

NOTES

THE "COMPREHENSIVE PLAN" REQUIREMENT OF THE FEDERAL POWER ACT: A SENATOR'S DREAM, A CONGRESSIONAL MANDATE, AND A PARAMETER FOR AGENCY DISCRETION

INTRODUCTION

This nation has enjoyed and exploited its rivers for various purposes, including navigation, irrigation, recreation, sewage disposal, water supply, and power production. Not surprisingly, these uses may conflict with or complement each other.¹ A waterpower project, in particular, may have significant effects on the potential for other uses of the resource. For example, impounded water behind a hydroelectric dam may flood a "white water" recreational area, or a dam may severely hamper the navigability of a river. Locating the dam lower or higher on the river and thus protecting the recreational area or installing facilities which improve rather than harm navigation, however, may possibly realize the same power production. Whether a project optimizes water resource benefits and minimizes opportunity costs depends on the planning process used in the development of that resource.

Congress has delegated numerous waterpower planning responsibilities to the Federal Energy Regulatory Commission (Commission).² The general responsibilities of the Commission include the regulation of natural gas, electric utilities, oil pipelines, and hydroelectric power.³ Among these functions, the Commission must issue licenses for any project to produce power from any navigable waters.⁴ This authority was originally

¹ For example, a developer may devise a plan to use river water to supply urban needs. After use and treatment, the same water is used for irrigation, which simultaneously purifies it. The water can then be returned through groundwater movement to the river where it can be withdrawn again downstream. Alternatively, the plan could involve using the water for urban needs and returning it directly to the river for sewage disposal, thus precluding immediate reuse of the water. See generally J. SHEAFFER & L. STEVENS, *FUTURE WATER* (1983).

² In 1977, the Federal Energy Regulatory Commission (FERC) replaced the Federal Power Commission (FPC). This note uses the term "Commission" to refer to either or both of these commissions except where clarity necessitates more specificity.

³ Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 583-85 (1977), 42 U.S.C. § 7172 (1982). FERC is an independent regulatory commission of the federal government established within the Department of Energy by the Department of Energy Organization Act of 1977. *Id.* at 582, 42 U.S.C. § 7171. The Commission maintains its own staff and is composed of five members whom the President appoints with the consent of the Senate, each serving four-year terms. *Id.* Congress transferred the bulk of FERC's authority from the FPC, whose functions, for the most part, FERC assumed under the 1977 Act. *Id.* at 583-84, 42 U.S.C. § 7172.

⁴ *Id.* Congress has defined navigable waters as any water body over which Congress has jurisdiction due to its commerce powers and which is suitable for transportation of persons or property. 16 U.S.C. § 796 (1982).

vested in the Commission by the Federal Water Power Act of 1920.⁵ Section 10 of that Act lists several conditions on which the Commission is to issue licenses.⁶ Section 10(a) states that one of these conditions shall be

[t]hat the project adopted . . . shall be such as in the judgment of the Commission will be *best adapted to a comprehensive plan* for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary *in order to secure such plan* the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.⁷

Although the plain meaning of this section suggests that the Commission must base its licensing decisions on an actual development plan for the affected waterway, the Commission has not used such plans when authorizing hydroelectric projects.⁸ This has led to recent challenges to the Commission's licensing approach.⁹ The National Wildlife Federation and the Idaho Wildlife Federation have petitioned the Ninth Circuit Court of Appeals for review and reversal of several issues, including the Commission's 1983 decision to issue preliminary permits for several proposed projects in the Salmon River Basin and the Commission's denial of the petitioners' request for the preparation of a comprehensive plan to guide waterpower development in that basin.¹⁰ The petitioners argue that both the plain meaning and legislative history of section 10(a) indicate that the Commission must develop a comprehensive plan for the basin prior to granting any preliminary permits.¹¹ Furthermore, the petitioners contend that the Commission's failure to give reasons for its decision not to prepare a comprehensive plan is itself reversible error.¹² Similarly, several environmental organizations, intervenors in a Commission proceeding regarding the licensing of a hydroelectric project in the Penobscot River Basin, have submitted a motion for an order by the Commission directing its staff to prepare a comprehensive plan for that basin pursuant to section 10(a).¹³ The renewed interest in this issue has led Senators Evans and Metzenbaum to introduce legislation which would amend section 10(a) to require the Commission to consider the extent a

⁵ Ch. 258, 41 Stat. 1063, 1065 (1920). That act created the FPC as a three-member commission, without staff, composed of the Secretaries of War, Interior, and Agriculture. *Id.* at 1063. The Reorganization Act of 1930, ch. 572, recreated that agency as a presidentially appointed five-member commission, with staff. 46 Stat. 797 (1930), 16 U.S.C. §§ 792, 793, 797 (1982). In 1935, Congress amended the Federal Water Power Act and renamed it the Federal Power Act, ch. 687, 49 Stat. 838, 863 (1935).

⁶ 49 Stat. at 842 (1935), 16 U.S.C. § 803 (1982).

⁷ *Id.* (emphasis added).

⁸ See *infra* notes 177-209 and accompanying text.

⁹ See, e.g., Motion of American Rivers Conservation Council (Directing Preparation of a Comprehensive Plan), *In re* Great Northern Corporation, Application for Big "A" Hydroelectric Project, Project No. 3779 (F.E.R.C. 1985) [hereinafter *American Rivers*]; Petitions for Review of Orders of the Federal Energy Regulatory Commission, *National Wildlife Federation v. Federal Energy Regulatory Commission*, No. 84-7325 (9th Cir. 1985) [hereinafter *National Wildlife Federation*].

¹⁰ *National Wildlife Federation*, *supra* note 9, at 2-3.

¹¹ *Id.* at 21.

¹² *Id.* at 27.

¹³ *American Rivers*, *supra* note 9, at 1.

proposed project is consistent with a comprehensive plan prepared by a regional or state authority.¹⁴

The current interest in hydroelectric power as a renewable energy resource heightens the important question of whether the Commission must use an actual comprehensive plan in its licensing decisions. Requiring preparation of comprehensive plans may mean delaying or denying private developers' considerable economic gain, which they can realize as a result of the Public Utilities Regulatory Policy Act.¹⁵ This act requires utilities to purchase privately produced power, from renewable resources, at relatively high rates.¹⁶ In addition, some developers have expressed concern that further delays might preclude them from placing projects in service before the eligibility deadline of January 1, 1989, for energy investment tax credits.¹⁷ These potential costs, of course, must be considered relative to the potential benefits which may arise from a more deliberate approach to granting private rights to public resources.

This note examines whether and when section 10(a) of the Federal Power Act requires the Commission to use an actual comprehensive plan for waterway development in its licensing decisions. Section I is divided into two parts, first examining the legislative history which led to the enactment of the Act.¹⁸ This history alone does not provide a clear indication of what Congress intended by including the comprehensive plan terminology in that Act. Section I then examines legislative efforts that were underway to establish a separate commission with the explicit charge of preparing comprehensive plans for the nation's waterways.¹⁹ This discussion will shed light on why Congress included the comprehensive plan terminology in the Federal Power Act. Section II reviews the Commission's interpretation and application of section 10(a).²⁰ While the Commission originally determined that actual plans were sometimes necessary, it subsequently abandoned this position and adopted a position that such plans were not necessary under any circumstances. Section III discusses judicial review of the Commission's application of section 10(a).²¹ Although the recent litigation is the first challenge to the Commission's failure to require an actual plan of waterway development, the courts generally have been deferential to the manner in which the Commission has exercised its planning function.

¹⁴ Letter from Cheri Y. Cornell, Legislative Aide to Senator Daniel J. Evans (Oct. 2, 1985) (concerning proposed amendment by Senators Evans and Metzenbaum in the Nature of a Substitute to Senate bill 426).

¹⁵ 16 U.S.C. § 824a-3(a)(2), (b) (1982).

¹⁶ *Id.* A utility must allow a small (less than 80 megawatts) power producer to interconnect to the utility's system and pay the producer the utility's "avoided cost." 18 C.F.R. §§ 292.204(a), (b), 292.304(d) (1985). Generally, this cost equals the cost the utility would have paid to produce the energy received from the private producer. Normally, a utility activates its most expensive generating sources last and deactivates them first. Thus, the price it must pay to the private producer is generally equal to the utility's highest cost of producing energy at the time the energy is received from the producer.

¹⁷ See 26 U.S.C. § 46(b)(2)(D) (1986). See also Procedures for Assessing Hydropower Projects Clustered in River Basins, Federal Energy Regulatory Commission, Commission Directive to Staff, Docket No. EL85-19-000 (issued April 24, 1985).

¹⁸ See *infra* notes 23-90 and accompanying text.

¹⁹ See *infra* notes 91-154 and accompanying text.

²⁰ See *infra* notes 155-209 and accompanying text.

²¹ See *infra* notes 210-28 and accompanying text.

Finally, section IV suggests that the courts should not continue to accept the Commission's current interpretation of section 10(a).²² Although the courts should not require the Commission to use actual plans under all circumstances, they should require the Commission to use plans in situations where there are significantly conflicting uses proposed for a waterway. Moreover, if the Commission decides not to use an actual plan, it should justify its decision not to do so.

I. LEGISLATIVE HISTORY

Interpretation of a statutory term whose meaning is not clear on its face or within the context of the entire statute often begins with an examination of the statute's legislative history. Yet an examination of the legislative history of the Federal Power Act alone does not indicate a concise interpretation of the comprehensive plan requirement of section 10(a). The requirement was a vague and ambiguous directive, never defined in the statute and virtually ignored in the conference and committee reports and in the discussions on the floor of the Senate and the House. To understand the origin of section 10(a), one must look beyond the immediate legislative history of the Federal Power Act and examine contemporaneous efforts directed at truly comprehensive water resource legislation. These efforts led to the authorization of a "Waterways Commission" with the explicit charge of formulating comprehensive plans for development of the nation's waterways. An examination of both strains of legislative history suggests that the comprehensive plan terminology of the Federal Water Power Act originated as a concession to the advocates of the Waterways Commission. It was likely a compromise designed to ensure that the Federal Power Commission in the process of authorizing waterpower projects would consider the plans developed by the Waterways Commission. Yet, the Waterways Commission was never appointed and the Federal Power Act, when finally passed three years after initially proposed, abolished the Waterways Commission. Section 10(a) became merely a directive that the Federal Power Commission use an actual plan of development in some, but not all, licensing decisions.

A. *Legislative History of The Federal Power Act*

Until the late nineteenth century, there was little federal involvement in water resource regulation, with the matter generally left to the states.²³ In the later part of that century, Congress became more involved but aimed initial legislation only at improving or maintaining waterway navigability.²⁴ In 1896 Congress did, however, subsequently grant to any citizen or association free rights of way through publicly owned land to develop waterway facilities for the purpose of producing or generating electrical

²² See *infra* notes 229-59 and accompanying text.

²³ Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9, 9 (1945).

²⁴ The Rivers and Harbors Act of 1884, 23 Stat. 133 (1884), and Rivers and Harbors Act of 1888, 25 Stat. 400 (1888) authorized the Secretary of War to expend funds for improving numerous harbors and rivers and to require modification of structures obstructing navigation. See also Rivers and Harbors Act of 1890, 26 Stat. 426 (1890) (forbidding the creation of any unauthorized obstructions to navigation or the building of any structure in a navigable waterway without the permission of the Secretary of War).

power.²⁵ Finally, in 1899, Congress statutorily assumed direct control over most hydroelectric construction by requiring congressional authorization and the approval of the Chief of Engineers and the Secretary of War for any facilities, including dams, built over any navigable waterway.²⁶ In 1901, Congress established a permit procedure for electrical facilities on public lands.²⁷ During the next several years, however, Congress rarely refused to authorize, or even constrain, the ad hoc development of hydroelectric sites.²⁸

Congress gave the federal government a more active role in waterpower development with the passage of the General Dam Act of 1906.²⁹ While the act did not disturb the requirement of congressional authorization of a proposed dam on a navigable stream, it did require that the developer submit its plans, specifications, drawings, and a site map to the Secretary of War and the Chief of Engineers for approval.³⁰ The act authorized these officials to impose conditions or stipulations such as they might "deem necessary" to protect the interests of the United States.³¹ The underlying purpose of the act was to insure that navigability of the nation's streams was maintained and improved while the development of hydroelectric power was encouraged.³²

During the following years, various political and economic forces urged a more comprehensive approach to waterway development by the federal government than the ad hoc approval of projects based on localized evaluation of navigational impacts. For example, the Democratic platform of 1908 called for "a liberal and comprehensive plan for improving every watercourse in the Union which is justified by the needs of commerce."³³ On the floor of the Senate in 1910, Senator Newlands of Nevada noted that during the preceeding years there had been a movement, "through conventions and river and harbor congresses," which had led to President Theodore Roosevelt's appoint-

²⁵ Act of May 14, 1896, ch. 179, 29 Stat. 120 (1896) (codified as amended at 43 U.S.C. § 957 (1982)). See also 26 Stat. 1101 (1891).

²⁶ Act of March 3, 1899, ch. 425, 30 Stat. 1121, 1151 (1899) (codified at 33 U.S.C. §§ 401, 403 (1986)).

²⁷ Act of February 15, 1901, ch. 372, 31 Stat. 790 (1901) (codified as amended at 16 U.S.C. § 79, 43 U.S.C. § 959 (1986)).

²⁸ Pinchot, *supra* note 18, at 11.

²⁹ Ch. 3508, 34 Stat. 386 (1906).

³⁰ *Id.*

³¹ *Id.*

³² See H.R. REP. NO. 337, 59th Cong., 1st Sess., 1-3 (1906). This report stated, "[u]nder the conditions of this bill . . . millions of horsepower would be developed . . . with benefit rather than detriment to the interests of navigation." *Id.* at 3. It also stated that "[i]f this bill be enacted in law it will only be necessary hereafter, in passing a bill to authorize the construction of a dam, to provide a simple sentence granting authority to construct a dam in accordance with the provisions of this act." *Id.* at 1. Although the principal protective concern of Congress was navigation, this Act also provides one of the first examples of Congress's concern for fisheries; section 3 of the Act required, *inter alia*, that the owners of a dam "shall maintain, at their own expense . . . such fishways as the Secretary of Commerce and Labor shall prescribe." General Dam Act of 1906, ch. 3508, 34 Stat. 386 (1906).

