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American Rivers, Inc. v. FERC: Conflict between FERC Authority under the Federal Power Act and State Authority under Section 401 of the Clean Water Act in the Hydroelectric Licensing Process

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AMERICAN RIVERS, INC. V. FERC: CONFLICT BETWEEN FERC AUTHORITY UNDER THE FEDERAL POWER ACT AND STATE AUTHORITY UNDER SECTION 401 OF THE CLEAN WATER ACT IN THE HYDROELECTRIC LICENSING PROCESS

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I. INTRODUCTION

The Federal Energy Regulatory Commission (FERC or Commission) has central decision-making authority under the Federal Power Act (FPA)[1] to issue licenses to hydroelectric power facilities.[2] However, that authority is fragmented by the influence of other agencies, both federal and state, which have an impact on the hydropower licensing process.[3] It has been estimated that at least forty federal statutes impact the licensing procedure.[4] One of those statutes is the Clean Water Act (CWA)[5], under which an applicant for a federal license is required to receive a certification by the state that its activities will not violate the water laws of that state.[6] Any conditions imposed by

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[1]16 U.S.C. § 797(e) (1920).

[2]Hydroelectric power has been an important source of energy in the United States for over a century. Judith A. Johansen, *Is Hydropower an Endangered Species?*, 8 NAT. RESOURCES AND ENV'T, 13(1994). Its supporters generally consider it to be a viable alternative to other forms of energy sources. "Relative to other sources of power, hydroelectric dam facilities are an attractive option since they do not consume fossil fuels or produce undesirable by-products such as air pollutants or radioactive waste." Nathaniel Stevens, *Canada and the United States – Dealing With the Hydro Power Paradox: Evaluating the Environmental Effects of a Natural Energy Source*, 19 SUFFOLK TRANSNAT'L L. REV., 273, 274 (1995). "Hydropower is also cheaper than other forms of electricity, its prices are stable, and the plants are relatively simple and inexpensive to operate. Moreover, hydropower is a more reliable source because it is both domestically available and renewable and thus not subject to the vagaries of politics and markets." Michael T. Pyle, Note, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 STAN. ENVTL. L.J. 97, 115-16 (1995). However, construction of hydropower facilities can also negatively affect a river ecosystem. *See* Johansen, *supra*, at 14; Stevens, *supra*, at 275.

[3]*See* Donald H. Clarke, *Relicensing Hydropower: The Many Faces of Competition*, 11 NAT. RESOURCES & ENV'T, 8 (1996).

[4]George William Sherk, *Approaching a Gordian Knot: The Ongoing State/Federal Conflict Over Hydropower*, 31 LAND & WATER L. REV. 349, 361 (1996).

[5]33 U.S.C. § 1251 (1977).

[6]Certification may also be waived by the state. 33 U.S.C. § 1341(a)(1) (1977).

the state in its certification must be included as conditions of the federal license.[7]

The authority given to the states under the CWA has consistently clashed with the FERC's hydroelectric licensing authority under the FPA,[8] primarily due to the conflicting purposes of the statutes. Judicial interpretations of the relationship between state agencies and the FERC, and of the statutes that they enforce, have been inconsistent at best.

In *American Rivers, Inc. v. FERC*,[9] petitioners American Rivers, Inc. (American Rivers) and the State of Vermont sought review of six FERC orders that issued licenses to hydropower facilities but refused to incorporate several conditions imposed by Vermont pursuant to its certification authority under the CWA. The Commission contended that if it determines that state-imposed conditions are beyond the scope of the state's authority under the CWA, then it may exclude those conditions from the license. This contention represented a reversal in the FERC's position on this issue. The Commission had previously held that it had no authority to review the appropriateness of the state-imposed conditions. American Rivers and Vermont contended that the Commission was required to incorporate all of the state-imposed conditions into the licenses and that the legality of the conditions may only be challenged by the licensee in a court of appropriate jurisdiction. The Second Circuit agreed with the petitioners and held that the Commission did not have the authority to exclude state-imposed conditions. The Court further held that the FERC's inability to refuse the conditions did not conflict with the Commission's authority under the FPA.[10]

This Article scrutinizes the *American Rivers* opinion and concludes that such a precedent could have a negative impact on the ability of the FERC to carry out the purposes of the FPA. The FPA presents a balanced approach to hydropower licensing, requiring the FERC to consider development, energy conservation,and environmental concerns when it issues a hydropower license. If the FERC has no authority to review and reject state-imposed conditions, state agencies will invariably take advantage of their authority and disrupt the comprehensive approach of the FPA.

