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REVIVING THE FEDERAL POWER ACT'S COMPREHENSIVE PLAN REQUIREMENT: A HISTORY OF NEGLECT AND PROSPECTS FOR THE FUTURE

By
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In 1920, Congress enacted the Federal Power Act (FPA) to secure inexpensive and widely available power through federal licensing of private hydroelectric development in accordance with a "comprehensive plan." The Federal Power Commission (FPC) was charged with administering the statute and undertook its planning obligations with diligence, preparing plans for at least two river basins. However, chronic manpower and resource deficiencies soon led the FPC to neglect Congress' planning directive. No comprehensive plans have been produced since 1930, either by the FPC or its successor, the Federal Energy Regulatory Commission (FERC). This failure to plan, combined with the avalanche of hydro-license applications caused by recently enacted federal subsidies, has exposed serious flaws in FERC's licensing process, flaws which result in haphazard development and inefficient dedication of basin-wide resources, including anadromous fish. This Article examines the flaws in federal hydropower licensing resulting from FERC's refusal to plan for development, explicates the benefits of comprehensive planning, and traces the history of federal hydropower legislation. This history proves that Congress intended the FPC and FERC to prepare "real" plans before permitting or licensing projects. Finally, the Article examines current efforts in Congress and the courts to reinforce the FPA's planning mandate. The author concludes that comprehensive plans offer the best hope for rational decision making about the future of the nation's river resources.

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I. Introduction

The first half-decade of the 1980's saw "hydromania" sweep the country. Particularly in the Pacific Northwest, New England, California, and Appalachia, entrepreneurs responded to the lure of federal subsidies and expedited procedures by damming and diverting flowing streams in the name of renewable resources development and decentralized electric power. In the Northwest alone, more than 300 applications for hydroelectric projects were pending in 1985.* This flood of applications overwhelmed the

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1. This "hydromania" is illustrated infra section II. B.2.
2. FERC, HYDROELECTRIC AND OTHER ELECTRIC ALL PENDING WORKLOAD (Jan. 21, 1986). The figure represents pending hydroelectric applications of projects pro-
Federal Energy Regulatory Commission (FERC), the federal agency charged with licensing hydroprojects, exacerbating existing flaws in the current regulatory system.

Since 1920, the federal government has regulated hydroelectric development under Title I of the Federal Power Act (FPA). Largely unamended for fifty years, the FPA no longer provides an adequate vehicle for deciding whether rivers should produce electric power, fish, recreation, or some combination of these. This Article describes the shortcomings of the present system, examines the evolution of the existing regulatory framework, and provides recommendations designed to make the FPA responsive to the realities of the 1980's, while fulfilling the intent of the Act's framers.

This Article contends that comprehensive plans offer the best hope for rational decision making about the future of the nation's river resources. Planning would promote orderly development and efficient resource use by (1) increasing FERC's information base; (2) broadening the Commission's focus, to take into account the basin-wide resources its decisions affect; and (3) expediting decision-making procedures. If produced by an open, pluralistic process, comprehensive waterway plans would overcome most of the deficiencies of the existing regulatory system.

Section II of this Article describes the flaws in the current regulatory system, resulting primarily from a failure to plan. Section III assesses the benefits of planning for orderly development and efficient resource use, benefits well understood by the progressive conservationists of the early twentieth century, who promoted congressional reform of waterpower legislation. As a result of their efforts, Congress included a planning provision in the 1920 Federal Water Power Act. Section IV reviews the legislative

posed for the states of Washington, Oregon, Montana, and Idaho.
4. Section 10 of the Federal Power Act, 16 U.S.C. § 803, in pertinent part provides:
   All licenses issued under this subchapter shall be on the following conditions:
   (a) 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 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 bene-
and early administrative histories of that statute which indicate that Congress intended FERC's predecessor, the Federal Power Commission (FPC), to prepare comprehensive waterway plans prior to permitting and licensing hydroprojects in order to promote orderly development and efficient resource management. Unfortunately, by 1930, the FPC began to neglect Congress' planning directive, arguing that its FPA obligations merely required the Commission to license projects in the "public interest," a position FERC maintains today. The history of the FPA belies that contention, and has implications for prospective judicial resurrection of the Act's planning requirement.

The FPC's misinterpretation of section 10(a) became entrenched through decades of judicial and congressional acquiescence. However, as section V discloses, Congress is now considering several legislative proposals to reactivate the planning provision. In addition, the issue is currently before the Ninth Circuit United States Court of Appeals. This Article concludes that whether judicially or congressionally mandated, comprehensive plans represent the best means of promoting the original conservationists' goals of orderly and efficient river basin development. But, to be effective, planning must be directed to achieve those goals.


6. See infra note 115 and accompanying text.

7. Congress has only recently shown renewed interest in the FPA's planning requirement. See infra note 130 and accompanying text. The judiciary's acquiescence is most likely a function of the more stringent standing requirements existing prior to the 1970's and other historical factors. See infra note 143. The planning issue is now before the Ninth Circuit U.S. Court of Appeals. See infra section V.A.

8. See infra notes 158-170.

9. See infra section V.A.
II. THE FEDERAL HYDROELECTRIC REGULATORY SYSTEM

A. The FPA's Adjudicatory System

1. FERC's Licensing Process

FERC regulates hydropower development by adjudication. After receiving a properly prepared and submitted permit or license application, FERC publishes notice in the Federal Register and in a newspaper located near the proposed project site, and forwards notice to interested federal and state agencies. If the proposed project would generate more than five megawatts of electricity, the applicant must furnish copies of its application to those agencies. The Commission must then consider the agencies' comments in its "competitive analysis" of the proposal, before issuing an order.

Members of the public may intervene in FERC proceedings.
or comment on permit and license applications. Intervenors receive full party status, including the right to judicial review of Commission orders. However, intervenors must be prepared to travel to Washington for full evidentiary hearings, and must have access to sufficient resources to afford judicial review of an adverse agency order.

By enacting a predominantly adjudicatory system for regulating hydropower development, Congress provided FERC and its predecessor, the FPC, with an effective means of deciding between competing applications. However, adjudication only provides the agency with that amount of information required to settle individual rights. In recognition of that deficiency, Congress, in section 10(a) of the FPA, sought to supplement the Commission's information base by directing FERC to license only those projects "best adapted to a comprehensive plan." Unfortunately, FERC refuses to prepare and adopt development plans, claiming that its licensing process is sufficient to determine which projects are in the public interest. In effect, FERC argues, the adjudicatory record becomes the comprehensive plan.

2. Flaws in the system

FERC's refusal to plan for development results in ad hoc licensing decisions, haphazard development, and inefficient dedication of river basin resources, primarily by limiting the information available to the Commission. Because it refuses to plan for development, FERC must rely solely on information provided by project applicants and the other interested parties who can afford the expense of participating in evidentiary hearings and possible subsequent litigation. Thus, the universe of information sources is limited. Members of the public not represented by the various "interested parties" have no meaningful voice in Commission pro-

16. See id. at 25; see generally Roos-Collins, supra note 12.
17. FERC Answers, supra note 13, at 27.
18. See, e.g., D. ROthschild & C. Koch, supra note 10, at 68 ("Because adjudication involves individual rights or duties, the procedures must reflect a concern for those rights.").
19. See supra note 4.
20. FERC Answers, supra note 13, at 39 ("... the record should provide pertinent information on all beneficial public uses and thus contain the information that would constitute elements of a comprehensive plan").
ceedings; FERC is not required to solicit or respond to their comments. More significantly, the Commission refuses to adopt hydro-development plans prepared by state and other federal entities, such as the Northwest Power Planning Council, further limiting the information it considers in its licensing decisions. Ultimately, FERC's voluntary restriction of available information promotes haphazard development and inefficient resource use.

