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. ²⁷ 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. ²⁸

Ås already noted, the FWPA was not drafted and passed with environmental concerns in mind. ²⁹ 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)

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). 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.³⁰ 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: 31

[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.³²

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

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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.³³ 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

²⁷ 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).

²⁸ The suggestion of municipal licensees 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).

²⁹ 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.

 $^{^{\}rm 30}\,\rm As$ 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.

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

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

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).

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