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. 116 NHA would also regard such a result as an impermissible balancing of developmental and nondevelopmental values under the ECPA amendments to the FPA. 117

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.118

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.119 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.120

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.¹²¹ Commerce, New York, and Michigan, would treat it as a *de facto* surrender.¹²²

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. 123 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.124 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. 125 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. 126

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.¹²⁷

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. 128 Kennebec also contends that the Commission has authority to compel a licensee to remove its dam at the expiration of its license. 129

Interior and Commerce believe that the Commission has inherent authority to mandate either partial or total decommissioning, with or without environmental mitigatory measures. 130 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. 131

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 that 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.¹³²

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.¹³³ 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.¹³⁴

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. 135 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

¹¹⁶ NHA at 31.

¹¹⁷ NHA at 31–33.

¹¹⁸APPA 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 EEI at 27.

¹¹⁹ Reform at 32.

¹²⁰ Kennebec at 44-46.

¹²¹ Interior at 7.

¹²² Commerce at 9–10; New York at 2; Michigan

 $^{^{\}rm 123}\,\rm NHA$ at 34; see also Central Maine at 4.

¹²⁴ APPA at 13.

¹²⁵ Id. at 15.

¹²⁶ Montana Power at 10.

¹²⁷ Reform at 33-34.

¹²⁸ Kennebec at 45-46.

¹²⁹ Kennebec reply comments at 8-11.

¹³⁰Interior at 7–8; Commerce at 11.

¹³¹ 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.

¹³² NHA at 35-37.

¹³³ Reform at 34-35.

¹³⁴Kennebec at 47; Nebraska at 3–4; New York at 2; Brazos.

¹³⁵ Water at 3–5, 10.