In addition, FERC's refusal to plan for development shifts the administrative focus from the efficient basin-wide dedication of resources, which Congress sought to ensure in the FPA's planning provision. Instead, FERC focuses on individual project proposals, with little regard for the basin-wide consequences of its licensing decisions. Thus, FERC's narrow focus further promotes haphazard development and inefficient dedication of resources.

Finally, FERC's refusal to plan for development hinders expeditious development by depriving the Commission of a pattern against which to judge specific project proposals. As a result, the


22. For over 50 years, critics have cited the failure to plan as the root cause of haphazard hydroelectric development. See J. Kerwin, Federal Water-Power Legislation, at 205-06 (1926).

23. See supra note 4. On Congress' intent, see infra section V.

24. FERC's reluctance to consider the basin-wide impacts of its licensing decisions is illustrated by the controversy surrounding the Commission's limited effort at cumulative impacts analyses. On that controversy, see Eckberg, Cumulative Impacts of Hydropower Development Under the National Environmental Policy Act: The Requirement of a Basin-Wide Approach [1979-Present Transfer Binder], 31 Anadromous Fish L. Memo (Nat. Resources L. Inst.) 1 (July 1985).

25. FERC's lack of pattern against which to judge development decisions is especially troublesome considering FERC's considerable caseload. FERC and its predecessor, the FPC, have long been overloaded with administrative responsibilities for hydropower applications and natural gas ratemaking, generating backlogs of cases since the 1950's. See Gifford, The New Deal Regulatory Model: A History of Criticisms and Refinements, 68 Minn. L. Rev. 299, 317 (1983). In 1958, Profes-
Commission operates at a snail’s pace. Congress, in the late 1970’s, exacerbated this problem, as well as the other flaws resulting from FERC’s failure to plan, by enacting legislation designed to increase American energy independence, but which resulted in the 1980’s version of the gold rush—the rush to develop small-hydropower. FERC was inundated with an unmanageable number of permit, license, and exemption applications, resulting in even more haphazard development and inefficient dedication of basin-wide resources.

B. PURPA and the Rise of “Hydromania”


In 1973-1974, the Oil Producing and Exporting Countries (OPEC) quadrupled the price of world oil, shocking an American economy which depended on OPEC to supply one-third of the total United States energy consumption. While Congress sought for a way to stem the flood of imported oil, domestic supplies dwindled and American dependence on foreign suppliers increased. By 1977, the United States consumed 9.6 million barrels of foreign oil each day, accounting for fifty percent of total

sors James March and Herbert Simon concluded that the resulting administrative “mismanagement” was directly related to a failure to plan. J. MARCH & H. SIMON, ORGANIZATIONS 137-42 (1958); see also Gifford, supra, at 318. The hydropower boom of the 1980’s has further inundated FERC, increasing its hydropower application workload more than twenty-fold between 1979 and 1981. See infra section II.B.2.


consumption. Meanwhile, oil prices continued to rise, causing the American trade deficit to skyrocket.

It was this three-tiered problem of increasing dependence on unsecure foreign supplies, rising prices, and decreasing reserves that President Carter confronted when he took office in 1976. Within three months of his inauguration, the new President sent to Congress five coordinated and comprehensive statutes, collectively entitled the National Energy Act, to promote energy independence and conservation. One of these statutes, the Public Utility Regulatory Policies Act (PURPA), empowered FERC to encourage the development of renewable resources, including hydropower. PURPA provided for (1) the exemption of certain qualifying cogeneration and small power production facilities from FERC licensing procedures under the FPA, (2) loan programs to fund development at existing dams not currently being used to generate electric power, and (3) guaranteed purchase of power from qualifying cogeneration and small power production facilities at “just and reasonable” rates.
The 1980 Energy Security Act (ESA)\(^3\) expanded PURPA's exemption program by (1) doubling the ceiling on power produced from qualifying projects at existing dams to thirty megawatts,\(^3\) and (2) including projects generating up to five megawatts using "natural water features . . . without the need for any dam or impoundment."\(^3\) The 1980 Crude Oil Windfall Profits Tax Act\(^3\) further promoted renewable resources development through its system of business tax credits. The Act provided an additional eleven percent credit, on top of the existing ten percent investment tax credit, to qualifying hydroelectric generating facilities.\(^4\)

2. The Legacy: "Hydromania" and FERC

The spate of incentives and tax credits offered by Congress in PURPA, the ESA, and the Crude Oil Windfall Profits Tax Act had a dramatic impact, as would-be hydropower developers flooded FERC with permit, license, and exemption applications. In 1977, the year before Congress enacted PURPA, FERC received just nine permit and thirty license applications for small hydropower projects.\(^3\) In 1979—after PURPA, but before the


41. See O'Connor Letter, supra note 13, at 3. FERC "licenses" authorize project construction and operation. FERC permits reserve priority for applicants in
ESA—FERC received 101 combined license and preliminary permit applications. The following year FERC received over 500 applications for preliminary permits alone, indicating that PURPA's incentives were beginning to have an impact. The exemption program took effect in 1981, when FERC received 177 applications for exemptions, along with over 1800 permit applications. The number of exemption applications almost tripled the following year to 475.

This explosion of applications overwhelmed an agency that has complained of insufficient resources almost since its inception. FERC attempted to cut its workload by expanding the exemption program, but a rash of resulting lawsuits hindered its efforts. The avalanche of applications continues today as FERC searches for ways to alleviate its licensing burden. As the following section discloses, FERC could relieve its licensing burden sim-


42. O'Connor Letter, supra note 13, at 1.
43. Id.
44. Id.
45. Id.
46. See infra note 113 and accompanying text.
47. The chronology of events indicates that the flood of project applications prompted FERC's efforts to expand PURPA's exemption program. FERC's initial "natural water feature" rule, for example, denied exemptions for projects utilizing "any structure for impounding water." 45 Fed. Reg. 76,115, 76,124 (1980). The next year, when confronted with a 2500% single-year increase in applications, FERC proposed a new definition of "natural water feature" which would have allowed exemptions for projects utilizing six-foot-high dams, impounding up to one acre-foot of water. 46 Fed. Reg. 55,536, 55,540 (1981). In 1982, FERC exemption applications tripled as the Commission finalized its new "natural water feature" rule authorizing exemptions for projects utilizing "diversion structures" up to ten feet high, impounding less than two acre-feet of water, and not increasing hydraulic head by more than five percent. 47 Fed. Reg. 38,506, 38,512-13 (1982).
49. FERC has even contracted outside the agency for an "independent assessment of the hydropower licensing process," focusing on "ways to improve staff productivity and streamline the operations of the Commission." O'Connor Letter, supra note 13, at 2.
ply by planning for development. At the same time, plan preparation would alleviate most of the flaws inherent to FERC's system of adjudicating hydro-license applications.

