehanna)  
Union Electric Company (Union)  
Upper Peninsula Power Company  
(Peninsula)  
Washington Water Power Company  
(Washington Water)  
Wisconsin Electric Company (Wisconsin  
Electric)  
Wisconsin Valley Improvement Company,  
Wisconsin Public Service Corporation,  
Weyerhaeuser Company, Consolidated  
Water Power Company, Neekosa Papers  
Inc., and Wisconsin River Power Company  
(Wisconsin Companies)

##### Other Organizations and Individuals

A great number of local organizations and private citizens, including many local and regional environmental groups and many licensees of small hydropower projects, submitted comments in letter form of one to several pages in length.

BAILEY, Commissioner, *dissenting*

I respectfully dissent from the views expressed in this policy statement. I will admit that as a regulator, both here and formerly as a State Commissioner, I am sympathetic to the analysis that an agency that has been vested with the authority to implement a particular statute must, of necessity, fill in certain specifics as changing circumstances warrant. In this case, an argument can be made that inherent in the authority to grant a relicensing application is the ability to deny that application and to oversee the process of decommissioning the project.

But I pull away from the majority after a review of the record in this proceeding. I cannot concur in the decision that the Federal Power Act authorizes this Commission to require the decommissioning of a hydroelectric project. While someone drafting the Federal Power Act today may very well write it differently, the provisions of the statute as they currently stand, read together with the legislative history, do not support, in my view, the conclusion that the Commission has the authority to order dam removal.

The whole tone of the legislative history is the encouragement of development. And in order to encourage development, the drafters strove to give investors certain assurances that their investments would be secure. Thus, they set out the specific scenario that would occur at the time of license renewal.

That scenario is reflected today in sections 14 and 15 of the Federal Power Act: the Commission may issue a new license, either to the original licensee or a third party, issue a license for the nonpower use of the project, or recommend Federal takeover. The extensive legal analysis supporting this conclusion is articulated in detail in numerous comments filed in response to the Notice of Inquiry, and I will not begin to repeat those arguments here.

In addition, I find the passage of Public Law No. 83-278 in 1953 to be a strong indicator that, even 30 years after passage of the Federal Water Power Act, no one envisioned dam decommissioning as being part of the Commission's authority. By enacting that law, Congress exempted municipal licensees from the possibility of Federal takeover at the end of the license term. This legislation was intended to facilitate the financing of project expansions through the sale of revenue bonds with amortization schedules extending well beyond the term of the initial license.

Clearly, the legislation anticipated that these municipally-owned projects would continue to operate and provide sufficient revenue to meet debt service obligations. The threat that a municipal licensee might not only lose its license at the end of the term, but also have to fund the project's decommissioning or removal, would

<sup>196</sup> Commerce at 15.

<sup>197</sup> Kennebec at 48-49.

<sup>198</sup> All of the commenters filed initial comments. Commenters identified by this footnote also filed reply comments.

obviously be a much larger obstacle to financing than the Federal takeover possibility that Congress eliminated in 1953. Thus, as argued in the comments, the imposition of a decommissioning requirement would directly undermine and be contrary to the specific intent of Public Law No. 83-278.

Although the policy statement indicates that the Commission rarely expects to mandate project decommissioning, the decision to imply such authority has significant consequences. While this Commission may exercise that authority narrowly, parties and intervenors will continue to call for its broad application, including the imposition of trust funds at each project, as well as contributions to regional funds. Indeed, the policy statement concludes that, should later experience with decommissioning demonstrate a stronger need, the Commission can reassess the issue of establishing some type of industry-wide fund.

I question whether the Federal Power Act contemplates such a scheme. In addition, there will be social and economic consequences that flow from such decisions. Decommissioning funds, should they be required, are traditionally included in rates. The likely increase in electric rates for consumers in potentially large regions of the country and the possible negative impact on the financial viability of certain projects are issues not addressed by the policy statement.

In sum, there are major social consequences, in the broadest sense, that derive from the decision to imply authority here, and I am unwilling to assume lightly that authority. Sections 14 and 15 of the Federal Power Act outline the relicensing process to be implemented by the Commission. Many of the issues raised by the decommissioning debate are not solely FERC's to decide and I believe should be addressed in a broader forum.