³³ 56 CONG. REC. 10, 9853 (1918) (reprinting of waterways plank of Democratic Platform of 1908). See also the Democratic Platform of 1912, which, in relevant part, stated that:

[w]e favor the cooperation of the United States and the respective States in plans for the comprehensive treatment of all waterways with a cooperative plan for channel improvement [and] with plans for drainage of swamp and overflowed lands We favor the adoption of a liberal and comprehensive plan for the development and improvement of our inland waterways

Id.

ment of an Inland Waterways Commission in 1907 to study the issue of comprehensive waterway development.³⁴ In appointing that commission, Roosevelt himself cited the petitions from commercial organizations requesting a commission which would prepare a "comprehensive plan" for the development of the nation's rivers.³⁵

The phrase "comprehensive plan" had become, then, a term which those advocating alternatives to the ad hoc approach to water resource development frequently used. They used the term, however, in two different contexts. On the one hand, there was the concept of a comprehensive plan as an actual plan which some authority would prepare prior to a waterway's development and would serve as a blueprint against which any proposed project for the waterway would be evaluated. Alternatively, the phrase was used to denote an approach involving the centralization of water resource authority whereby the authority would consider each project, at the time it was proposed and without an actual waterway plan prepared beforehand, to determine whether it was consistent with the affected waterway's optimum development.

The manner in which President Theodore Roosevelt used the term "comprehensive plan" illustrates the dual nature of its meaning at that time. When Roosevelt created the Inlands Waterways Commission in 1908,³⁶ he conceived of a "comprehensive plan" as an actual plan for waterway development which would cover all potential uses of the resource.³⁷ He criticized the approach of developing water projects for single purposes and suggested that such projects should be merged into a comprehensive plan that accounted for all potential uses of waterways.³⁸ He stated that after formulation of a definite policy regarding water resources, the second step toward successful development of the nation's waterways would be "a concrete general plan, prepared by the best experts available, covering every use" to which the streams could be put.³⁹ Clearly, at this time, the President used the term "comprehensive plan" to mean an actual plan for comprehensive waterway development.

Soon after this, however, Roosevelt suggested the alternative approach to comprehensive planning with his vetoes of congressional authorization of dams across the Rainy

³⁴ 45 CONG. REC. 2, 2068 (1910).

³⁵ 42 CONG. REC. 7, 6967 (1908) (President's letter, sent to individuals requesting their service on the Inland Waterways Commission).

³⁶ *Id.* The record shows the incorrect date of letter of appointment as evidenced by dates of letters shown on the same and preceeding pages. *Id.* at 6966-67.

³⁷ *See id.* Notably, the vice-chair of the Commission was Senator Newlands, *id.* at 6971, who would be the leading campaigner during the next ten years for a comprehensive approach to the development of the nation's waterways. *See infra* notes 93-154 and accompanying text.

³⁸ 42 CONG. REC. 7, 6968 (1908). Roosevelt noted that water projects usually had been developed for only one purpose, such as navigation, power, irrigation, flood control, or water supply, but that "the time has come for merging local projects and uses of inland waters in a comprehensive plan designed for the benefit of the entire country." *Id.* He further stated that such a plan should comprehend all potential uses of waterways and coordinate the opinions of all water users. *Id.* *See also* Pinchot, *supra* note 23, at 15-16.

³⁹ 42 CONG. REC. 7, 6967 (1908). Roosevelt did not anticipate that this Inlands Waterways Commission would be the body to prepare plans for any specific waterway. Although the Commission noted in its report that "there exists an expectation in certain localities that the report here presented will include plans extending in detail to the principal waterways of the country," such plans were not possible within the Commission's budgetary and manpower constraints. *Id.* at 6968. What the Commission did present was "a comprehensive plan designed for the benefit of the entire country," which it defined as "a statement of principles and an outline of policy, coupled with recommendations." *Id.*

and James Rivers.⁴⁰ In his message accompanying his veto of the Rainy River dam, Roosevelt criticized the policy of granting private privileges to valuable public water resources prior to the formulation of "definite plans" for their use.⁴¹ Despite this criticism of the absence of "definite plans," he went on to suggest a "definite policy" which was concerned primarily with ensuring timely construction of projects and compensation for the government and which mentioned nothing about prior comprehensive planning.⁴² Instead, he stated that there should be some designated government official who, in approving the plans for the project, "sees to it" that a project contributes to the optimum development of the stream's navigation and power potential, or at least that the project will not interfere with such optimum development.⁴³ Roosevelt used similar language in his subsequent veto of the James River dam.⁴⁴

Thus, Roosevelt's language demonstrates the alternative approaches to what may constitute comprehensive planning for a waterway. On the one hand, a comprehensive plan could require a "definite plan" formulated prior to any authorization for waterway development. On the other hand, comprehensive planning could merely require some government entity who "sees to it" that optimum utilization of the resource is realized.

The General Dam Act of 1910 contained the first statutory requirement regarding comprehensive plans for waterways.⁴⁵ Like the 1906 Act, it required that developers submit plans and specifications for dams on navigable streams to the Secretary of War and the Chief of Engineers for their approval.⁴⁶ In addition, the 1910 Act required that the Chief of Engineers and the Secretary of War "consider the bearing" of the proposed project on a comprehensive plan for the improvement of the waterway involved to promote navigation and full water power development.⁴⁷ In stating that this was one of the "principal changes" Congress made in the 1906 Act,⁴⁸ the House Committee on Interstate and Foreign Commerce reiterated that the act required the designated officials to "consider a comprehensive plan" for the waterway's improvement, including the authority to locate the project "to best conform to the requirements of such waterway."⁴⁹

⁴⁰ 42 CONG. REC. 5, 4698 (1908); 43 CONG. REC. 1, 978-80 (1909).

⁴¹ 42 CONG. REC. 5, 4698 (1908) ("The present policy pursued in making these grants is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown, and granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use.").

⁴² *Id.*

⁴³ *Id.* Roosevelt stated that "[i]t should also be the duty of some designated official to see to it that in approving the plans [for the project] the maximum development of the navigation and power is assured, or at least . . . [the project will not] ultimately . . . interfere with the better utilization of the water or complete development of the power." *Id.*

⁴⁴ See 43 CONG. REC. 1, 978-80 (1909).

⁴⁵ General Dam Act of 1910, ch. 360, 36 Stat. 593, 594 (1910).

⁴⁶ *Id.* at 543.

⁴⁷ *Id.* at 593-94. The relevant language reads:

[I]n acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power.

Id.

⁴⁸ But see 45 CONG. REC. 5686 (1910). Representative Adamson stated that the 1910 amendments "contain many words and very little change in the original bill of 1906 and no material change."

Id.

⁴⁹ H.R. REP. NO. 1160, 61st Cong., 2d Sess. 2 (1910).

The 1910 Act, then, required the Secretary of War and the Chief of Engineers to "consider" a comprehensive plan. Nowhere does the Act, however, define "comprehensive plan" nor does it state who is to formulate the plans.⁵⁰ In the only relevant discussion on the floor of the House regarding the comprehensive plan language, Representative Stevens stated that, in the future, the "whole plan of that river" was to "be considered" when any entity presents a project for approval.⁵¹ This evaluation of a proposed project, he stated, would include studying all uses of the water, whatever they may be, planning for its most effective utilization, and locating the project to have the least effect on other uses of the water.⁵² Representative Stevens also stated that Congress included the comprehensive plan language as a result of President Roosevelt's recommendations in his messages accompanying his vetoes of the Rainy and James River dams.⁵³

As a response to President Roosevelt's vetoes, Congress most likely intended that the term have the same meaning as the President's use of it. His use of the term, however, had indicated alternative meanings: comprehensive plan as an actual plan and comprehensive plan as merely comprehensive "considerations." Several factors suggest that the latter understanding is most appropriate for the use of the term in the 1910 Act. The Act only required that the Secretary of War and the Chief of Engineers ensure that any project approved would not impede the maximum development of a river's navigational and power potential. This interpretation is supported by both the House Report and Representative Stevens' discussion of the bill, in addition to the bill itself, which presents the "comprehensive plan" as something that should "be considered," but not actually be formulated by the relevant government officials.⁵⁴ Furthermore, if such a formulation was contemplated by Congress, it seems unusual that there is no express statement to that effect in either the bill or the discussion addressed to it.⁵⁵ Finally, there

⁵⁰ See General Dam Act of 1910, ch. 360, 36 Stat. 593 (1910).

⁵¹ 45 CONG. REC. 5, 5684 (1910). Representative Stevens stated, we provide, in accordance with the recommendations of President Roosevelt in his veto message, that hereafter whenever a project for a dam shall be presented to Congress or to the War Department or the Chief of Engineers, the whole plan of that river shall be considered, that all the uses of that water should be studied and planned for most effective use for navigation, for power, for irrigation, or whatever may be, and that the dam shall be so placed as to best conserve the public uses of the water of that stream.

Id.

⁵² *Id.* Representative Stevens's language is rather ambiguous. On the one hand, "the whole plan" of the river was to be "considered." *Id.* Yet, apparently, the various potential uses of the waterway were to be studied and planned for when the project was presented for approval. *Id.*

⁵³ *Id.* Statements of the House Committee on Interstate and Foreign Commerce demonstrate that the 1910 Act was a response to President Roosevelt's vetoes of the congressionally authorized dams. After President Roosevelt had vetoed the Rainy and James River dams, this committee acknowledged that "defects might exist" in the 1906 Act and assumed responsibility for drafting amendments. H.R. REP. NO. 1767, 60th Cong., 2d Sess. 3 (1908). Representative Stevens also noted the Committee's "promise" to President Roosevelt to amend the general law before authorizing construction of other dams. 45 CONG. REC. 5, 5683 (1910).

⁵⁴ H.R. REP. NO. 1160, 61st Cong., 2d Sess. 2 (1910); 45 CONG. REC. 5, 5683 (1910); and General Dam Act of 1910, ch. 360, 36 Stat. 593 (1910).

⁵⁵ Alternatively, the requirement that the Chief of Engineers and the Secretary of War "consider the bearing of [a proposed dam] upon a comprehensive plan" for the waterway may have been partially a directive that they consider such a plan if one existed. For instance, the Rivers and Harbors Act of March 3, 1909 had directed the Corps of Engineers to conduct studies of all subjects which may have a bearing upon the navigation of several rivers in Alabama, including the Coosa

is no evidence that, after enactment of the 1910 Act, the Commission failed to approve any proposed project because the project was not consistent with a comprehensive plan developed by the Secretary of War or the Chief of Engineers. On the other hand, Representative Stevens' somewhat ambiguous remarks on the house floor suggest the alternative definition. While stating that pursuant to section 10(a) "the whole plan" of the river was to be "considered," he also stated that "all the uses of that water should be studied and planned for . . ."⁵⁶ Some members of Congress, then, may have conceived of the "comprehensive plan" as an actual preconceived plan for waterway development.

In the years following the passage of the 1910 Act, many became dissatisfied with its licensing procedure because it hindered rather than facilitated hydroelectric power development.⁵⁷ This resulted in legislative efforts which would eventually lead to Congress's replacing the General Dam Act of 1910 with the Federal Water Power Act.⁵⁸ Before the passage of that Act, however, there ensued a bitter struggle in Congress between advocates of private interests seeking a free hand in the development of the nation's water resources and those who sought governmental control of, and a more comprehensive approach to, such development.⁵⁹

River. Rivers and Harbors Act of 1909, ch. 264, 35 Stat. 815, 822, 825 (1909). The Corps conducted studies of the Coosa and developed a plan for navigational improvement. Letter from the Chief of Engineers to the Senate (Aug. 1, 1912), *reprinted in* FEDERAL CONTROL OF WATER POWER, PAPERS SUBMITTED TO THE COMMITTEE ON COMMERCE, UNITED STATES SENATE, 62 Cong., 3d Sess., on Regulation and Control of Waters and Water Power in Navigable and Nonnavigable Streams of the United States, and the Rights of Riparian Owners 23 (1913). The Corps' reports were considered to be "comprehensive plans . . . for the development of navigation of this river." Statement by President Taft upon vetoing a Coosa River dam on other grounds, *reprinted in* S. Doc. No. 949, 62d Cong., 2d Sess. 1 (1912). In addition, separate legislative efforts were underway to establish some sort of a commission with the express duty of preparing comprehensive plans. *See infra* notes 93-115 and accompanying text. Thus, it appears that where a plan had been developed, it probably was to be considered in the authorization process. Such prior plan formulation, however, was not the rule. *See, e.g.,* letter from Secretary of War to Senator Nelson (Jan. 2, 1913), *reprinted in* S. REP. No. 1131, 62d Cong., 3d Sess. 4-5 (1913). In response to a request that he express his views on a bill authorizing the construction of a dam on the Connecticut River, the Secretary of War made no mention of any plan and discussed only navigational aspects and requiring the grantee to pay a reasonable fee "to be devoted to the interests of navigation." *Id.* In any case, it is apparent that the 1910 Act's comprehensive plan requirement more likely required certain "considerations" on the part of the Secretary of War and the Chief of Engineers rather than the actual formulation of a plan in the form of a document.

⁵⁶ 45 CONG. REC. 5, 5684 (1910).

⁵⁷ For example, during the ten year period between 1910 and 1920, only five federally authorized projects, with a combined horsepower of 63,300 (47.2 megawatts), were constructed. *See* First Annual Report of the Federal Power Commission, 1 FPC ANN. REP. 6 (1921). In 1918, Representative Snell observed that the 1910 act was entitled "An act to regulate power development," but stated that it should have been called "An act to prohibit power development." 56 CONG. REC. 9, 9118 (1918). Noting that "water-power development under Federal control has practically ceased," he stated that with only two small exceptions, no private hydroelectric developments had occurred on navigable streams since 1912. *Id.* The First Annual Report of the Federal Power Commission described the 1906 and 1910 Acts as "practical failures" because the rights granted under them "were so insecure and the liabilities imposed so uncertain" that hydroelectric development was "largely blocked" and recourse was had, instead, to steam power. 1 FPC ANN. REP. 5-6 (1921).

