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National Wildlife Federation v. FERC and Washington State Department of Fisheries v. FERC: Federal Energy Regulatory Commission Ignores Ninth Circuit Rebuke on Hydropower Permitting*

Murray D. Feldman**

INTRODUCTION

Mirroring a nationwide trend,1 Idaho's Salmon River Basin and Washington's Snohomish River Basin attracted a renewed interest in hydropower development in the early 1980's. By 1984, more than eighty hydropower development proposals for the Salmon River Basin2 and more than fifty proposals for the Snohomish River Basin3 were pending before the Federal Energy Regulatory Commission (FERC),4 the federal entity responsible for licensing hydropower projects on waters under federal jurisdiction.5

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1. The renewed interest in hydropower development was reflected in the huge growth in the number of hydropower development applications received by the Federal Energy Regulatory Commission (FERC). In 1977, FERC received only 47 applications for preliminary permits or licenses for hydropower projects. In 1981, the Commission received 1,548 preliminary permit applications. Small Hydro Program: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 44, 48 (1984) [hereinafter Small Hydro Hearings] (letter from Raymond J. O'Connor, Chair of FERC). By fiscal year 1985, the number of preliminary permit applications had declined to 636. Proett, Cumulative Impacts of Hydroelectric Development: Beyond the Cluster Impact Assessment Procedure, 11 HARV. ENVTL. L. REV. 77, 83 (1987). The federal policies underlying this increase in hydropower development have been well documented elsewhere. See, e.g., Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 HARV. ENVTL. L. REV. 1, 2, 6-8 (1986); Proett, supra, at 83-86.

2. National Wildlife Fed'n v. FERC, 801 F.2d 1505, 1509 n.10 (9th Cir. 1986).

3. Small Hydro Hearings, supra note 1, at 9-10 (letter from Tulalip Tribes).


This renewed interest in hydropower development also focused attention on FERC's consideration of environmental and other nondevelopment values in its regulation of hydropower development under the Federal Power Act. In a series of actions leading to the litigation in *National Wildlife Federation v. FERC* and *Washington State Department of Fisheries v. FERC*, environmental organizations, state and federal fish and wildlife agencies, and Indian tribes intervened in FERC preliminary permit proceedings for the Salmon and Snohomish River Basins. The intervenors' goal was to reform both FERC's hydropower planning and its evaluation of the potential cumulative environmental impacts of multiple hydropower developments. When FERC rejected the intervenors' requests to improve the Commission's consideration of environmental values, the intervenors appealed to the Ninth Circuit.

The petitioners asked the Court to rule that the Federal Power Act required FERC to prepare a comprehensive plan and to assess cumulative environmental impacts prior to issuing preliminary permits for hydropower projects in the Salmon and Snohomish River Basins. Although the Ninth Circuit declined to hold that FERC must prepare a comprehensive plan and assess cumulative impacts in the two river basins, the court's decisions appeared to be at least a partial victory for the intervening environmental interests. The court remanded the decisions to FERC for further consideration of the petitioners' claims under the Federal Power Act and vacated several preliminary permits in the two basins.

Following the Ninth Circuit's remand, FERC resumed issuing preliminary permits for developments in the Salmon and Snohomish River Basins. Despite the success of the intervenors' arguments before the Ninth Circuit, FERC's later permit decisions differ little from the origi-
nally challenged decisions in their consideration of the need for comprehensive planning and cumulative impact assessment in the two river basins. This Note examines how the efforts of the National Wildlife Federation, the Washington State Department of Fisheries, and other intervenors to reform FERC's preliminary permit procedures in the Salmon and Snohomish River Basins were rejected by FERC despite the Ninth Circuit's favorable rulings in *National Wildlife Federation* and *Department of Fisheries*.

Section I of this Note examines the goals of the intervening environmental groups and the interests they sought to protect in FERC's permitting process. Section II describes both the groups' efforts to intervene in FERC's preliminary permit proceedings for the Salmon and Snohomish River Basins and FERC's subsequent dismissal of the intervenors' proposals. Section III discusses the Ninth Circuit's rejection of FERC's reasoning and the apparent significance of the *National Wildlife Federation* and *Department of Fisheries* decisions in reforming FERC's preliminary permit process. Section IV examines FERC's later preliminary permit decisions in the Salmon and Snohomish River Basins and argues that FERC's new permit decisions in these basins ignore the Ninth Circuit's directive that FERC must obtain the environmental information necessary to make a properly informed licensing decision. Section V explores potential reasons for FERC's failure to comply with the Ninth Circuit's ruling. That Section concludes that FERC's failure to address the comprehensive planning and cumulative impact assessment issues raised by the Ninth Circuit is symptomatic of FERC's traditional response to new environmental policy demands. Finally, Section V offers some alternative strategies to achieve the reforms sought by the environmental organizations in *National Wildlife Federation* and *Department of Fisheries*. This Note concludes that explicit legislative reforms are necessary to improve FERC's consideration of environmental values in the preliminary permit process.

