

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Part 2]

Before Commissioners: Martha O. Hesse, Chairman;  
Anthony G. Sousa, Charles G. Stalon  
and Charles A. Trabandt.

Interpretation of Comprehensive ) Docket No. RM87-36-001, et al.  
Plans Under Section 3 of the )  
Electric Consumers Protection )  
Act )

ORDER NO. 481-A

ORDER ON REHEARING

(Issued April 27, 1988)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is issuing an order on rehearing of its final rule 1/ setting forth the Commission's interpretation of a Federal or state comprehensive plan under section 10(a)(2)(A) of the Federal Power Act (FPA), 2/ as amended by the Electric Consumers Protection Act of 1986 (ECPA). 3/ The Commission will treat as a comprehensive plan one that: is prepared by an agency established pursuant to Federal law that has the authority to prepare such a plan, or by a state agency, of the state in which the proposed hydroelectric project is or will be located, authorized to conduct such planning pursuant to state law; is a comprehensive study of one

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1/ Order No. 481, 52 Fed. Reg. 39,905 (Oct. 26, 1987), III FERC Stats. & Regs. ¶ 30,773 (1987).

2/ 16 U.S.C. § 803(a)(2)(A).

3/ Pub. L. No. 99-495, 100 Stat. 1234 (1986).

or more of the beneficial uses of a waterway or waterways; includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and is filed with the Secretary of the Commission.

## II. BACKGROUND AND DISCUSSION

Section 10(a)(2)(A) of the FPA requires the Commission, in its hydropower licensing decisions, to consider, among other things:

- (A) The extent to which the [proposed] project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by -
  - (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
  - (ii) the State in which the facility is or will be located.

The Commission issued a final rule stating its interpretation of such a comprehensive plan on October 26, 1987. The Commission received ten requests for rehearing of the rule. 4/

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4/ The State of California ex rel. Resources Agency and the State Water Resources Control Board, the Commonwealth of Kentucky Department for Environmental Protection, the Vermont Agency of Natural Resources, the New York State Department of Environmental Conservation, the State of Minnesota Department of Natural Resources, and American Rivers et al. filed timely rehearing requests. The State of Montana, the State of Washington Department of Ecology, the Northwest Power Planning Council, and the State of Oregon filed requests for rehearing out of time. The Commission is considering these as requests for reconsideration.

1. The interpretative rule exception to the APA.

The final rule was issued without prior notice and comment under the interpretative rule exception to the Administrative Procedure Act (APA). <sup>5/</sup> The APA generally requires an agency to publish notice of a proposed rulemaking in the Federal Register and give interested persons an opportunity to comment on the proposed action before issuing a final rule. <sup>6/</sup> These requirements, however, do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice . . ." <sup>7/</sup> Most of the petitioners for rehearing argue that the final rule does not fall within the interpretative rule exception to the APA. They argue that the rule imposed requirements for these plans that were not contained in ECPA and that the rule was therefore not interpretative in nature.

The Commission disagrees. Since the final rule merely stated the Commission's interpretation of a comprehensive plan under ECPA, the Commission believes the rule was properly issued under the interpretative rule exception to the APA.

2. Comprehensive plan criteria.

In the final rule, the Commission stated that Congress intended that a state plan would fall within the scope of section

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<sup>5/</sup> 5 U.S.C. § 551 et seq. (1982).

<sup>6/</sup> 5 U.S.C. § 553 (b) (A) (1982).

<sup>7/</sup> Id.

10(a)(2)(A) of the FPA only if the plan were prepared and adopted pursuant to a specific act of the state legislature and were developed, implemented, and managed by the appropriate state agency. The final rule also codified the Commission's conclusion in Fieldcrest Mills, Inc. <sup>8/</sup> that plans within the scope of section 10(a)(2)(A) should "reflect the preparers' own balancing of the competing uses of a waterway." The rule pointed out that the weight to be accorded any plan, whether or not it qualifies as a state comprehensive plan, depends on its supporting documentation, since Commission findings must be based on substantial evidence. <sup>9/</sup> The rule then set forth general guidelines with respect to what type of plan would carry the most weight in the Commission's licensing decisions.

The petitioners assert that the final rule interprets section 10(a)(2)(A) incorrectly by drawing overly restrictive requirements for qualifying comprehensive plans. Their arguments are based on the statutory language of section 10(a)(2) and on its legislative history.