⁵⁸ 1 FPC ANN. REP. 5-10 (1921).

⁵⁹ *See* Pinchot, *supra* note 23, at 17-19. Members of Congress introduced various bills addressing waterpower development, which failed passage, including the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess. (1914), Ferriss Bill, H.R. 16673, 63d Cong., 2d Sess. (1914), Shields Bill, S. 1419, 65th Cong., 1st Sess. (1917) and Myers Bill, S. 2399, 65th Cong., 1st Sess. (1917).

In early 1918, the three cabinet secretaries who initially would form the Federal Power Commission (FPC) proposed a particularly important bill.⁶⁰ Section 10(a) of their bill would appear verbatim as section 10(a) in the Federal Water Power Act, enacted into law more than two years later.⁶¹ The proposed section 10(a) would condition approval of all licenses on the Commission's judgment that the project was "best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses."⁶² The bill did not further delineate what was to be the character or scope of such a "comprehensive scheme" nor did it specifically state that the Commission was actually to prepare any plans. The precise meaning of this "comprehensive scheme" requirement, therefore, cannot be determined from an examination only of the bill itself.

Testimony before the House Water Power Committee by the Secretaries of Interior and Agriculture and by the Chief Engineer of the Forest Service provided the most thorough interpretation of section 10(a).⁶³ This testimony is particularly important for several reasons. First, these Secretaries, together with the Secretary of War, drafted the bill.⁶⁴ Second, O. C. Merrill, the Chief Engineer of the Forest Service within the Department of Agriculture, was a leader of the conservation movement which campaigned vigorously for a federally controlled comprehensive approach to water resource use.⁶⁵ Merrill was later appointed to be the first Executive Secretary of the Federal Power Commission.⁶⁶ He assisted in the drafting of the bill, and his testimony was intended to supplement that of the Secretaries.⁶⁷ Finally, this testimony was a contemporaneous interpretation of section 10(a), a section which Congress virtually ignored when it finally enacted the Federal Water Power Act into law.⁶⁸ Obviously the interpretation of the comprehensive plan language of section 10(a) by the individuals who drafted that language is very important in analyzing its meaning.

⁶⁰ The bill would establish the FPC, composed of the Secretaries of War, Interior, and Agriculture, with the authority to grant licenses for hydroelectric projects without project-by-project congressional authorization. See H.R. REP. NO. 715, 65th Cong., 2d Sess. 21-39 (1918).

⁶¹ Compare H.R. REP. NO. 715, 65th Cong., 2d Sess. 34 (1918) with Federal Water Power Act of 1920, ch. 273, 41 Stat. 1063, 1068 (1920).

⁶² H.R. REP. NO. 715, 65th Cong., 2d Sess. 34 (1918). The full text of section 10(a) as the secretaries finally proposed reads,

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such a scheme, the commission shall have authority to require modification of any project and of the plans and specifications of the project works before approval.

Id. The drafters originally proposed the term "comprehensive plan" instead of "comprehensive scheme." *Id.* at 24. Congress gave no explanation for the change.

⁶³ See *Hearings Before House Water Power Committee: March 18-May 15, 1918*, 65th Cong., 2d Sess. 20-24, 90-93, 454-57, 670-72 (1918) [hereinafter *Hearings*].

⁶⁴ See Pinchot, *supra* note 23, at 18-19.

⁶⁵ *Id.* The conservation movement stressed the use of scientific principles to make rational choices regarding natural resources to optimize and preserve their beneficial uses. See F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 4-5 (1984).

⁶⁶ See 1 FPC ANN. REP. 1 (1921); *Hearings*, *supra* note 63, at 4.

⁶⁷ See *Hearings*, *supra* note 63, at 3-4.

⁶⁸ See *infra* notes 85-87 and accompanying text.

Merrill indicated that under the bill the FPC would prepare actual plans for comprehensive waterway development.⁶⁹ He emphasized the need for data on the water-power resources of the nation, lamenting that the government knew little about such resources and that the data it had gathered was merely incidental to other investigations or secured only for statistical purposes.⁷⁰ The government should make extensive studies of selected waterways, he stated, and "[p]lans should be drawn" so that their most complete development could be secured.⁷¹ In identifying the east as an area where such studies were particularly needed, he said that general development of water power would only be possible if there was a "comprehensive plan of development" which would involve "the interconnection of many plants over a considerable territory."⁷²

Merrill did not, however, envision the bill as directing the FPC to conduct general surveys of the water-power resources of the United States. Rather, the FPC should look at particular territories already needing water power and evaluate the existing and future power availability.⁷³ He stated that the studies were to be "not extensive but intensive studies" in assessing the economic feasibility of particular sites relative to specific power needs.⁷⁴ Where such studies were appropriate the FPC would conduct investigations of rivers, identify power sites, and evaluate proposed projects as though all other sites were already developed.⁷⁵ He stated that the FPC "should have a plan drafted" and should approve those applications that best carry out the approved plan.⁷⁶ Thus, Merrill apparently believed that the "comprehensive plan," in some instances, would be more than just a consideration and would be a physical document. Furthermore, he also believed that the scope of these plans could be quite broad, including irrigation, water power, water supply, navigation, and "whatever there may be."⁷⁷

⁶⁹ See *Hearings*, *supra* note 63, at 20-24.

⁷⁰ *Id.* at 20-21.

⁷¹ *Id.* at 21.

⁷² *Id.*

⁷³ *Id.* at 22.

⁷⁴ *Id.* at 21.

⁷⁵ *Id.* at 23-24. The following exchange took place between Merrill and the chairman of the House Water Power Committee:

The Chairman: Mr. Merrill, I suppose one way of treating the stream as a whole would be to locate the power plants in such a way that they would not prevent future development, and you want to develop the whole field as though it was for one plant?

Mr. Merrill: Yes . . . that each individual plant shall be so located and so constructed that it will fit into a complete scheme for the whole stream, so as to get the maximum results out of it as a unit when you are through.

The Chairman: And the investigation, mapping it out beforehand, shows the sites where plants may be erected with reference to coordinating them with all other plants just as if they were already established?

Mr. Merrill: Yes, sir.

The Chairman: And thus unifying and connecting them together?

Mr. Merrill: Yes.

Id.

⁷⁶ *Id.* at 90-91. Merrill cited a Canadian study of a section of the Winnipeg River as an example of an ideal comprehensive plan because it actually located power plants such that any plant built on that section of the river would have to be built pursuant to the plan "which was made in advance." *Id.* at 23.

⁷⁷ *Id.* at 90. Merrill further stated that "under the provisions of subparagraph (a) of section 10, the commission would have authority, in considering licenses or applications for licenses, to require

While Merrill saw a broad scope for the FPC's planning power, Secretary of the Interior Franklin Lane⁷⁸ and Secretary of Agriculture D.F. Houston understood the scope to be much more limited. Lane stated that it was neither his nor the President's intention that the Commission should "burden" itself with making studies of streams to determine whether they could best be used for a purpose other than power production.⁷⁹ Rather, Lane stated, the Commission should only give consideration to this matter "if there is any need for it" so that the FPC would not deny the possibility of using the water for another purpose.⁸⁰ Similarly, Secretary Houston saw the bill as creating a commission to deal with water power development; only in unusual cases would it consider other water uses.⁸¹ While he stated that "[r]elative uses and needs should be considered," he believed that the majority of licensing cases would relate only remotely to broad water-power plans.⁸² Secretary Houston apparently did not believe that the FPC itself would prepare any comprehensive plans, but rather would coordinate only the interests of the Departments of War, Agriculture, and Interior.⁸³ He did, however, foresee that the Commission would use the services of those departments and the work of other government agencies.⁸⁴

The cabinet officers who proposed the bill, therefore, did not share Merrill's broad interpretation of section 10(a) as directing the FPC to draft "comprehensive plans" to deal with all relevant water uses. Instead, the secretaries appear to have understood the bill to be simply a water-power bill with other uses considered only when necessary. Only in those unusual situations which obviously called for a weighing of conflicting potential uses was the Commission to provide a broader planning function. Neither secretary, however, contradicted Merrill's interpretation that, in at least some instances, the Commission would use an actual plan of development for a river in the licensing procedure.

Congress apparently shared this more limited view of the planning function assigned to the FPC by the Federal Water Power Act. During early discussions of a proposed version of the bill, Representative Mondell expressed concern that the bill would be interpreted as a broad grant of authority to the Commission over water uses, such as irrigation, and stressed that, "[t]his is a power bill."⁸⁵ Several senators, just prior to the

that all the uses of that water be considered and the relation of the different uses to water-power development before granting a license for a water power." *Id.* at 92. Simply, under section 10(a), the Commission should "take into consideration any public uses" of a stream's water and evaluate the proposed project in relation to all such uses. *Id.* at 92-93.

⁷⁸ Lane perceived himself to be the "father of this commission idea" because he suggested the idea to the President. *Id.* at 457.

⁷⁹ *Id.* at 456. Lane's comments were in response to Representative Raker's questioning regarding whether the Commission would be studying the issue of whether a stream could best be used for irrigation or power production. *Id.* at 455-56.

⁸⁰ *Id.* at 456. Authorization to study the larger issue of the best use of the nation's waterways was "a little broader power" than Lane thought the Commission should have. *Id.*

⁸¹ *Id.* at 671-72.

⁸² *Id.* at 672.

⁸³ This conclusion is indicated by Secretary Houston's statement that had it not been for the conflicting interests of the three departments, he would have preferred that a single executive be given the duties of the Commission and that he thought that the Commission should not be larger than what would be necessary to "coordinate" the interests of the departments. *Id.* at 671-72.

⁸⁴ *Id.* at 671, 672.

⁸⁵ 56 CONG. REC. 9, 9115 (1918). A House amendment to an early version of a waterpower bill explicitly listed "irrigation" as one of the "beneficial uses" the "comprehensive scheme" was to include. See H.R. REP. NO. 715, 65th Cong., 2d Sess. 6 (1918). Neither the cabinet secretaries'

passage of the Act, expressed concern that the Commission would not have the authority to treat a waterway in a sufficiently comprehensive manner.⁸⁶ These senators' remarks, however, apparently were based on the bill's section 4 grant of authority to make investigations and collect data regarding water resources and related industries and markets, rather than its section 10(a) comprehensive scheme language.⁸⁷ Indeed, it appears that Congress virtually ignored section 10(a) of the Act during discussion on the floor of either house during the year preceeding its enactment.

The "comprehensive scheme" requirement of section 10(a) thus was a vague and ambiguous directive. The Commission was to make sure that a proposed project was "best adapted" to such a scheme, yet the Act did not explicitly require it to prepare any plans. Despite this uncertainty, the 1920 Act clearly was a water-power act, derived from the General Dam Acts of 1906 and 1910, and was concerned primarily with facilitating and optimizing hydroelectric development while protecting the navigability of rivers. Although amendments to the Act in 1935 demonstrated a congressional intent that the Commission broaden the scope of its considerations beyond optimization of waterpower development and protection of navigation,⁸⁸ Congress never intended the Act to be a

proposed bill nor the bill finally passed into law as the Federal Water Power Act included a reference to irrigation. *See id.* at 24, 34; Federal Water Power Act, ch. 285, 41 Stat. 1063, 1068 (1920) (codified and amended as 16 U.S.C. § 803(a) (1982)).

⁸⁶ Senator Randell wished to expand the scope of the proposed commission's planning function. 59 CONG. REC. 2, 1176 (1920). Senator Ashurst voiced his concern that the bill would not give the Commission any authority to treat a river in a comprehensive way. *Id.* at 1174-75. Rather, he thought the bill would limit its jurisdiction to passing on applications on a case-by-case basis. *Id.* Senator Lenroot, however, argued that the bill would require the Commission to make studies before it could determine where licenses could be granted. *Id.* at 1176. Senator Fletcher believed that the scope of such studies would be limited. *Id.* at 1175.

⁸⁷ *See id.* at 1174. Section 4(a) of the Act empowered the Commission, To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites Federal Water Power Act, ch. 285, 41 Stat. 1063, 1065 (1920) (codified as amended at 16 U.S.C. § 797(a) (1982)).

⁸⁸ Congress made certain "minor" changes, *see* H.R. REP. NO. 1318, 74th Cong., 1st Sess. 24 (1935), in section 10 of the Act in 1935 with the passage of the Public Utility Act, ch. 687, 49 Stat. 803 (1935), which included, as Title II, the Federal Water Power Act, amended and renamed the "Federal Power Act," ch. 687, 49 Stat. 803, 838 (1935) (codified as amended at 16 U.S.C. §§ 791-828 (1982)). Relative to section 10(a), the only significant change was the addition of "recreational purposes" which the Commission may include in its consideration of other beneficial public uses within a comprehensive plan to which an applicant's project may be best adapted. *See* H.R. REP. NO. 1318, 74th Cong., 1st Sess. 24 (1935), S. REP. NO. 621, 74th Cong., 1st Sess. 45 (1935). This addition was probably in response to an opinion issued by the Attorney General, and accepted by the Commission, that a construction of the Federal Water Power Act which would allow the FPC to take such issues as recreation into consideration in its licensing deliberations might render the Act invalid. *See* Columbia Ry. & Navigation Co., 1 F.P.C. 78, 87 (1933). The Commission, in dismissing the complaints by users and owners of duck shooting grounds which a proposed hydroelectric project would affect, had quoted the following language of the Attorney General: "To construe the statute (the Federal Water Power Act) to allow the Commission to take such matters (aesthetic, recreational, scenic, or like considerations) into consideration would raise very grave doubt as to its validity." *Id.* (quoting Cumberland Hydroelectric Power Co., 10 FPC ANN. REP. 146 (1930)).