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[7]33 U.S.C. § 1341(d) (1977).

[8]For a general discussion of the conflict between federal and state authority in the hydropower licensing process, *see* Sherk, *supra* note 4.

[9]129 F.3d 99 (2nd Cir. 1997).

[10]*Id.* at 102, 106.

Part II of this Article provides a general overview of the CWA and the FPA, the conflict that has arisen between the two statutes, and a judical interpretation of the statutes. Part III sets forth the factual and procedural history of *American Rivers*. Part IV analyzes the Second Circuit's reasoning and discusses the ramifications of the decision. Part V concludes that the *American Rivers* decision further disrupts the balance between federal and state authority to regulate hydropower licensing and calls for legislative action to restore that balance.

II. BACKGROUND

A. Origins of Federal and State Authority: The FPA and CWA

1. The Federal Power Act

The FPA was enacted in 1920 to establish "a broad federal role in the development and licensing of hydroelectric power."[11] The FERC receives its hydropower licensing authority from section 4(e) of the FPA. This section instructs the Commission to issue licenses for hydroelectric facilities which are "necessary or convenient ... for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction."[12] Section 4(e) further instructs that, when deciding whether to issue a license,

> the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife ..., the protection of opportunities, and the preservation of other aspects of environmental quality.[13]

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[11] 129 F.3d at 111 (quoting California v. FERC, 495 U.S. 490, 496 (1990)).

[12] 16 U.S.C. § 797(e) (1920).

[13] *Id.* This language was added by the Environmental Consumer Protection Act (ECPA). Pub. L. No. 99-495, 100 Stat. 1243 (1986) (amending 16 U.S.C. §§ 797(e), 803(a), 803(j) (1920)).

2. The Clean Water Act

The states receive their authority to impact the hydropower licensing process under section 401 of the CWA. The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[14] The Act gives broad authority to the states to help achieve this objective.[15] Under section 401(a), an applicant for a federal license must first receive state certification that any discharge will not violate the state water quality standards.[16] Section 401(d) authorizes the states to set forth effluent limitations and monitoring requirements in the certification and further asserts that these will become conditions of the federal license.[17]

3. Conflict Between the Statutes

A conflict arises between the FERC and state agencies in the licensing process due to the differing purposes of the statutes they enforce. The FPA requires the FERC to consider a combination of

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[14]33 U.S.C. § 1251 (1977).

[15]The State is limited in this regard by section 1313(c)(2)(A), which states:

> [W]ater quality standard[s] shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of the water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A) (1994). The Environmental Protection Agency defines criteria as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports particular use. When criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1994).

[16]33 U.S.C. § 1341(a)(1) (1977). The section states, in relevant part:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

Id.

[17]33 U.S.C. § 1251(d) (1977). The section states, in relevant part, that "any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary . . . and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id.*

factors, including water-related environmental concerns, when it issues a hydropower license.[18] The CWA, however, gives states certification authority for the sole purpose of protecting their own water resources, and state agencies have no obligation to consider any other interests when they issue a certification. This difference in purposes often results in differing expectations of hydroelectric facilities and their responsibilities according to the FERC and the state agencies, which in turn may result in contradicting opinions about what types of conditions should be included in a federal license.

State agencies may now use their authority under the CWA to further goals which are not related to water quality under the CWA.[19] For example, state agencies may consider factors such as fisheries, aesthetics, or recreation when they issue a certification.[20] Some agencies have even required that applicants satisfy conditions which are not related to the project.[21] This has resulted in the FERC including conditions in its licenses which are invalid under the provisions of the CWA or FPA and inconsistent with the FERC's role under the FPA.

