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Since its inception in 1920 the Federal Power Commission has been required to weigh many of the same considerations embodied in the National Environmental Policy Act of 1969. Nevertheless, implementation of the Act has not been without its tribulations. The authors of this article review the Commission's efforts at compliance, the problems encountered to date, and some of the conflicts to be anticipated.

## THE IMPACT OF THE NATIONAL ENVIRONMENTAL POLICY ACT UPON ADMINISTRATION OF THE FEDERAL POWER ACT

*Thomas M. Debevoise\**

*William J. Madden, Jr.\*\**

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however, praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.<sup>1</sup>

—Chief Justice Berger, July 19, 1972

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1. *Aberdeen R.R. v. Students Challenging Regulatory Agency Procedures*, \_\_\_\_\_ U.S. \_\_\_\_\_, Nos. A-72, A-73, 41 U.S.L.W. 2068-69 (U.S. July 19, 1972), opinion denying applications for stay of injunction.

THE Federal Power Commission is responsible for the regulation of several major segments of the American electric utility industry. Under Part I of the Federal Power Act<sup>2</sup> it has comprehensive licensing jurisdiction over non-federal hydroelectric projects which affect the navigable waterways or lands of the United States, or which develop power for transmission in interstate commerce. Under Parts II and III of the Act<sup>3</sup> the Commission has jurisdiction over various interstate activities of electric utilities; primarily wholesale rates, acquisitions, security issuances and books of account.<sup>4</sup>

The purpose of this article is to review the effect which the passage of the National Environmental Policy Act of 1969<sup>5</sup> has had upon the administration of the FPC's responsibilities under the Federal Power Act and to suggest some possible areas of both additional conflict and of accommodation between those statutes.

## I. THE FEDERAL POWER ACT

The Federal Power Act was originally enacted as the Federal Water Power Act of 1920.<sup>6</sup> Title II of the Public Utility Act of 1935,<sup>7</sup> made the original Federal Water Power Act Part I of the Federal Power Act and added Parts II and III.

### A. Part I of the Federal Power Act

The passage of the Water Power Act of 1920, as the Supreme Court noted in *First Iowa Hydro-Electric Corp. v. FPC*, was

the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote

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2. 16 U.S.C. §§ 792-823 (1970).

3. 16 U.S.C. §§ 824a-825u (1970).

4. 15 U.S.C. §§ 717-717w (1970).

5. 42 U.S.C. §§ 4321-47 (1970).

6. Act of June 10, 1920, ch. 285, 41 Stat. 1063.

7. Act of Aug. 26, 1935, ch. 687, 49 Stat. 838.

the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Act and other federal laws previously enacted.

. . . That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act. . . .<sup>8</sup>

According to historians the conservationist movement behind the Water Power Act took its keynote from President Theodore Roosevelt, who, in 1908 vetoed a bill which would purportedly have turned over to private interests, free of charge, important power sites on the Rainy River. The veto message proclaimed:

We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this power. . . .

It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power.<sup>9</sup>

In the same year, President Roosevelt appointed the Inland Waterways Commission, noting in a letter to its members:

Works designated to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the pro-

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8. 328 U.S. 152, 180-81 (1946).

9. 42 CONG. REC. 4698 (1908). See KERWIN, *FEDERAL WATER-POWER LEGISLATION* (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9, 16-17 (1945).

tection of lowlands from floods, or to supply water for domestic purposes; . . . the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country.<sup>10</sup>

Twelve years later the work begun by the Inland Waterways Commission resulted in the enactment of the Federal Water Power Act.

Unlike the licensing authority later granted to the AEC<sup>11</sup> by the Atomic Energy Act of 1954<sup>12</sup> the Water Power Act conferred broad authority and responsibility on the FPC to weigh the full gamut of environmental considerations in determining whether a particular project should be licensed.<sup>13</sup> Under the provisions of Part I of the Federal Power Act,<sup>14</sup> it is unlawful for any non-federal entity to construct, maintain or operate a hydroelectric project on the navigable waters of the United States or on lands of the United States without obtaining a license from the Federal Power Commission. Also any project constructed after 1935 which develops power which is transmitted in interstate commerce requires an FPC license regardless of its effect on a navigable water. Under Section 10(a) of the Act<sup>15</sup> the Commission is authorized to issue a license only if it finds that the project 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 waterpower development and for other beneficial public uses, including recreational purposes; . . .

Licenses may be issued for any period not exceeding fifty years and, although they may be amended only with the con-

10. 42 CONG. REC. 6968 (1908).

11. See *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir. 1969), cert. denied, 395 U.S. 962 (1969), where the court found that radioactive hazards were the special concern of Congress in 1954 and that the AEC properly refused to consider evidence of thermal effects. The passage of the National Environmental Policy Act of 1969 has necessitated a wider consideration of these and other matters by the AEC. See *Calvert Cliffs' Coordinating Committee Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

12. 42 U.S.C. §§ 2011-2296 (1970) (originally enacted as Act of Aug. 30, 1954, ch. 1073, 68 Stat. 921).

13. *Udall v. FPC*, 387 U.S. 428 (1967).

14. 16 U.S.C. §§ 792-823 (1920).

15. 16 U.S.C. § 803(a) (1970).

sent of the licensee, the licensee is required by Section 10(c) of the Act<sup>16</sup> to comply with any regulations which the Commission may from time to time prescribe for the protection of life, health and property.

Licenses may be issued on whatever conditions the Commission finds appropriate provided they are not inconsistent with the provisions of the Act.<sup>17</sup> Typically licenses are conditioned to provide for various protective measures during construction, public access to the reservoir, recreation facilities at the project, restoration of fishways and for minimum water releases. In recent years many conditions have been open-ended, *i.e.* reserving the Commission's right to order a licensee to undertake certain activity if the Commission should at some future time find it to be in the public interest and consistent with the primary purpose of the project.<sup>18</sup>

At the end of a license term the United States has the right to take-over and operate a project, except those licensed to a state or a municipality, by paying the licensee its net investment in the project plus severance damages.<sup>19</sup> If the United States does not elect to take-over a project, the Commission is authorized to issue a new license to the existing licensee or to another applicant.<sup>20</sup> The Commission under legislation passed in 1968<sup>21</sup> is also authorized to issue a non-power license to an applicant if it finds that the existing project is no longer adapted for use for power purposes. Such a license is temporary and is to be terminated along with FPC jurisdiction as soon as the Commission determines that some state or federal agency is authorized and willing to assume regulatory supervision of the project. Pending action on an application for a new license, Section 15(a) of the Act<sup>22</sup> provides that an annual license, on the same terms and conditions as the expired license, shall be issued to the original licensee.

16. 16 U.S.C. § 803(c) (1970).

17. 16 U.S.C. § 803(g) (1970).

