



American Rivers

**THE FEDERAL ENERGY REGULATORY COMMISSION
AND THE NATION'S RIVERS:
A CASE FOR REFORM
OF HYDROPOWER REGULATION**

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SUMMARY

The Federal Energy Regulatory Commission ("FERC"), is a little-known federal agency that is charged with licensing and regulating private hydropower dams on navigable rivers in this country. FERC's record over the last decade on hydropower policy, as documented in this report, demonstrates that it is an agency that is out of touch with the public and the fundamental environmental policies of this country.

Indeed, FERC displays an arrogance and disregard for the environment and principles of fundamental fairness rarely seen in government today. Over the years, the Commission has consistently shown an aggressive pro-hydropower development bias (which is reflected by the resumes of the Commissioners appointed over the last 20 years). This is an agency whose staff conducts secret meetings with industry, that ignores the recommendations of state and federal natural resource agencies on important environmental issues and all but excludes citizens from meaningful involvement in its decision-making process. In 1986, Congress amended the Federal Power Act to require FERC to give equal consideration to nonpower values in relicensing decisions. Yet, to this day, FERC has failed to fulfill that statutory mandate and give serious consideration to such values as energy conservation and fish and wildlife protection in relicensing cases.

This agency must change the way it does business. If it does not, there will be profound and possibly irreversible consequences for many of America's rivers over the next half century. Most critical is the fact that the Commission must act on applications to "relicense" 237 existing hydropower dams whose licenses expire in 1993. This is the most dams up for relicensing at any time in history. Most of these dams were originally licensed and constructed early in this century, well before their environmental impacts on a watershed and on aquatic species were well understood. Indeed, environmental considerations, including such fundamental issues as fish passage, were ignored. These 237 dams on 105 rivers, the class of '93, are now before FERC for relicensing.

Although FERC's recent record on environmental matters reflects some modest improvement over the past, there is still a mentality within FERC to rubber-stamp these relicensings, requiring minimal conditions or operational changes to improve the river environment or mitigate for past ecological damage. Recent FERC

decisions indicate that the Commission is still insensitive--and at times hostile--to the environment.

As this report indicates, there is a desperate need to establish balance on the Commission and to restore its credibility with the public and other governmental agencies. To address this situation, American Rivers, and a national and regional coalition of conservation and recreation organizations, are urging the President to appoint new FERC Commissioners who are knowledgeable about hydropower development and its impacts on the river environment as well as energy production.

THE COMMISSIONERS: A HISTORY OF IMBALANCE

When President Bush nominated William Liedtke, an oil and gas consultant, to the Federal Energy Regulatory Commission (FERC) in 1992, Rep. John Dingell, (D-MI), the Chair of the House Energy and Commerce Committee, wrote to the Secretaries of the Energy, Interior, and Commerce Departments to complain:

I find it troubling that a review of the memberships of the Commission fails to produce a single member who has a background in environmental matters, particularly fish and wildlife and natural resources matters, as they relate to hydropower issues. (Letter of June 10, 1992.)

As a review of the following list of appointments to FERC over the past 20 years indicates, Congressman Dingell was correct. With one exception,¹ it is difficult to single out any Commissioner in the past 20 years with significant environmental policy expertise, or even with a background in hydropower. All but one of the present Commissioners, and twelve of the 23 Commissioners nominated to FERC in the past 20 years, have come from the energy industry, and particularly from the oil and gas industry. Nearly a third (7) of the Commissioners are from Texas.

Of all the Commissioners confirmed in the past twenty years, only one, James Watt (who later gained fame as Secretary of the Interior), claimed during confirmation hearings to be a "conservationist." As the summary that follows indicates, with few exceptions, FERC has been filled with political acquaintances and energy industry nominees without any background, knowledge or interest in the impacts of hydropower development on the environment.

¹Elizabeth Moler, now acting Chair of the Commission, served as senior counsel and a staff member to the Senate Energy and Natural Resources Committee for twelve years.

Commissioner

Employment Background

William L.
Springer
(1973)

Former congressman from Illinois, ranking minority member of Interstate and Foreign Commerce Committee.

Don S. Smith
(1973)

Commissioner, Arkansas Public Service Commission.