Five petitioners <sup>10/</sup> point out that section 10(a)(2)(A) refers to comprehensive plans "for improving, developing, or conserving" waterways (emphasis added), and that therefore these

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<sup>8/</sup> 37 FERC ¶ 62,264 (1986).

<sup>9/</sup> See section 313(b) of the FPA, 16 U.S.C. § 8251(b).

<sup>10/</sup> State of California, Kentucky Department for Environmental Protection, Vermont Agency of Natural Resources, Minnesota Department of Natural Resources, and American Rivers, et al.

plans should not be required to balance all relevant public uses of the waterways. Rather, they reason that a plan, for example, that is concerned only with identifying reaches of rivers that should be protected from all forms of development should also qualify under section 10(a)(2)(A). These petitioners refer by way of contrast to the language of section 10(a)(1), which requires that projects to be licensed shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for a variety of beneficial public uses that are linked with the conjunctive "and," not the disjunctive "or." 11/

Two petitioners 12/ also argue that requiring section 10(a)(2)(A) comprehensive plans to consider and balance all beneficial uses of a waterway renders "conflicting or redundant" the requirement of section 10(a)(2)(B) of the FPA that the Commission consider the "recommendations of ... State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of

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11/ Section 10(a)(1) provides that projects to be licensed

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, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e)... . [Emphasis added.]

12/ State of Oregon and State of California.

the State in which the project is located... ." California asserts that state comprehensive plans would always be subsumed within the state recommendations obtained pursuant to section 10(a)(2)(B).

Finally, American Rivers, et al. takes issue with the Commission's conclusion, as expressed in its order in Fieldcrest Mills, Inc. and in Order No. 481, that a comprehensive plan must be prepared and adopted pursuant to a specific act of the state legislature. American Rivers, et al. reasons that a comprehensive plan should qualify so long as a state agency is legally competent as a matter of state law to prepare such a plan.

The issue before the Commission is whether Congress, in enacting Section 10(a)(2)(A) of ECPA, intended state and Federal comprehensive plans to consider and balance all relevant beneficial uses of a waterway, or whether Congress intended that such plans could deal with some, or only one, beneficial use.

The Commission recognizes that there is an ambiguity of intent reflected in the statutory language and the legislative history. However, it is not necessary to resolve this ambiguity, because, as a matter of policy, the Commission will accord section 10(a)(2)(A) treatment to state and Federal plans that consider one, or more, or all beneficial public uses of a waterway. In so doing, it will ensure that all state and Federal river programs and policies will be fully considered in the Commission's licensing decision.

With respect to the argument of American Rivers, et al. opposing the requirement of a specific act of the state legislature, the Commission's position was guided by the pre-passage remarks of Committee Chairman McClure, who stated that the provision would require the Commission to consider the extent to which a proposed plan was consistent with a state comprehensive plan "as established by an act of the State legislature and developed, implemented and managed by an appropriate State agency." 13/ No state petitioner objected to the Commission's interpretation on this point. However, we are satisfied that, as the Senate Report states, the plan must merely be "prepared by appropriate agencies as authorized to conduct such planning pursuant to ... State law." 14/

In sum, the Commission will treat as a comprehensive plan under section 10(a)(2)(A) of the FPA a plan that (1) is prepared by an agency established by Federal law that has the authority to prepare such a plan, or by a state agency authorized to conduct such planning pursuant to state law; (2) is a comprehensive study of one or more of the beneficial uses of a waterway or waterways; (3) articulates the standards applied, the data relied upon, and the methodology used; and (4) is filed with the Secretary of the Commission.

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13/ 99 CONG. REC. S4140 (April 11, 1986).

14/ S. REP. NO. 99-161, 99th Cong., 1st Sess. 8-9 (1985). The Conference Report refers to comprehensive plans "developed by other entities pursuant to State or Federal law... ." H.R. REP. NO. 99-934 at 22.

It also bears repeating that, as we stated in Order No. 481, even if a state or Federal plan does not qualify as a comprehensive plan under section 10(a)(2)(A), the Commission will consider the plan, as it considers all relevant studies and recommendations, in its public interest analysis pursuant to section 10(a)(1).