18. For examples and a discussion of such conditions see *South Carolina Electric & Gas Co.*, 30 F.P.C. 1338 (1963).

19. 16 U.S.C. §§ 796(13), 807(a) (1970).

20. 16 U.S.C. § 808(a) (1970).

21. 16 U.S.C. § 808(b) (1970) (originally enacted as Act of Aug. 3, 1968, Pub. L. No. 90-451, 82 Stat. 616).

22. 16 U.S.C. § 808(a) (1970).

More than 50 years have elapsed since the adoption of the Federal Water Power Act. At the end of the Commission's 1971 fiscal year there were 456 projects under license with an installed generating capacity of nearly 28.5 million kilowatts.<sup>23</sup> In addition there were 193 other licenses for transmission lines and for minor parts of hydropower projects.<sup>24</sup> Licenses issued shortly after the passage of the Act have expired and the Commission now has before it a large number of relicensing applications. As of June 30, 1972 there were relicense applications pending for 65 major projects<sup>25</sup> (more than 1,500 kw capacity), or for more than 14 percent of all the projects licensed by the Commission in its 52 year history.

### B. Parts II and III of the Federal Power Act

The enactment of Parts II and III of the Federal Power Act was prompted by more prosaic concerns than those which preceded the passage of Part I. The reasons and motivations for their enactment were probably captured in words as succinctly and as colorfully as their subject matter will allow by Judge Robinson in *Duke Power Company v. FPC.*:

Until 1927, state commissions exercised rate-making jurisdiction over sales by public utilities of electric energy, including energy transmitted over interstate lines. In that year came the celebrated *Attleboro* decision to the effect that the states are constitutionally incapable of fixing the rates at which sales at wholesale in interstate commerce are to be made. In the *laissez-faire* milieu thus created utility holding companies flourished, and behind the *Attleboro* shield abuses became flagrant. It was to correct these abuses that, with the strong support of President Roosevelt, Congress enacted the Public Utility Holding Company Act of 1935 to bring the holding companies under federal governance. And it was primarily to fill the "Attleboro gap" that Congress concomitantly passed the Federal Power Act as its

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23. FPC, 1971 ANNUAL REPORT at 24.

24. *Id.*

25. Statement of Chairman Nassikas, *Before the Subcomm. of the Senate Comm. on Appropriations*, Apr. 17, 1972, 92d Cong., 2d Sess., AEC & PUBLIC WORKS APPROPRIATIONS, 1973, Pt. 2, 1022, (1972).

first exertion of national authority over the operating electric utilities.<sup>26</sup> (Footnotes omitted)

Parts II and III of the Federal Power Act do not provide the Commission with the kind of comprehensive regulation over electric utilities which Congress in Part I gave it over hydroelectric projects. Entry into the business is not subject to FPC control. State and municipal electric systems are specifically exempted from the provisions of those Parts<sup>27</sup> and the FPC and the courts have interpreted the provisions of Part II and III as not applying to entities organized as cooperatives.<sup>28</sup>

A brief review of the provisions of Part II and III will show the regulation conferred upon the FPC over the interstate activities of electric utilities is selective and decidedly not of an environmental nature. All electric utilities which own jurisdictional transmission facilities and meet the Act's definition of public utilities<sup>29</sup> are required to keep their books of account in accordance with the system of accounts prescribed by the FPC.<sup>30</sup> Public utilities which sell power at wholesale are required to keep their rates and contracts on file with the FPC. The Commission may, under Sections 205<sup>31</sup> and 206,<sup>32</sup> after investigation and hearing, determine that a rate is unjust, unlawful or unduly preferential and may prescribe the lawful rate to be thereafter observed. Acquisitions and dispositions of transmission facilities by public utilities are subject under Section 203<sup>33</sup> to the approval of the Commission. The issuance of securities by some public utilities is subject to the approval of the Commission under Section 204<sup>34</sup> in cases where approvals by state commissions are not required or where the utility is incorporated in a state other than the one in which it is doing business. Upon application,

26. 401 F.2d 930, 934 (D.C. Cir. 1968).

27. 16 U.S.C. § 824(f) (1970).

28. Dairyland Power Cooperative, 37 F.P.C. 12 (1967); Salt River Project Agricultural Improvement & Power District v. FPC, 391 F.2d 470 (D.C. Cir. 1968); *cert. denied*, 393 U.S. 857 (1968).

29. See FPC v. Florida Power & Light Co., 404 U.S. 453 (1971).

30. 16 U.S.C. § 825(a) (1970).

31. 16 U.S.C. § 824d (1970).

32. 16 U.S.C. § 824e (1970).

33. 16 U.S.C. § 824b (1970).

34. 16 U.S.C. § 824c (1970).



but not on its own motion, the Commissioner under Section 202(b)<sup>35</sup> may order a public utility to connect its transmission facilities with those of other utilities.

### C. FPC Rules of Practice under the Federal Power Act

When an application filed pursuant to any provision of the Power Act is uncontested as to any issue of fact, the FPC typically disposes of the application without holding a hearing. Its authority to act without a hearing in such circumstances has been spelled out in *Citizens for Allegan County v. FPC*.<sup>36</sup> When applications are contested and issues of fact are presented, the Commission's decisional processes are governed by its Rules of Practice and Procedure<sup>37</sup> which in general provide for Commission decisions to be based on a record developed at a hearing where the rules of evidence apply. Unless waived with Commission permission, the Administrative Law Judge who presides at the hearing issues an initial decision after the record is closed and briefs are filed. The Commission reviews that decision in light of written exceptions to the initial decision which any party to the case may file.

At FPC hearings members of the Commission staff typically take an active role, especially in hydro licensing proceedings under Part I of the Federal Power Act. Direct testimony is submitted by qualified staff witnesses and staff lawyers cross-examine other witnesses and file briefs with the Administrative Law Judge and with the Commission. Members of the staff who participate in a proceeding are not permitted to advise the Commission informally at decision making time under the Commission's policy as well as the strictures of the Administrative Procedure Act pertaining to the separation of agency functions.<sup>38</sup> A party aggrieved by a Commission order may seek review in a U.S. Circuit Court of Appeals pursuant to Section 313(b) of the Federal

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35. 16 U.S.C. § 824a (b) (1970).

36. 414 F.2d 1125 (D.C. Cir. 1969).

37. 18 C.F.R. §§ 1.1-1.51 (1972).

38. 5 U.S.C. § 557 (1970).

Power Act<sup>39</sup> provided it first files a timely application for rehearing with the Commission.

## II. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act (NEPA) was passed by Congress late in 1969 and was signed by the President on January 1, 1970. Title I of the Act sets forth in five sections policies and procedures to be followed by all federal agencies in seeing to it that environmental effects of their actions are considered in their decision making. Title II of the Act created the Council on Environmental Quality for the purpose of advising the President on matters relating to the environment. The procedures to be followed by agencies in evaluating the environmental implications of major federal actions are set forth in Section 102(2)(C) of Title I. That Section, in full, provides:

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

. . . .