John H.
Holloman
(1975)

Attorney in private practice specializing in labor law. Clients included Mississippi Power and Light and Mississippi Valley Gas Co. Holloman served on the Board of the Tombigbee Valley (Mississippi) Water Management District from 1961-1964; confirmation hearing record does not indicate any knowledge of hydropower/environmental issues.

Richard L.
Dunham
(1975)

Deputy Director of the Domestic Council; assistant to the Vice President for Domestic Affairs.

James G. Watt
(1975)

Watt, who had been director of the Bureau of Outdoor Recreation at the Interior Department, labelled himself a "conservationist" during his confirmation hearing. Watt was also secretary of the Natural Resources Committee of the United States Chamber of Commerce from 1966-69.

Charles B.
Curtis (1977)

Attorney for Washington law firm representing various power companies.

George R.
Hall (1977)

Economic advisor to the Atomic Energy Commission.

Matthew
Holden (1977)

Commissioner, Wisconsin Public Service Commission; political science professor, University of Wisconsin.

Georgiana
Sheldon
(1977)

Acting chair, U.S. Civil Service Commission; personal assistant, Rep. Rogers C.B. Morton.

John D.
Hughes (1980)

Attorney in Lubbock, Texas, representing various energy-related clients. Assistant attorney general for the State of Texas.

C. M. Butler
(1981)

Attorney, American Natural Resources Co., Detroit, MI; drafted Reagan transition document on natural gas; administrative assistant to Sen. John Tower (R-TX).

Anthony G.
Sousa (1981)

Vice president and general counsel, Hawaiian Telephone Co.; administrative law judge, California Public Utilities Commission.

Oliver G. Richard (1982) Legislative assistant, Sen. Lloyd Bentsen (D-TX).

Raymond J. O'Conner (1983) Attorney, Consolidated Edison Co. of New York; senior vice president, Energy Systems, Citibank. O'Conner's confirmation hearing testimony does not indicate any background in hydropower.

Charles G. Stanlon (1984) Commissioner, Illinois Department of Commerce; economics professor, Southern Illinois University.

Martha O. Hesse (1986) Assistant Secretary, Management and Administration, Energy Department; member, OMB Task Force on Management Reform; director for data management, American Hospital Association.

C. M. Naeve (1985) Lobbyist, Aminoil USA; lawyer, Conoco; vice-president Mid-continent Oil and Gas Association; legislative director for Sen. Lloyd Bentsen (D-TX).

Charles A. Trabandt (1985) Nuclear submarine officer, United States Navy; program manager for Tetra Tech, Inc. of Arlington, VA, a consulting firm with energy clients.

Elizabeth A. Moler (1988) Counsel, Senate Energy and Natural Resources Committee.

Jerry Langdon (1988) President and owner of Texas Intramark Gas Co.; president, Natural Gas Society of the Permian Basin; owner, Langdon Associates of Midland, TX, a petroleum consulting firm; formerly worked for Delhi Gas Co. and Houston Natural Gas Co.

Martin L. Allday (1989) Attorney in private practice in Midland, Texas, representing oil and gas firms.

Branko Terzic (1990) Vice president, AUS Consultants, Milwaukee, WI, a consulting firm specializing in valuations and appraisals for electric and gas companies.

William Liedtke (1992) Oil and gas consultant in Oklahoma City, OK; independent general partner, Merrill Lynch Oklahoma Venture Partners (oil and gas); attorney, Superior Oil Co.

THE FERC RECORD: A BILL OF PARTICULARS

"Off the Record" with Industry

The Commission and its staff maintain a cooperative and supportive relationship with the hydropower industry. FERC Commissioners and staff have engaged in secret "off-the-record" consultations with applicants to discuss significant matters affecting licensing and relicensing decisions.

One recent example of a "behind-the-scenes" deal occurred last year during the relicensing of the Ripogenus Hydroelectric project on the West Branch of the Penobscot River in Maine. As a result of repeated requests from the U.S. Fish and Wildlife Service and conservation groups, including Trout Unlimited, FERC initially told the dam owner that an instream flow study for fisheries below the dam would be required. Shortly thereafter, FERC staff held private meetings with the applicant and decided to cancel the study requirement. The U.S. Fish and Wildlife Service complained to FERC, since it had not received notice of FERC's meeting with the dam owner, and had not even been consulted about FERC's decision to drop the study request.