The Commission notes the Conference Report, which states: 15/

[The bill] incorporates a new section 10(a)(2), expressly requiring FERC to consider comprehensive plans developed by other entities pursuant to State or Federal law, as well as recommendations of Federal and State agencies and Indian tribes with expertise on aspects of the public interest. It is not an exclusive list of values FERC must evaluate and address in order to satisfy its comprehensive planning responsibilities. However, it highlights the steps the Commission must take to inform itself regarding the needs and uses of the river in question. Other steps the Commission would have to take, depending on particular circumstances, include addressing fish and wildlife management and restoration plans for the river drainage and accom[m]odating the views of other interested parties.

Congress, in enacting ECPA, thus affirmed the Commission's "responsibility to resolve competing demands in the public interest." 16/ This means that, whereas the Commission has the clear duty to give full consideration to the recommendations submitted in a licensing proceeding, no one recommendation -- or

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15/ H.R. REP. NO. 99-934 at 22.

16/ Id. at 25.



comprehensive plan under section 10(a)(2)(A) -- can veto a proposed project. <sup>17/</sup> Moreover, the fewer the beneficial uses of a waterway that a state or Federal plan has considered and balanced, the less weight will be attached to a proposed project's inconsistency with the plan, since the Commission is required to consider and balance all beneficial uses of a waterway. The Commission therefore encourages states and Federal agencies to develop plans that study and balance as many uses as possible and provide as much data as possible. However, all plans, based on articulated standards and data, will assuredly enhance the Commission's decisionmaking process by giving it the benefit of the planners' analyses and policy judgments.

Because this order constitutes a new policy with respect to comprehensive plans under section 10(a)(2)(A) of the FPA, we will instruct the Director, Office of Hydropower Licensing, to mail a copy of this order to all state governors and appropriate Federal agencies. The Director will request the states and Federal agencies to file with the Commission the plans they believe meet the policy criteria set forth in this order. The Director will, within a reasonable period of time, advise the filer whether a plan meets the policy criteria, and if not, why not. If necessary in order to make a determination, the Director may ask

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<sup>17/</sup> Cf. id. at 23 ("Section 10(j) does not give [fish and wildlife] agencies a veto..."); Escondido Mutual Water Co. v. La Jolla Band, 466 U.S. 765, 777 (1984) (under Section 4(e), a Secretary administering a federal reservation "has no power to veto the Commission's decision to issue a license...").

the filer to submit additional information with respect to a plan. The Commission staff will also be available, on request, to discuss comprehensive planning with state and Federal personnel.

As a final matter, the Commission notes the request of the Northwest Power Planning Council that the Commission clarify whether the Council's Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan are comprehensive plans within the final rule. The Commission found that these two plans were comprehensive plans within the meaning of ECPA in Utah Power & Light Company. 18/ The Commission is clarifying that, as a policy matter, it will treat the Council's Program and Plan as comprehensive plans under section 10(a)(2)(A).

List of Subjects in 18 C.F.R. Part 2

Administrative practice and procedure  
Electric power  
Environmental impact statements  
Natural gas  
Pipelines  
Reporting and recordkeeping requirements

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18/ 40 FERC ¶ 61,139 (1987).

In consideration of the foregoing, the Commission amends Part 2, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

(S E A L)

*Lois D. Cashell*

Lois D. Cashell,  
Acting Secretary.

**PART 2 -- GENERAL POLICY AND INTERPRETATIONS**

1. The authority citation for Part 2 is revised to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. 12009, 3 CFR 142 (1978); Federal Power Act, 16 U.S.C. 792-825r (1982); Natural Gas Act, 15 U.S.C. 3301-3432 (1982); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601-2645 (1982); Electric Consumers Protection Act of 1986, Pub. L. No. 99-495; and National Environmental Policy Act, 42 U.S.C. 4321-4361 (1978), unless otherwise indicated.

2. Section 2.19 is revised to read as follows:

**§ 2.19 State and Federal comprehensive plans.**

(a) In determining whether the proposed hydroelectric project is best adapted to a comprehensive plan under section 10(a)(1) of the Federal Power Act for improving or developing a waterway, the Commission will consider the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by:

(1) An agency established pursuant to Federal law that has the authority to prepare such a plan, or

(2) A state agency, of the state in which the facility is or will be located, authorized to conduct such planning pursuant to state law.

(b) The Commission will treat as a state or Federal comprehensive plan a plan that:

(1) Is a comprehensive study of one or more of the beneficial uses of a waterway or waterways;

(2) Includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan;  
and

(3) Is filed with the Secretary of the Commission.