(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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39. 16 U.S.C. § 8251 (b) (1970).

Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review process;<sup>40</sup>

On its face, NEPA and particularly Section 102(2)(C) does not substantively expand the kind of considerations which the FPC must weigh in carrying out its licensing responsibilities under Part I of the Federal Power Act. As previously noted, under the "comprehensive plan" standard of Section 10(a)<sup>41</sup> the Commission is required to consider the full impact of a proposed hydro project on a river basin as well as the availability of other energy alternatives to an applicant.<sup>42</sup> As a practical matter the FPC, because of NEPA, is considering the environmental impact of a number of its actions under Part I which previously received no such consideration in most cases. For example, its environmental regulations<sup>43</sup> adopted after NEPA now require license applicants for existing hydro projects to file detailed environmental statements. Applications for such projects were in the past routinely approved without consideration of environmental effects unless a governmental agency or an intervenor brought some particular matter of concern to the Commission's attention. In contrast NEPA has had the legal effect of substantively expanding the kind of considerations which the AEC must weigh in carrying out its licensing program under the Atomic Energy Act.<sup>44</sup> To comply with the procedures of NEPA it must prepare an impact statement which discusses nuclear plant effects of a considerably broader

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40. 42 U.S.C. § 4332 (1970).

41. 16 U.S.C. § 803(a) (1970).

42. *Udall v. FPC*, 387 U.S. 428 (1967).

43. 18 C.F.R. §§ 2.80-2.82 (1972).

44. 42 U.S.C. §§ 2011-2296 (1970).

nature than it previously was required to do under the *New Hampshire* decision.<sup>45</sup> To the extent that the FPC's administration of Parts II and III of the Power Act may have a significant environmental impact (and to date no such impact under those Parts, within the meaning of 102(2)(C), has been conceded by the Commission), NEPA would substantively expand the considerations which the Commission has traditionally weighed in making determinations under those Parts of the Federal Power Act.

Upon the enactment of NEPA the Commission was confronted with at least three interpretative problems, most of which are not peculiar just to the FPC. They were: (1) the retroactive effect of NEPA upon pending cases; (2) which FPC actions constitute a "major federal action significantly affecting the quality of the human environment";<sup>46</sup> and (3) how could the FPC in a proceeding on a contested application requiring a hearing prepare, obtain comments on, and make a decision both on the hearing record and on the basis of an environmental impact statement consistent with the Administrative Procedure Act and its own hearing rules. So far the Commission has been successful in its treatment of only the first of those interpretative problems, namely, that of retroactivity.<sup>47</sup> Its treatment of the second problem has not yet been challenged, and its treatment of the third problem has resulted in a major reversal by a U.S. Court of Appeals.<sup>48</sup>

### III. COMMISSION'S NEPA REGULATIONS

It was not until December 4, 1970, nearly one year after the enactment of NEPA, that the FPC issued regulations<sup>49</sup> implementing the requirements of Section 102(2)(C) of that

45. *Supra* note 11.

46. See text *supra* p. 101.

47. *Greene County Planning Board v. FPC*, 455 F.2d 412, 424 (2d Cir. 1971), cert. denied, 41 U.S.L.W. 3184 (U.S. Oct. 10, 1972) (No. 71-1597).

48. *Id.*

49. Order No. 415 Implementation of the National Environmental Policy Act, 44 F.P.C. 1351 (1970), 35 Fed. Reg. 18958 (1970), amended by Orders No. 415-A, issued Apr. 13, 1971, 36 Fed. Reg. 7232 (1971) and 415-B issued Nov. 19, 1971, 36 Fed. Reg. 22738 (1971) (codified at 18 C.F.R. §§ 2.80-2.82 (1972)). Order granting rehearing for purposes of further consideration and amending Order No. 415-B issued Jan. 19, 1972, 37 Fed. Reg. 1164 (1972).

Act with respect to both the Federal Power Act and the Natural Gas Act.<sup>50</sup> Prior to the adoption of those regulations and subsequent to the effective date of NEPA, January 1, 1970, the Commission issued licenses for two major pumped storage projects for which applications had been pending long before the enactment of NEPA. They were the 600 megawatt Bear Swamp project licensed to New England Power Company by order issued April 28, 1970,<sup>51</sup> and the 2,000 megawatt Cornwall project licensed to Consolidated Edison Company by order issued August 19, 1970.<sup>52</sup> In both cases hearings had been held and concluded prior to January 1, 1970. And in both cases the Commission's treatment of environmental issues did not reflect the NEPA procedures it adopted on December 4, 1970, in Order No. 415. In its order affirming the Examiner's decision and issuing the Bear Swamp license the Commission did not even refer to NEPA much less provide an environmental impact statement in connection with its license order. In his initial decision issued on February 11, 1970, the Examiner did make reference to NEPA in the following finding:

The National Environmental Policy Act of 1969 was enacted on January 1, 1970. Although the parties did not have the benefit of the Act's provisions at the time of the hearings in this consolidate proceeding, the record made by the parties, and the findings and conclusions herein, fully satisfy the environmental purposes of the Act.<sup>53</sup>

The Commission's license order for the Bear Swamp project was never appealed.

In its opinion and order issuing license for the Cornwall project the Commission explicitly recognized the applicability of NEPA and noted that in its opinion the hearing record in the case amply demonstrated that "full and careful consideration was given to all the concerns which the Act embodies."<sup>54</sup> The Commission, however, did not prepare a sep-

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50. 15 U.S.C. §§ 717a-717w (1970).

51. 43 F.P.C. 568 (1970).

52. 44 F.P.C. 350 (1970).

53. 43 F.P.C. 568, 607 (1970).

54. 44 F.P.C. 350, 396 (1970).

arate environmental impact statement on the Cornwall application. Instead it discussed at considerable length in its opinion the various ecological and scenic issues in the case as well as alternative power sources and other matters which Section 102(2)(C) of NEPA directs an agency to consider. The Commission treated the opinion and order as a final environmental impact statement and filed it with the Council on Environmental Quality. The Cornwall license order was appealed to the Second Circuit on the grounds, among others, that the Commission had violated Section 102(2)(C) of NEPA by failing to prepare an environmental statement to accompany the application through the FPC's existing review processes. The court of appeals however, found<sup>55</sup> that the Commission had fully complied with NEPA and noted that in the course of the lengthy proceeding the Commission had consulted with a number of federal agencies and that the Commission's opinion which contained "exhaustive environmental findings"<sup>56</sup> was submitted as the environmental statement required by Section 102(2)(C) of the Act.