**I**

BACKGROUND: ENVIRONMENTAL VALUES AND ENVIRONMENTAL IMPACTS

The outstanding environmental values of the Salmon and Snohomish River Basins, coupled with the proposals for multiple hydropower developments, made these areas a likely subject of efforts to reform FERC's hydropower decisionmaking. Among the environmental resources in the Salmon River Basin are spawning grounds for salmon, steelhead, and cutthroat trout, many popular stretches of whitewater for

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17. *See infra* text accompanying notes 226-57.
recreational boating, and one of the nation's largest wilderness areas. In the Snohomish River Basin, near-pristine streams support a fishery valued at more than $15 million. The Snohomish Basin also provides excellent wildlife, scenic, and recreational resources.

The threat posed to these environmental values by the multiple hydropower proposals in the Salmon and Snohomish River Basins attracted the concern of several entities seeking to ensure adequate consideration of environmental values in FERC's hydropower decisionmaking.

A. The Intervenors

Three types of groups were concerned about the environmental impact of hydropower development in the two river basins: environmental organizations, state and federal fish and wildlife agencies, and Indian tribes. The two environmental groups involved were the National Wildlife Federation and one of its state affiliates, the Idaho Wildlife Federation. The goal of these organizations was to assure that FERC's hydropower permitting process adequately considered the protection of the fish and wildlife resources of the Salmon River Basin. This goal was consistent with the interest of the organizations and their members in environmental quality and habitat conservation.

The state and federal fish and wildlife agencies concerned with hydropower development were the Washington State Department of Fisheries and the National Marine Fisheries Service. The goal of these agencies was to ensure that FERC and the hydropower developers would gather the information needed to assess cumulative environmental impacts so that the agencies could fulfill their consultation duties under the Fish and Wildlife Coordination Act.

Finally, there were the Indian tribes: the Nez Perce in the Salmon River Basin and the Tulalip Tribes of Washington in the Snohomish River Basin. These tribes sought to protect their treaty fishing rights

19. Department of Fisheries, 801 F.2d at 1517.
20. Id.
23. Department of Fisheries, 801 F.2d at 1519 & n.4.
24. 16 U.S.C. § 662(a) (1982). The Fish and Wildlife Coordination Act "requires federal licensing agencies such as FERC to consult with NMFS [National Marine Fisheries Service], FWS [Fish and Wildlife Service], and the appropriate state fish and wildlife agencies during the licensing process to ensure the conservation of fish and wildlife resources." Bodi & Erdheim, Swimming Upstream: FERC's Failure To Protect Anadromous Fish, 13 Ecology L.Q. 7, 32 (1986) (citation omitted).
by ensuring that FERC adequately considered the impact of the proposed developments on the anadromous fish resources of the two basins. The tribes also wanted FERC to consider the tribes' suggestions on measures to reduce this impact.

B. Environmental Impacts of Hydropower Projects

Underlying the efforts of the intervening groups to improve FERC's consideration of environmental information was their concern about the adverse environmental impacts of the proposed hydropower developments. These adverse impacts can impair several of the resources most valued by the intervening groups—resident and anadromous fisheries, free-flowing rivers, recreational opportunities, and wildlife habitat.

Hydropower developments can have a detrimental effect on fish life through habitat alteration. Impounding water behind a dam or de-watering a river segment for a diversion project may cause changes in several water quality factors, including sediment levels, dissolved oxygen content, and water temperature. These changes in water quality may destroy spawning habitat required for the reproduction of anadromous and resident fish.

Hydropower developments also may harm fish populations directly. For instance, anadromous fish species, such as salmon and steelhead trout, may be blocked or hindered in their upstream and downstream migration by the barriers presented by dams, water diversion structures, turbines, and spillways. In addition, anadromous fish require a minimum detectable streamflow to orient the direction of their migration and to maintain the urge to migrate. Reservoirs and other water impoundments can alter the natural streamflow so that it is below the minimum flow needed to trigger the downstream migration response, resulting in decreased anadromous fish production.