In addition, Congress altered the wording of sections 10(a) and 7 of the Federal Water Power

general water resources bill. Further, it also appears that Congress did not intend section 10(a) to be a directive that the Commission formulate plans governing all possible beneficial uses of any river on which a license was sought. With a three member board and virtually no staff,⁸⁹ such a requirement would surely have slowed the development of hydroelectric power, contrary to the central purpose of the Act.⁹⁰

On the other hand, the purpose of the Act was also to ensure optimum development of water power. One method of achieving this was by ensuring that any licensed water project be best adapted to a comprehensive plan. Merrill's testimony perhaps evidences the best interpretation of this requirement by suggesting that in a limited number of situations, where significant potentially conflicting uses were readily apparent, the Commission was to make use of actual comprehensive plans in authorizing particular water-power projects in order to ensure optimized use of the nation's water resources.

B. Parallel Legislation: The Effort to Establish a National Waterways Commission

The legislative history of the Federal Power Act⁹¹ indicates that the comprehensive plan requirement of section 10(a) was poorly defined within the context of the Act. The plain meaning of the statutory directive that the Commission condition licenses upon its determination that the project "will be best adapted to a comprehensive plan for improving or developing a waterway" suggests that the Commission cannot make such a determination without an actual plan.⁹² It was the intent of neither Congress nor of the Act's framers, however, that the Federal Power Commission would always prepare plans nor that such plans would be necessary for most licensing decisions. To understand more fully the meaning of section 10(a), the following examines contemporaneous legislative efforts aimed at establishing a separate Waterways Commission with the explicit charge of preparing comprehensive plans. Such an examination reveals that the most likely explanation for the appearance of the comprehensive plan terminology in the Federal Power Act is that it resulted from political compromise. The compromise was designed to accommodate these separate legislative efforts by providing implicit cognition that the work of the two commissions would be coordinated.

While President Theodore Roosevelt and Congress were battling over the proper approach to use in the authorization of dams,⁹³ and before legislation had been introduced which would lead to the General Dam Act of 1910,⁹⁴ Senator Francis G. Newlands of Nevada was attacking the water resources issue more broadly. Senator Newlands had

Act "for the purpose of clarifying the broad objective of the act" of giving the Commission control over all projects affecting the nation's water resources. S. REP. NO. 621, 74th Cong., 1st Sess. 44 (1935). The House report indicated that Congress made the section 10(a) changes to broaden the number of factors the Commission must consider in evaluating whether and under what conditions to issue a license. H.R. REP. NO. 1318, 74th Cong., 1st Sess. 24 (1935).

Finally, Congress changed the phrase "comprehensive scheme" to "comprehensive plan," thus returning to the terminology used in the General Dam Act. See H.R. REP. NO. 1318, 74th Cong., 1st Sess. 39 (1935). The implications of this change are not apparent from the record.

⁸⁹ See *infra* notes 177-78 and accompanying text.

⁹⁰ See *supra* notes 57-58 and accompanying text.

⁹¹ Congress amended and renamed the Federal Water Power Act the Federal Power Act in 1935. See *supra* note 88.

⁹² See 16 U.S.C. § 803(a) (1982).

⁹³ See *supra* notes 33-44 and accompanying text.

⁹⁴ See *supra* notes 45-56 and accompanying text.

been vice-chairman of the Inland Waterways Commission which President Roosevelt appointed in 1908,⁹⁵ and was a supporter of the growing national movement for a more comprehensive approach to river development.⁹⁶ In December of that year and two months before the presentation of the final report of the temporary, presidentially appointed and authorized Inlands Waterways Commission, Newlands introduced the Inland Waterways Commission Bill.⁹⁷ The bill was oriented primarily toward navigation and would have established a permanent Inland Waterways Commission to prepare studies, as directed by the President, for the development of the nation's inland waterways.⁹⁸ In addition, however, the Commission was also to "consider and coordinate" any other issues relating to the development of the nation's waters for the purpose of commerce, including irrigation, water purification, soil erosion, forest protection, flood control, and water power.⁹⁹

Secretary of War Taft noted that a permanent Inland Waterways Commission could cure the "chief defect" of the absence of presidential authority to originate comprehensive plans for the nation's waterways.¹⁰⁰ The creation of a body to prepare such plans, he stated, would be an improvement over the existing situation, supplying "a tribunal other than Congress charged with the duty of originating and developing a satisfactory plan."¹⁰¹ At the same time, Taft, whose approval the 1906 General Dam Act required for any dams built on navigable waterways,¹⁰² feared that the bill might be construed in a way that would limit the discretion of his Department in these matters.¹⁰³ Rather, the Secretary envisioned a situation where the proposed Inland Waterways Commission created comprehensive plans and his department coordinated its activities with the plans produced.¹⁰⁴ Taft's view represents an early suggestion of the concept of split functions between a commission charged with preparing comprehensive plans for the nation's waterways and a government official, perhaps a cabinet member, taking such plans into

⁹⁵ See 56 CONG. REC. 10, 9835 (1918); see also *supra* notes 36-37 and accompanying text.

⁹⁶ See generally 56 CONG. REC. 10, 9831-33 (1918).

⁹⁷ S. 500, 60th Cong., 1st Sess. (1907).

⁹⁸ *Id.* § 2.

⁹⁹ *Id.*

¹⁰⁰ See 45 CONG. REC. 2, 2070 (1910).

¹⁰¹ *Id.* Secretary Taft wrote in addition, "the creation of an Inland Waterways Commission for the purpose of initiating plans for the improvement of waterways seems to me a more effective way of a general plan for the improvement of all the waterways in the country than under the present provisions of the law." *Id.*

¹⁰² See *supra* text accompanying note 30.

¹⁰³ See 45 CONG. REC. 2, 2070 (1910). Taft wrote that, "[i]n its present form the bill might be construed to curtail indirectly certain functions of the War Department, which is now charged with large discretion in waterway affairs. Possible ambiguity on this point should be removed." *Id.* It should be noted that the Secretary appeared to believe that the bill could remove the "ambiguity" regarding the potential limitation of his discretion if it provided that the President appoint the Chief of Engineers from his department as one of the members of the Commission. *Id.*

¹⁰⁴ *Id.* Taft noted that "military engineers have been prohibited from initiating projects or originating plans for meeting the growing needs of commerce." *Id.* He added,

It is desirable to continue the policy of keeping the military engineers in training and at the same time rendering their skilled service available in work on waterways, although it is not necessary to vest them with the power of initiative, which they have not exercised in the past and which is, perhaps, inconsistent with their primary duty in connection with the military establishment of which they form a part.

consideration and authorized to grant final approval regarding specific waterway development projects.

Although Newlands' initial bill did not pass the Senate,¹⁰⁵ Senator Newlands continued his campaign to establish a body of experts that would coordinate and provide comprehensive plans for the development of the nation's water resources. In February of 1910, he proposed his first "river-regulation amendment" for that year's rivers and harbors bill.¹⁰⁶ In introducing the amendment, Newlands noted that there were numerous agencies acting without coordination upon the same general issue of water resources.¹⁰⁷ The amendment was to allow the President, "through a board or boards," to coordinate these agencies with each other and with the Corps of Engineers.¹⁰⁸ The Corps would remain the primary water development agency, yet the board(s) would give it the "benefit of the advice" derived from the experience and studies of the other agencies.¹⁰⁹ One way in which these boards would give advice to the Corps was by "providing . . . comprehensive plans."¹¹⁰ Newlands, therefore, envisioned the creation of a separate board that would study the various aspects of water resource utilization and develop comprehensive plans which the Corps would use in its leading role in the development of the nation's waterways. The bill, however, represented a compromise by Newlands in that he would have preferred that Congress create a board with more complete power over waterway development.¹¹¹

At the same time Newlands was campaigning for this legislation, Congress was considering the General Dam Act of 1910.¹¹² That act required the Chief of Engineers and Secretary of War to "consider the bearing" of a proposed waterway structure "upon a comprehensive plan," yet was silent about who was to prepare such a plan or what it was to contain.¹¹³ Similarly, there is little in the congressional record addressing what

¹⁰⁵ See 56 CONG. REC. 10, 9842 (1918).

¹⁰⁶ 45 CONG. REC. 2, 1963 (1910), *reintroduced and printed in full*, 45 CONG. REC. 2, 2067 (1910).

¹⁰⁷ *Id.* at 2069. He noted that the Engineer Corps of the Army was operating only on the question of navigation, the Reclamation Service was working on the question of flood control, and that the Forestry Service, the Weather Service, the Soils Service, the Coast and Geodetic Survey, and the Geological Survey were all "engaged in the study of questions relating to water, its development, and its regulation and control." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* Newlands stated that, "whilst not going so far as I would desire to do, as indicated in my appendix to the report of the Inland Waterways Commission, [the amendment] goes as far as the judgment of Congress will at present sanction . . ." *Id.* In his appendix, Newlands stated that, "a comparatively free hand should be given to an administrative body of experts in the full development of projects . . ." See 42 CONG. REC. 7, 6971 (1908). That body was to be called the National Commission for the Conservation of Natural Resources and was to investigate "all questions relating to the conservation, use, and control of the water resources of the United States . . ." including power. *Id.* at 6972.

¹¹² See *supra* notes 45-56 and accompanying text.

¹¹³ *Id.* Congress had apparently derived the General Dam Act from those parts of President Roosevelt's veto messages regarding the Rainy and James River dams discussing the need for a "designated official" to assure maximum development of navigation and water power. See *supra* notes 40-44 and accompanying text. Newlands' proposals appear to be an extension, however, of Roosevelt's call for a "comprehensive" or "definite" plan. See *supra* notes 36-41 and accompanying text. Unlike the General Dam Act, Newlands' bills expressly addressed who would formulate the comprehensive plans and what they would contain. These bills were truly "comprehensive" in scope.

would otherwise appear to be a fairly significant clause.¹¹⁴ The clause, then, may have appeared as a result of Newlands' efforts to secure in the new act at least some sort of a statutory directive that the Chief of Engineers consider the plans that Newlands hoped Congress would authorize his proposed "board" to formulate.¹¹⁵

Senator Newlands did not perceive the General Dam Act of 1910 to require the type of comprehensive planning that he envisioned. On June 22, 1914, he again introduced a river-regulation amendment.¹¹⁶ The bill was similar to the one he had introduced in 1910, with an explicit emphasis on comprehensive planning.¹¹⁷ The bill called for the formation of a "river-regulation commission" which was "to report to the Congress comprehensive plans for the development of the waterways and water resources of the country for every useful purpose . . ."¹¹⁸

Newlands did not succeed in his legislative effort until August 8, 1917, when his river-regulation amendment finally passed as section 18 of the River and Harbor Act of 1917.¹¹⁹ Pursuant to section 18, the Act authorized the President to appoint a seven member Waterways Commission to coordinate all activities and studies relating to the development of the nation's waterways, including the "utilization of water power."¹²⁰ Furthermore, section 18 directed the Waterways Commission to present to Congress "a comprehensive plan or plans" for the development of the nation's water resources "for the purpose of navigation and for every useful purpose . . ."¹²¹

The passage of the amendment was the culmination of a ten year effort to establish some sort of comprehensive planning legislation. Again, however, Newlands had been forced to compromise. The original version of this bill, which Newlands introduced on April 24, 1916, would have established a "national waterways council" which, unlike the Waterways Commission finally approved, would have included as members the President

¹¹⁴ See *supra* notes 50-53 and accompanying text.

¹¹⁵ Given that he recognized the necessity to compromise to the extent that the plans to be prepared not bind the Chief of Engineers, and that Congress had not approved Newlands' amendment when the General Dam Act passed, it is understandable that the language of that act was not more explicit in referring to which plans the Commission was to consider and in what manner. Newlands' amendment, however, did not pass the Senate until February 1913, and Congress subsequently struck it in conference less than one month later. See 49 CONG. REC. 5, 4365-76, 4380, 4427-28 (1913).

¹¹⁶ 51 CONG. REC. 11, 10833 (1914). It is of interest to note that Newlands stated that the bill would comply with the Democratic Platforms of 1908 and 1912 because it specifically called for the preparation of comprehensive plans. *Id.* at 10834. Regarding the Democratic Platforms of 1908 and 1912, see also *supra* note 33 and accompanying text.

¹¹⁷ See 51 CONG. REC. 11, 10834 (1914). Newlands noted that:

The most important difference between this amendment and the [previous bill he introduced] is that it does not carry the large and continuing appropriation for which the advocates of a comprehensive plan of waterway development have been working. It does, however, provide complete machinery for the coordination of the scientific services of the Government, for the study of the problems involved, and for the formulation of plans.

Id.

¹¹⁸ *Id.* Significantly, Newlands recognized the magnitude of the endeavor he was advocating as indicated by the clause in the bill which provided that the plans were to be formulated "if practicable." *Id.*

¹¹⁹ River and Harbor Act of 1917, ch. 49, 40 Stat. 250, 269 (1917).

¹²⁰ *Id.*

¹²¹ *Id.*

and the Secretaries of War, Interior, Agriculture, and Commerce.¹²² Furthermore, the bill would have established a "water-control board" under the direct control of the council.¹²³ This board would have considered existing and planned water projects in both the public and private sector, conducted its own studies, and prepared for the consideration of the council "comprehensive general plans for each watershed, treating the entire watershed of each river as a unit"¹²⁴ Thus, Newlands' original bill would have been a statutory directive to an identified governmental body to prepare the type of plan to which the Federal Power Act appears to refer.¹²⁵ Partly due to appropriation considerations, however, Newlands had to settle for the less explicit and narrower legislation contained in section 18 of the 1917 act.¹²⁶ In addition to failing to provide for a commission that would include the cabinet secretaries as members and for a board that would provide staff assistance in the preparation of comprehensive plans, a clause in section 18 specifically stated that it should not be construed so as to interfere with any waterways project "heretofore or hereafter" authorized.¹²⁷ The Waterways Commission, therefore, was to serve in a purely advisory capacity.