III. THE BENEFITS OF PLANNING

Comprehensive development plans could alleviate and possibly eradicate the flaws in FERC's adjudicatory system by (1) greatly enhancing the Commission's information base for decision making; (2) broadening FERC's focus from individual project applications to resources the Commission regulates; and (3) providing a pattern against which specific project proposals could be judged. Together, these benefits would result in more orderly development, more efficient dedication of basin-wide resources, and expedited FERC licensing decisions.

The FPA's comprehensive planning requirement is roughly analogous to the master plan of land use law. Many justifications for comprehensive planning in land use apply equally to water power development.

A. Lessons from Land Use Law

The land use plan serves a number of important functions, each related to the increased information such plans provide. Land use plans inform planners of present conditions, so that they may set suitable goals. The planning process opens channels of communication with the public. Moreover, the comprehensive plan can “provide a pattern against which specific proposals for use or building may be viewed.”

The comprehensive plan can undoubtedly serve those same purposes in water power development by providing FERC with increased information for setting goals. At the same time, the plan would force FERC to consider possible future conditions and plan ahead accordingly. In addition, planning would ease the Commission's licensing burden, by providing a pattern against which to judge specific project proposals. Finally, truly “compre-

51. Id.
52. Id. at 360.
prehensive" planning would open channels of communication with sectors of the public who currently lack a meaningful voice in FERC's adjudicatory system.53

B. Criticisms of Comprehensive Planning

Despite its obvious benefits, the land use plan has been criticized on two grounds. First, it is argued that a plan cannot be truly "comprehensive" because it is practically impossible to predict impacts on definable populations over extended periods of time.54 Another line of criticism doubts planners' abilities to overcome "political and organizational constraints on their operations."55 Neither criticism, however, supplies a compelling reason not to plan. The first argument merely exhorts planners to recognize the importance of regular plan revision: once adopted, a comprehensive plan should not be cast in stone; changing circumstances and new knowledge make occasional revision imperative.56 The second criticism—that planners suffer political and organizational constraints on their abilities to plan effectively—is no more troublesome. Planning decisions, like all choices between alternatives, inevitably are political.57 Moreover, such constraints do not end with the planning stage, but affect all agency decision-making processes. In any case, Congress sought specifically to minimize organizational constraints on FERC's planning abilities by supplying the Commission with "sufficient organization" and authority to enable it to undertake its planning responsibilities.58

Organizational constraints on the Commission were further minimized by implicit authorization of FERC to cooperate with other agencies in preparing comprehensive plans.59 Ultimately, the fact that a comprehensive plan is not quite "comprehensive,"

53. See supra section II.A.2.
55. Id.
56. See Haar, supra note 50, at 357-59.
57. See M. Bernstein, Regulating Business by Independent Commission 258 (1955) (arguing that knowledge and technical expertise alone are insufficient to resolve regulatory decisions).
59. Id.
whether because of political constraints or scientific uncertainty, does not detract from the important functions the plan serves in providing information to the decision maker that broadens the administrative focus and expedites development decision making. Administrators should not be deprived of valuable information simply because it is imperfect.

The continuing trend toward comprehensive plan requirements in land use law indicates a growing awareness of the value of planning for orderly and efficient development of this country's land resources. As the progressive conservationists of the early twentieth century recognized, planning is no less valuable for the efficient and orderly development of the nation's water resources. As a result of their efforts, Congress included a comprehensive planning requirement in the 1920 Federal Water Power Act. The following section examines the legislative and early administrative histories of that statute, which demonstrate conclusively that Congress intended FERC and its predecessor, the FPC, to prepare comprehensive waterway plans before issuing hydropower permits and licenses.

IV. HISTORY OF SECTION 10(a) OF THE FEDERAL POWER ACT


Enactment of the 1920 Federal Water Power Act (FWPA) culminated a nineteen-year struggle by progressive conservationists for federal control and development of the nation's hydroelec-

60. See DiMento, supra note 54, at § 21.16, 12-36. ("More and more states have realized that without a definitive plan which will guide all land use regulation, zoning may be haphazard and amendments to the zoning map may be made on an ad hoc basis without any reasonable relationship to the purposes of zoning."). Id. The trend towards comprehensive plan requirements in land use may also represent a desire to get more people involved in land use decisions. Congress has, in the last decade, enacted planning requirements for its two largest land management agencies, the Forest Service and the Bureau of Land Management (BLM). See National Forest Management Act of 1976, 16 U.S.C. § 1604(a) (1982) (requiring land management plans for "units of the National Forest System") and Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (providing the BLM with planning responsibilities). On the Forest Service's planning obligation, see Wilkinson & Anderson, Land and Resource Planning in the National Forests, 64 Or. L. Rev. 1 (1985).

61. See infra sections IV.A. & B.
tric resource. Disgruntled with the expensive and poorly distributed electrical service provided by the highly monopolized power industry, the conservationists argued for "efficient" use of the nation's water power resource, under the guidance of nonpolitical scientists and planners. This efficiency paradigm demanded basin-wide development to serve multiple purposes, including electric power generation, irrigation, and navigation. Progressives considered federal control essential to avoid state conflicts which might impede multiple purpose development of interstate streams. However, many groups opposed federal control, fearing they would be excluded from influencing resource policy-making. Notable members of the opposition included the utilities, which stood to lose their monopoly, and resource rich states, which stood to lose regulatory authority over development within their borders.

The Administration of Theodore Roosevelt promoted the efficiency paradigm of the progressive conservationists. In his 1901 inaugural address, Roosevelt presented the conservationist itinerary, calling for comprehensive development of the nation's waterways by the federal government "in accordance with the ad-


63. S. Hays, supra note 62, at 100-01.

64. Other justifications for federal control included: State and private funding were insufficient for large-scale projects; and only the Federal Government, which controls navigable waters, could prevent land speculators from inhibiting development. Id. at 101-02. See also Blumm, The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act, 58 Wash. L. Rev. 175, 183 nn.39-40 (1983) [hereinafter cited as Hydroelectric Heritage].

65. S. Hays, supra note 62, at 240. Prior to federal assertion of control over development, many states had their own water power acts. A Virginia statute, for instance, required private developers to obtain licenses, limited license terms to fifty years, and provided for state recapture of projects. See United States v. Appalachian Elec. Power Co., 311 U.S. 377, 422-23 (1940). After assertion of federal authority, the validation of such state laws was left to FERC's discretion. See generally First Iowa Hydro-electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

vice of trained experts." 67 A year later, Congress passed the Reclamation Act, effectively placing the federal government in the business of irrigating the arid West. 68

In 1906, Congress passed a General Dam Act 69 which required congressional authorization for dam construction in navigable rivers, and approval of construction plans by the Secretary of War and Chief of Engineers. Failure to comply with approved plans resulted in divestment of construction rights. 70 With the 1906 Act, Congress sought to adopt a "uniform policy with respect to an ever increasing number of applications for permits to dam navigable streams." 71

The Roosevelt Administration was dissatisfied that the 1906 Act failed to provide compensation to the government for use of the nation's navigable waterways by private developers. The Administration was also irritated that development remained under congressional control, subject to the influence of powerful utilities. Consequently, the President pressured Congress to amend the law. 72

In March, 1908, President Roosevelt appointed the Inland Waterways Commission to prepare a "comprehensive plan" for