It has traditionally been the policy of the FERC to include all state-imposed conditions in hydropower licenses, whether or not it believed the conditions were valid under section 401 of the CWA.[22] The FERC has consistently held that "review of the appropriateness of the conditions is within the purview of the state courts and not the Commission."[23] However, that policy has consistently placed the FERC in the difficult position of either issuing a license that includes

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[18] *See* discussion *supra* Part II.A.1.

[19] *See* discussion *infra* Part II.B.

[20] *See* Bangor Hydro-Elec. Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991); Long Lake Energy Corp. v. New York State Dep't. of Envtl. Conservation, 563 N.Y.S.2d 871 (N.Y. Sup. Ct. 1989).

[21] Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J., 43 (1992). One result of the abuse by the states is to "frustrate an already complex and inefficient Federal licensing process for hydropower projects." *Clean Water Act: Hearings Before the Subcomm. on Water Resources and Environment of the House Transportation and Infrastructure Comm.*, 104th Cong. 781-793 (1995) (statement of Roger Purdom, President, National Hydropower Ass'n) [hereinafter Purdom]. "This policy trend is having significant impacts on the economics of hydropower projects – high regulatory costs and a lack of certainty in the licensing process are inhibiting the ability of hydropower to compete." *Id.*

[22] *See* discussion *infra* note 47.

[23] Town of Summersville, West Virginia, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992). *See also*, Carex Hydro, 52 F.E.R.C. ¶ 61,216 at 61,769 (1990); Central Maine Power Co., 52 F.E.R.C. ¶ 61,033 at 61,172 (1990).

conditions that it believes to be unlawful or denying the application altogether and depriving the public of the benefits of the project.[24]

B. *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*: An Expensive Interpretation of State Authority Under the CWA

Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology (*PUD 1*)[25] is illustrative of the continuing conflicts between federal and state authority in the hydropower licensing process. In *PUD 1*, the United States Supreme Court confronted the question of whether a state could condition section 401 certification of a hydroelectric project on minimum stream flow requirements pursuant to its authority under the CWA. The Court held that the requirements were permissible conditions of the certification and that the state's authority to impose those requirements did not interfere with the FERC's authority under the FPA. However, the court did not reach the question of whether the state-imposed minimum flow requirements would be binding on the FERC.[26]

In *PUD 1*, the City of Tacoma and the Jefferson County Public Utility District No. 1 (collectively, Tacoma) proposed to construct a hydroelectric project that would result in discharges. Tacoma obtained a certification from the Washington Department of Ecology that placed a minimum stream flow condition on the project. Because the flow rates required by the Department would lessen the power generated by the hydropower facility, Tacoma objected. They contended that the state did not have authority under section 401 to impose the condition.[27]

The Supreme Court examined the language of section 401 and found that, though section 401(a) specifically provides that state certification is required for a "discharge" into waters, section 401(d) expands that language by providing that a certification may impose "other limitations" and "any other appropriate requirement of state law" in order to comply with the CWA.[28] The Court noted that the text of 401(d) refers to the compliance of the applicant and not to the

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[24] 68 F.E.R.C. ¶ 61,078 (1994).
[25] 511 U.S. 700 (1994) [hereinafter PUD 1].
[26] *Id.* at 710-711, 722.
[27] *Id.* at 711.
[28] *Id.*

discharge. In effect, the Court placed greater significance on the language of section 401(d) rather than reading section 401 as a whole.[29]

The Court then turned to whether minimum stream flow requirements served as a limitation reflecting "any other appropriate requirement of state law."[30] The Court analyzed section 303[31] and found that the imposition of a minimum stream flow would be consistent with the "designated use" of the river as a fish habitat.[32] Tacoma argued that section 303 requires states to protect designated uses solely through implementation of specific "criteria." However, the Court found section 303 should be "most naturally read" to say that water quality standards contain two components: the designated use and the water quality criteria.[33] Therefore, under section 401(d), a state may require the applicant to comply with both the designated uses and the water quality criteria of the state water quality standards. Since the Court found the minimum stream flow requirement to protect a designated use, the state could impose the requirement on the certification pursuant to section 401(d).[34]