While Newlands was pushing for his comprehensive planning legislation, he was also fighting against efforts for legislation to promote water-power development that failed to provide for a comprehensive approach to such development. One such bill, the Shields Bill, sought to facilitate hydroelectric power development but protect navigation by requiring the Secretary of War's approval of any dams affecting navigation.¹²⁸ Senator Newlands opposed this bill when it was first introduced, stating that proper development of rivers would occur only if work under the bill "is done with reference to the dovetailing of that work with a great and comprehensive plan for the full development of our rivers."¹²⁹ When the Shields Bill was reintroduced in 1917, he argued that it was merely "part of the piecemeal legislation" that had been characteristic of the government's approach to water resource development in that the bill dealt only with water power and navigation and did not address such issues as irrigation, swamp land reclamation, and forestry development.¹³⁰ He further noted that since the prior failure of the Shields

¹²² S. 5736, 64th Cong., 1st Sess. § 2 (1916).

¹²³ *Id.* at § 3.

¹²⁴ *Id.*

¹²⁵ The Secretaries of Agriculture and the Interior, designated members of the proposed national waterways council, and future members of the Federal Power Commission approved of this bill. See Letter from the Secretaries to the President (Feb. 26, 1916), reprinted in 56 CONG. REC. 10, 9851 (1918).

¹²⁶ See 56 CONG. REC. 1, 285, 286 (1917).

¹²⁷ River and Harbor Act of 1917, ch. 49, 40 Stat. 250, 270 (1917).

Nothing herein contained shall be construed to delay, prevent, or interfere with the completion of any survey, investigation, project, or work heretofore or hereafter adopted or authorized upon or for the improvement of any of the rivers or harbors of the United States or with legislative action upon reports heretofore or hereafter presented.

Id.

¹²⁸ S. 1419, 65th Cong., 1st Sess. (1917).

¹²⁹ 53 CONG. REC. 4, 3730 (1916).

¹³⁰ 56 CONG. REC. 1, 284 (1917). Newlands stated that his opposition to the bill remained as it was in 1916 when the bill was first introduced, stating that it was simply a part of the piecemeal legislation which has characterized the country for over a century regarding water legislation . . . [I]t proposed to provide only for water-power development in connection with navigation, and . . . it was not so enlarged in

Bill, Congress had passed section 18 of the River and Harbor Act of 1917 establishing the Waterways Commission to coordinate the efforts of various governmental agencies regarding river development and to develop comprehensive plans.¹³¹ He believed that Congress should give the authority which the Shields Bill would give the Secretary of War for granting permits for the erection of hydroelectric dams to the newly authorized Waterways Commission.¹³² Newlands allowed that if the Secretary were to become a member of the Waterways Commission, his objection would be partially removed.¹³³ If Congress did not make the Secretary a member of the Commission, however, Newlands noted that the authority to control one of the most important aspects of waterway development, through the issuance of licenses for hydroelectric projects, would be in the hands of someone outside the Waterways Commission.¹³⁴ Newlands' primary fear was that the Secretary's consideration of permits and the Commission's comprehensive planning activities would be carried on in isolation from each other. Instead, he sought to bring the Secretary of War, in the exercise of the Secretary's licensing authority, "into coordination with this great commission" so that their efforts would be in harmony.¹³⁵

Senator Newlands' campaign for comprehensive planning and development of the nation's water resources came to an abrupt end with his sudden death on December 4, 1917,¹³⁶ only four months after the passage of his long sought legislation creating the Waterways Commission. Sadly, that commission was never to be appointed.¹³⁷ Furthermore, no member of Congress stepped in to continue his efforts for a program for comprehensive water resources planning. The Congressional Record for the two and one-half years between his death and the passage of the Federal Water Power Act reflects remarkably little substantive discussion of this matter.

Nevertheless, the concept of the "comprehensive plan" was to hover like a ghost around subsequent legislative efforts. The Shields Bill never passed the House. Instead,

its scope as to embrace every useful purpose for which water can be used, including not only navigation and the development of water power but the reclamation of arid lands, the control of water for the reclamation of swamp lands, intensive cultivation in the humid region, and the development of forestry.

Id.

¹³¹ *Id.* at 285.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

[T]hen we have this condition, that a waterways commission would be vested by Congress with the full power to effect a competent organization for the treatment and development of our rivers for every useful purpose to which water can be put, and yet that jurisdiction over a most important part of the rivers, namely, the issuance of permits for the construction of dams for water-power development, would be intrusted entirely to the direction and control of an official outside of that commission, thus depriving them to that extent of their jurisdiction.

Id.

¹³⁵ *Id.* Newlands wanted "to bring that official, who is practically placed in control of water-power development all over the country, into coordination with this great commission . . . [so that] there be harmonious action with reference to this very important question." *Id.* As Senator Jones stated in response to Newlands' comments, however, the Senate had rejected the proposition that Cabinet officers should be members of the Commission and that Congress had not intended the changes it had made in the prior version of amendment 18 to encourage the appointment of Cabinet officers to that body. *Id.* at 286.

¹³⁶ See 56 CONG. REC. 10, 9819 (1918).

¹³⁷ See *infra* text at note 151.

attention focused on the substitute bill which the three cabinet secretaries proposed only five months after Congress authorized the Waterways Commission and less than one month after Newlands' death.¹³⁸ The bill contained section 10(a) exactly as it would appear in the Federal Water Power Act enacted into law more than two years later.¹³⁹ Quite likely, as in the 1910 Act,¹⁴⁰ the use of the comprehensive plan terminology in section 10(a) was a result of Newlands' relentless campaigning for this concept and his behind-the-scenes efforts to ensure that his hoped for Waterways Commission would have an influence over waterpower development. Newlands' power in the Senate was considerable.¹⁴¹ He had sought over a ten year period to enact into statutory form the idea of comprehensive planning.¹⁴² Surely, after achieving authorization of the Waterways Commission, a body that would produce "comprehensive plans," he would have sought to guarantee that any agency which would have authority over water power development would at least have to consider these plans. The comprehensive plan requirement of section 10(a) most likely resulted from Newlands' efforts to ensure that those who would control waterpower development would have to consider the work of his Waterways Commission.

Several factors support this conclusion. The secretaries' bill was offered as a substitute for the Shields Bill,¹⁴³ which Newlands had strongly opposed, because of the Shields

¹³⁸ See 56 CONG. REC. 1, 890 (1917).

¹³⁹ H.R. 8716, 65th Cong., 2d Sess. (1918). See *supra* notes 60-61 and accompanying text.

¹⁴⁰ See *supra* notes 45-56 and accompanying text.

¹⁴¹ See generally 53 CONG. REC. 4, 3726-36 (1916); 56 CONG. REC. 10, 9831-54 (1918). Senator Smith, a Republican, said of the Democratic Senator and his Waterways Commission proposal, that, if I had been originally opposed to it I would have long ago since surrendered my views, for I have heard the Senator speak upon it many times since I have been a Member of the Senate. I could not entertain any view opposed to his own. Impressive and serious detailed arguments have been advanced here year after year by the Senator, and not only on the floor of the Senate, but in committee rooms where I have been fortunate enough to be associated with him, until at last my own views about this subject have given way to the powerful argument of the Senator from Nevada.

53 CONG. REC. 4, 3728 (1916). Senator Smith also noted that Senator Newlands had "succeeded in getting the governors of a number of States to approve his plan," and that "the very citadel of Democracy, the White House, fell under the fierce bombardment of the Senator and the last Democratic national convention proclaimed [the plan's] virtue." *Id.* During debate on the Shields Bill, Senator Brandegee admonished that the bill should not "be held here in ambush" by Senator Newlands. *Id.* at 3729. Senator Shields apparently felt some antagonism toward Newlands when, after noting that the Senate had heard Newlands' remarks regarding Shields' bill, he attempted to invoke a rule from Jefferson's Manual that, "no one is to speak impertinently or beside the question, superfluously, or tediously." *Id.* at 3732. Senator Brandegee further complained that whenever a bill came before the Senate with bipartisan support, Newlands would "spring from ambush" to ingraft his Waterways Commission proposal to it. *Id.* Newlands himself had noted that he had withdrawn his "strangle hold" from a bill several years earlier upon assurances that the senators would look at his proposal with a hospitable view. *Id.* at 3730.

¹⁴² See 59 CONG. REC. 8, 7771 (1920). More than two years after Newlands' death, Senator Henderson noted that Newlands "never slackened his earnest and tireless efforts to secure the adoption of this plan of bringing the different constructive agencies of the Government together in harmonious cooperation and coordination. It was the great dream of his life . . ." *Id.* Henderson further stated that "[t]here has been perhaps in all the history of the Senate only one other instance of such loyal and tenacious advocacy of a great idea by one Senator . . . [I]t was practically the life work of a great constructive mind." *Id.*

¹⁴³ See H.R. REP. NO. 715, 65th Cong., 2d Sess. 21 (1918).

Bill's failure to coordinate the Secretary of War's licensing authority over hydroelectric projects with the newly authorized Waterways Commission's charge to develop comprehensive plans.¹⁴⁴ In addition, the secretaries' bill would require their proposed Commission to determine that a project was "best adapted" to a comprehensive plan before it authorized the project, yet it did not state that the Commission was to prepare such plans.¹⁴⁵ When the secretaries proposed their bill, the Waterways Commission had been authorized but not appointed, and thus any specific allusion to the work of that commission would have been premature.¹⁴⁶

Finally, at least two of the three secretaries who proposed the bill had approved of Newlands' proposal to create a commission with the explicit charge of developing comprehensive plans.¹⁴⁷ The secretaries anticipated cooperation between the agencies and did not believe that the FPC was going to assume the functions of the Waterways Commission. Secretary of the Interior Lane expressed that he did not intend that the FPC would study the "general question" of water resource utilization, noting that Congress had authorized the Waterways Commission to study these larger issues and that the FPC ought not "to supplant the other commission."¹⁴⁸ In addition, Secretary of Agriculture Houston believed that in most licensing cases, broader water resource issues would not be directly involved.¹⁴⁹ Yet, in situations where such broader issues were implicated, he stated that they should be "handled in close cooperation with the [Waterways] commission created for the general purpose."¹⁵⁰

The final version of the Federal Water Power Act, however, contained section 29 which abolished the still unappointed Waterways Commission by repealing section 18 of the River and Harbor Act of 1917.¹⁵¹ Some legislators felt that the FPC would duplicate some of the work which section 18 of the 1917 act authorized the Waterways Commission to perform.¹⁵² This argument, however, was based on section 4 of the new act authorizing

¹⁴⁴ See *supra* notes 128-35 and accompanying text.

¹⁴⁵ See *supra* notes 60-62 and accompanying text.

¹⁴⁶ See *supra* notes 136-37 and accompanying text.

¹⁴⁷ See *supra* note 60.

¹⁴⁸ See *Hearings, supra* note 63, at 456-57 (statement of Franklin K. Lane, Secretary of the Interior).

¹⁴⁹ See *Hearings, supra* note 63, at 672 (statement of Secretary D.F. Houston, Secretary of Agriculture).

¹⁵⁰ *Id.*

¹⁵¹ See Federal Water Power Act, ch. 285, 1063, 1077, 41 Stat. 1077 (1920).

¹⁵² See, e.g., 59 CONG. REC. 7, 6523 (1920). In response, several senators pointed out that the Waterways Commission's duties were much broader because the Commission was authorized to deal with water resource development in a comprehensive way while the FPC was to focus on specific developments. See 59 CONG. REC. 2, 1173-76. Senator Ashurst opposed the amendment, noting that Congress had "worked for years" to attain the Waterways Commission legislation, that "it was the dream" of the late Senator Newlands that "a commission . . . would take up the water-power question in a comprehensive way," and that, "[w]e have discovered that these great rivers can not be treated by piecemeal as one single, isolated question. They must be treated together." *Id.* at 1173, 1174. As he viewed it, "there is no authority given in this bill to treat any system of rivers or any particular river in a comprehensive way." *Id.* at 1174. Senator Randell, who had assisted Newlands in the earlier legislative effort, agreed:

[T]he commission provided in the river and harbor act of 1917 is very much more comprehensive and covers infinitely more ground than the water power commission created in the pending act [A] very casual reading of the provisions of the river and harbor act of 1917, creating what is popularly known as the Newlands Commission,

the FPC "[t]o make investigations and to collect and record data," not on section 10(a).¹⁵³ Indeed, the congressional record regarding the final version of the 1920 Act is barren of any discussion of the section 10(a) "comprehensive scheme" requirement which remained as the three cabinet secretaries had originally proposed.¹⁵⁴ When Congress finally passed the Federal Water Power Act, it virtually ignored both the origin and meaning of section 10(a). By simultaneously abolishing the Waterways Commission, Congress relegated the nearly lifelong work of Senator Newlands, then over two years dead, to the annals of congressional history, with section 10(a) as the only remnant of his efforts. Congress was left with statutory language, only vaguely interpreted, in one act calling for consideration of a comprehensive plan, while repealing another act authorizing a commission to prepare such plans.

II. INTERPRETATION AND APPLICATION OF THE COMPREHENSIVE PLAN REQUIREMENT BY THE FEDERAL POWER COMMISSION AND THE FEDERAL ENERGY REGULATORY COMMISSION

The Commission¹⁵⁵ has interpreted the comprehensive plan requirement of section 10(a) very broadly. It never believed that it must have an actual plan of development for a waterway prior to every licensing decision. Although the Commission initially held that such a plan was necessary in situations where there were significant competing applications or proposed uses for a waterway, it quickly moved to the position that the Federal Water Power Act of 1920 did not require an actual comprehensive plan, regardless of the interests involved.

From its inception, the Commission did not interpret the comprehensive plan language of section 10(a) as a requirement that, in all situations, it must determine whether the proposed project will be consistent with the full utilization of the affected stream's resources.¹⁵⁶ For example, in its first year of existence, it was not possible to complete any comprehensive plans. Nevertheless, by November 1, 1921, the Commission had

would convince anyone that it takes in a great deal more than the provisions of the pending bill.