**Vicky A. Bailey,**  
*Commissioner.*

[FR Doc. 95-63 Filed 1-3-95; 8:45 am]

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## 18 CFR Part 347

(Docket No. RM94-2-001)

### Cost-of-Service Reporting and Filing Requirements for Oil Pipelines; Order on Rehearing and Clarification

Issued December 28, 1994.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule; Order on rehearing and clarification.

**SUMMARY:** The Federal Energy Regulatory Commission in ruling on a request for rehearing is making a minor change to its regulations that provide revised filing requirements for oil pipelines seeking to establish new or changed depreciation rates, and clarifying Order No. 571, issued October

26, 1994. The change is to ensure that the information provided is in a format that will protect individual shippers.

**EFFECTIVE DATE:** The amendment to the regulations is effective January 1, 1995.

#### FOR FURTHER INFORMATION CONTACT:

Harris S. Wood, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 208-0224.

#### SUPPLEMENTARY INFORMATION:

In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3104, 941 North Capitol Street NE., Washington, DC 20426.

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Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

### Order on Rehearing and Clarification

Issued December 28, 1994.

On October 28, 1994, the Federal Energy Regulatory Commission (Commission) issued Order No. 571, in which it established filing requirements for cost-of-service rate filings for oil pipelines; filing requirements for oil pipelines seeking to establish new or changed depreciation rates; and new and revised pages of FERC Form No. 6, Annual Report for Oil Pipelines.<sup>1</sup> On November 28, 1994, the Association of Oil Pipe Lines (AOPL) filed a request for rehearing and clarification of Order No.

<sup>1</sup> Cost-of-Service Reporting and Filing Requirements for Oil Pipelines, Order No. 571, 59 FR 59137 (November 16, 1994), III Stats. & Regs. ¶ 31,006 (1994).

571. As discussed below, the Commission clarifies Order No. 571, and grants in part and denies in part AOPL's request for rehearing.

#### Discussion

A. AOPL argues that the Commission cannot prescribe initial filing requirements for cost-of-service rates in excess of requirements specified in Section 6 of the Interstate Commerce Act (ICA).<sup>2</sup> Section 6(3) provides that a carrier must file a notice of rate change "which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates \* \* \* will go into effect; and the proposed changes shall be shown by printing new schedules \* \* \*". These requirements of Section 6(3) are preserved intact in sections 346.1 (a) and (b) of the regulations adopted by the Commission in Order No. 571.<sup>3</sup> Thus, AOPL's dispute is with section 346.1(c), which requires that an oil pipeline file statements and supporting workpapers to make an Opinion No. 154-B cost-of-service showing as set forth in section 346.2, on the basis that these requirements go beyond the limiting provisions of section 6(3).

As the Commission explained in Order No. 571, the requirement that a pipeline file these statements and workpapers is justified, not by the filing of information as a part of a notice of rate change, but by the requirement of Order No. 561<sup>4</sup> that the oil pipeline meet the threshold test of demonstrating a substantial divergence between rates at the indexed ceiling level and the pipeline's cost of service. Rather than a "filing requirement" for a notice of rate change, the statements and workpapers must be filed to demonstrate that the pipeline is entitled to change rates on a cost-of-service basis as an exception to changing rates under the indexing methodology.

The Commission relied on section 12 of the ICA as the statutory authority for requiring a pipeline to demonstrate that it meets the threshold test specified in Order No. 561.<sup>5</sup> AOPL argues, however,

<sup>2</sup> 49 App. U.S.C. 1 (1988).

<sup>3</sup> See 18 CFR 342.1 (a) and (b), to be effective January 1, 1995.

<sup>4</sup> Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act, Order No. 561, 58 FR 58785 November 4, 1993), III FERC Stats. & Regs. ¶ 30,985 (1993), order on reh'g and clarification, Order No. 561-A, 59 FR 40243 August 8, 1994), III FERC Stats. & Regs. ¶ 31,000 (1994). These orders are jointly referred to as "Order No. 561," unless the text clearly specifies otherwise.

<sup>5</sup> Section 12 provides, in material part, that "The Commission may obtain from such carriers \* \* \* such information as the Commission deems necessary to carry out the provisions of this chapter