67. 35 CONG. REC. 86 (1901).
68. Reclamation Act, Pub. L. No. 57-161, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-660e (1982)). Often referred to as the Newlands Act after its chief sponsor, Representative Francis G. Newlands of Nevada, the Act called for federal construction and operation of reclamation facilities. These projects were to be self-financed through a reclamation fund, to which project beneficiaries were to repay construction and maintenance costs in annual interest-free installments. The Act delegated authority to initiate projects, without congressional approval, to the newly created Reclamation Service, in an attempt to take control out of the hands of politicians and place it in the hands of experts. Blumm, Hydroelectric Heritage, supra note 64, at 183-84 n.42. For a more detailed analysis of the 1902 Reclamation Act, see G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 105-109 (1981).
70. See H.R. Rep. No. 61, 66th Cong., 1st Sess. 2 (1919); see also J. Kerwin, supra note 22, at 111-12 (1926).
71. J. Kerwin, supra note 22, at 114.
72. VETO MESSAGE RELATING TO EXTENSION OF TIME FOR CONSTRUCTION OF DAM ACROSS RAINY RIVER, S. Doc. No. 438, 60th Cong., 1st Sess. 1 (1908) [hereinafter cited as VETO MESSAGE]; SPECIAL MESSAGE OF THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 1350, 60th Cong., 1st Sess. 3 (1909) [hereinafter cited as SPECIAL MESSAGE] (vetoing special legislation under the 1906 General Dam Act); see infra text accompanying notes 77-79.
development of the nation's inland waterways, marking the first use of the "comprehensive plan" language eventually included in the 1920 FWPA. That same year, the President created the National Conservation Commission, chaired by Gifford Pinchot, to compile an extensive inventory of the nation's natural resources and analyze their supply, rate of use, and probable date of exhaustion. In its report to Congress, the Commission recommended that a "large and comprehensive plan be adopted providing for multiple purpose waterway improvement." The reports of the National Conservation and Inland Waterways Commissions reflected progressive faith in comprehensive planning for efficient development. The reports, however, failed to induce Congress to enact new water power legislation.

A more effective force for congressional action proved to be President Roosevelt's veto power. In 1908 he stated his intention not to sign any more bills permitting private dam construction unless they provided a limited license term and payment of compensation to the government. Roosevelt subsequently vetoed two bills on those grounds. In each case, the President sent a veto message to Congress calling for reform of water power legislation in order to protect the public from the monopolistic endeavors of

73. See Pinchot, supra note 62, at 15. Members of Roosevelt's hand-picked Commission included Representatives Theodore E. Burton of Ohio and John H. Bankhead of Alabama; Senators William Warner of Kansas and Francis G. Newlands of Nevada (Newlands, author of the 1902 Reclamation Act, moved from the House to the Senate in 1903); Commissioner of Corporations Herbert Knox Smith and W.J. McGee, a member of the Bureau of Soils. See S. HAYS, supra note 62, at 105-06.

The Inland Waterways Commission's plan was to be "designed for the benefit of the entire country," and was to consider "all the uses to which streams may be put." PRELIMINARY REPORT OF THE INLAND WATERWAYS COMMISSION, S. Doc. No. 325, 60th Cong., 1st Sess. 15 (1908).

74. The great conservationist, Pinchot, serving as Chief of the Forestry Board, had considerable influence on Roosevelt, even before Roosevelt became president in 1901. See S. HAYS, supra note 62, at 14.

75. Id. at 132.


77. See S. HAYS, supra note 62, at 116. Letters from President Roosevelt to Secretary of War (Mar. 16, 1908); Roosevelt to William P. Frye (Mar. 18, 1908); Roosevelt to Theodore E. Burton (Mar. 18, 1908). Id. at n.88, quoted in S. HAYS, supra note 62, at 116. Roosevelt had previously approved 25 special acts under the 1906 General Dam Act. Id. at 115.
private power companies. Roosevelt's demands made further development under the 1906 Act impossible, thereby forcing Congress to take action.


Congress passed the General Dam Act of 1910 as a result of Roosevelt's efforts, despite an intervening change in Administrations. The new statute was a compromise measure, ultimately leading to universal dissatisfaction. Yet, the 1910 Act was significant in one respect: it was the first piece of water power legislation to require a "comprehensive plan" for improvement of the Nation's waterways. Under the Act, the Secretary of War and Chief of Engineers were to apply basin-wide comprehensive plans in choosing suitable locations to recommend to Congress for development.

78. VETO MESSAGE, supra note 72, at 1; SPECIAL MESSAGE, supra note 72, at 3.
79. See J. Kerwin, supra note 22, at 125 (discussing legal limitations under the 1906 Act).
82. The Act failed to please conservationists because it retained congressional control over individual projects and did not require compensation by developers using the nation's waterways. See J. Kerwin, supra note 22, at 130. Ironically, the Act displeased developers for some of the same reasons. Congressional control discouraged investment because it required investors to accept the risk of expensive navigation improvements, but guaranteed no disposition of the properties after the fifty-year license expired. Id. In the final analysis, the 1910 Act was little improvement over the 1906 Act. Id.
83. Specifically, § 1 of the 1910 Act provided:
   . . . in acting upon said plans as aforesaid the Chief of Engineers and 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 . . . .
36 Stat. 594 (1910).
84. See H.R. REP. No. 1160, 61st Cong., 2d Sess. 2 (1910); H.R. REP. No. 61, 66th Cong., 1st Sess. 3 (1919). In other respects, the bill offered little improvement over the 1906 Act. J. Kerwin, supra note 22, at 130. For instance, while the Act did provide for government reimbursement by private developers for any expense
The failure of the 1910 General Dam Act to please either developers or conservationists sent Congress back to the drawing board. Between 1910 and 1917, Congress considered many bills to federalize hydroelectric development, but could not agree on the form water power legislation should take.\(^8\) For example, in 1915, private power interests attempted to run "gift legislation" through Congress, while national attention focused on the war in Europe.\(^8\) Their proposal, the "Shield's Bill,"\(^9\) did not provide a comprehensive planning requirement.\(^8\) Senator Newlands of Nevada\(^10\) sought to remedy the omission by offering a detailed comprehensive development scheme as an amendment to the proposed legislation.\(^10\) Newlands suggested dividing the country into regions, corresponding to watersheds. A plan of development would be mapped out for each region following scientific investigation by a commission of experts. Newlands' amendment failed, but so too did the Shields Bill.

In 1917, Congress took a giant stride toward progressive reform of water power legislation when it created the National Waterways Commission (NWC) to prepare comprehensive plans of development for each of the country's watersheds.\(^11\) Perhaps recognizing that the NWC's plans would be useless without some effective scheme for regulating development, President Woodrow Wilson began to pressure Congress to undertake another attempt at enacting water power legislation.\(^12\) At the same time, the President requested his Secretaries of War, Agriculture, and Interior

\(^{11}\) See supra note 22, at 171-263 (analyzing a variety of proposed water power proposals considered by Congress during the Administration of Woodrow Wilson).