Finally, the Court held that there was no reason to determine whether the state's authority to impose minimum stream flow requirements interfered with the FERC's authority under the FPA. The Court stated that no conflict was presented, because the FERC had not yet acted on Tacoma's license application.[35] However, the Court mentioned its previous holding in *California v. FERC*,[36] in which it held that "the California Water Resources Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license" and concluded that "the FPA did not 'save' to the States this authority."[37]

Justice Thomas, in his dissent, argued that minimum stream flow requirements were beyond the state's conditioning authority under

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[29] *Id.*

[30] *Id.* at 714-715.

[31] *See* discussion *supra* note 16.

[32] 511 U.S. at 714.

[33] *Id.* at 715.

[34] *Id.* at 714-15.

[35] The Court stated that it did not want to speculate on a "hypothetical" conflict between the two statutes; if the FERC included minimum stream flow conditions which Tacoma considered to be invalid due to its interference with the FERC's authority pursuant to the FPA, then Tacoma could seek judicial relief at that time. Further, the FERC may deny the application altogether, or the FERC license may contain the same conditions as those in the state certification. *Id.* at 722-23.

[36] 495 U.S. 490 (1990).

[37] 511 U.S. at 722 (citing California v. FERC, 495 U.S. at 498).

section 401(a), because they had no relation to a "discharge" that would result from the project.[38] Justice Thomas argued that the majority's interpretation of section 401 would allow state agencies "to pursue ... their water goals in any way they choose" and "the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to make the water more suitable for the uses the State has chosen."[39] Justice Thomas further stated that the result of the decision was to give the states "limitless" power under 401(d) to protect abstract "uses" of the water.[40]

In addition to the reasons discussed in the dissent, *PUD I* has also been criticized for the burden it places on hydropower license applicants.[41] As one commentator noted, "[a]lthough the decision does not answer whether state imposed minimum stream flow conditions in 401 certifications are binding on FERC, [*PUD I*] is a sizable step in state authority to regulate waterways, with potentially far reaching water policy ramifications."[42]

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[38] *Id.* at 724 (Thomas, J., dissenting). The dissent stated:

> In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act.

Id.

[39] *Id.* at 731.

[40] *Id.*

[41] In his testimony regarding the reauthorization of the CWA, Roger Purdom, President of the National Power Association, stated:

> The Supreme Court's ruling in this case creates a dual regulatory process for hydroelectric resources at the state water quality agencies under Section 401 to allow for the imposition of license conditions unrelated to pollution control, such as minimum stream flows for fish habitat, aesthetic, and recreational requirements. The result has been duplication of licensing costs, conflicting license requirements, and unbalanced regulatory decision-making.

Purdom, *supra* note 21.

[42] W. Herbert McHarg, *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology: A Strong Holding for State Authority to Regulate, But Will it Hold Water?*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 140, 158 (1995).

III. STATEMENT OF THE CASE

The Tunbridge Mill Corporation (Tunbridge), pursuant to section 401 of the CWA, petitioned the Vermont Agency of Natural Resources (VANR) for certification of a small hydroelectric facility.[43] Tunbridge and the VANR discussed this possibility and agreed on the conditions that would be included in the certification, which contained minimum stream flow and fishery protection conditions. Tunbridge then sought an original hydroelectric license from the FERC under Part 1 of the FPA.[44] The FERC granted Tunbridge a forty-year license to construct and operate the "Tunbridge Mill Project."[45] The Commission, however, refused to incorporate three state conditions[46] into the license, stating that those conditions were beyond the scope of Vermont's authority under the CWA and were thus unlawful.[47] American Rivers and Vermont filed motions to intervene and petitions for rehearing, challenging the holding of the FERC. The Commission granted the

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[43] American Rivers Inc. v. FERC, 129 F.3d 99, 102 (2nd Cir. 1997).