In its December 4, 1971, order<sup>57</sup> adopting regulations implementing the National Environmental Policy Act the Commission requires that applicants for licenses and re-licenses under Part I of the Federal Power Act file detailed statements of environmental factors with their applications.<sup>58</sup> The Commission did not promulgate such a requirement for applicants under Parts II and III of the Federal Power Act nor for utilities filing rate schedules and rate increases. The clear implication of this being that the Commission does not consider the latter applications and filings to involve requests for "major federal actions significantly affecting the quality of the human environment" within the meaning of section 102(2)(C) of NEPA.

All statements of environmental factors filed by applicants are to be reviewed by the Commission's staff only for

55. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *rehearing denied, cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 92 S.Ct. 2453 (1972).

56. *Id.* at 481.

57. Order No. 415, *supra* note 49.

58. The regulation also provided for the filing of environmental statements by certain applicants under the Natural Gas Act, 15 U.S.C. §§ 717a-717w (1970).

sufficiency as to form and are to be circulated among federal and state agencies for comment after any necessary additions have been made by the applicants at the request of the FPC staff.<sup>59</sup> Notice in the Federal Register is also given that the applicant's statement is available for inspection and comment.

In the event that the application is either uncontested or does not require an evidentiary hearing to resolve any factual dispute, the regulations provide that the Commission staff shall proceed to prepare an environmental impact statement of its own and circulate it among interested federal and state agencies for comment.<sup>60</sup> Should the Commission grant the application, its final order is to include its own detailed environmental statement presumably based on the statement of its staff and the comments received on it.<sup>61</sup>

In the case of applications set for an evidentiary hearing, the regulations do not provide for the staff to prepare an environmental impact statement after notice has been given and comments have been received on the applicant's statement. Instead the regulations encourage all parties, including the staff, to submit evidence for the record with respect to environmental issues. The regulations further provide that in the briefs, filed after the hearing is closed, the parties taking a position on environmental issues shall specifically analyze and evaluate the evidence in the light of the environmental criteria set forth in Section 102(2)(C) of NEPA.<sup>62</sup> Finally, the regulations provide that the Administrative Law Judge shall include in his initial decision an evaluation of those environmental factors, and the Commission, if it grants the application, shall include a detailed environmental impact statement as part of its final order.<sup>63</sup>

The NEPA regulations of the FPC were plainly designed, in part, to preserve its existing hearing procedures for deciding contested applications, particularly the requirement

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59. 18 C.F.R. § 2.81(b) (1972).

60. 18 C.F.R. § 2.81(f) (1972).

61. *Id.*

62. 18 C.F.R. §§ 2.81(c)-2.81(e) (1972).

63. 18 C.F.R. § 2.81(e) (1972).

under the Administrative Procedure Act<sup>64</sup> for Commission decisions to be based on the hearing record. Testimony of witnesses subject to cross-examination and exhibits sponsored by those witnesses and admitted into evidence would be relied on by the Commission in preparing its final environmental impact statement. But the environmental statement initially filed by the applicant and any statement or comments filed by other parties would not be relied upon by the Commission except to the extent that a qualified witness was able to sponsor all or parts of it as an exhibit. While the regulations with respect to contested cases do not require the staff to prepare an impact statement prior to a hearing, the regulations do not relieve the staff from existing duties of preparing testimony and participating actively in licensing cases under Part I of the Federal Power Act.<sup>65</sup>

The principal difficulty with the approach of the FPC's NEPA regulations on the matter of developing the final environmental statement on the basis of a hearing record arises from the language in section 102(2)(C) of NEPA which provides:

[A] detailed statement by the responsible officer. . . shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes;<sup>66</sup>

In the case of contested applications set down for hearing the FPC regulations provide that only the Commission will prepare an impact statement and then only as part of a final order if it decides to grant the application. Other "responsible" FPC officials, namely the staff counsel assigned to the case and the Administrative Law Judge, are merely required to evaluate, in briefs and in the initial decision, the environmental evidence in light of the NEPA criteria.<sup>67</sup> The regula-

64. 5 U.S.C. § 557 (1970).

65. In Order No. 415, adopting regulations implementing NEPA the Commission stated: "[These regulations] do not negate our duty and that of our staff to take all reasonable and relevant efforts to insure that our decisions are based on a complete record." 44 F.P.C. 1531, 1533, 35 Fed. Reg. 18958 (1970).

66. See Text *supra* p. 102.

67. The five factors set forth in section 102(2)(C) of NEPA on which detailed statements are to be prepared.



tions contemplate that comments from other agencies will be solicited only in connection with the statement filed by the applicant.

The FPC regulations on the matter of environmental statements in contested proceedings, however, appear to be consistent with the brief guidelines which were issued, after the FPC regulations were adopted, by the Council on Environmental Quality. On April 23, 1971 CEQ, in response to Executive Order 11514 of March 4, 1970,<sup>68</sup> issued guidelines For Federal Agencies Under the National Environmental Policy Act.<sup>69</sup> Section 7 of the guidelines, dealing with the particular federal agencies which should be consulted in connection with the preparation of statements, provides:

A federal agency considering an action requiring an environmental statement, on the bases of (i) a draft environmental statement for which it takes responsibility or (ii) *comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act*, should consult with . . . federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved.<sup>70</sup> (Emphasis supplied)

Section 10(e) of the CEQ guidelines provides in pertinent part:

Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least fifteen (15) days prior to the time of the relevant hearings *except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act* and preceded by adequate public notices and information to identify the issues and obtain the comments provided for in sections 6-9 of these guidelines.<sup>71</sup> (Emphasis supplied)

On November 19, 1971 the FPC issued a revision to its NEPA regulations expressly noting Section 7 of the CEQ

68. 35 Fed. Reg. 4247 (1970).

69. 36 Fed. Reg. 7724 (1971).

70. *Id.* at 7725.

71. *Id.* at 7726.

guidelines and advising that the environmental statement submitted by an applicant would be circulated for comments as "information comparable to an agency draft statement."<sup>72</sup>

#### IV. THE GREENE COUNTY DECISION

On January 17, 1972 in the case of *Greene County Planning Board v. FPC*,<sup>73</sup> the Second Circuit found that the Commission's NEPA regulations governing contested applications violated NEPA and ordered the FPC to suspend hearings in a case until its staff had prepared and circulated for comments its own draft environmental impact statement. The Commission applied unsuccessfully for rehearing *en banc* of the *Greene County* decision and its petition for a writ of certiorari with the U.S. Supreme Court was similarly denied. The *Greene County* decision has managed to aggravate an already serious backlog in the Commission's licensing docket.<sup>74</sup> Nine months after the decision the FPC has managed to issue only one new license involving the reconstruction of an existing project.<sup>75</sup>

The *Greene County* case arose out of a Commission hearing held to determine the route to be used for a 35 mile 345 kv transmission line to be used as part of the Blenheim-Gilboa pumped storage project. A license for the project had been issued in June of 1969, (more than six months before the passage of NEPA) to the Power Authority of the State of New York, (PASNY).<sup>76</sup> The project works were to consist of a lower reservoir along the middle reaches of Schoharie Creek

72. 36 Fed. Reg. 22738, 22740 (1971) (codified at 18 C.F.R. § 2.82(b) (1972)).