\(^{12}\) See supra notes 68, 73.
to prepare a waterpower bill.\textsuperscript{93}

In January, 1918, the Wilson Administration introduced its bill creating the FPC to relieve Congress of the responsibility of overseeing water power development.\textsuperscript{94} The Commission, composed of the Secretaries of War, Interior, and Agriculture, would have "sufficient organization and sufficient authority to enable it to undertake, in cooperation with other agencies, the fundamental studies and investigations upon which such a program must be founded if it is to be effective."\textsuperscript{95} Those fundamental studies and investigations would result in a "comprehensive plan" of development, as is required by Section 10(a) of the proposed statute.\textsuperscript{96}

Signed into law by President Wilson on June 10, 1920,\textsuperscript{97} the FWPA displeased many conservationists because it violated the principles of multiple purpose development. Its focus was power production. Navigation was a secondary consideration, while flood control and irrigation were omitted from the Act entirely.\textsuperscript{98} The Act did, however, institute a number of progressive reforms including (1) establishment of an independent commission to undertake investigations which would result in comprehensive development plans,\textsuperscript{99} (2) payment to the government of reasonable charges for the privilege of using navigable waterways,\textsuperscript{100} (3) a

\begin{itemize}
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id. at 221.
  \item \textsuperscript{95} See supra notes 55-59 and accompanying text.
  \item \textsuperscript{96} THE WATER POWER BILL, H.R. REP. No. 715, 65th Cong., 2d Sess. 24 (1918). The "comprehensive plan" language for that section was later altered to "comprehensive scheme" at the request of the Secretaries of War, Interior, and Agriculture. According to the House Report, the change was apparently made to "clarify" the language or "improv[e] the form of the bill." Id. at 30. The reports accompanying the 1920 Act do not indicate that the change in any way altered the sense of the phrase as President Roosevelt employed it when he appointed the Inland Waterways Commission in 1907. See supra note 73 and accompanying text.
  \item \textsuperscript{97} Act of June 10, 1920, ch. 285, § 30, 41 Stat. 1077, repealed by Act of Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847. Congress adjourned on June 5, 1920, having delivered the approved bill to the President on May 31. President Wilson failed to sign the legislation before adjournment, raising the presumption that he had applied a "pocket veto." However, Wilson's Attorney General advised him that congressional adjournment did not deprive the President of the 10 days provided by the Constitution for consideration of a measure. See J. Kerwin, supra note 22, at 261-63.
  \item \textsuperscript{98} S. Hays, supra note 62, at 239-40.
  \item \textsuperscript{99} 16 U.S.C. §§ 792, 797.
  \item \textsuperscript{100} 16 U.S.C. § 803(e).
\end{itemize}
fifty-year license term,\textsuperscript{101} and (4) a suitable recapture provision.\textsuperscript{102}

The new FPC's planning duties eliminated the need for the NWC, created three years earlier.\textsuperscript{103} Thus, Congress repealed the act creating the NWC in section 29 of the FWPA,\textsuperscript{104} demonstrating its intention that the new FPC take over the NWC's intensive studies and investigations in order to produce comprehensive plans for each of the nation's watersheds.\textsuperscript{105}

C. FPC Administration of the Federal Water Power Act, 1920-1930

According to one theory of agency "life cycle," administrative agencies lose sight of the policies which led to their creation as time separates them from the enacting legislature.\textsuperscript{106} Still, it is surprising that the FPC began to neglect its FWPA planning responsibilities within ten short years of the statute's enactment.

The original FPC\textsuperscript{107} began its administration of the FWPA by strictly adhering to the letter of the law and the intent of Congress. In its First Annual Report to Congress (1921), the Commission interpreted its duties under section 10(a) of the Act: "if the Commission is to comply with the requirements of the act . . ., it must make, or cause to be made, careful studies of the streams, and must have a consistent scheme of development outlined, before any permits or licenses are issued."\textsuperscript{108} Moreover, the Commission recognized the important policies which led Congress to

\begin{itemize}
\item[\textsuperscript{101}] 16 U.S.C. § 799.
\item[\textsuperscript{102}] 16 U.S.C. § 800(c).
\item[\textsuperscript{103}] See supra note 91 and accompanying text. The NWC had never been appointed.
\item[\textsuperscript{104}] 16 U.S.C. § 823.
\item[\textsuperscript{105}] The floor debates concerning § 29 of the FPA indicate that Congress intended the new FPC to take over the planning duties of the NWC. See, e.g., 59 Cong. Rec. 1173-74 (1920) (comments of Senator Ashurst regarding the duplication of planning functions between the NWC and the proposed FPC); see also B. Schwartz, The Economic Regulation of Business and Industry 1874-75, 1931-32, 2030-31 (1973).
\item[\textsuperscript{106}] See, e.g., M. Bernstein, supra note 57, at 74-75.
\item[\textsuperscript{107}] The "original" Commission, composed of the Secretaries of Interior, War, and Agriculture, were replaced in 1930 by a full time Commission, composed of presidential appointees. See infra notes 116-17 and accompanying text.
\end{itemize}
include the planning provision in the FWPA. In its Fourth Annual Report to Congress (1924), the FPC reiterated those policies:

If . . . we are to develop these powers to the fullest productivity, free of all unavoidable waste, and are to secure at the same time the correlated use of the waters for navigation, irrigation, and other beneficial purposes, we must change from the haphazard methods heretofore employed and proceed to prepare real plans of comprehensive stream development.109

In its first two years, the FPC undertook “special investigations” resulting in two comprehensive plans of development.110 In 1921, the Commission adopted a plan, entitled “Uses of the Deschutes River in Oregon.”111 The following year, the Commission suspended all action on preliminary permit and license applications for projects on the Colorado River while it completed its “Best Scheme of Development of the Colorado River Below Its Junction With the Green.”112 Thus, the Commission believed plan adoption was prerequisite to its other regulatory activities.

While preparing plans in compliance with the FWPA, the FPC bemoaned the lack of manpower and other resources necessary to fulfill its obligations.113 This may partially explain the

Commission's otherwise mysterious cessation of comprehensive planning activities in the late 1920's.\textsuperscript{114} Later, the FPC adopted a new interpretation of section 10(a), which effectively transformed its planning obligation into a directive to license projects in the "public interest," a standard FERC maintains today.\textsuperscript{115}

\textbf{D. Amendment of the Federal Water Power Act, 1930 and 1935.}

Throughout the 1920's, conservationists questioned the capacity of the Secretaries of War, Interior, and Agriculture, who were constrained by other duties, to administer adequately water power development.\textsuperscript{116} Consequently, Congress replaced the cabinet members in 1930 with an independent, full-time FPC composed of five presidential appointees.\textsuperscript{117}


\textsuperscript{115} \textit{See}, \textit{e.g.}, Clark-Cowlitz Joint Operating Agency, 25 FERC \textsuperscript{F} 61,052, 61,176 (1983); Southern California Edison Co., 8 FPC 364, 386 (1949) ("The Commission has not read Section 10(a) of the Federal Power Act as requiring that a single 'comprehensive plan' be prepared against which a proposed project is measured before a license is issued. Rather, a proposed project is measured against the aggregate of information on beneficial public uses of the waterway developed in the record in the proceeding."); \textit{O'Connor Letter, supra} note 13, at 39.

\textsuperscript{116} Pinchot, \textit{supra} note 62, at 19-20. The conservationists' criticism of the cabinet members was somewhat harsh, considering their strict adherence to the most progressive aspects of the FWPA. The Commission undertook numerous river investigations and prepared two comprehensive plan documents during the tenure of the Secretaries of War, Interior, and Agriculture. \textit{See supra} notes 107-12 and accompanying text.