Conservation groups, including Trout Unlimited, strongly protested the decision, because it was made in secret and in apparent violation of the Commission's own regulations that forbid such non-public meetings. The Commission staff refused, however, to reconsider the decision.

NEPA Revisited

It was 1987, nearly 20 years after enactment of the National Environmental Policy Act (NEPA), before FERC finally adopted the CEQ regulations to implement this quintessential environmental law. It was 1985 before FERC began to even prepare environmental assessments of projects; even today, these assessments are largely "boilerplate" with few independent analyses of fisheries, energy or economic alternatives. In testimony before the House Energy and Natural Resources Subcommittee, David Conrad of the National Wildlife Federation cited FERC as having the worst NEPA compliance record of any federal agency.

Based on current understanding, it would appear that FERC intends to require environmental impact statements in only a limited number of relicensing cases--where additional construction is being requested. It seems beyond question, however, that existing FERC-licensed dams will have a significant impact on the environment over the next 30 to 50 years. The cumulative impact of multiple dams within a single watershed should also be considered and studied before any relicense is approved. It is

hard to justify FERC's continued attempts to avoid the full satisfaction of NEPA's requirements.

Despite the requirement of the 1986 Electric Consumers Protection Act that FERC give "equal consideration" to power and "non-power" values (such as fish, wildlife and recreation), the Commission still refuses to take this law seriously. In fact, FERC seems to look at environmental protection solely in terms of the effect that any proposed environmental requirements would have on the economics of a project. In a memorandum relating his experience with FERC's hydropower division, a field supervisor for the U.S. Fish and Wildlife Service, stated: "All other project features are compared to hydropower production on an economic basis. If an environmental feature reduces hydropower benefits, the feature is dropped." (Memorandum of United States Fish and Wildlife Service Field Supervisor, Tulsa OK, to USFWS Regional Director, Albuquerque, New Mexico, April 24, 1992.)

Industry Consultant Hired: "Dams Are Us"

FERC's decision last year to hire the engineering consulting firm of Stone & Webster to carry out environmental studies added fuel to the fire of concerns about the Commission's commitment to addressing the impacts of hydropower on the environment. The lucrative contract with Stone & Webster could be worth \$46 million over the next five years. Given Stone and Webster's extensive work on behalf of hydro industry clients, the contract raises at least the appearance of a conflict of interest.

Stone & Webster has been actively involved in the construction of new dams and the preparation of consulting reports for dam operators involved in FERC licensings. The firm's hydropower work includes, for example: engineering consulting for Allegheny Electric Cooperative's Raystown Project (PA), 1986; erosion study for Independence Electric's Warrior project (AL), 1988; dam break study for Great Northern Paper's East Millinocket Dam (ME), 1989; safety, stability and earthquake studies for Great Northern Paper's Ripogenus Dam (ME), 1986, 1992; engineering for Grant Co. PUD No. 2's Wanapum and Priest Rapids Projects (WA), 1990; engineering upgrade for Mt. Hope Hydro's Mt. Hope Pumped Storage (NJ), 1992. Although the firm's annual reports do not reveal the exact amount of money these operations generated, it is clearly substantial.

Rocky Point

In 1990, Stone & Webster organized the Hydro Relicensing Alliance, a coalition of six consulting firms that planned to work jointly on a number of hydropower relicensing projects now before the Commission. According to a news release announcing the group's creation, Stone & Webster planned to specialize in fish protection and dam stability studies for dam owners, two areas in which it is now involved as the Commission's consultant.

Although FERC and the company have acknowledged that a conflict-of-interest question exists, the Commission has defined the term narrowly to apply only where Stone & Webster has a private contract for a particular dam.

In such cases, another entity will perform the studies. It is not clear, however, whether this interpretation precludes Stone & Webster from working for FERC on projects in watersheds where the firm has or had private contracts, even though an adequate environmental review should consider the cumulative effects of hydro projects throughout a river basin.

Moreover, regardless of whether dams are in the same watershed, it seems obvious that objective, comprehensive environmental analyses performed by Stone & Webster for FERC could create precedents that would adversely impact hydro projects owned by the firm's past and future clients. Although FERC's work is to be performed by "Stone & Webster Environmental Services," this entity is a division of "Stone & Webster Engineering Corp.," the company that performs consulting services for private industry.