River-based recreational opportunities are also affected by hydropower.

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27. Anadromous fish—e.g., salmon—are fish that "hatch in fresh water, spend most of their adult life in the ocean, and then return to freshwater to spawn." Bodi & Erdheim, supra note 24, at 7 n.1.

28. See, e.g., Small Hydro Hearings, supra note 1, at 13 (letter from Tulalip Tribes).

29. Id. at 9.


32. Id. at 13.

33. Id.

34. Id. at 64.

35. Id. at 13, 64.


37. Bentley & Raymond, Delayed Migration of Yearling Chinook Salmon Since Comple-
power development. Whitewater recreational boating opportunities may be destroyed or impaired by reservoirs, river obstructions, and changes in the flow regime. Construction and operation of hydropower facilities discourages other streamside recreation activities, such as camping, fishing, and hiking.

Hydropower construction activities disturb both aquatic and terrestrial wildlife habitats. This disturbance results from the road dust, oil and toxic waste spills, noise, lighting, and increased human activity associated with the construction and operation of hydropower facilities. Offsite environmental impacts also may be caused by development of roads and transmission line corridors necessary to access the new hydropower facilities. For instance, projects currently proposed in the Salmon and Snohomish Basins include transmission lines up to ten miles long and penstocks up to 12,000 feet long. Thus, a full consideration of the environmental impacts of the proposed projects must consider the impacts of these accompanying developments.

C. Cumulative Impacts of Multiple Hydropower Developments

The adverse effects outlined above may occur with the development of any single hydropower project. A primary concern of the intervening groups, however, was the potential cumulative impacts from the development of multiple hydropower projects in a single river basin. The operation and construction of multiple hydropower projects in a single river basin, such as the Salmon or Snohomish Basin, may result in three types of cumulative impacts: additive impacts, multiplicative impacts, and synergistic impacts.

Additive impacts are the sum of the discrete resource impacts of...
hydropower projects in a single river basin.\textsuperscript{47} One example of an additive impact would be the impact of two different hydropower projects on the total trout habitat in a river basin. Because trout are a resident (nonmigrating) fish species, the impact from the two projects would be separate and would not interact. Therefore, if each of the two hydropower projects were to destroy five percent of the total trout habitat in a river basin, the additive impact from both projects would be a ten percent reduction in the total trout habitat in the basin.\textsuperscript{48}

Multiplicative impacts are the product of separate impacts on the same resource.\textsuperscript{49} Multiplicative impacts occur when, for example, anadromous fish must migrate through or around several hydropower projects in a single river basin. Bypass measures\textsuperscript{50} at the projects can allow for the passage of migrating fish. Nevertheless, not all the fish in a particular run will survive passage over or through the project. The impact in this case is multiplicative, and not additive, because the impact affects the entire resource base (an anadromous fish population) at each project.\textsuperscript{51}

Synergistic impacts are the result of different kinds of impacts that interact with each other directly to create impacts that are greater than the sum of their individual effects.\textsuperscript{52} An example of a synergistic impact is the combined impact of turbine passage and tailwater predation on the survival of anadromous fish during downstream migration. Passing through the power-generating turbines of a hydroelectric project can weaken or stun juvenile salmon.\textsuperscript{53} Given adequate recovery time, most of these fish can continue their downstream migration unaffected.\textsuperscript{54} When, however, these juvenile fish are ejected from a power turbine into the tailwater of yet another downstream reservoir populated by predatory fish species, the juvenile fish have a much lower survival rate.\textsuperscript{55} These two impacts, turbine passage and tailwater predation, interact synergistically to cause a mortality rate among juvenile salmon greater than the additive effect of each impact in isolation.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{47} Id.
\item \textsuperscript{48} See id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Bypass measures include fish ladders to allow the upstream passage of adult fish, and fish screens and spill operations to guide migrating juvenile fish past the dams' power-generating turbines. NWF, Hydropower \& Environment, supra note 40, at 8 n.5, 9.
\item \textsuperscript{51} If each dam in a river basin had an 80\% bypass efficiency, there would be a 20\% reduction in any particular fish stock passing over each dam. Thus, 80\% of a particular anadromous fish stock would survive the upstream and downstream migration past one of these dams, only 64\% of the entire population would survive the upstream and downstream migration past two of these projects, and only 51\% would survive passage over three of these projects. See Rochester \& Lloyd, supra note 31, at 176.
\item \textsuperscript{52} Proett, supra note 1, at 92.
\item \textsuperscript{53} Rochester \& Lloyd, supra note 31, at 119, 124, 176.
\item \textsuperscript{54} Id. at 176.
\item \textsuperscript{55} Id. at 83, 176.
\item \textsuperscript{56} Id. at 176.
\end{itemize}
The cumulative impact examples outlined above illustrate—for a single resource—the different types of cumulative impacts from hydropower development. The actual cumulative impacts of multiple hydropower developments in a single river basin would include additive, multiplicative, and synergistic impacts acting simultaneously upon all the resources of a river basin—fish and wildlife, recreation, water quality, vegetation, habitat, and free-flowing rivers. In ecologically complex and sensitive areas, such as the Salmon and Snohomish River Basins, these cumulative impacts could be both numerous and far reaching.