[44] Tunbridge Mill Corp., 68 F.E.R.C. ¶ 61,078 (1994). The project is required to be licensed under section 23(b)(1) of the FPA due to its location on a stream over which Congress has jurisdiction under the authority of the Commerce Clause. 16 U.S.C. § 817 (1988).

[45] 68 F.E.R.C. at ¶ 61,078 (1994).

[46] The state certification contained eighteen conditions, three of which were excluded from the FERC Order Issuing License, as follows:

> Condition J states that any significant changes to the project or its operation should be submitted to Vermont for review and approval. Condition L provides that construction cannot commence until the licensee receives state approval for items required in Conditions B, C, D, E, and J . . . [and] [c]ondition P is a 'reopener' provision, allowing the state to reserve the right to alter terms and conditions as necessary to protect water quality.

Id. Similar minimum stream flow and fishery conditions which were at issue in *Public Utility* were found by the FERC in *Tunbridge Mill* to be valid under the CWA, and they were therefore included in the license. 75 F.E.R.C. ¶ 61,175 (1996).

[47] *Id.* Prior to its holding in *Tunbridge Mill*, the FERC had consistently held that review of the appropriateness of state conditions was within the jurisdiction of the state courts and not the Commission. *Id.* In *Tunbridge Mill*, the FERC reversed its position, stating:

> After careful consideration, we have decided that our prior conclusion regarding the mandatory nature of conditions contained in state water quality certifications was incorrect . . . [w]e conclude that we have the authority to determine that such conditions do not become terms and conditions of the licenses we issue . . . [w]e believe that in light of Congress' determination that the Commission should have the paramount role in the hydropower licensing process, whether certain state conditions are outside the scope of 401(d) is a federal question to be answered by the Commission.

motions to intervene and denied the petitions for rehearing.[48] Petitioners American Rivers and Vermont sought review in the Second Circuit Court of Appeals.

Relying primarily on its holding in *Tunbridge Mill*, the FERC licensed several other hydroelectric projects and again refused to incorporate state-imposed conditions into the licenses which it believed were in violation of the CWA.[49] The petitioners sought review of those orders as well, after the Commission had granted their motions to intervene and denied their petitions for rehearing.[50]

IV. DECISION ANALYSIS

The central issue in *American Rivers* was whether the FERC could exclude state conditions from hydropower licenses if it determined that those conditions were beyond the scope of the states' authority under the CWA. Therefore, the "crux of the dispute" was whether the FERC had the authority to determine which conditions were valid under section 401 of the CWA.[51]

A. Statutory Construction of the CWA

Petitioners contended the language of section 401(d) clearly indicates that conditions must be included in a license as they appear in the state certification and the FERC had no authority to review those conditions to decide if they conformed with the CWA.[52] The FERC disagreed, arguing that section 401(d) is not as clear as petitioners alleged. The FERC contended that the states' authority under section 401(d) is limited to imposing only those conditions which are reasonably related to water quality and valid under the provisions of section 401. The FERC further argued that it could exclude any

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Id.

[48]Tunbridge Mill Corp., 75 F.E.R.C. ¶ 61,175 (1996).

[49]*See* Green Mountain Power Corp., 70 F.E.R.C. ¶ 62,205 (1995), *reh'g denied*, 75 F.E.R.C. ¶ 61,250 (1996); Central Vermont Pub. Serv. Corp., 69 F.E.R.C. ¶¶ 62,197; 62, 198; 62,199; 62,200 (1994), *reh'g denied*, 75 F.E.R.C. ¶ 61,263 (1996). The FERC licensed one Green Mountain project and relicensed four Central Vermont projects for a total of five projects which were licensed under the reasoning of *Tunbridge Mill*. *Id.*

[50]129 F.3d 99, 104-105 (2nd Cir. 1997).

[51]*Id.* at 102-07.

[52]*See* discussion *supra* note 18.

conditions that it found to be outside of the states' section 401 authority.[53]

The Court of Appeals first noted that the FERC's interpretation of the CWA does not receive deference under the doctrine of *Chevron USA, Inc. v. Natural Resources Defense Council*,[54] because administration of the CWA is delegated to the Environmental Protection Agency (EPA) and not the FERC.[55] The Court then applied a "plain meaning" analysis to section 401(d) of the Act,[56] emphasizing that certification conditions *shall* become conditions on a federal license and finding that language "unequivocal."[57] Therefore, the court agreed with the petitioners' belief that the language was clear and that the FERC was required under 401(d) to incorporate all conditions.