Id. at 1176. Senator Fletcher thought that "there might be some duplication in a way;" yet, he thought, "it would be really a small part of the scope of the work which the Waterways Commission created by the act of 1917 was intended to perform." *Id.* at 1175. Senator Ashurst proposed that if Congress repealed section 18 of the 1917 act, which authorized the Waterways Commission, then the Federal Water Power Act should incorporate totally section 18 by assigning all authority and duties granted to that commission to the FPC. *Id.* He was of the opinion that "there are many things with respect to our water powers that this Water Power Commission ought to do; but they will be inhibited; they will be powerless to do those things, unless some such authority is granted to them as was granted by section 18 of the act of 1917." *Id.* at 1174. His solution was to incorporate, by reference, section 18 of the 1917 act into the Federal Water Power Act by adding to the latter act the clause:

and all authority and powers conferred and duties imposed by said section 18 upon the commission thereby created are hereby conferred and imposed upon the Federal Power Commission, which in the discharge of the same shall be subject to all the requirements of the said section 18 governing the commission referred to therein.

Id. at 1175. Congress did not incorporate Ashurst's proposal, however, into the final language of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920) (current version at 16 U.S.C. § 797(a) (1986)).

¹⁵³ See 59 CONG. REC. 2, 1174 (1920); 59 CONG. REC. 8, 7772 (1920).

¹⁵⁴ See *supra* notes 85-87 and accompanying text.

¹⁵⁵ See *supra* note 2.

¹⁵⁶ 2 FPC ANN. REP. 6 (1922); 1 FPC ANN. REP. 51 (1921).

authorized twenty-seven preliminary permits and thirty-one licenses for a total installed capacity of 2,627,000 horsepower (1,960 megawatts).¹⁵⁷

In some situations, however, the Commission did believe that the Act required an actual plan. In its First Annual Report, the Commission noted that there were several streams where proposed projects so potentially conflicted with other uses that "careful studies" of the stream would have to be made either by it or at its directive.¹⁵⁸ It stated that in these instances, section 10(a) required an outline of "a consistent scheme of development" before it would issue any permits or licenses.¹⁵⁹ The Commission identified several major river basins for which such plans were necessary and indicated that it had suspended action on applications for projects on those rivers until completion of the necessary investigations.¹⁶⁰ The Commission originally believed, therefore, that its duties included making an initial determination of whether an actual plan would be necessary before proceeding to evaluate a project proposal without such a plan. In addition, the Commission indicated that its functions would include the preparation of comprehensive plans, listing it as one of the duties of its engineering division in its proposed organizational plan.¹⁶¹ It also hoped, however, to rely on the studies and plans of other government entities.¹⁶²

The first "comprehensive study" undertaken under the direction of the Commission was of the Deschutes River in Oregon, begun in 1921.¹⁶³ The Commission noted that the study was necessary because of the potential use of much of the water for irrigation, making it "desirable that the relation between power and irrigation should be carefully studied before action was taken on the applications before the Commission."¹⁶⁴ Because the Commission did not have its own staff of engineers, an interdepartmental board of engineers from several governmental agencies was appointed to conduct the study.¹⁶⁵ The scope of the study and resulting "plan" was limited to what the Commission had identified as the major conflicting potential uses of the river's waters: irrigation and power production.¹⁶⁶ Except for a few brief and rather summary comments, there was no attempt to develop a general plan covering such concerns as future domestic water supply, recreation, flood control, and fish and wildlife.¹⁶⁷

¹⁵⁷ 1 FPC ANN. REP. 24 (1921). By June 30, 1922, there were 27 licensed projects throughout the country with a total installed capacity of 1,951,780 horsepower (1,456 megawatts) which had been or were being constructed. 2 FPC ANN. REP. 19 (1922).

¹⁵⁸ 2 FPC ANN. REP. 30 (1922).

¹⁵⁹ 1 FPC ANN. REP. 30 (1921).

¹⁶⁰ *Id.* at 30-33; see also 2 FPC ANN. REP. 1 (1922) (stating that action on the Colorado River is awaiting the findings of the Colorado River Commission).

¹⁶¹ 1 FPC ANN. REP. 84 (1921).

¹⁶² For example, as to the St. Lawrence River, the FPC awaited the completion of investigations and the International Joint Commission's approval of general plans, anticipating that it would only have to make such studies, if any, necessary to adapt specific applications to the plans approved. *Id.* at 30. The FPC took a similar approach relative to the Colorado River where it awaited organization of a multi-state commission authorized by Congress to determine an equitable apportionment of the river's waters. *Id.* at 33.

¹⁶³ *Id.* at 30.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ FEDERAL POWER COMMISSION, REPORT TO THE FEDERAL POWER COMMISSION ON USES OF DESCHUTES RIVER OREGON (1922).

¹⁶⁷ *Id.*

An authoritative treatise on the FPC by Milton Conover, published in 1923, supported the Commission's interpretation of section 10(a).¹⁶⁸ Conover stated that the FPC must "exercise judgment" whether a proposed project would be best adapted to a comprehensive scheme of waterpower development.¹⁶⁹ He noted that "some projects" would be "seriously involved" with other water uses such as irrigation and navigation.¹⁷⁰ In those cases, the Commission would be "required to see to it that careful studies are made of such water sources, and that a careful and just plan of development is outlined" prior to the issuance of any permits or licenses.¹⁷¹ This interpretation appears to be consistent with the FPC's understanding, at that time, of its section 10(a) responsibilities.¹⁷² Furthermore, both of these interpretations appear to be consistent with the intent of the Act's framers.¹⁷³

In summary, the Commission initially interpreted section 10(a) as a directive for it to use actual comprehensive plans in some but not all situations. Where it foresaw no significant potential conflicts of water use, the Commission would require only that an applicant show that the proposed project would be compatible with the "fullest utilization of the resources of the stream."¹⁷⁴ Where there were numerous competing applications or conflicting water uses involved, however, the Commission could determine that an actual plan was necessary "in order to secure the data necessary for an intelligent decision."¹⁷⁵ The Commission noted that it need not prepare the plan itself and, in fact, where the work of others was available, it could rely on that plan in order that it "not duplicate the work of any other agency."¹⁷⁶

The Commission, however, moved away from the position that in some situations it must prepare a comprehensive plan prior to issuing a license for water-power development. This shift was probably a result of some very practical considerations. Until the Reorganization Act of 1930,¹⁷⁷ Congress had not authorized the FPC to employ any personnel other than its executive secretary and engineer officer.¹⁷⁸ Thus, it was necessary that employees temporarily "detailed" by the Departments of War, Interior, and Agriculture perform all staff work, including field investigations and preparation of reports.¹⁷⁹ The Commission was forced to borrow such personnel as these departments could spare and were willing to loan. By the end of 1922, this detail consisted of eight engineers, two attorneys, two accountants, and eighteen clerks.¹⁸⁰ With this limited staff, over 500 applications confronted the Commission during its first two years of existence.¹⁸¹ As a result the Commission noted in its First Annual Report, it was barely able to act upon the applications as fast as they were reported upon by the field offices of other

¹⁶⁸ M. CONOVER, *THE FEDERAL POWER COMMISSION* (U.S. Service Monographs No. 17, 1923).

¹⁶⁹ *Id.* at 66.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See *supra* notes 155-62 and accompanying text.

¹⁷³ See *supra* notes 60-84 and accompanying text.

¹⁷⁴ 1 FPC ANN. REP. 51 (1921).

¹⁷⁵ *Id.* at 33.

¹⁷⁶ *Id.*

¹⁷⁷ Reorganization Act of 1930, ch. 572, 46 Stat. 797 (1930) (current version at 16 U.S.C. §§ 792, 793, 797 (1986)).

¹⁷⁸ 2 FPC ANN. REP. 6 (1922).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 13; 1 FPC ANN. REP. 23 (1921).

departments used by the Commission.¹⁸² Protracted delays in licensing occurred and, the Commission stated, "[n]either the Commission nor the departments [were] able to make investigations of the character which the law contemplates as a prerequisite to issuing licenses."¹⁸³

The Commission noted that if this situation continued, it would be forced to pursue one of two courses of action. It could either comply with the law and act only on those applications it could process properly, or it could "ignore the requirements of the law, [and] issue permits or licenses without adequate investigation . . . and without enforcing the safeguards provided by the act."¹⁸⁴ The Commission apparently soon chose the latter approach.

The Commission may have been influenced to make this decision to proceed without comprehensive plans because, although Congress was fully aware of the workload,¹⁸⁵ congressional authorization for the FPC to employ its own staff did not occur until 1930.¹⁸⁶ Furthermore, although it broadened the scope of the comprehensive plan requirement by its 1935 amendments to the Act, Congress did not clarify where such plans were to originate or what form they were to take.¹⁸⁷ Since 1935, Congress has not addressed the comprehensive plan requirement of section 10(a).

Whatever the cause, the Commission soon implicitly interpreted comprehensive "plan" (or "scheme") to mean comprehensive "considerations." Instead of first determining whether a plan was necessary prior to issuing a license, the Commission would only "consider" the entire waterway, or a portion of it, when determining whether a proposed project would be compatible with the comprehensive development of the waterway. For example, in a 1940 decision regarding an applicant's proposal to build two power plants on the Feather River in California, the Commission specifically noted that it was Congress's intent that the Commission was not to issue a license unless the proposed project was "best adapted to a comprehensive plan to conserve and utilize in the public interest the water resources of the region."¹⁸⁸ Therefore, it went on to say, it could only issue a license if the projects would be "consistent with the public interest" and in accord with the "purposes" of the Federal Power Act.¹⁸⁹ The Commission's analysis contained no reference to an actual plan for the Feather River. Instead, the Commission considered potential conflicts between the proposed projects and the marketing of energy from a major federal project in the region,¹⁹⁰ effects on fish,¹⁹¹ effects on a state highway development,¹⁹² and integration of the projects with an existing reservoir within the river basin.¹⁹³ These were certainly comprehensive considerations; however, they do not appear to have been based on a pre-existing plan.

¹⁸² 1 FPC ANN. REP. 15 (1921).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also 2 FPC ANN. REP. 6 (1922).

¹⁸⁶ Reorganization Act of 1930, ch. 572, 46 Stat. 797 (1930), (current version at 16 U.S.C. §§ 792, 793, 797 (1986)).

¹⁸⁷ *Id.*

¹⁸⁸ Pacific Gas and Electric Co., 2 F.P.C. 300, 307 (1940).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 303, 306, 307.

¹⁹¹ *Id.* at 303.

¹⁹² *Id.*

¹⁹³ *Id.* at 309-10.

The Commission's 1946 decision regarding redevelopment of a hydroelectric project on the Connecticut River, a major river of the northeast, reveals a similar approach.¹⁹⁴ Again the Commission cited its statutory duty to find whether the project was best adapted to a comprehensive plan and then proceeded to present its decision without any reference to a plan.¹⁹⁵ Instead the Commission weighed the power values expected from the project "against the relatively small amounts of agricultural land" to be flooded and approved the project pursuant to its "duty under the statute to promote the comprehensive development of waterways in a manner best adapted to" the issues identified in section 10(a).¹⁹⁶ Section 10(a) became a requirement that the Commission determine, on a case-by-case basis, whether a given project would contribute to the maximization of the beneficial public uses of the affected waterway.¹⁹⁷

¹⁹⁴ Bellows Falls Hydro-Electric Corp., 5 F.P.C. 271 (1946).

¹⁹⁵ *Id.* at 273-74.

¹⁹⁶ *Id.* at 274. There are innumerable examples of this type of approach taken by the Commission relative to the comprehensive plan requirement. Relative to a proposed project on the Kern River in California, the Commission saw the meaning of section 10(a) as "clear and unambiguous" in that the FPC's responsibility was "to protect the public interest" by controlling the use of waters so that it may "assure adaptation of the project to all public purposes." Southern California Edison Co., 8 F.P.C. 364, 386 (1949). A project on the Columbia River in Washington was best adapted to a comprehensive plan for that river when it did not render a contemplated downstream project uneconomical, optimized the economic potentials of the affected stretch of river, and minimized damage to property. Public Utility District No. 1 of Chelan County, Washington, 18 F.P.C. 25, 29 (1957). A pump-storage hydroelectric project in South Carolina was "best adapted to the comprehensive development" of the waterways involved where there were no conflicting applications and the project would be an integral part of a large multi-facility power development, have no effect on government water resource projects, be compatible with navigation, and have no appreciable effect on flood control. Duke Power Co., 59 F.P.C. 1266, 1276 (1977). Recently, the Commission found the Sayles Flat Project in California to be best adapted to a comprehensive plan where it found the project was not in conflict with any existing or proposed water resource development in the affected river basin. Joseph M. Keating, 24 FERC ¶61,343 (1983). This determination was made after a consideration of economic feasibility, need for the power, and effects on recreation, cultural resources, water quality, stream flow, and aquatic and terrestrial resources. *Id.*

¹⁹⁷ At times, the Commission has appeared to treat the plans an applicant submits for a proposed project as the "comprehensive plan." In a case involving an applicant who sought to develop four facilities under one license on the Coosa River in Alabama, the Commission stated that its duty under section 10(a) was to determine which developer's proposal was the best plan of development for the stream involved. Alabama Power Co., 18 F.P.C. 257, 259, 261 (1957). The Commission noted that developers had submitted many plans for the development of the Coosa but, without reference to a more comprehensive scheme of development, it found the applicant's plan superior. *Id.* at 261. Although the FPC did not approve the applicant's plan in full upon issuance of the license, the language in this decision was suggestive of the project-plan-as-comprehensive-plan approach.