\textsuperscript{117} Ch. 572, 46 Stat. 797 (1930), (codified as amended at 16 U.S.C. §§ 792, 793, 797 (1982)). \textit{See also Comm. on Interstate Commerce, to Reorganize the Federal Power Commission}, S. Rep. No. 378, 71st Cong., 2d Sess., 2 (1930) (citing to the unmanageable workload of the cabinet members as the reason Congress reorganized the FPC). Ironically, the new, full-time FPC never found the time to undertake intensive river investigations, and never prepared a single comprehen-
The 1935 Federal Power Act (FPA) subsumed its 1920 predecessor with few, and mostly “minor,” amendments. One significant amendment expanded the beneficial uses to which licensed projects might be adapted under section 10(a) of the Act, expressly providing that the Commission may consider recreational purposes. The principle focus of the 1935 Act, entitled the Public Utility Holding Company Act, federalized ratemaking for wholesale and interstate sales of electricity, thus making the 1935 FPA, a product of the New Deal, a more complete embodiment of progressive conservationist policies.

But, unfortunately, the Act never fulfilled conservationist’s hopes of an efficient and orderly system of basin-wide, multiple purpose waterway development. After the first few years of its administration, the FPC, and then FERC, refused to undertake the regional studies and investigations necessary to produce the comprehensive plans considered prerequisite to efficient waterway development by the progressive conservationists. In his 1926 history of water power legislation, Jerome Kerwin suggested that Congress’ failure to adopt Senator Newlands’ “broad-visioned” plan. See infra note 115 and accompanying text.


119. PUBLIC UTILITY ACT OF 1935, H.R. REP. No. 1318, 74th Cong., 1st Sess. 7 (1935). One “minor” change concerned § 10(a), where Congress substituted the word “plan” for the word “scheme.” No reason was given for this re-substitution (see supra note 96); in fact, Senate and House reports on the legislation failed to note the change. See id. at 24; PUBLIC UTILITY ACT OF 1935, S. REP. No. 621, 74th Cong., 1st Sess. 45 (1935). The Senate Report actually maintained the word “scheme.” Id.

120. H.R. REP. No. 1318, supra note 119, at 24. This vindicated conservationists critical of the 1920 Act’s failure to provide true multiple purpose development. See supra note 98 and accompanying text. On the importance of the recreational purposes addition, see Udall v. Federal Power Comm’n, 387 U.S. 428, 436-438 (1967) (discussing the purpose of the addition of “recreational purposes” to the FPC’s “best adapted” criteria, under § 10(a) of the FPA); Namekagon Hydro Co. v. Federal Power Comm’n, 216 F.2d 509, 511 (7th Cir. 1954) (sustaining an FPC order denying issuance of license under the FPA because of unique recreational features of the proposed dam site).


122. Cf. Fly, supra note 62, at 293 (“For it remained to President Franklin D. Roosevelt to give the fullest expression to the principles of the conservationists.”).

123. See supra notes 110-15 and accompanying text.

124. See supra note 22.
comprehensive plan proposal in 1916,\textsuperscript{126} produced the "hit-or-miss system of dredging a little here and digging a little there that has characterized our water-development system" ever since.\textsuperscript{128} Actually, Congress did adopt the essence, if not the detail of Newlands' proposal in section 10(a) of the 1920 FWPA, which does require preparation of comprehensive plans for development.\textsuperscript{127} Nevertheless, Congress remains responsible for the existing haphazard system of water power development due to its acquiescence to the historically unsupported interpretation of section 10(a) adopted by the FPC after 1930 and maintained by FERC today.

Growing pressure on Congress to reinforce the FPA's planning directive has forced some recent movement on Capitol Hill.\textsuperscript{128} But Congress is not the only entity capable of forcing FERC to plan for development. Because a comprehensive plan requirement already exists in FERC's statutory mandate, a court may order the Commission to plan. In fact, the issue is currently before the Ninth Circuit United States Court of Appeals.\textsuperscript{129} The following section analyzes congressional and judicial efforts to revive the FPA's planning requirement.

V. JUDICIAL AND LEGISLATIVE PROSPECTS FOR RESURRECTING THE FEDERAL POWER ACT'S COMPREHENSIVE PLAN REQUIREMENT

Recent widespread criticism of the FPA's regulatory system and its administration by FERC has reawakened congressional interest in federal hydropower regulation.\textsuperscript{130} Congress is currently considering several legislative proposals to alter FERC's mandate,\textsuperscript{131} which suggest various regulatory reforms including (1)

\begin{itemize}
  \item \textsuperscript{125} See supra note 90 and accompanying text.
  \item \textsuperscript{126} J. Kerwin, supra note 22, at 205-6.
  \item \textsuperscript{127} See 16 U.S.C. § 803(a), which, like Newlands' 1916 proposal, ostensibly requires consideration of basin-wide comprehensive plans in FERC licensing decisions.
  \item \textsuperscript{128} See infra note 130 and accompanying text; see also infra section V.B.
  \item \textsuperscript{129} See infra notes 134 & 137 and accompanying text; see also infra section V.A.
  \item \textsuperscript{130} See, e.g., Colbo Statement, supra note 21.
  \item \textsuperscript{131} These include S. 426, sponsored by Wyoming Senator Malcolm Wallop (see infra notes 162-68 and accompanying text), S. 870, 99th Cong., 1st Sess., Cong. Rec. 54020 (daily ed. Apr. 3, 1985), sponsored by Senator Mitchell of Maine, and a March 15, 1985 draft proposal by Washington Congressman Al
\end{itemize}
mandating cumulative impacts analyses of FERC-licensed projects, and (2) eliminating the incentives provided by PURPA, the ESA, and the Windfall Profits Tax Act. Both of these suggestions offer the hope of more rational resource management.

Another potential solution to FERC's inefficient resource management already exists in the Commission's statutory mandate: the comprehensive plan requirement of section 10(a) of the FPA. Like some of the other proposed solutions, a comprehensive plan requirement would (1) increase FERC's information base, resulting in a more orderly development and a more efficient dedication of basin-wide resources, and (2) shift FERC's focus from the technical aspects and power potential of individual projects to the resources those projects impact. In addition, the comprehensive planning solution has certain advantages over other proposed reforms: a comprehensive plan requirement would (1) not require congressional action, (2) obviate the need for later cumulative impacts analyses, and (3) expedite FERC licensing procedures by providing a pattern against which to judge specific development proposals.

Swift, which has yet to be introduced in Congress.

132. See, e.g., § 4, Congressman Swift's draft bill, supra note 131. On FERC and the cumulative impacts analysis generally, see Eckberg, supra note 24.

133. See, e.g., § 10, Congressman Swift's draft bill, supra note 131. Critics have suggested this reform, in favor of allowing market forces to select sites for hydroelectric projects. See, e.g., Blumm, supra note 38, at 49 ("At the very least, the value of such projects, as well as all projects opposed by pertinent federal and state agencies, ought to be determined by market forces unencumbered by subsides.").


135. See supra discussion in section III.A and text accompanying note 50. Cumulative impacts analyses would similarly increase FERC's information base. See Eckberg, supra note 24, at 10 ("the documentation resulting from the basin-wide approach could fulfill or supplement FERC's 'comprehensive plan' obligations under the Federal Power Act").