The FERC argued that the language of 401(d), though mandatory, restricts the substantive authority of the states to impose only those conditions which relate to water quality. The court agreed, stating that the section, "reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."[58] Although the court recognized that the state's authority is limited, it found that the language in section 401(d) does not delegate *to the FERC* any authority to decide which conditions are valid under section 401.[59]

The FERC also argued that two other sections of the Act, 401(a)(3)[60] and 401(a)(5), [61] give it the authority to review state-imposed conditions. Section 401(a)(3) provides that state certification for a federal license shall fulfill the requirements for any subsequent federal licenses which affect the same facility.[62] Section 401(a)(5) affords the licensing agency the authority to suspend or revoke a license

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[53] 129 F.3d at 102.

[54] 467 U.S. 837 (1984). The doctrine of *Chevron* is that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* at 844.

[55] 129 F.3d at 107. Section 101 of the CWA states that "the Administrator of the Environmental Protection Agency . . . shall administer this chapter." 33 U.S.C. § 1251 (1977).

[56] The Court notes that it is generally assumed "that Congress expresses its purposes through the ordinary meaning of the words it uses." 129 F.3d at 107 (quoting Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984)).

[57] 129 F.3d at 107.

[58] *Id.*

[59] *Id.*

[60] 33 U.S.C. § 1251(a)(3) (1977).

[61] 33 U.S.C. § 1251(a)(5) (1977).

[62] 33 U.S.C. § 1341(a)(3) (1997).

if it is found to be in violation of certain provisions of the CWA.[63] The court found that the FERC did not establish that it has been given any authority by Congress to determine whether the state-imposed conditions are consistent with the provisions.[64]

B. Analagous Cases

The Commission argued that the D.C. Circuit Court of Appeals, in *Keating v. FERC*,[65] rejected the petitioners' argument based on the plain meaning of section 401(d) and held that the FERC had the authority to review and reject state-imposed conditions which were not valid under section 401. The Second Circuit Court of Appeals rejected this interpretation of the case, stating that the FERC read the holding too broadly.[66]

In *Keating*, the Court of Appeals for the District of Columbia confronted the issue of whether the FERC or the state court had jurisdiction to decide whether a state's purported revocation of its certification was valid under the terms of 401(a)(3). The petitioner in *Keating*, seeking to operate a hydroelectric facility, obtained a permit from the Army Corps of Engineers under section 404. The Corps had obtained certification from the state for a "nationwide permit,"[67] and Keating was assured by the state that the project had certification under that permit. Keating then applied for a hydropower license from the FERC. The state, however, claimed to have revoked the certification, stating that it "never intended by its blanket Corps [section 404] certification to certify any individual projects for purposes of a later federal power license."[68] The FERC declined to issue a license, asserting that it had no power to apply the provisions of section 401(a)(3) and that the revocation must be reviewed by the state court.[69]

The *Keating* Court found that the state's prior certification was sufficient to obtain a federal license and that the state could not revoke the certification for reasons other than those listed in section

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[63] 33 U.S.C. § 1341(a)(5) (1997).

[64] 129 F.3d at 108.

[65] 927 F.2d 616 (D.C. Cir. 1991).

[66] 129 F.3d at 109.

[67] A nationwide permit is one that "authorizes any party to engage in the sort of activity described in the permit without the need to seek prior project-specific authorization." 927 F.2d at 619.

[68] *Id.* at 620.

[69] *Id.* at 624.

401(a)(3).[70] Further, the court held that because section 401(a)(3) required an application of federal law, and "[a] state can affect federal authority under section 401(a)(3) only to the extent therein indicated," then the application of that section "involves a federal question that, absent satisfactory explanation, presumably must be resolved by the applicable federal licensing authority and the federal courts."[71] Therefore, the FERC must determine whether the revocation by the state of its certification was proper under 401(a)(3).