The Commission used similar language in a decision it issued a year later, Pacific Northwest Power Co., 19 F.P.C. 127 (1958). In that opinion, it noted that when there is more than one possible project which will develop a stretch of river, the Commission can only grant a license that in its judgment "will be 'best adapted' to the purposes of Section 10(a)." *Id.* at 130. Relative to a comprehensive plan, the Commission interpreted this requirement to mean that the project licensed must be one that will permit the development of all "reasonably necessary and desirable" beneficial uses of the water. *Id.* This comprehensive plan analysis was to consider the "potentialities of the particular project on the river." *Id.* (emphasis added). Although the decision referred to a Corps of Engineers plan for the river, the Commission appears to have focused its analysis on a comparison of whether the applicant's "plan" or that of the Corps was better adapted to fully developing the river. *Id.* at 132-34. When the same issue was brought before the Commission six years later, it used a similar

Although the Commission no longer interprets section 10(a) to be a requirement that it have an actual plan for a waterway prior to issuing a license for the development of the water resource, it occasionally has used "comprehensive plans" prepared by the Corps of Engineers in its analyses.¹⁹⁸ For example, the Commission denied a license in 1950 for a hydroelectric project on the St. Lawrence River primarily because the site was an integral part of an extensive plan for the comprehensive development of that waterway.¹⁹⁹ The Commission did not, however, go so far as to state that the Corps' plan was the section 10(a) plan for the river, but only that the Corps' plan was best adapted to a comprehensive plan for the river's development.²⁰⁰

This does not mean, however, that the Commission's decisions were always in accord with these plans. To the contrary, the Commission has demonstrated a consistent unwillingness to be locked into any particular "plan." The Nez Perce decisions of 1958 and 1964 demonstrate the Commission's desire not to be bound to any plan.²⁰¹ In the first decision, the Commission agreed with the Corps' plan which stated that any combination of projects which precluded the development of the Nez Perce site would be inferior utilization of the water resource relative to development which included that site.²⁰² Six years later, however, the Commission reversed itself and licensed a project which would eliminate the Nez Perce as a power site, stating that the "plan" approved would produce more benefits because it better mitigated the impacts on anadromous fish.²⁰³ Similarly, in 1949, contrary to the recommendation of the Secretary of the Interior and the Bureau of Reclamation, the Commission granted a license for a private project at a site which the Bureau's revised comprehensive plan for development of the Central Valley Basin in California had identified for federal development.²⁰⁴

The apparent rationale behind the Commission's treatment of comprehensive plans prepared by other government agencies is the Commission's unique and broader obligations relative to water resource development. A Corps of Engineers' comprehensive plan may focus on maximizing power production from a given waterway; however, the Commission must consider, when appropriate, not only power production but also flood

approach, except that it compared the plans of competing applicants. *Pacific Northwest Power Co.*, 31 F.P.C. 247 (1964).

¹⁹⁸ See, e.g., *Pacific Northwest Power Co.*, 19 F.P.C. 127, 131 (1958).

¹⁹⁹ *The Power Authority of the State of New York*, 9 F.P.C. 301 (1950).

²⁰⁰ *Id.* at 306.

²⁰¹ *Pacific Northwest Power Co.*, 31 F.P.C. 247 (1964); *Pacific Northwest Power Co.*, 19 F.P.C. 127 (1958).

²⁰² *Pacific Northwest Power Co.*, 19 F.P.C. at 131.

²⁰³ *Pacific Northwest Power Co.*, 31 F.P.C. at 263. As a practical matter, political considerations would have prohibited the Commission from treating lightly the plans prepared by the Corps of Engineers. Throughout the early years of the Commission's existence, Congress had authorized the Corps to conduct scores of studies of various river basins with the aim of formulating "general plans" or "comprehensive plans" for their development. See, e.g., H.R. Doc. No. 308, 69th Cong., 1st Sess. (1926); Rivers and Harbors Act, ch. 47, 44 Stat. 1010, 1015 (1927); H.R. Doc. No. 65, 74th Cong., 1st Sess. (1935); H.R. Doc. Nos. 444-47, 475, 643-52, 78th Cong., 2d Sess. (1944); Flood Control Act of 1944, ch. 665, 58 Stat. 887, 891-98 (1944). Clearly, Congress would have frowned upon any attempt by the Commission to ignore these vast undertakings.

²⁰⁴ *Fresno Irrigation Dist.*, 8 F.P.C. 348, 359 (1949). The Commission questioned whether this particular project was essential to the Bureau's comprehensive plans and reasoned that the private proposal promised "more complete development." *Id.* at 353. Therefore, the FPC concluded that the applicant's project "will be best adapted to a comprehensive development of these water resources as required by section 10(a)." *Id.* at 357.

control, navigation, recreation, and other public uses of the water.²⁰⁵ While it may be "essential to take notice" of such a plan, particularly if it is multi-purpose oriented, another agency's plan does not consequently bind the Commission even if it initially endorses the plan.²⁰⁶ The Commission has noted that it has "neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power" in commenting upon other agencies' comprehensive plans.²⁰⁷ When the Commission receives an application, however, "the responsibilities assigned to the Commission under the Federal Power Act . . . requir[e] full and impartial evaluation of the applicant's proposal on its merits and the objections thereto."²⁰⁸

In summary, the Commission has never interpreted section 10(a) of the Federal Power Act as embodying a requirement that, in all cases, a license be best adapted to an actual plan formulated prior to its authorization. In its early years the Commission believed that such a plan was necessary for a waterway for which there were competing applications or significant potentially conflicting uses. Out of practical necessity, however, the Commission quickly moved away from that position and no longer believes that any actual plan is ever a prerequisite to the issuance of a license. Rather, the Commission interprets section 10(a) to be a requirement that it "consider" all significant possible uses of the resource involved and the potential consequences of a project relative to those uses. In this manner, it believes that its decision should lead to the most beneficial public utilization of the waterway. Although in some situations the Commission has treated the plan for the project itself as a sort of comprehensive plan,²⁰⁹ plans prepared by applicants or other government agencies generally are not determinative but serve as input into the Commission's "considerations." Under the Commission's current interpretation, the results of these considerations actually serve as both the "comprehensive plan" and the determination of whether a proposed project is "best adapted" to it.

III. JUDICIAL INTERPRETATION OF THE COMPREHENSIVE PLAN REQUIREMENT OF SECTION 10(A)

The courts have not yet directly considered the question of whether, in any situation, section 10(a) requires the Commission to prepare a comprehensive plan prior to issuing a license pursuant to the Federal Power Act. There have been, however, several challenges to the manner in which the Commission has carried out its duties under section 10(a) of the Act. The courts have interpreted the Act to be a broad congressional grant of authority to the Commission and have extended great deference to the Commission's interpretation of the comprehensive planning requirement of section 10(a). Generally, the courts' criticisms have been limited to the scope of the Commission's considerations rather than the Commission's failure to use an actual plan of waterway development.

The courts frequently have noted that the central purpose of the Federal Power Act in general, and section 10(a) in particular, was to provide for the comprehensive control, use, and development of the nation's water resources over which the federal

²⁰⁵ *Idaho Power Co.*, 14 F.P.C. 55, 58-59 (1955).

²⁰⁶ *Id.* at 59-60.

²⁰⁷ *City of Tacoma*, 10 F.P.C. 424, 427-28 (1951).

²⁰⁸ *Id.* at 428.

²⁰⁹ See *supra* note 197.

government could exercise authority.²¹⁰ Accordingly, Congress created the Commission as a "permanent disinterested expert agency of Congress" authorized to carry out these policies.²¹¹ The Commission was to be the "guardian of the public domain."²¹² To accomplish this Congress gave the FPC "sweeping authority" and a "specific planning responsibility."²¹³

In deference to this congressionally bestowed authority, the courts generally have granted the Commission great discretion in the exercise of its statutory duties. In part, a very broad interpretation of the comprehensive plan requirement of section 10(a) has accomplished this deference. The Supreme Court has noted with approval that when issuing a license the Commission had expressed its judgment that the approved project was consistent with the "general conception" of how the river basin should be developed.²¹⁴ The District of Columbia Circuit has emphasized strongly that section 10(a) states that the project approved shall be in the Commission's judgment best adapted to a comprehensive plan.²¹⁵ The court concluded that courts should allow the Commission whatever flexibility would be consistent with the Federal Power Act.²¹⁶ That court has also applied a "highest and best use" standard in interpreting the comprehensive plan requirement, finding it satisfied when the Commission neglects no critical aspect of a waterway's potential use when considering the project.²¹⁷ Similarly, the Ninth Circuit has interpreted section 10(a) as a requirement that the Commission find that there is a resulting public benefit from the proposed project when issuing a license.²¹⁸ These are broad interpretations of what constitutes a determination that a project is best adapted to a comprehensive plan for the development of a waterway.

Even in the rare instances where the courts have not demonstrated great deference to a licensing determination by the Commission, those courts have not criticized the Commission's failure to prepare a plan but, rather, have only required it to expand the scope of its considerations. The Second Circuit, in rejecting a licensing determination by the Commission for a project on the Hudson River, did not discuss the lack of an actual plan on which the FPC based its decision but instead focused on the duty of the Commission to consider all relevant factors relative to the beneficial uses of a stream,

²¹⁰ See, e.g., *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946) (Act was result of widely supported effort for complete scheme to promote comprehensive development of nation's water resources); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 613 (2d Cir. 1965) (Act was result of effort for "complete scheme of national regulation which would promote the comprehensive development of the nation's water resources"); *Georgia Power Co. v. Federal Power Comm'n*, 152 F.2d 908, 913 (5th Cir. 1946) (Act intended to develop, conserve, and use nation's navigation and waterpower resources through use of comprehensive plan).

²¹¹ *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 154, 168 (1953).

²¹² *California v. Federal Power Comm'n*, 345 F.2d 917, 923 (9th Cir. 1965) (quoting *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 23 (1953)).

²¹³ *Scenic Hudson Preservation Conference*, 354 F.2d at 613.

²¹⁴ *United States ex rel. Chapman*, 345 U.S. at 169.

²¹⁵ *Washington Pub. Power Supply Sys. v. Federal Power Comm'n*, 358 F.2d 840, 847 (D.C. Cir. 1966); *Udall v. Federal Power Comm'n*, 387 U.S. 428, 451 (1957); *National Hells Canyon Ass'n v. Federal Power Comm'n*, 237 F.2d 777, 779 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924, *reh'g denied*, 353 U.S. 978 (1957).

²¹⁶ *Washington Pub. Power Supply Sys.*, 358 F.2d at 847.

²¹⁷ *Municipal Elec. Ass'n v. Federal Power Comm'n*, 414 F.2d 1206, 1207, 1208 (D.C. Cir. 1969).

²¹⁸ *California*, 345 F.2d at 929.

including fisheries and scenic and historical aspects.²¹⁹ Only by considering the totality of a project's effects, the court stated, could the Commission properly fulfill its planning function in the public interest under section 10(a).²²⁰ Similarly, in *Udall v. Federal Power Commission*, a rare example of the Supreme Court overturning a lower court's affirmation of an FPC licensing authorization, the Court did not base its decision on the Commission's failure to follow an actual plan, even though the Court noted that the Corps of Engineers had prepared a "comprehensive plan" for the affected river.²²¹ Instead, the Court relied on the Commission's failure to consider adequately the effects of the licensed project on anadromous fish and the probable lack of need for the project's power.²²² The test, the Court stated, was whether the project was in the public interest.²²³

When Congress formally adopts a comprehensive plan prepared by another government agency, the Commission probably must accept it as the comprehensive plan to be used in execution of its section 10(a) duties.²²⁴ The Supreme Court addressed this issue in 1965 in *United States ex rel. Chapman v. Federal Power Commission*, stating that "congressional approval of a comprehensive plan can be read . . . simply as saying that [the] plan . . . should be accepted by the Commission as the comprehensive plan to be used in the application of these [section 10(a)] statutory provisions."²²⁵ Because even these plans give only "guidance" to the Commission in determining whether all benefits will be derived from the proposed project,²²⁶ the details of the plan do not completely bind the Commission if, in its judgment, such an approach would be inconsistent with the public interest.²²⁷ Furthermore, when another agency has prepared a "comprehensive plan" pursuant to a Congressional directive but Congress has not formally adopted the plan, the courts have not required the Commission to use that plan as its standard of judgment.²²⁸

²¹⁹ *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 624 (2d Cir. 1965).

²²⁰ *Id.* at 620.

²²¹ 387 U.S. 428, 435 n.4 (1967).

²²² *Id.* at 436-50.

²²³ *Id.* at 450. Applying the principle of *pari materia* to the Federal Power Act, the 1965 Anadromous Fish Act, and the Fish and Wildlife Coordination Act, the Court found that the Commission must consider fully fisheries and wildlife in a determination of whether a hydroelectric project will be in the public interest. *Id.* at 438-44. The Ninth Circuit followed similar reasoning in *Confederated Tribes and Bands of Yakima Indian Nation v. Federal Energy Regulatory Comm'n*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The *pari materia* principle states that courts must construe laws pertaining to the same subject with reference to each other. *See* BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

²²⁴ *United States ex rel. Chapman*, 345 F.2d at 168-69.

²²⁵ *Id.*

²²⁶ *Id.* at 164.

²²⁷ *Id.* at 168.

²²⁸ *See, e.g., National Hells Canyon Ass'n*, 237 F.2d at 783, 784. *See also Washington Pub. Power Supply Sys.*, 358 F.2d at 843-46.

Language in the *National Hells Canyon Ass'n* opinion suggests that the applicant's proposal can, by itself, serve as the "comprehensive plan" on which the Commission may base its decision. 237 F.2d at 783-84. The D.C. Circuit agreed that the Commission could reject a Corps of Engineers plan for a dam as the section 10(a) comprehensive plan. *Id.* The applicant's plan, the court held, was as "equally comprehensive" as the rejected plan relative to the "achievement of public purposes." *Id.* Although this is probably dicta and subsequent decisions have not followed it, this language may have encouraged the Commission occasionally to treat an applicant's proposal as the comprehensive plan for the development of a section of waterway. *See supra* note 90.

In summary, the courts have not interpreted section 10(a) of the Federal Power Act to require the Commission to develop or even use an actual plan for a waterway in its licensing decisions, nor have they required that the Commission evaluate whether the project requires a plan. Courts have interpreted broadly the term "best adapted to a comprehensive plan" and generally the courts have shown the Commission great deference in the manner in which it has executed its obligations pursuant to this statutory language. Occasionally, the courts have insisted on a broader scope of "considerations" as a prerequisite to a license issued "in the public interest." These additional considerations have focused on environmental or aesthetic concerns. Yet, in all cases except those in which the Commission has been challenged for its failure to follow a plan prepared by another agency, the issue has been the extent and scope of its considerations involved in its licensing decision. No court has yet been asked to address directly the question of whether the Commission must, in at least some instances, base its decision on some actual "comprehensive plan" prepared prior to its determination of the merits of a license application or at least justify its failure to do so.