136. See supra notes 23-24 and accompanying text.

137. Because the planning requirement is already part of FERC's statutory marching orders, a court may order compliance. In fact, the National Wildlife Federation is currently seeking such an order from the Ninth Circuit U.S. Court of Appeals in National Wildlife Fed'n v. FERC. See infra Sec. V.A.

138. A truly "comprehensive" plan would assess the cumulative impacts of projected development. The Commission would therefore be relieved of the burden of performing such an analysis during licensing proceedings.

139. See supra text accompanying note 52.
The FPA's comprehensive plan requirement is currently at issue before Congress and before the Ninth Circuit Court of Appeals. However, a judicial resurrection of the FPA's section 10(a) may not suffice to reform FERC's regulatory system; for although the court can require the Commission to plan, it probably cannot dictate how or how much to plan.

A. Judicial Prospects: The Salmon Basin Case

In 1984, the National Wildlife Federation petitioned the Ninth Circuit to review a spate of FERC orders, charging that the Commission's refusal to prepare comprehensive plans of development before permitting and licensing projects is unlawful, under section 10(a) of the FPA. This suit marks the first challenge to the Commission's interpretation of that provision since the FPC adopted its "public interest standard" position more than half a century earlier.

Faced with almost fifty project applications for the Salmon River Basin in Idaho, FERC steadfastly refused to adopt a comprehensive plan. The federal courts have thus far been unwilling to order comprehensive planning in the face of FERC's determination that such action would not be in the public interest. The Ninth Circuit's decision in the Salmon Basin case serves as the most compelling illustration of judicial reluctance to order comprehensive planning.

140. See infra note 142 and accompanying text.
141. See infra note 156 and accompanying text.
142. No. 84-7325 (9th Cir. May 14, 1984); Brief for National Wildlife Federation and Idaho Wildlife Federation, National Wildlife Federation v. FERC, No. 84-7325 (9th Cir. Jan. 17, 1985) [hereinafter cited as NWF's Brief].
143. But cf. United States ex rel. Chapman v. Federal Power Comm'n, 345 U.S. 153 (1953) (requiring Commission licensing decisions to be "best adapted" to congressionally approved comprehensive plans). The fifty year delay between the beginning of the FPC's misinterpretation and the first resulting court challenge should not be surprising. In 1930—about the time the FPC began neglecting its planning obligations—the effects of hydropower development on such resources as anadromous fish populations and habitat were largely unknown. See, e.g., REPORT OF THE COMMISSIONER OF FISHERIES ON BONNEVILLE DAM AND PROTECTION OF THE COLUMBIA RIVER FISHERIES, S. Doc. No. 87, 75th Cong., 1st Sess. 1 (1937) ("The conservation of a great fishery resource involves a variety of circumstances, concerning which there is a dearth of information at the present time."). Moreover, there were no public interest groups, such as the Sierra Club and National Wildlife Federation, with the inclination and resources to fight for aesthetic and recreational resource benefits. In fact, judicial standing requirements before 1972 would have precluded such groups from pressing their concerns. (In 1972, the Supreme Court decided Sierra Club v. Morton, 405 U.S. 727 (1972), ruling that where Congress has granted standing—as in the FPA—noneconomic injuries could be adequate to obtain access to the courts.)
144. The exact number was 48. See NWF's Brief, supra note 142, at 22.

The Salmon River flows from the mountains of Custer County, Idaho, some
comprehensive plan of development prior to issuing preliminary permits. The National Wildlife Federation (NWF) intervened in the Commission's proceedings arguing that, without the guidance of a pre-existing plan as required by section 10(a) of the FPA, FERC could not reasonably determine which, if any of the projects were needed and at what locations. FERC declined to accept the NWF's invitation to plan, and also refused to prepare a cumulative impacts analysis prior to issuing permits from among the four dozen applications for the Salmon Basin. The NWF appealed the subsequent issuance of five of those four dozen permits to the Ninth Circuit.

Before the court, the NWF argued that the legislative and early administrative histories of the FPA indicated that Congress intended section 10(a) to compel FERC to prepare comprehensive river basin plans prior to permitting or licensing projects. Specifically, the NWF relied on much of the same legislative history analyzed in section IV of this Article, and on the 1921 First Annual Report of the FPC, in which the Commission interpreted section 10(a) to require preparation of comprehensive plans "before any permits or licenses are issued." In response, FERC argued that section 10(a)'s requirements apply only to license, not to permit, applications. Moreover, the Commission denied the

420 miles to its confluence with the Snake River at the Washington border. The entire Salmon River basin covers 14,000 square miles. See Brief for FERC at 5, National Wildlife Fed'n v. FERC, No. 84-7325 (9th Cir. Jan. 16, 1985) [hereinafter cited as FERC's Brief]. The Salmon River constitutes "some of the best anadromous fish spawning habitat remaining in the Northwest." Blumm, Restoring Columbia Basin Salmon under the Northwest Power Act: A Report on the Experiment and a Look at Some Storm Clouds on the Horizon [1979-Present Transfer Binder], 30 ANADROMOUS FISH L. MEMO (NAT. RESOURCES L. INST.) 11 (June 1985).

145. See FERC's Brief, supra note 144, at 9.
146. NWF's Brief, supra note 142, at 21.
147. FERC performed a limited cumulative impacts analysis, which applied only to license applications. FERC argues that preparing cumulative impacts analyses at the permitting stage would be premature, considering the number of permitted projects that never receive a license. FERC's Brief, supra note 144, at 9. On the distinction between license and permit applications, see supra note 11.
148. Id. at 3. All appeals of FERC orders must be made in the federal circuit courts of appeal. 16 U.S.C. § 825(b).
149. NWF's Brief, supra note 142, at 17-18, 19-20.
150. Id. at 20; see also supra note 108 and accompanying text.
151. FERC's Brief, supra note 144, at 15-16. On the distinction between license and permit applications, see supra note 11.
admissibility of the FPA’s early administrative history because
the NWF did not raise the issue at FERC’s rehearing. In any
case, FERC argued, the NWF mistook the original FPC’s intent:
According to FERC, the Commission was “at most . . . expres-
sing a view as to the scope of its discretion in extending the re-
quirement to permits,” and its opinion should not bind the
Commission today.

A Ninth Circuit decision on the comprehensive planning is-
ssue in the Salmon Basin Case could have significant consequences
for FERC’s regulatory system and the resources it affects. However, even if the court orders FERC to plan before issuing per-
mits, it will likely leave the nature of the plan entirely to agency
discretion because the FPA contains no provision detailing the
planning procedures the agency must follow. It is therefore con-
ceivable that a NWF victory in the Salmon Basin Case might not
result in more efficient resource management. A planning man-
date will only promote efficient development if the responsible
agency diligently plans for efficiency. The result of planning de-
pends entirely on the goals of the planner.

Unlike the court in National Wildlife Federation v. FERC, Congress can establish specific planning procedures and goals,
which FERC must follow, improving the chances for good plans which promote efficient resource use. Fortunately, prospects are promising for congressional resurrection of the FPA's planning requirement.  

B. Legislative Prospects

Congress has recently considered several legislative proposals to reinforce section 10(a) of the FPA. These proposals share the common goal of resurrecting the dormant comprehensive plan clause, by forcing FERC to either prepare its own development plans or, at least, seriously consider the plans prepared by state, regional, or other federal authorities. The proposals typically provide that FERC-adopted plans would be effective for five years, after which they would be subject to review. In addition, each proposal would extend the purposes for which hydroprojects might be “best adapted,” expressly including fish and wildlife protection as a beneficial use.

