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

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.'' [158]

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.[159]

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.[160] 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.[161]

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.[162]

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.[163] 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.[164] 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.[165] 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.'' [166]

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.[167] 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.[168]

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.[169]

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.[170]

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.[171]

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.[172]

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.'' [173]

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.'' [174]

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.'' [175]

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

[157] Oregon at 8–9.

[158] Michigan at 12.

[159] Public Pool at 8–9.

[160] Consolidated at 6.

[161] Washington Water at 10–11.

[162] Wisconsin Electric at 9–10.

[163] NHA at 43.

[164] 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.

[165] Reform at 39–40.

[166] Walton at 15.

[167] APPA at 20–21.

[168] Reform at 41–42.

[169] EPA at 2.

[170] Michigan at 12.

[171] APPA at 21–23.

[172] Reform at 43.

[173] Kentucky at 1.

[174] EPA at 2.

[175] Interior at 9.