II

THE SALMON AND SNOHOMISH RIVER BASIN PERMIT PROCEEDINGS

A major concern of the intervening groups in the Salmon and Snohomish River Basins was that FERC's traditional procedure for issuing permits and licenses to hydropower projects, which examined each project individually, would not provide the information needed to evaluate the potential cumulative impacts of multiple hydropower projects in the two river basins.57 The environmental groups, therefore, decided to intervene in FERC's preliminary permit proceedings for projects in the Salmon and Snohomish River Basins in an attempt to persuade FERC to ensure that hydropower developers gathered the data needed to assess cumulative environmental impacts. Before examining the groups' efforts and the Commission's response, however, some background on FERC's hydropower permitting and licensing process is necessary.

A. FERC's Hydropower Permitting and Licensing Process

The Federal Power Act (FPA)58 establishes FERC's jurisdiction over hydropower development. The FPA also dictates the substance of FERC's licensing decisions. Under the FPA, FERC issues licenses for the construction, operation, and maintenance of dams and other projects on waters under federal jurisdiction.59 Before FERC may grant a license, section 4(e) of the FPA requires a finding by FERC that the project is in the public interest.60 The public interest factors that FERC must consider under section 4(e) include "future power demand and supply, alternate sources of power, . . . preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."61 Under sec-

59. Id. § 797(e) (Supp. IV 1986).
60. Id.
tion 10(a), FERC also must find that the project "will be best adapted to a comprehensive plan for improving or developing a waterway." FERC's practice, however, is not to prepare comprehensive plans for a river basin or to evaluate projects against any existing comprehensive plans. Instead, FERC's view is that it satisfies the comprehensive plan requirement of section 10(a) when it bases its licensing decisions on the complete administrative record before it in each proceeding.

In order to provide the detailed information necessary for FERC to make its licensing decisions, the FPA also provides for the issuance of preliminary permits. The purpose of preliminary permits is to maintain the priority of a permittee's license application while the permittee gathers the information needed to prepare an acceptable license application. By securing the priority of a permittee's license application—and thereby increasing the likelihood of a return on the investment—the preliminary permits provide an incentive for permittees to invest the time and money necessary to perform the required studies. The potential return on the investment is the grant of a license to construct the project. Thus, preliminary permits are of "central importance" in the licensing process.

The FERC procedure for issuing preliminary permits operates in roughly three steps. First, the would-be developer initiates the procedure by filing a preliminary permit application. Second, notice of the pending application is published in the Federal Register and comments are accepted from the public. Third, after considering the initial permit application and comments, FERC decides whether to issue a preliminary permit. If issued, the permit usually specifies in detail additional information that FERC will require the permittee to gather in order for FERC to make a licensing decision. Finally, after all the required information has been gathered and submitted, FERC follows a similar procedure to decide whether to grant or to deny a license to construct the hydropower project. The preliminary permit and license proceedings are adjudicatory in style, and interested parties may intervene and ob-

63. Small Hydro Hearings, supra note 1, at 78-79 (letter from Raymond J. O'Connor, Chair of FERC).
64. 16 U.S.C. § 797(f) (1982).
65. See National Wildlife Fed'n v. FERC, 801 F.2d 1505, 1508 & n.7 (9th Cir. 1986).
69. Small Hydro Hearings, supra note 1, at 64-65 (letter from Raymond J. O'Connor, Chair of FERC).
73. See id. § 825g (1982).
tain party status\textsuperscript{74} entitling them to later judicial review of the Commission's decisions.\textsuperscript{75}