73. *Supra* note 47.

74. There are at least six applications involving substantial new construction which have been waiting Commission action and which were filed more than a year before the *Greene County* decision. They are: 1) Appalachian Power Company's Blue Ridge Project (1,800 megawatts), filed February 26, 1965; 2) California Department of Water Resources' Aqueduct Project (1,530 megawatts), filed December 20, 1965; 3) Pacific Northwest Power Company, High Mountain Sheep Project (1,290 megawatts), Order reopening hearings, after Supreme Court remand, issued July 21, 1967, 38 F.P.C. 217; 4) Alabama Power Company's Crooked Creek Project (135 megawatts) filed November 5, 1968; 5) Monogahela Power Company, David Power Project (1,000 megawatts) filed June 3, 1970; 6) City of Seattle's Skagit Project (291 megawatts) filed December 17, 1970.

75. Washington Water Power Company, Project No. 2545, issued August 17, 1972, 37 Fed. Reg. 16997 (1972).

76. Project No. 2685, 41 F.P.C. 712 (1969).

some forty miles southwest of Albany, an upper reservoir, a power house, and three 345 kv transmission lines. The Commission, however, prohibited construction of the transmission lines until further Commission approval was given to "plans for preservation and enhancement of the environment as it may be affected by the transmission lines design and location."<sup>77</sup> Five months after the license was issued PASNY applied for authority to construct the three lines. No protests were made following public notice with respect to two of the lines and the Commission issued an order without either holding a hearing or preparing an environmental statement approving construction of those two lines.<sup>78</sup> Protests with respect to the third line were received and the Commission deferred action on that line. Before a hearing was scheduled, however, the Commission issued Order No. 415<sup>79</sup> adopting regulations to implement NEPA. Subsequent to the issuance of those regulations, PASNY filed the environmental statement, required of an applicant by Section 2.81<sup>80</sup> of those regulations, with respect to the impact of the proposed third line and of two alternative routings. The staff reviewed the statement for its sufficiency as to form and circulated it for comments among various state and federal agencies. The Commission eventually set the matter for a hearing in June 1971. At the prehearing conference Green County asked the Examiner to set a date for the Commission to file its own impact statement. This motion, among others, was denied and an appeal to the Commission was made and denied. A petition for review to the Second Circuit followed while the evidentiary hearing at the FPC went forward on the routing of the third line.

On January 17, 1972 the Second Circuit issued its decision in *Greene County Planning Board v. FPC*,<sup>81</sup> finding that the Commission's procedures had violated NEPA and remanded the case to the Commission for further proceedings in accordance with its opinion.

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77. *Id.* at 718.

78. Power Authority of the State of New York, Project No. 2685, 43 F.P.C. 521 (1970).

79. *Supra* note 49.

80. 18 C.F.R. § 2.81 (1972).

81. *Supra* note 47.

Specifically, the Court found that the failure of the Commission's staff to prepare and circulate for comments prior to hearing its own draft impact statement violated the provision of Section 102(2)(C) of NEPA calling for the agency statement to "accompany the proposal through the existing review processes."<sup>82</sup> The Court rejected Commission arguments that hearings are for fact-finding purposes and that Sections 7 and 10 of the guidelines<sup>83</sup> of the Council on Environmental Quality, expressly contemplate that agencies operating under the Administrative Procedure Act may prepare impact statements on the basis of the hearing record. The Court didn't hold the CEQ guidelines to be erroneous, but simply disagreed with the FPC interpretation.<sup>84</sup> The court also rejected the Commission's claim that the applicant's environmental statement, reviewed as to sufficiency of form by its staff, could serve the same purpose as an agency draft statement as long as the Commission makes its own statement at the time it files its decision.

The court did recognize that FPC hearings are governed by the requirements of the Administrative Procedure Act, that decisions must rest upon the evidence of record, and that Commission members must not participate in the decision-making process until the record is completely developed. The court's recognition of these constraints were evidenced by its conclusions that it would be sufficient for NEPA purposes if the agency draft statement was prepared by the staff on the basis of staff investigations and that intervenors must be given an opportunity to cross-examine commission witnesses in light of the statement.<sup>85</sup> Thus, any staff environmental statement prepared prior to a hearing would presumably have to be written and sponsored by staff members qualified to testify as experts on the matters contained therein. The staff statement would under the logic of the court's opinion

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82. See text *supra* p. 102.

83. 36 Fed. Reg. 7724, 7725-26 (1971).

84. The Court did suggest that one interpretation of the CEQ Guidelines which it would deem acceptable would be for the Commission to hold two hearings—one solely to gather information to aid in formulating its statements, the second to consider the merits of the license application. *Supra* note 47, at 421.

85. *Supra* note 47, at 422.

be evidence of record upon which the Administrative Law Judge and the Commission would be able to rely.

In its effort to construe NEPA's impact statement requirements with the hearing requirements already imposed by the Administrative Procedure Act, the *Greene County* opinion has raised several troublesome and perhaps unnecessary legal and procedural problems under NEPA. First of all, as part of its decision the court decided that the evidentiary hearing is part of the "agency review processes" referred to in Section 102(2)(C) of NEPA. An Administrative evidentiary hearing, however, has been described by other courts and commentators as being for the purpose of resolving issues of fact.<sup>86</sup> Under *Citizens for Allegan County v. FPC*<sup>87</sup> the FPC is not even required to hold an evidentiary hearing where there are no controverted issues of fact on relevant matters being raised by the parties. If *Greene County* is correct in holding that the evidentiary hearing is one of the Commission's "existing . . . review processes" referred to by NEPA, it would seem that it could not be omitted by the Commission over objections of any party, even where facts are not in dispute.

If only a single issue of fact with respect to a proposed project divided the parties and the Commission ordered a hearing to be held limited to that issue, would *Greene County* automatically require the staff to prepare and be cross-examined on a statement covering the entire project? Or could the staff, for hearing purposes, limit the statement on which it would be cross-examined to the issue of fact involved as long as staff brief or the Commission decision contained a full NEPA impact statement? Does *Greene County* apply only when a hearing is held on an application or would it also require a staff impact statement to be prepared prior to a hearing triggered by a Commission order asking an existing licensee to show cause why it should not add additional capacity or alter project reservoir drawdowns? Interestingly, the

86. See *Citizens for Allegan County v. FPC*, *supra* note 36, at 1128; 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.01-7.04 (1958).

87. *Supra* note 36, at 1128.