Whether hiring Stone & Webster violates any conflict-of-interest rules, to contract with a company so closely aligned with the very industry that FERC is supposed to be regulating raises serious questions about the Commission's commitment to an objective relicensing process.

In its hydro licensing decisions, FERC continues to run roughshod over the strong objections of states, federal resource agencies and the general public.

Excluding the Public

To the public, and for other federal and state resources agencies, the Federal Energy Regulatory Commission is one of the most procedurally impenetrable difficult agencies in government.

The Commission's rules for public participation in FERC proceedings are complicated, burdensome and extremely time-consuming. It is almost impossible for an individual citizen or local groups to participate in Commission proceedings unless represented by an attorney experienced in practicing before the Commission. As one attorney with extensive FERC experience stated in testimony before a Congressional oversight committee on FERC last year:

"The FERC process is difficult at best and a nightmare at worst for intervenors, fish and wildlife agencies and applicants alike. The general public is effectively excluded from providing meaningful input."
(Testimony of F. Lorraine Bodi, Co-Director, American

Rivers Northwest Regional Office, before the Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations, May 15, 1992.)

For example, a member of the public who is concerned about the impact of a licensing on a local river has great difficulty even receiving timely notice that an application for a hydropower dam has been filed with the Commission in Washington, D.C. And, even if they do receive notice, they have only 60 days to comment on the technical adequacy of the application, which could be 10,000 pages long, and might cost them \$1,000 to receive a copy from the applicant.

Later in the process, the Commission sets a deadline for the public to file papers to become a "party" to the licensing; this allows an individual or group to be kept informed and to have an opportunity to make their positions known. A complex "motion to intervene" must be submitted to the Commission, along with eight copies, with additional copies served on all other parties to the proceeding. Many licensing proceedings languish for years before FERC and often take 10 or more years to be decided. The expense and staying power required of a concerned citizen or local group is prohibitive in such cases.

Fish Passage: Upstream Only

FERC's rule-making on fish passage is a classic and vivid example of the Commission's infringement on the authority of other agencies. In 1991, the Commission issued a new rule drastically reducing the seventy-year-old authority of federal fishery agencies to mandate construction of fishways at FERC hydropower projects. Under FERC's rule, federal fishery agencies would be allowed to mandate fishways only for the upstream passage of fish, eliminating the agencies' ability to prescribe downstream passage as they had for decades! The hydropower industry had urged FERC to adopt the regulation, which was opposed by federal fishery agencies and environmental groups.

Somehow, FERC concluded that fish only need protection when swimming upstream, despite the massive fish losses and resulting "chowder alley" on many rivers from unscreened dam turbines. Soon after the regulation was adopted, FERC retroactively rejected fishways for downstream fish passage, on the basis that the new regulation no longer allowed fishery agencies to mandate that type of passage and it was "too costly" to implement.

FERC's "one-way" fishway rule outraged members of Congress, prompting Rep. Jolene Unsoeld (D-WA) to introduce legislation to reverse the FERC rule. In addition, the Departments of Interior and Commerce, several environmental organizations and others

petitioned FERC to revoke its "one-way" rule. This fierce opposition finally prompted FERC to reverse itself and re-institute some authority for the Interior and Commerce Departments to prescribe fishways for upstream and downstream passage. However, the rule still placed enough limitations on fishery agencies to prompt FERC Commissioner Elizabeth Moler to dissent, stating her opinion:

In each part [of the newest rule] the majority acts to limit statutorily prescribed responsibilities of other agencies, state and federal. This is a disturbing trend. The error lies in the majority's seeming inability to recognize the limits of its own jurisdiction. (FERC Commissioner Elizabeth Anne Moler in a dissenting opinion to order 566-A, November 22, 1991.)

Ultimately, Congress acted to overturn FERC's fishway rule in an amendment to the 1992 Energy Act.

The Public Be Damned: State Protected Rivers

In recent years, there have been numerous conflicts between FERC and states that have adopted policies to limit or ban hydropower on certain rivers in order to protect fish and wildlife, or natural, cultural, or recreational resources. FERC insists, however, that it has authority to license hydropower projects even on rivers protected under state laws and continues to do so regardless of local opposition.

