

FPA,⁷⁷ 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.⁷⁸ 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.⁷⁹ 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.⁸⁰

Reform points out that licensees are required to obtain a water quality certification under section 401(a) of the Clean Water Act⁸¹ 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.⁸²

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."⁸³ 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.⁸⁴

Licensees also contend that section 6 of the FPA⁸⁵ requires mutual agreement between the licensee and the Commission as a prerequisite to any Commission order requiring removal of project facilities.⁸⁶ 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.⁸⁷

Municipal licensees also emphasize the Act of August 15, 1953,⁸⁸ 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,"⁸⁹ 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.⁹⁰

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.⁹¹ Some commenters cite section 23(b) of the FPA,⁹² 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.⁹³ Some commenters cite

sections 4(g), 10(c), and 309 of the FPA.⁹⁴ Others point to historical precedent.⁹⁵ 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."⁹⁶

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

Licensees refer to the enactment by Congress in 1992 of the Elwha River Ecosystem and Fisheries Act,⁹⁹ 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.¹⁰⁰ 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.

⁹⁴ 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.

⁹⁵ See, e.g., Kennebec at 20-21.

⁹⁶ *Id.* at 27-28.

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

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

⁹⁹ Pub. L. No. 102-495.

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

⁷⁷ 16 USC 797 and 803.

⁷⁸ 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.

⁷⁹ See, e.g., Kennebec at 5-7; Interior at 3.

⁸⁰ See, e.g., Reform at 24-25.

⁸¹ 33 USC 1341(a).

⁸² Reform reply comments at 15-16.

⁸³ Commerce at 1-3.

⁸⁴ *Id.* at 4.

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

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

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

⁸⁹ Water at 9.

⁹⁰ Chelan at 7-10; Centralia at 4-5; Grant at 2-3.

⁹¹ See, e.g., Reform at 27.

⁹² 16 USC 817.

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