A majority of the determinations on permit issuance are delegated to FERC's staff and are not acted upon by the full five-member Commission.\textsuperscript{76} A project applicant or intervenor may appeal delegated orders to the full Commission.\textsuperscript{77} After the full Commission issues an order on the appeal, an applicant or intervenor may file an application for rehearing of the full Commission's order.\textsuperscript{78}

In \textit{National Wildlife Federation} and \textit{Department of Fisheries}, the intervening groups appealed several delegated orders issued by the director of the Office of Electric Power Regulation.\textsuperscript{79} In both cases, the intervenors appealed to the full Commission and also requested a rehearing before the full Commission.\textsuperscript{80} Only after exhausting these administrative remedies did the intervenors seek judicial review of FERC's preliminary permit orders in the Ninth Circuit. In presenting their claims to FERC, the intervenors focused on the need for FERC to coordinate its review of the projects and to require the preliminary permittees in the Salmon and Snohomish River Basins to gather information on the cumulative environmental impacts of the projects proposed in each river basin.

\subsection*{B. The Salmon and Snohomish River Basin Preliminary Permit Proceedings}

In 1983, the National Wildlife Federation, Idaho Wildlife Federation, National Marine Fisheries Service, and Nez Perce Tribe intervened in preliminary permit proceedings for several of the Salmon River hydropower proposals.\textsuperscript{81} The National Wildlife Federation and other intervenors had three goals: (1) to have FERC prepare a comprehensive plan outlining the number, type, and location of desirable hydropower projects in the Salmon River Basin; (2) to have FERC assure that the permittees collected the information needed to assess cumulative im-

\begin{footnotesize}
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\item \textsuperscript{74} \textit{Id.} § 825g(a).
\item \textsuperscript{75} \textit{Id.} § 825(b). Judicial review of a Commission order is proper "in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." \textit{Id.}
\item \textsuperscript{76} \textit{Id.} § 825g(a) (authority to delegate hearing responsibility); \textit{Small Hydro Hearings, supra} note 1, at 60-62 (letter from Raymond J. O'Connor, Chair of FERC, discussing Commission delegation procedures).
\item \textsuperscript{77} \textit{Small Hydro Hearings, supra} note 1, at 61 (letter from Raymond J. O'Connor, Chair of FERC).
\item \textsuperscript{78} 16 U.S.C. § 825l(a) (1982).
\item \textsuperscript{79} \textit{National Wildlife Fed'n,} 801 F.2d at 1506; \textit{Washington State Dep't of Fisheries v. FERC,} 801 F.2d 1516, 1517 (9th Cir. 1986).
\item \textsuperscript{81} Lester Kelley, 25 F.E.R.C. ¶ 61,410 (1983).
\end{itemize}
\end{footnotesize}
HYDROPOWER PERMITTING

pacts; and (3) to have the plan prepared and cumulative impact data collected at the preliminary permit stage and not deferred until the licensing stage.82

At the hearings, the intervenors shaped these goals into four requests. First, the intervenors sought a comprehensive plan for all hydropower development in the Salmon River Basin because such a plan would allow all interested parties to make a coordinated response to a single basinwide plan instead of having to evaluate and respond individually to each project on an ad hoc basis.83 Second, the intervenors asked FERC to require permittees to gather information needed to assess the likely cumulative impacts of proposed developments because numerous hydropower developments in a single river basin could have additive, multiplicative, and synergistic effects.84 Third, the intervenors sought uniform study guidelines in the permit articles to allow direct comparison of the data gathered by the various permittees.85 Finally, the intervenors urged the collection of baseline environmental data so that permittees and other interested parties would have a common core of data to work with and so that all studies done would proceed from the same basic assumptions about the Salmon River Basin.86

FERC agreed to consider these requests, and the Commission's staff prepared two draft documents outlining an approach to cumulative impact assessment, comprehensive planning, and basinwide studies.87 FERC then held a public hearing in Boise, Idaho to discuss these documents and hydropower development in the Salmon River Basin.88

All of the testimony at the hearing supported both developing a comprehensive plan prior to issuing preliminary permits and requiring permittees to gather cumulative impact data.89 Developers, as well as state and federal fish and wildlife agency officials, agreed that a comprehensive plan was necessary.90 Developers thought that such a plan

82. Id.
83. National Wildlife Fed'n, 801 F.2d at 1509.
84. Id.
85. Id.
86. See id.
87. Id. at 1510.
89. National Wildlife Fed'n, 801 F.2d at 1510.
90. Id. at 1510 n.13. The court summarized the testimony as follows:

For example, Lorraine Bodi of the U.S. National Marine Fisheries Service stated that unless a comprehensive plan were first developed, "you can't see whether the studies [conducted under the preliminary permit] are helpful to accomplish the objective." Harold Miles of Idaho Consumer Affairs, Inc. testified that development of a comprehensive plan before issuing licenses was needed to direct developers to conduct the necessary studies. Jack Griswold of the Forest Service indicated that if a comprehensive plan were not developed before issuing preliminary permits, studies conducted by developers would frequently be inadequate and would have to be entirely redone. Tom Haislip, a developer, indicated that even a tentative comprehensive plan, or a plan limited to stream reaches instead of basinwide, identifying likely
would direct them to complete the necessary studies required for FERC license approval and that it would benefit them by identifying favorable and unfavorable development sites. Resource agency officials favored a comprehensive plan to eliminate the need for duplicative studies and to assess better the impacts of the proposed projects in conjunction with other projects in the same river basin.

At the end of this hearing, the FERC hearing chairman concluded that "we agree that you need site-specific information, and you need to assess cumulative impacts, and you need to have a basin plan." No one at the hearing recommended that comprehensive planning be deferred beyond the permit stage or that cumulative impacts not be studied.

Despite the overwhelming evidence gathered at the hearing supporting development of a comprehensive plan and study of cumulative impacts, FERC did not pursue either of these measures when granting permits in the Salmon River Basin. Instead, FERC began issuing standard preliminary permits without any of the special conditions requested by the National Wildlife Federation, NMFS, and the Nez Perce Tribe. These parties then appealed the issuance of seven of the permits. FERC denied their appeals and later denied a request for rehearing.

A similar situation developed in the Snohomish River Basin. There, the Washington State Department of Fisheries, the Tulalip Tribes, and NMFS urged FERC to adopt a comprehensive plan and to coordinate the study and review of proposed hydro projects. FERC held a hearing in response to these requests, and again all the testimony supported the petitioners' requests. As in the Salmon River Basin, however, FERC’s decision to reject petitioners’ proposals was based on the cost to permittees of performing cumulative impact studies and—given the historically high attrition rate from the preliminary permit to the project licensing stage—the uncertainty over how many projects eventually would be constructed. Lester Kelley, 25 F.E.R.C. ¶ 61,410 (1983). See supra text accompanying notes 57-63.
did not act on the petitioners’ requests;101 rather, it began issuing preliminary permits on a project-by-project basis without any coordinated procedures or comprehensive planning.102

C. FERC’s Reasons for Denying the Intervenors’ Requests

On appeal to the full Commission, the Salmon River Basin intervenors argued that the preliminary permits “should include detailed procedures for coordinated studies geared toward cumulative environmental impacts to provide information for subsequent consolidated Commission action on license and exemption applications.”103 While acknowledging that they had received forty-eight permit, license, and exemption applications for projects in the Salmon River Basin,104 FERC concluded—based on its experience with the standard permit articles—that the articles “will result in substantial and useful information on potential environmental effects, and will be adequate to enable the permittees to prepare acceptable license applications.”105 The Commission also noted that the requirements imposed on permittees “are largely the product of our discretion.”106

FERC further concluded that requiring coordinated studies and cumulative impact analysis at the preliminary permit stage would not be appropriate because “[s]uch studies would be extremely costly and time consuming.”107 Moreover, FERC noted that because “many projects studied pursuant to permits are never proposed for licensing, many of these studies may never be used” in final licensing proceedings.108 The Commission thought the last point was especially significant inasmuch as “[c]umulative study results may depend greatly on the number of projects evaluated; and if that number changes greatly from the permit

101. Id.
102. Id.
104. Id. By the time FERC denied the National Wildlife Federation’s petition for rehearing, there were over 80 permit, license, and exemption applications pending for projects in the Salmon River Basin. National Wildlife Fed’n, 801 F.2d at 1509 n.10.
106. Id.