Federal Trade Commission in *Lever Bros. v. FTC*,<sup>88</sup> not referred to in the *Greene County* opinion, was held not to have to file an impact statement in connection with a hearing on a proposed rulemaking involving phosphate labeling. The court expressly noted that such a statement would be expected from the FTC if it chose to adopt the rule. The only difference between the two cases was that in *Lever Brothers* the hearing was on an agency proposed rule, whereas in *Greene County* the hearing was on an application filed with the agency.

In *Greene County* the court apparently recognized that the purpose of an evidentiary hearing was for fact-finding in addition to its use as a step in an agency review process. The court suggested that it would be appropriate under both NEPA and the CEQ guidelines to "hold two hearings—one solely to gather information to aid the Commission in formulating its statements, the second to consider the merits of the license application."<sup>89</sup> But under the court's decision at the second hearing the staff would also have to present its draft environmental statement and submit to cross-examination in light of the statement. Thus it is entirely reasonable to expect that the staff, in the second hearing, may be forced to concentrate more on defending its draft environmental statement than in pursuing the kind of rigorous examination of an applicant's plans which another Second Circuit panel has clearly suggested is the staff's responsibility in licensing cases:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

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88. *Lever Bros. v. FTC*, \_\_\_\_\_ F.2d \_\_\_\_\_, 2 Env. Rep.—Cases 1651 (1st Cir. 1971).

89. *Supra* note 47, at 421 n.23.

... The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.<sup>90</sup>

A second difficulty with *Greene County* involves its assumption that the members of the FPC staff participating in an evidentiary hearing are "the responsible official[s]" referred to in section 102(2)(C) of NEPA who are required to include an environmental statement in every recommendation involving major federal action. The Commission regulations do contemplate that the staff counsel shall include an environmental statement in the brief filed after the close of the hearing. Since typically the position of agency staffs are not revealed until the filing of briefs, it would seem appropriate to consider any recommendation for federal action set forth in staff counsel's brief as requiring an accompanying environmental statement. Staff witnesses, however, are presumably selected for their ability to testify as to particular areas of their expertise and not because they have been responsible for reviewing an application. The court unfortunately made no effort to define the meaning of the term "responsible official" or to explain why the term apparently includes staff witnesses.

A third difficulty with the court's interpretation of NEPA is that it places a greater burden upon the staff of an agency such as the FPC which merely reviews proposals made by applicants than upon the staff of an agency such as the Corps of Engineers which actually makes their own construction proposals. The FPC staff under *Greene County* must be prepared to testify and be cross-examined under oath as to the factual basis for their environmental statement. The staff of the Corps of Engineers, with no evidentiary or Administrative Procedure Act hearing required, merely has to prepare an environmental statement which to a court will appear to be a good faith effort to canvass all of the environmental

90. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied sub nom., *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). Specifically *Scenic Hudson* places the "affirmative duty" upon the Commission and not its staff. However, unless the staff performs that function during the hearing, the Commission can only order the hearing record reopened if it finds deficiencies in the record.

effects which one of their projects may have.<sup>91</sup> Ironically the staff of an agency such as the Corps of Engineers which actually developed the plans for a project should be in a much better position to testify and be cross-examined under oath as to the environmental effects than should the staff of the FPC which is merely reviewing plans and studies prepared by others.

FPC environmental regulations, however, are not entirely without some troublesome features and it may be that one of those features was the real reason for the court's decision with all of its own troublesome features. The provision in the FPC regulations calling for an applicant's statement of environmental factors to be treated and circulated as "information comparable" to an agency draft statement<sup>92</sup> simply has no basis in section 102(2)(C) of NEPA. Plainly, any environmental statement prepared by an applicant for a project license is simply a pleading on behalf of the project. The court was obviously annoyed at the FPC's position that it was being consistent with the CEQ guidelines by treating an applicant's statement as information comparable to the agency draft statement prior to the hearing.<sup>93</sup> Perhaps the court over-reacted to the FPC position by deciding that the FPC staff must prepare its own environmental statement not only prior to a hearing, but also must undergo cross-examination on the statement. NEPA by its terms provides no explicit support for this position, and the court may have reached a different result if it had taken as hard a look at the terms "responsible official" and "agency review processes," as it did at the FPC's characterization of an applicant's statement.

#### V. EFFECT OF GREENE COUNTY DECISION UPON FPC LICENSING PROGRAM

The Commission is seeking Supreme Court review of the *Green County* decision. Pending disposition of the case by the court, the Commission has ordered further hearings on

91. *Conservation Council v. Froehlke*, 340 F. Supp. 222 (M.D.N.C. 1972), 3 Env. Rep.—Cases 1687, *aff'd per curiam*, \_\_\_\_\_ F.2d \_\_\_\_\_, 4 Env. Rep.—Cases 1044 (4th Cir. 1972).

92. 18 C.F.R. § 2.82(b) (1972).

93. *Supra* note 47, at 421.



PASNY's transmission line application to be deferred.<sup>94</sup> The Commission has not issued any revisions to its environmental regulations and, although no hearings on other license applications have been held since the *Greene County* decision, the Commission staff has in a number of hydro licensing cases issued public notice of the availability for comment of information comparable to an agency draft environmental statement which was nothing more than the statement of environmental factors submitted by the applicant.<sup>95</sup> The Commission has given no indication as to whether, or how, it expects its staff to comply with *Greene County* pending Supreme Court review in the event an evidentiary hearing, in the meantime, is held on a license application.<sup>96</sup>

The Commission has issued one license order authorizing construction of project facilities since the *Greene County* decision.<sup>97</sup> The Washington Water Power Company had sought authority to reconstruct an existing, but badly damaged, facility on the Spokane River within the City of Spokane, Washington. Although the application was opposed by several intervenors for ecological and scenic reasons, the Commission, citing *Citizens for Allegan*,<sup>98</sup> held that the opponents had not raised any issues of fact which required an evidentiary hearing and issued the license, without holding a hearing, after receiving comments from various governmental agencies on the application and on the applicant's environmental statement.

94. Power Authority of the State of New York, Project No. 2685, order staying further proceedings, issued June 1, 1972.

95. An appeal challenging the Commission's authority to seek comments on an applicant's statement without first preparing and circulating a staff environmental statement on a project has been filed in the U.S. Circuit Court of Appeals for the District of Columbia Circuit. *National Wildlife Federation v. FPC*, No. 72-1467.

96. After this article was set in type the Supreme Court denied the FPC's petition for writ of certiorari. 41 U.S.L.W. 3184 (U.S. Oct. 10, 1972) (No. 71-1597). Following denial of its petition for certiorari the Commission on October 30, 1972, issued a notice of rulemaking wherein it proposed various revisions to its environmental regulations to achieve compliance with *Greene County*. 37 Fed. Reg. 23360 (1972). Under the proposed regulations the staff will prepare a final environmental impact statement prior to hearing. The statement will then be offered as evidence at the hearing. An applicant's statement would no longer be circulated for comment as information comparable to an agency draft statement.