For example, in 1988, the citizens of Oregon voted in a statewide referendum to designate the Klamath River an Oregon Wild and Scenic River. This designation was supposed to prohibit the construction of any new hydropower projects on the river. Yet, FERC continues to entertain a license application, ignoring the state and local opposition and leading Rep. Peter DeFazio (D-OR) to say in a recent floor debate on the hydro amendments to the Energy bill:

No one can name these faceless [FERC] bureaucrats, but somehow we are going to allow them to preempt State law, States rights. When the people of Oregon have voted in a public referendum, statewide, to name rivers as wild and scenic, we are going to say that...they can come in and preempt and condemn essentially the lands of the State of Oregon or private lands and force dams to be built on these rivers to destroy these precious public assets. (Rep. Peter DeFazio speaking on the Floor of the House of Representatives during discussion of National Energy Strategy legislation, May 27, 1991.)

Amazingly, until Congress acted to ban it last year, FERC had a policy of issuing licenses to private hydropower developers which authorized condemnation of state park lands for hydropower sites! In 1992, the Commission issued a license for a one megawatt project at a scenic and historically significant waterfall within a park in the City of Norwich, Connecticut, over the strong objections of the city, the state, Native Americans and virtually everyone but the applicant. After a storm of criticism, the Commission eventually reversed itself and rescinded the license.

Dams in National Parks

Yet another example of the Commission's pro-industry stance--and their refusal to cooperate with federal resource agencies even when their decisions have disastrous impacts on natural resources--involved the relicensing of hydropower dams located within National Parks. In 1990, the National Park Service urged FERC to reject an application to relicense the Glines Canyon project on Washington's Elwha River, and to deny an original license for the old, never licensed Elwha dam downstream. The Park Service sought removal of the dams to begin to restore the natural values of the rivers within Olympic National Park and, in particular, the historic runs of all five species of Pacific salmon, plus steelhead, cutthroat trout, and Dolly Varden to the river.

A General Accounting Office report found that FERC had no legal authority to relicense the Glines Canyon dam because it lies partially within Olympic National Park. Yet FERC ignored the Park Service and defended in court its right to relicense the project. Congress finally resolved the situation by passing legislation that could lead to removal of the Elwha dams.

Water Quality Certification: States' Rights Ignored

FERC also has shown virtual contempt for states' rights in the administration of water quality under Section 401 of the Clean Water Act. Under Section 401, states have the authority to review the water quality impacts of hydropower projects licensed by FERC. Although state courts across the country have interpreted Section 401 differently--some courts have interpreted Section 401 broadly to include impacts on fisheries and recreation, while other courts have narrowly interpreted 401 to pertain exclusively to water chemistry--FERC has strongly advocated a very narrow view that limits a state's certification authority in licensing decisions. In 1987 the Commission implemented a rule that would cut off a state's right to certify water quality after a deadline imposed by the Commission. FERC even applied the rule retroactively, denying many states the right to effectively participate in the hydropower licensing

process. As the States of Idaho (see below), Vermont, Maine, and New York, to cite a few, have learned, this authority to certify FERC-sanctioned projects is critical to the proper management and protection of state water resources.

FERC FAILURES: CASE STUDIES

An Ecological Disaster: The Fall River Hydroelectric Project (Idaho)

When the Marysville Canal ruptured on June 11, 1992, 20,000 tons of sediment washed into the Fall River and left behind an ecological disaster. The flood of sediment killed an entire generation of trout, damaged significant salmon habitat in the Fall River and in the world-famous Henry's Fork of the Snake River, and resulted in extensive water quality degradation. This accident could have been avoided if FERC, which supervises the Marysville Hydroelectric project, had attended to concerns expressed by the local community.

FERC held no public hearings and gave local residents only scant notice about the construction of the hydroelectric project, which prevented Idaho Rivers United, other environmental groups and local officials from providing their recommendations on the dam until after construction began. When the Idaho Department of Environmental Quality (DEQ), one of the few groups aware of the impending construction, submitted comments, FERC misplaced them until the comment period had ended.

However, prior to the accident, local agencies and environmental groups did warn FERC that the canal's unstable soil condition could cause such a washout. Idaho Rivers United retained a soils engineer who found the canal walls had the potential for failure, but FERC ignored these concerns.