The scope of the Commission’s discretion when issuing preliminary permits was the central issue before the court in National Wildlife Federation. 801 F.2d at 1509. The statutory basis of the Commission’s discretion to issue preliminary permits is set out in 16 U.S.C. § 798 (1982). Although FERC’s authority to issue a license is subject to the public interest and comprehensive plan requirements of the FPA, id. §§ 797(e), 803(a), the FPA does not on its face place the same constraints on preliminary permits. See National Wildlife Fed’n, 801 F.2d at 1508. In National Wildlife Federation, however, the court noted that the statutory purpose of preliminary permits is to allow permittees to gather the information needed to prepare license applications. Thus, the Ninth Circuit reasoned, there may be some instances when a comprehensive plan is required prior to issuing preliminary permits. See id. at 1509; see also infra text accompanying notes 128-35 & 174-77.
108. Id.
stage to the licensing stage, information generated at the former may not be useful at the latter." As the Ninth Circuit later noted, however, the Commission must deal with this uncertainty and cannot use it as a reason to defer cumulative impact studies. FERC could require, for instance, that cumulative impact studies be performed based on a number of development scenarios, or it could calculate the expected attrition rate based on past experience and then use that information to determine the number of projects that eventually might be built.

FERC denied the National Wildlife Federation's petition for rehearing and, relying on its Salmon River Basin decision, the Commission also denied the appeals of the Washington State Department of Fisheries, the Tulalip Tribes, and NMFS concerning preliminary permits issued in the Snohomish Basin. When their efforts to reform FERC's preliminary permit procedures failed at the administrative level, the National Wildlife Federation and the Nez Perce Tribe appealed to the Ninth Circuit FERC's decision to grant the preliminary permits in the Salmon River Basin. In a parallel action, the Washington State Department of Fisheries and the Tulalip Tribes appealed to the Ninth Circuit FERC's issuance of preliminary permits in the Snohomish River Basin.

The intervenors' efforts to require FERC to prepare a comprehensive plan and to assess cumulative impacts were well received by the Ninth Circuit. Although the court of appeals did not order FERC to prepare a comprehensive plan or to assess cumulative impacts, the court vacated the challenged permits and remanded the decisions to FERC for further consideration of the intervenors' requests under the Federal Power Act. The court flatly rejected FERC's reasons for denying the intervenors' requests and it acknowledged the uncontroverted evidence supporting the requests. In its opinion, the court emphasized the role of the statutorily required comprehensive plan in FERC's licensing decisions and recognized that cumulative impacts are one of the factors FERC must consider during the licensing process under the FPA. Additionally, the Ninth Circuit stressed the need to gather in-

109. Id.
111. See id.
115. Department of Fisheries, 801 F.2d at 1517.
116. National Wildlife Fed'n, 801 F.2d at 1512; Department of Fisheries, 801 F.2d at 1519.
117. National Wildlife Fed'n, 801 F.2d at 1513; Department of Fisheries, 801 F.2d at 1517.
118. National Wildlife Fed'n, 801 F.2d at 1512-13; Department of Fisheries. 801 F.2d at 1518.
120. Id. at 1509. See also infra text accompanying notes 162-71.
formation on cumulative impacts at the preliminary permit stage.\textsuperscript{121} Finally, the court clearly suggested that FERC's discretion in considering the intervenors' requests would be constrained by the "hard look" standard of judicial review.\textsuperscript{122}

III
THE NINTH CIRCUIT DECISIONS

*National Wildlife Federation v. FERC*\textsuperscript{123} and *Washington State Department of Fisheries v. FERC*\textsuperscript{124} were argued and decided together in the Ninth Circuit. The court explained the substance of its decision on the Federal Power Act issues in its opinion in *National Wildlife Federation*, specifically adopting that holding by reference in *Washington State Department of Fisheries*.\textsuperscript{125}

A. The Court's Opinions

In the Ninth Circuit, the National Wildlife Federation argued that FERC violated section 10(a) of the Federal Power Act by granting preliminary permits without first developing a comprehensive plan for hydroelectric development in the Salmon River Basin, collecting baseline environmental data, imposing uniform study guidelines, and requiring permittees to collect data needed to evaluate the cumulative impacts of the proposed projects.\textsuperscript{126} FERC, in response, asserted that although the FPA required development of a comprehensive plan and consideration of cumulative impacts, the time to do this was prior to issuing licenses—not prior to issuing preliminary permits.\textsuperscript{127}

The FPA does not expressly require that a comprehensive plan be developed before FERC issues preliminary permits.\textsuperscript{128} In framing the issue before the court, however, Chief Judge Browning reasoned that,

