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. 34 Shortly after passage, the Commission issued a regulation that parallelled 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." 35

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. ³⁶ 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. 37 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, ³⁸ but it is not unusual that they be breached or removed. ³⁹ 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: 40

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: 41

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. 42 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. 43

³⁴ 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.

³⁵ 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).

³⁶ 59 Cong. Rec. 1046, 1443, 1474–75 (1920) [remarks of Sen. Lenroot].

 $^{^{37}}$ Niagara Mohawk Power Corp., 49 FPC 1352 (1973), 4 FERC \P 61,209 (1978).

³⁸ 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).

³⁹ 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.

⁴⁰ 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).

⁴¹ 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."

⁴²The 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.

⁴³This 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,