The FERC argued in *American Rivers* that the Court of Appeals for the District of Columbia's ruling in *Keating* supported its contention that it could reject state conditions which were invalid under section 401. The Second Circuit, however, found that *Keating* only addressed the narrow issue of the FERC's authority to determine whether a valid certificate exists under section 401; this narrow ruling did not give the FERC broad authority to review a state's conditions.[72]

The Second Circuit found *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*[73] to be more on point than *Keating*. In *Escondido*, the Supreme Court considered a pre-license plan within the FPA itself. Section 4(e) provides that the Secretary of the Interior "shall" place conditions on licenses issued for hydropower projects within Native American reservations. [74] The FERC refused to accept the conditions. In *Escondido*, as in *American Rivers*, the Court focused on the plain language of the statute, finding that "[t]he mandatory nature of the language chosen by Congress appears to require that the Commission include the Secretary's conditions in the license even if it disagrees with them."[75]

The FERC argued that this case is distinguishable from *Escondido* due to the Court's holding that the Commission was not required to include conditions regarding Native American reservations which did not have any of the licensed facilities on their property. As the Commission stated in *Tunbridge*, *Escondido* held that

> section 4(e)'s requirement that the license "shall" include the proposed conditions is not absolute; the Commission may reject conditions that fall outside the

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[70] *Id.* at 618.
[71] *Id.* at 624.
[72] 129 F.3d 99, 108 (2nd Cir. 1997).
[73] 466 U.S. 765 (1984).
[74] 16 U.S.C. § 797(e) (1920).
[75] 129 F.3d at 109 (quoting 466 U.S. at 772).

> scope of section 4(e) in that they purport to apply to projects or parts of projects not located within a reservation. This supports our conclusion that we can reject conditions that fall outside the scope of section 401.[76]

In *American Rivers* the Second Circuit found that this "unremarkable holding" did not support the Commission's argument.

C. The FPA

The FERC argued that, in addition to violating the terms of the CWA, the state conditions imposed on Tunbridge also violated the FPA itself. Specifically, the FERC argued that: (1) the conditions that imposed deadlines conflicted with section 13 of the FPA,[77] (2) the reopener and pre-approval conditions violated section 6 of the FPA,[78] and (3) the conditions violated the balanced approach to environmental concerns in the Electric Consumers Protection Act (ECPA).[79] Curiously, the court did not address the first two of these arguments but simply repeated that the Commission failed to establish that a Congressional mandate gives it authority to review section 401 conditions. Concerning the ECPA amendments to the FPA, the Commission argued that their provisions would be disturbed, since states would have the ability to label all of their would-be "recommendations" as conditions on the certification and would thus usurp the FERC decision-making authority.[80] The Commission contended that this result would be impermissible because section 511(a) of the CWA provides that the Act "shall not be construed as ... limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this

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[76]75 F.E.R.C. ¶ 61,175 (1996) (citing 446 U.S. at 780-781).

[77]16 U.S.C. § 806 (1920). This section "places construction deadlines largely within the discretion of the Commission and generally contemplates that construction will be commenced within two years of the date of the license." 129 F.3d at 111.

[78]16 U.S.C. § 799 (1920). This section limits the period of a license to fifty years and states that "[e]ach such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter." *Id.*

[79]Pub. L. No. 99-495, 100 Stat. 1243 (1986), *amending* 16 U.S.C. §§ 797(e), 803(a), 803(j) (1920). For a general discussion of the ECPA, *see* John D. Echeverria, *The Electric Consumers Protection Act of 1986*, 8 ENERGY L.J. 61 (1987).

[80]129 F.3d at 112.

chapter ..."[81] However, the Court found that 511(a) is inapplicable because the ECPA is inconsistent with the terms of the CWA.[82]

D. Interference With the FPA

The FERC contended that if the states were able to impose conditions that were not valid under the CWA, it would give them "the kind of governance and enforcement authority that is critical and exclusive to administer a license under the Federal Power Act, a power which the courts have repeatedly concluded belongs to the Commission."[83] While recognizing the broad federal role of the FERC in hydropower licensing and sympathizing with its inability to reject state conditions, the Second Circuit considered the Commission's concerns to be "overblown."[84] In support of this statement, the court noted that an applicant can seek review of the license conditions and that the FERC has the ability to reject a license altogether.