IV. THE EFFECTIVENESS OF THE CURRENT APPROACH TO THE COMPREHENSIVE PLAN REQUIREMENT

The Commission has long interpreted section 10(a) of the Federal Power Act as merely a directive that it consider on an ad hoc basis whether proposed water projects will contribute to the most beneficial use of our nation's waterways.²²⁹ While the Commission includes various factors in these considerations, it never requires that a project conform to an actual, pre-existing plan for waterway development.²³⁰ This interpretation of section 10(a) is flawed. Both the framers of section 10(a) and the original Commission itself understood that where significant conflicting and competing uses were proposed for a waterway, the Commission would not issue permits until a comprehensive plan had been developed for that waterway.²³¹

When considering a permit application, then, the Commission should first determine whether an actual plan is required to coordinate the waterway's development and to resolve any potential conflicts from competing proposals. Only after it has determined that such a plan is not necessary should it proceed to issue the permit without a plan. Similarly, a court reviewing the Commission's decision to issue a permit should look first to whether it based that decision on an actual plan. If not, the court should determine whether the record supports the Commission's finding of insignificant conflicting uses. If the court finds that the record does not support this determination, it should not proceed to the merits of the Commission's licensing decision, but should remand to the Commission for reconsideration of the application based on an actual plan of waterway development. Only in this manner can the courts ensure that the Commission carries out the original purposes of the Federal Power Act of both encouraging and optimizing waterway development.

The interrelated legislative history of the Federal Power Act and Senator Newlands' Waterway Commission supports the conclusion that the Commission must make an initial determination of whether a comprehensive plan is required to ensure that a proposed

²²⁹ See *supra* notes 177-208 and accompanying text.

²³⁰ *Id.*

²³¹ See *supra* notes 63-84, 158-76 and accompanying text.

project contributes to the optimum development of a waterway.²³² Newlands consistently and successfully resisted any legislation that would allow waterway development not based on comprehensive plans, and also led the fight for parallel legislation that authorized a Waterways Commission to develop such plans.²³³ Most likely it is primarily because of Newlands' efforts, both individually and through President Roosevelt as an original member of the Inland Waterways Commission, that the comprehensive plan language originally appeared in section 10(a).²³⁴ As originally conceived, then, "comprehensive plan" meant actual plan.

After Newlands' death, however, his scheme for comprehensive waterway development, embodied in actual and proposed statutory language, was left unfulfilled.²³⁵ The Waterways Commission was never appointed and, without the guidance of Newlands or that Commission, Congress failed to expressly define how the new Commission should implement the comprehensive plan requirement of section 10(a).²³⁶ It is likely that the intended meaning of this term changed during the nearly three years between Newlands' death and the passage of the Act; the term did not, however, lose all meaning, as suggested by the testimony of those who wrote the Act.

The framers of section 10(a) assumed that it was a directive to the Commission to use actual plans in at least some instances.²³⁷ O.C. Merrill, a framer of the Act and the first executive secretary of the FPC, implied this reading of section 10(a) in his testimony before the House Water Power Committee.²³⁸ Merrill indicated that the framers intended that the Commission make intensive studies of selected waterways where there was an economic interrelationship of various sites and an identified need for power.²³⁹ Although he may have overstated the scope of the subject matter to be included in the plans, the cabinet officials responsible for the bill did not contradict his interpretation of that section as it applies to hydroelectric power and navigability; nor did the House Committee seriously question this interpretation.²⁴⁰

Apparently, then, the Federal Water Power Act required the Commission to determine which waterways or portions of waterways needed comprehensive plans on which licenses would be based. Such initial determinations were necessary to further the dual purposes of the Act: to accelerate the development of hydroelectric power while optimizing the development of the nation's water resources for all uses. The slow and unsure authorization process under the 1910 General Dam Act had severely inhibited the growth of hydroelectric power.²⁴¹ If the Act required that the Commission develop a comprehensive plan for every river on which an applicant sought a license, obviously there would be a negative effect on water power development. The purpose of the Federal Water Power Act, however, was also to ensure optimal development.²⁴² On those rivers where applicants sought many, sometimes conflicting, licenses, a comprehensive plan

²³² See *supra* notes 23-154 and accompanying text.

²³³ See *supra* notes 93-135 and accompanying text.

²³⁴ See *supra* notes 136-50 and accompanying text.

²³⁵ See *supra* notes 136-37 and accompanying text.

²³⁶ See *supra* notes 151-54 and accompanying text.

²³⁷ See *supra* notes 63-84 and accompanying text.

²³⁸ See *supra* notes 69-77 and accompanying text.

²³⁹ *Id.*

²⁴⁰ See *supra* notes 78-87 and accompanying text.

²⁴¹ See *supra* note 57 and accompanying text.

²⁴² See *supra* notes 59-90 and accompanying text.

was essential for the Commission to fulfill its functions of ensuring optimum development and safeguarding navigation. It would be appropriate, therefore, for the Commission to make initial determinations of when an actual development plan would be necessary to ensure the full development of a waterway.

The Commission itself originally adopted this interpretation of its comprehensive planning obligations.²⁴³ The Commission considered that the prior preparation of a plan was necessary where developers proposed significant conflicting uses for a river.²⁴⁴ This approach has its own logic. Where a developer proposed only one project and use for an undeveloped stream, and the project appeared to represent the best possible use for the resource, the Commission could conclude rationally that formulation of a prior plan was unnecessary and use the developer's plan for the project as a comprehensive plan for development of the stream or at least the stream segment. Where significant potential competing uses were evident, however, the Commission recognized that no individual proposal could serve as a comprehensive plan for the waterway. Perhaps even more important than satisfaction of statutory terminology, the Commission recognized that it could not satisfy the spirit and intent of the Federal Water Power Act without such a prior plan because otherwise it could not ensure the optimum development of the waterway.

This original interpretation by the Commission of the statutory directive is particularly important. The Supreme Court has stated that a court should give an agency's statutory interpretation that is contemporaneous with the statute's enactment greater deference than a later interpretation by that agency which is in conflict with the earlier one.²⁴⁵ That principle is of even greater applicability here where the agency officials involved are the same ones who drafted the statutory language in question.²⁴⁶

While the Commission has the power to decide whether an actual comprehensive plan is necessary, it cannot exercise that power without constraint. An agency's findings of fact must be supported by the record on which that decision was based.²⁴⁷ In the Commission's licensing decisions, its findings of fact must be "supported by substantial evidence" shown in the record of its decision.²⁴⁸

²⁴³ See *supra* notes 156-73 and accompanying text.

²⁴⁴ See *supra* notes 158-67 and accompanying text.

²⁴⁵ *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976). In rejecting a guideline promulgated by the Equal Employment Opportunity Commission as not controlling in the case, Justice Rehnquist stated that the guideline "is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of the Title. More importantly, the . . . guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute . . ." *Id.* Justice Rehnquist further stated that in prior cases the Court had not accepted administrative guidelines which conflicted with previous pronouncements of the agency. *Id.* at 143 (citing *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858-59 n. 25 (1975); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-96 (1973)). It should be noted, of course, that the timing and consistency of agency interpretations of statutes are only two of several factors the Court considers in determining how much weight to accord an interpretation. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Other factors include the thoroughness of the agency's considerations, the quality of its reasoning, and the expertise and experience of the agency relative to the subject matter. *Id.*

²⁴⁶ See *supra* note 60 and accompanying text.

²⁴⁷ See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Interstate Commerce Comm'n v. Union Pacific Ry. Co.*, 222 U.S. 541, 547-48 (1912).

²⁴⁸ 16 U.S.C. § 825(l)(b) (1986).

If the Commission's original understanding of the comprehensive plan directive is accepted, then a Commission decision to issue a license without using an actual "comprehensive plan" for the development of a waterway involves a finding of fact that such a plan is not necessary. Where a developer proposes only one use for a river and no substantial potential conflicting uses are apparent, it would be appropriate for the Commission to find that no actual plan for the river's development is necessary to ensure its optimum development. The record of the decision on the application should state and support such a finding. On the other hand, where the Commission has identified significant other beneficial uses of a river and a decision to grant a license will eliminate those other uses, it would be difficult for the Commission to substantiate a finding that an actual plan is not necessary to ensure that the approved project is best adapted to a comprehensive plan. At a minimum, the lack of such a plan should cause a reviewing court to take a "hard look" at the evidence supporting the Commission's finding that the proposed project was "best adapted to a comprehensive plan for improving or developing a waterway."

Where the evidence indicates that the Commission must use an actual plan in its licensing deliberations, that plan need not be drafted by the Commission itself.²⁴⁹ There is nothing in the Act which expressly directs the Commission to formulate any plans but only, as in section 4, to make investigations and collect data concerning water resources and the water power industry.²⁵⁰ Also, one of the Commission's functions is to coordinate the water power activities of other government agencies.²⁵¹ Thus, it would be proper for the Commission to use plans that any such agency formulated. Indeed, as the legislative history reveals, the very origin of the comprehensive plan requirement was probably the political pressure to ensure that the Commission would make use of the comprehensive plans to be formulated by the ill-fated Waterways Commission.²⁵² There is nothing in the Act nor in its legislative history to suggest that a reviewing court should prohibit the use of a comprehensive plan adopted by the Commission but formulated by another government entity.

The subject matter of these plans should, at a minimum, include those issues section 10(a) explicitly addresses. The Act names these subjects because they represent the principle concerns Congress intended to address.²⁵³ In the original Act Congress limited these concerns to water power and navigation.²⁵⁴ In 1935, Congress expanded the Act's scope to include recreation and commerce in general.²⁵⁵ In addition, the Act requires that the comprehensive plan consider "other beneficial uses."²⁵⁶ The testimony of Secretary Lane of Interior and Secretary Houston of Agriculture, both authors of the bill whose version of section 10(a) eventually became law, perhaps best reveals the manner in which the Commission is to address these uses.²⁵⁷ Both indicated that they felt that only rarely would other uses relate to the question of water-power development but, in

²⁴⁹ See *supra* note 162 and accompanying text.

²⁵⁰ 16 U.S.C. § 797(a) (1986).

²⁵¹ See *supra* note 83 and accompanying text.

²⁵² See *supra* notes 18-143 and accompanying text.

²⁵³ For instance, encouraging and optimizing water power development while protecting the navigability of rivers were the Federal Water Power Act's principal goals. See *supra* note 47.

²⁵⁴ Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, 1068 (1920).

²⁵⁵ Public Utility Act of 1935, ch. 687, 49 Stat. 803, 842 (1935).

²⁵⁶ 16 U.S.C. § 803(a) (1986).

²⁵⁷ See *supra* notes 78-84 and accompanying text.

such circumstances, the Commission should consider those uses.²⁵⁸ The Commission should address other specific uses only if, and to the extent that, there is a conflict between water power development and those other uses. Again, this would be an agency determination in the first instance which substantial evidence in the record of the licensing decision should support.²⁵⁹

In summary, a court reviewing a Commission decision that an applicant's proposal is "best adapted to a comprehensive plan" for a waterway's development should determine whether that decision is supported by substantial evidence. The court can support the Commission's decision to proceed without an actual development plan only when the decision's record indicates that such a plan is unnecessary to ensure the affected waterway's optimum development. When developers propose significant conflicting uses for the waterway, the absence of an actual plan of development would suggest that the record does not support the Commission's finding that the project is best adapted to a comprehensive plan. In such instances, the court should remand to the Commission to reconsider the applicant's proposal relative to an actual plan of development.

CONCLUSION

The legislative history of the Federal Power Act does not demonstrate a clear congressional intent regarding the "comprehensive plan" requirement of section 10(a). Most likely, no such clear intent existed. Rather, the comprehensive plan terminology appeared as a result of compromise between congressional forces. One faction, led by Senator Newlands, sought to establish a commission with broad authority over water resource development and with the explicit charge of preparing comprehensive plans for such development. Other forces sought a commission with more limited authority, charged only with facilitating the development of waterpower while protecting waterway navigability. Newlands succeeded in achieving legislation authorizing the formation of his commission; he would not then have acquiesced in the establishment of a separate agency with authority over water-power development which would not be required to recognize in some way the work of that commission. Yet, after Newlands' death and for the next two and one-half years, no one in Congress would champion his cause. As a result, passage of the Federal Water Power Act resulted in the abolition of his commission, leaving only section 10(a) as an indirect remnant of his efforts.

That remnant, however, was not without significance. Congressional testimony and the manner in which the Commission in its early years applied section 10(a) demonstrate that the section constituted a requirement that, in all cases, the Commission at least consider whether a proposed project would be compatible with a waterway's optimum development, with a view to securing its most beneficial public uses. In addition, Congress intended section 10(a) to require that the Commission use an actual development plan in licensing decisions where it determined that there were significant conflicting potential uses of a waterway. Such an understanding of section 10(a) is both logical and consistent

²⁵⁸ *Id.*

²⁵⁹ See *supra* text accompanying notes 247-48. The doctrine of *pari materia*, discussed in *Udall v. Federal Power Comm'n*, 387 U.S. 428, 438-44 (1967) would raise additional considerations affecting the scope of the Commission's considerations. As discussed *supra*, notes 214-16 and accompanying text, the *Udall* Court found that the 1965 Anadromous Fish Act and the Fish and Wildlife Coordination Act required the Commission to consider fully the fisheries issue pursuant to the comprehensive plan requirement. 387 U.S. at 438-44.

with the original purpose of the Federal Water Power Act of promoting and ensuring optimum hydroelectric power development.

The Federal Energy Regulatory Commission should return to this original understanding of section 10(a). On the one hand, the Commission should not have to prepare a comprehensive plan for each waterway on which an applicant seeks a hydroelectric project license. To do so would be impractical, unnecessary, and contrary to the Act's central purpose of promoting waterpower development. On the other hand, the Commission should address the issue of whether the Act necessitates an actual development plan for it to make a reasoned determination of whether a proposed project is compatible with the goal of ensuring the affected waterway's most beneficial public use. Such an approach would help to ensure that the Commission, under the mandate of the Federal Water Power Act, encourages and facilitates waterpower development while securing the optimum utilization of the nation's water resources.

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