97. Washington Water Power Co., *supra* note 75.

98. *Supra* note 36.

The Commission staff also prepared an environmental statement in connection with the Washington Water Power Company's application which was circulated for comments. Attached to the Commission's license order was a 35 page document entitled Final Environmental Statement. Several of the issues raised in opposition to the Company's application to redevelop the Spokane River Project were arguably of such a factual nature that a hearing should have been held. For example, various opponents of the application argued that the loss of electric generation resulting from denial of the application would be insignificant and easily absorbed by other generating sources and that during spring months excess amounts of nitrogen-saturated water would spill over the dam. Both of these contentions clearly indicated that issues of fact were present. The Commission, however, merely referred to its environmental statement (much as if it were referring to the evidence compiled in a hearing record) and noted that the discussion in the statement attached to its license order indicated that these claims were without merit. The Commission's reference to its own Final Environmental Statement to dispose of those borderline factual issues reveals a possible new use of NEPA which may cause some concern among those who have been successful in using NEPA to delay the authorization of various projects.

Section 102(2)(C) requires an agency to prepare a detailed environmental statement based on a "systematic, interdisciplinary approach" in connection with proposed major federal actions significantly affecting the environment. If an agency with expertise in a field prepares such a statement, perhaps an administrative hearing on factual issues covered in the statement and on issues within an agency's expertise does become a wholly unnecessary exercise. An application for rehearing filed with the FPC with respect to the Spokane River Project license was denied by a Commission order dated October 13, 1972. If court review is sought, there may be some interesting law made on the extent to which an agency NEPA statement may replace an evidentiary hearing.

VI. NEPA IMPACT ON ADMINISTRATION  
OF PARTS II & III OF FEDERAL POWER ACT

The Commission's outstanding regulations implementing the environmental impact statement requirements of NEPA make no provision for the preparation of such statements either by applicants or the Commission in connection with applications filed under Parts II and III of the Federal Power Act. Plainly, Commission approval of certain applications under several sections of Part II can have some effect on the environment. If some of those approvals can be said to constitute major federal action significantly affecting the human environment, a NEPA statement would be required. So far, however, there has been no challenge to the Commission's regulations on this matter. A number of recent cases suggest, however, that FPC actions under various sections of Part II of the Act may in certain cases necessitate an impact statement under section 102(2)(C) of NEPA.

A. Rates

A recent decision involving the setting of rates by the Interstate Commerce Commission suggests a basis on which to challenge the FPC's authority to issue orders involving wholesale rates under Sections 205 and 206 of the Federal Power Act<sup>99</sup> without a NEPA statement. In the case of *Students Challenging Regulatory Agency Procedures v. United States*,<sup>100</sup> a three-judge District Court held that an Interstate Commerce Commission order permitting a temporary railroad rate increase to go into effect, without suspension, constituted a major federal action significantly affecting the environment and should have been accompanied by an impact statement. The so-called *SCRAP* case involved a challenge to the effect which existing railroad rates have upon shipments of recyclable goods. The plaintiffs claimed the across-the-board increase filed by the railroads would continue the dis-

99. 16 U.S.C. §§ 824d, 824e (1970).

100. \_\_\_\_\_ F. Supp. \_\_\_\_\_, Civil No. 971-72, 41 U.S.L.W. 2041 (D.D.C. July 10, 1972), *stay denied sub nom.*, *Aberdeen R.R. v. Students Challenging Regulatory Agency Procedures*, \_\_\_\_\_ U.S. \_\_\_\_\_, 41 U.S.L.W. 2068-69 (U.S. July 19, 1972), *petition for cert. filed* 41 U.S.L.W. 3191 (U.S. Oct. 2, 1972) (No. 72-535).

incentives to the shipment and use of such goods and therefore would significantly affect the environment within the meaning of NEPA. The plaintiffs argued that the ICC's action was unlawful because it had not issued an impact statement. The District Court issued a preliminary injunction on July 10, 1972 enjoining the railroads from collecting the temporary surcharge on further shipments insofar as that surcharge relates to goods being transported for purposes of recycling, pending further order of the court.

On a number of occasions courts have held rate suspension orders of various agencies, including both the ICC and the FPC, to be discretionary and not judicially reviewable.<sup>101</sup> This court, however, found that regardless of whether this particular ICC suspension order was reviewable under existing judicial precedents, NEPA provided ample authority for review of such orders "so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed."<sup>102</sup>

As is apparent from *Arrow Transportation v. Southern Railway Co.*<sup>103</sup> and *Municipal Light Boards of Reading v. FPC*,<sup>104</sup> Congress and the court have historically recognized a need for prompt decisions on rate filings of regulated industries. The protection of the financial integrity of those industries is as important to consumers as is the elimination of excessive rates. If NEPA was intended to impose on regulatory agencies the need to prepare detailed environmental statements based on a systematic, interdisciplinary approach before issuing even a rate suspension order, much less a final order setting rates, then there may have to be some basic rethinking of the role of various federal agencies in regulating rates in the light of NEPA. Chief Justice Burger, however, suggested in his order denying a stay of the District Court injunction that he felt at least four Justices would, neverthe-

101. See *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963); *Port of New York Authority v. U.S.*, 451 F.2d 783 (2d Cir. 1971); *Municipal Light Bds. of Reading v. FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_ (1972).

102. *Supra* note 100.

103. *Supra* note 101.

104. *Id.*

less, want to review the *SCRAP* decision.<sup>105</sup> An opportunity for rethinking this area may be provided during this coming term of the Supreme Court.

Regardless of the final outcome of the *SCRAP* case, the wholesale rates of electric utilities may not be exposed to the same kind of environmental attacks as were railroad rates in the *SCRAP* case. Historically, the latter rates have been based, in part, on the value of the service rendered to the shipper, whereas FPC regulated wholesale rates of electric utilities are based strictly on the allocated cost of rendering the service. Under the logic of the *SCRAP* case, however, it may be urged that a NEPA statement is required in electric rate proceedings for such purposes as discussing the impact of a rate increase upon the human environment, whether electric rates at the wholesale level should be designed so as to discourage certain uses of electric energy, or whether certain arrangements among utilities for joint use of facilities may discourage duplication of some generating and transmission equipment.

## B. Interconnections, Acquisitions and Securities

A Commission order under Section 202(b) of the Federal Power Act<sup>106</sup> can result in a utility being required to build transmission facilities for the purpose of interconnecting with another utility system.<sup>107</sup> Although any transmission facilities ordered to be constructed pursuant to that Section are not likely to be subject to the Commission's hydro licensing jurisdiction under Part I, it is difficult to see why an impact statement should not be required, as is now the case, under the FPC regulations with respect to transmission facilities licensed under Part I.<sup>108</sup>

Commission orders under Section 203<sup>109</sup> authorizing the acquisition of existing utility facilities or of another utility's

105. *Supra* note 1.