On October 2, 1985, the Senate Committee on Energy and Natural Resources reported favorably on one of the legislative proposals to amend the FPA, the Electric Consumers Protection Act of 1985, sponsored by Wyoming Senator Malcolm Wallop. Among other things, that bill would direct FERC (1) to consider the extent to which proposed projects are consistent with

157. See infra section V.B.
158. See supra note 131.
163. One major feature of the bill, not related to comprehensive planning, is its provision which would eliminate the FPA’s municipal preference from FERC relicensing proceedings, in favor of a preference for original licensees. S. 426, § 4, supra note 162, at 2.
the comprehensive plans of appropriate agencies, including the Northwest Power Planning Council and the states affected by the proposed project;\textsuperscript{164} and (2) provide written explanations to interested federal and state agencies as to why the Commission rejected or modified their recommendations for terms and conditions on licenses.\textsuperscript{165}

Unfortunately, S. 426 would not require FERC to adhere to any comprehensive plan. In fact, the bill would not impose any new planning obligations on the Commission.\textsuperscript{166} The directive in S. 426—that FERC consider the extent to which a project is consistent with plans prepared by entities such as the Northwest Power Planning Council—merely restates Congress' Northwest Power Act requirement directing FERC to consider the Council's comprehensive plan at each relevant stage of its decision-making process.\textsuperscript{167} As a result, S. 426 is less effective than other recent legislative proposals attempting to resurrect the FPA's dormant planning requirement.\textsuperscript{168} However, the House of Representatives, on January 21, 1986, passed related legislation, which includes a somewhat more forceful planning provision.\textsuperscript{169}

S. 426 and other current legislative proposals to amend the FPA represent long overdue congressional concern that FERC's administration of a regulatory system largely unamended for more than fifty years no longer reflects the public interest. For the past year, Congress has been gathering information and scrutinizing various legislative proposals which would update that regulatory system, bringing it into line with contemporary notions

\textsuperscript{164.} S. 426, § 3(c)(2)(A), \textit{supra} note 162, at 1-2.

\textsuperscript{165.} S. 426, § 3(c)(3)(A), \textit{supra} note 162, at 2.

\textsuperscript{166.} S. \textit{Rep.} No. 161, \textit{supra} note 162, at 9. ("This provision does not place any additional requirement on the FERC to adopt or to reject any particular recommendation. It only requires the FERC to state the reasons for its decision.")

\textsuperscript{167.} \textit{See supra} note 21.

\textsuperscript{168.} Specifically, it is far less effective than the draft proposal of Washington Congressman Al Swift, which would \textit{require} FERC to adopt plans submitted by state, regional, and other federal entities, which meet certain minimal standards.

\textsuperscript{169.} H. \textit{R. 44, discussed in S. \textit{Rep.} No. 161, 99th Cong., 1st Sess. at 7 (1985) (85 C.I.S. S313-12). Specifically, the bill requires FERC to give fish and wildlife "equitable treatment" in its "best adapted" analysis under § 10(a). The bill also provides for greater input by the Northwest Power Planning Council in FERC licensing decisions, but does not require the Commission to prepare or adopt any comprehensive plans.
of conservation and cooperative federalism. However, it is not possible to predict if or when Congress will enact new water power legislation. Nevertheless, by focusing public attention on FERC's administrative record, the recent congressional interest itself constitutes a small victory for more efficient resource management.

VI. CONCLUSION

Whether judicially or congressionally mandated, comprehensive plans offer the best hope of improving the federal government's system of regulating hydropower development. Planning for development would alleviate flaws in FERC procedures, which today focus on individual project applications. Basin-wide comprehensive plans would encourage more efficient dedication of basin-wide resources by enlarging the Commission's focus to include those resources. In addition, comprehensive plans would expedite FERC licensing decisions and promote orderly development of resources by substantially increasing FERC's information base.

The progressive conservationists of the early twentieth century recognized the importance of planning for orderly development and efficient resource management. They persuaded Congress to place a comprehensive planning requirement at the "heart" of the 1920 FWPA. However, after less than a decade of strict adherence to that directive, the FPC began to neglect its planning obligations, arguing that section 10(a) merely established a "public interest" standard for its licensing decisions. The FERC maintains that position today.

170. See remarks of Senator Mitchell of Maine, introducing legislation to amend § 10(a) of the FPA, 131 Cong. Rec. S4020 (daily ed. Apr. 3, 1985) ("I am introducing legislation which will enable States and the Federal Government to work together in promoting the effective utilization and sound management of river resources.").

171. See supra note 23-24, 136 and accompanying text.

172. See supra notes 50-52, 135 and accompanying text.

173. See supra section IV.A.

174. See supra section IV; see also O'Connor Statement, supra note 48, at 7 (referring to § 10(a) as "the heart of the licensing provisions of the Federal Power Act").

175. See supra notes 107-115 and accompanying text.

176. Id.
After sixty years of acquiescing to the Commissions' interpretation of section 10(a), Congress is now considering a number of proposals to resurrect the planning requirement.\textsuperscript{177} This renewed interest is the result of recent criticism citing to flaws in the FPA's hydro-licensing system,\textsuperscript{178} flaws revealed during the first half-decade of the 1980's, when would-be developers, seeking to take advantage of recently enacted federal subsidies,\textsuperscript{179} buried FERC under an avalanche of applications for small hydro-projects.\textsuperscript{180}

Congress is not the only entity capable of compelling FERC to plan. Because the comprehensive plan requirement already exists in FERC's statutory mandate,\textsuperscript{181} a court may order compliance. In fact, the Ninth Circuit Court of Appeals is currently scrutinizing the Commission's interpretation of section 10(a).\textsuperscript{182} If nothing else, this recent combination of judicial and congressional attention has focused public attention on FERC's management of the nation's rivers, encouraging the commission to adopt a more responsible posture.

To be effective, a congressional or judicial order to plan must be goal-oriented.\textsuperscript{183} Without policy objectives, planning makes no sense. FERC should plan to achieve the original conservationist goals of orderly river basin development and efficient basin-wide resource use. As the history of water power legislation indicates,\textsuperscript{184} those are the goals Congress implicitly mandated in section 10(a) of the FPA. Under a paradigm of efficiency, comprehensive planning would promote informed and expedited resource-oriented decision making.

\textsuperscript{177} See \textit{supra} note 131. This renewed interest in water resource planning comes nearly a decade after Congress implemented planning requirements for its chief land manager, the Forest Service, and the Bureau of Land Management. See \textit{supra} note 60.

\textsuperscript{178} See \textit{supra} note 130 and accompanying text.

\textsuperscript{179} On these subsidies, see section II. B.I.

\textsuperscript{180} See \textit{supra} section II.B.2.

\textsuperscript{181} Sec. 10(a), 16 U.S.C. § 803(a) (1982).

\textsuperscript{182} See \textit{supra} section V.A.

\textsuperscript{183} For this reason, a congressional order to plan may be preferable to court-ordered planning. See \textit{supra} note 156 and accompanying text. However, the conservationist goals of efficiency are implicit in § 10(a) of the FPA. See \textit{supra} section IV. A particularly active court may implement those implicit goals in an order directing FERC to plan in accordance with § 10(a).

\textsuperscript{184} See \textit{supra} section IV.