The Second Circiut suggested that the applicant has the ability to seek review of the validity of the conditions. However, the FERC has asserted that it cannot rely on applicants to appeal conditions that exceed the scope of section 401 and "infringe on the Commission's direct and exclusive jurisdiction over the project works and operations."[85] The court noted that *Escondido* addressed the same problem, and quoted the Supreme Court's proposition that "Congress apparently decided that if no party was interested in the differences between the Commission and the Secretary, the dispute would best be resolved in a nonjudicial forum."[86] This reference shows that the Second Circuit Court of Appeals failed to recognize the problems in the current licensing process, which is extremely complex and expensive.[87] Some applicants would rather settle for unfavorable conditions than go through the long, expensive process of hearings and reviews.

The Court also suggested that the FERC failed to acknowledge

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[81] *Id.* at 111 (quoting 33 U.S.C. § 1371(a) (1977)).

[82] *Id.* at 112.

[83] Brief for Respondent at 16, *Id.* at 111.

[84] *Id.*

[85] 75 F.E.R.C. ¶ 61,175 (1996).

[86] 466 U.S. at 779, n. 20. The language begins, "[w]e note that in the unlikely event that none of the parties to the licensing process seeks review, the conditions will go into effect notwithstanding the Commission's objection to them since the Commission is not authorized to seek review of its own decisions." *Id.*

[87] "[H]igh regulatory costs and a lack of certainty in the licensing process are inhibiting the ability of hydropower to compete with other generation resources." Purdom, *supra* note 21.

its ability to deny an applicant's license altogether if it appears that its authority under the FPA will suffer. However, the Commission was all too aware of this authority, recognizing that denial of a license has detrimental effects and deprives both private and public interests of the benefits of the project.[88] That does not serve the purpose of the FPA, nor does it solve the problem of the states' imposing conditions which are not within their authority pursuant to section 401.

V. CONCLUSION

In *American Rivers*, the court considered the plain language of section 401 and held that the CWA gave the state complete authority to determine the conditions of its certification of hydropower projects. Read in conjunction with *PUD 1, American Rivers* has given states the power to include conditions in their certifications that are unrelated to water quality and to impose those invalid conditions on a federal hydropower license.

The question of whether state conditions are outside the scope of their authority pursuant to section 401(d) is a federal question to be answered by the Commission.[89] Because the conditions of the certification become incorporated into the federal license, the conditions are subject to review by the FERC and federal courts.[90] In addition, because both the CWA and FPA indicate that the FERC may revoke or suspend the license or review its own grant or denial of the license, the role of the state ends when the state certification has been granted.[91]

The Court in *American Rivers* did not properly consider the FERC's intended role in hydropower licensing or that the state agencies, which only consider the interests of the state, will easily override the FERC. In order to have a comprehensive approach to the hydropower licensing process, which considers both private and public

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[88] 129 F.3d at 111. *See also* Tunbridge, 68 F.E.R.C. ¶ 61,175.

[89] One commentator noted:

> States have the opportunity to anticipate projects, like hydroelectric facilities, when they develop water quality criteria to protect a water body's uses. Having developed these criteria, states should not be able to revisit their decisions outside of the political process or interfere in the federally preempted field of hydropower licensing unless Congress authorizes otherwise.

Bogardus, *supra* note 21 at 101.

[90] Bogardus, *supra* note 21 at 99.

[91] *Id.*

interests, the FERC needs to have its central decision-making authority restored. Judicial interpretations of the CWA have disrupted the balance that the FPA intended to maintain for the licensing process. It is time for Congress to restore the balance and enact legislation which will settle the conflict. Otherwise, interference with the FERC's authority will disrupt the comprehensive purpose of the FPA and could negatively impact the future of hydropower, a valuable and essential energy source.