Since the accident, the Idaho DEQ has found the Marysville hydroelectric project to be in violation of several water quality standards. Even after the massive siltation damage occurred in June of 1992, discharges continue to pollute Fall River because an inadequate vinyl liner along the canal walls does not prevent further erosion.

Despite objections by the State of Idaho and the request for an Environmental Impact Statement, in January of 1993, the Commission allowed construction to resume and denied the request for an EIS. FERC also denied Idaho's right to recertify that the project met state water quality standards. The State has requested a rehearing on that issue.

The Marysville incident is yet another case revealing FERC's failure to assess the possible environmental impacts of a project and to respond to them once they occur. The major concerns about FERC's licensing authority that have arisen as a result of the Marysville disaster are:

- * FERC resists local community involvement and does not provide citizens a real opportunity to participate in licensing a project.
- * FERC should conduct on-site inspections once construction begins.
- * FERC's safety requirements are inadequate. The Marysville license required no emergency check valves at the site. After the canal collapsed, it took five hours before workers were able to stop the water discharge.
- * A state must have the right to determine whether a FERC-licensed project meets state water quality standards if it is to protect its resources from ill-founded or poorly designed projects.

Doing Battle Over One Megawatt

In 1992, FERC issued a license to develop the Falls Mill Dam Hydroelectric Project on the Yantic River in Norwich, Connecticut, over the strong objections of the City of Norwich, the state Department of Environmental Protection, the governor, the local congressman, both U.S. senators, and countless others.

The reasons for such strenuous objections were because this tiny project would drastically reduce the flow over Yantic Falls, an important tourist attraction and, reportedly, the site of the Last Great Battle between the Naragansett Indians and the Mohegan Indians, in 1642. In addition, in licensing the project, FERC was granting to the developer the right to condemn city parkland for the project.

The City of Norwich, which owns the site, argued that the Yantic River's double falls and deep narrow glacial gorge constitute unique natural features that would be adversely affected by the project. Blasting during excavation, the city suggested, would cause the gorge to fracture and would send boulders tumbling into the river. The community also expressed concern that the reduced flows would detract from the area's aesthetic quality and recreational value.

The FERC license required the developer, Summit Energy Inc., to release 100 cubic feet per second (cfs) of water on weekends and the summer holidays during daylight hours, but to reduce the

flows to 20 cfs at all other times. At its rehearing request, the City argued that the flows should be permanently maintained at 100 cfs. It asserted that the gorge attracts tourists throughout the week, and reduced weekday flows would significantly damage the falls' aesthetic qualities. Even in the face of such opposition, FERC claimed that it was acting in the greater public interest by allowing this small development to proceed (it would take nearly 27,000 Falls Mill hydroelectric projects to supply the energy needs of New England).

During consideration of hydropower-related amendments to the National Energy Strategy Legislation last year, Representative Sam Gejdenson (D-CT) expressed the difficulty that he, Governor Weicker, and Senators Dodd and Lieberman had in trying to impress upon FERC the local opposition based on the important values of Yantic Falls. As Rep. Gejdenson stated:

Again and again, when considering this project, FERC ignored the non-developmental value of these important resources and dismissed the interests of the people of Norwich and the community (Rep. Sam Gejdenson, remarks during House consideration of the National Energy Strategy legislation, May 27, 1992).

Finally realizing the controversy the Falls Mill project had generated in Congress, FERC rescinded the six-month-old license for the project in October, 1992, and conveniently declared that the site's recreational, aesthetic and historical features indeed outweigh the Falls' one-megawatt capacity.

However, it was too late for FERC. This controversy was the major reason Congress did approve an amendment to the National Energy Policy Act that removed FERC's authority to allow condemnation of state and local parkland for hydropower development.

CONCLUSION: "A ROGUE ELEPHANT OUT OF CONTROL"

Given the above, it is not surprising that Congressman Bruce Vento (D-MN), during the floor debate of the Energy Act last fall, referred to FERC as "... a rogue elephant out of control" (Hon. Bruce Vento [D-MN] statement during debate on H.R. 776, the National Energy Strategy Act, May 27, 1991.)

Over the past few years, Congress has attempted to limit FERC's discretion and provide new direction in a number of instances. However, the best solution to the problem is to reform the agency from the top down, by selecting new FERC Commissioners who are committed to giving the environment equal consideration.