106. 16 U.S.C. § 824a (b) (1970).

107. *See Gainesville Utilities Dep't. v. Florida Power Co.*, 402 U.S. 515 (1971).

108. The primary line or lines transmitting power from a hydro project are subject to the Commission's licensing jurisdiction. 16 U.S.C. § 796 (11) (1970).

109. 16 U.S.C. § 824b (1970).

securities should not, and probably have not in most cases had any environmental effect. Occasionally, however, a utility transfers interests in existing facilities as part of an effort to accomplish an equitable sharing of the costs of a joint construction program. For example, in connection with the construction of the Four Corners Project, a current subject of considerably environmental discussion, an application was filed with the FPC by one utility in the joint venture seeking authority to transfer ownership interests in various existing transmission facilities which would be used as part of the new generating unit to be constructed jointly by several utilities. The transfer was routinely approved by a Commission order.<sup>110</sup> It would be interesting to see whether today the Commission would be permitted to issue such an order under Section 203 involving the Four Corners development without a vigorous demand for a NEPA impact statement.

Commission orders under Section 204 of the Federal Power Act<sup>111</sup> involve applications seeking authority to issue securities for the purpose of raising funds for utility construction programs. Typically the proceeds from a particular issue of securities are not used to build a specific facility. Rather they are used together with funds from other sources to provide capital for the construction of many facilities over a period of several years. In some cases the proceeds are merely used to pay off short term loans or to refinance other obligations which were issued to finance a utility's construction program. Although the Commission examines applications to determine whether the proceeds are to be used for legitimate utility purposes, it has held that it has no authority under Section 204 to determine whether a particular facility is in the public interest and should or should not be constructed with the proceeds of the particular security issue.<sup>112</sup>

The Commission's environmental regulations do not provide for the preparation of impact statements in connection with Section 204 applications. If the principal statutory concern of the Commission under Section 204 is primarily with

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110. Arizona Public Service Co., 40 F.P.C. 346 (1968).

111. 16 U.S.C. § 824(c) (1970).

112. Pacific Power & Light Co., 27 F.P.C. 620, 623 (1962).

the financial integrity of the applicant utilities and not with the particular utility facilities which are being financed, the impact statement requirements of NEPA would appear to be inapplicable. Even if Commission orders approving security issuances can arguably be said to constitute major action significantly affecting the environment, applications under Section 204 are particularly inappropriate occasions for developing a detailed environmental statement. Utility financings must take place within a time frame which does not allow for the preparation and circulation for comment of such a statement.<sup>113</sup>

A recent decision of the U.S. Court of Appeals for the District of Columbia Circuit, however, has enlarged the matters which must be considered by the FPC under section 204 and in so doing has provided a basis for arguing that actions under that section may not be immune to a NEPA challenge. In *City of Lafayette v. F.P.C.*,<sup>114</sup> the Court held that the Commission had to consider allegations made by a municipal electric system that Gulf States Utilities was engaged in various anticompetitive practices and that proceeds from the security issuance would be utilized for the construction of facilities that would assist the company in its unlawful objectives. The Court, however, did state that because of the time considerations the Commission could approve such a challenged security issue provided it "stands ready to proceed with hearing and consideration of the anticompetitive issues, and to take the problems into account in the disposition of another application projected for presentation to the agency within a reasonable time."<sup>115</sup>

As noted the Supreme Court has decided to review the *City of Lafayette* decision. If the appeals court is affirmed,

113. See *Cohen v. Price Commission*, 337 F. Supp. 1236 (S.D.N.Y. 1972), holding that NEPA impact statement was not required in connection with approval of subway fare increase because temporary, emergency nature of Economic Stabilization program indicated Congressional intent that actions by Price Commission were to be taken with a faster dispatch than could be the case if detailed agency environmental statements were to be prepared in connection with such actions. The Commission's regulations advise applicants under Section 204 that approvals will ordinarily take a minimum of 30 days. 18 C.F.R. § 34.9 (1972).

114. \_\_\_\_\_ F.2d \_\_\_\_\_, Trade Cas. ¶ 73, 730 (D.C. Cir. 1971), cert. granted, \_\_\_\_\_ U.S. \_\_\_\_\_, 40 U.S.L.W. 3568 (U.S. May 30, 1972).

115. *Id.*

a claim that NEPA statements may be required of the Commission in connection with some utility financing approvals may not be unrealistic or untenuous. It is a fact that most major utility facilities are subject to environmental approvals and standards of other federal or state agencies and the FPC consideration of environmental effects in a financing proceeding would for the most part duplicate similar considerations by other governmental bodies. However, the fact that U.S. District Courts provide a forum for antitrust complaints to be heard did not persuade the Court in *City of Lafayette* to free the FPC from considering claims of anticompetitive practices in a section 204 proceeding. Even if the Supreme Court affirms *City of Lafayette*, there is another case pending before the Supreme Court this term which may provide some light on this matter. In *Upper Pecos Association v. Stans*,<sup>116</sup> the Tenth Circuit held in a 2 to 1 decision that the Department of Commerce in connection with a grant under the Public Works and Economic Development Act of 1965<sup>117</sup> of \$3,795,200 to a county in New Mexico for the construction of a highway was not required to file an impact statement because such a statement was being prepared by the U.S. Forest Service in connection with a request to that agency by the county for a permit to build the highway through lands under the jurisdiction of that agency. The Supreme Court's treatment of the issues posed by this case may have some affect upon the possible NEPA obligations of the FPC not only under Section 204 but also under other provisions of Part II of the Federal Power Act.

#### SOME REFLECTIONS ON CLOSING

As suggested by the number of cases cited above which are awaiting action by the Supreme Court, any predictions as to the full, eventual impact of NEPA upon the FPC and other Federal regulatory agencies would be wholly speculative at this time. Perhaps some of the NEPA cases now pending, particularly *Greene County*, would not have arisen if the Council on Environmental Quality had developed clearer and

116. 452 F.2d 1233 (10th Cir. 1971), cert. granted, \_\_\_\_\_ U.S. \_\_\_\_\_ (1972).

117. 42 U.S.C. §§ 3121-3226 (1970).



more comprehensive guidelines in response to the President's Executive Order. The sections of the guidelines dealing with actions of administrative agencies are vague and provided no help to the FPC or to the Second Circuit in determining the correct procedures to be followed under NEPA in what was a typical run of the mill administrative hearing. Perhaps CEQ has delayed making any revisions to those guidelines pending the outcome of *Greene County* before the Supreme Court. But it should make revisions and it should do so in a way which will not force other federal agencies and the courts to guess as to their meaning.<sup>118</sup>

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118. *Supra* note 47, at 421 n.23.