\textsuperscript{121} See infra text accompanying notes 172-79.
\textsuperscript{122} See infra text accompanying notes 180-200.
\textsuperscript{123} \textit{Id. at} 1505 (9th Cir. 1986).
\textsuperscript{124} \textit{Id. at} 1516 (9th Cir. 1986).
\textsuperscript{125} \textit{Id. at} 1517.
\textsuperscript{126} \textit{National Wildlife Fed'n}, 801 F.2d at 1507.
\textsuperscript{127} \textit{National Wildlife Fed'n}, 801 F.2d at 1507.
\textsuperscript{128} \textit{Id. at} 1508.
because of the role preliminary permits play in the FPA licensing scheme, the information gathered at the preliminary permit stage is a function of the information required for the Commission to make an informed decision at the licensing stage.\textsuperscript{129} The purpose of preliminary permits is to enable the permittees to gather the information necessary to prepare acceptable license applications.\textsuperscript{130} If the information needed by the permittees could not be obtained unless a comprehensive plan was first developed,\textsuperscript{131} then FERC would abuse its discretion by issuing preliminary permits without first developing a comprehensive plan.\textsuperscript{132} Permits issued under these circumstances could not serve their statutory purpose under the FPA of allowing permittees properly to prepare license applications.\textsuperscript{133}

Similarly, if the cumulative impacts of the projects could be assessed only by requiring permittees to collect the data needed to determine these impacts, then FERC would abuse its discretion if it failed to require the permittees to collect this information.\textsuperscript{134} Thus, the question before the court was "whether, given the evidence before it, the Commission abused its discretion in concluding that none [of the measures requested by the National Wildlife Federation] was necessary to provide the Commission with the information needed to make a properly-informed licensing decision."\textsuperscript{135}

After reviewing the events leading up to FERC's granting of the preliminary permits, the court applied the "substantial evidence" test set out in the FPA\textsuperscript{136} for judicial review of FERC actions. The court held that FERC's decision to grant the preliminary permits without considering a comprehensive plan or requiring the collection of data needed to evaluate cumulative impacts had "no discernible support in the record."\textsuperscript{137} For instance, FERC's argument that the standard permit arti-

\textsuperscript{129} \textit{Id.} at 1509. In a later section of the opinion, the court noted that "issuance of preliminary permits and the formulation of their articles are of central importance in the process of licensing," \textit{Id.} at 1514 (citing Northern Colo. Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1512 (D.C. Cir. 1984)).

\textsuperscript{130} \textit{Id.} at 1508.

\textsuperscript{131} For example, permittees may require certain information on other projects proposed for the same river basin in order to complete the studies needed by the Commission for its licensing decision. Information on other developments in the same river basin could influence the analysis of power demands, alternative designs, and resource tradeoffs for a particular project. In the absence of a comprehensive plan, however, the permittee might not be able to obtain the necessary information on other projects proposed for the same basin. \textit{Id.} at 1510 n.11.

\textsuperscript{132} \textit{Id.} at 1509.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} 16 U.S.C. § 825l(b) (1982) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.").

\textsuperscript{137} \textit{National Wildlife Fed'n}, 801 F.2d at 1512.
icles would provide appropriate environmental impact information was inapplicable, the court noted, because the Salmon River Basin was a unique area that presented "fundamentally different problems" than did standard hydropower development proposals. Thus, FERC's "run-of-the-mill experience with boilerplate permits was an inadequate basis for rejecting petitioners' requests."  

FERC also claimed that preparing coordinated studies aimed at cumulative impact assessment would be "extremely costly and time consuming." The court again rejected FERC's analysis and held that the record contained no evidence of the cost of cumulative impact studies. Indeed, testimony suggested that coordinated studies might reduce the costs of assessing environmental impacts. Furthermore, the court observed that the cost of these studies must be incurred at some point before issuing licenses in order to develop the comprehensive plan required by section 10(a) of the FPA.  

Lastly, the court rejected FERC's argument that cumulative impact studies might not be useful because the results would vary based on the number of projects actually built. "Some uncertainty will exist until all projects are completed," the court stated, and it is up to FERC to deal with that uncertainty in the statutorily required comprehensive plan. The court suggested that FERC either could base cumulative impact studies on the assumption that all projects detailed in the plan eventually would be built or could prepare cumulative impact studies based on several different development scenarios. The alternatives posed by the court suggest that, in multiple development situations such as the Salmon River Basin, FERC may be required to have a comprehensive plan available at the preliminary permit stage in order to guide permittees in their assessment of cumulative impacts. The court's opinion also indicated that it views a comprehensive plan as an actual planning document that analyzes alternative paths of development for a river basin. Thus, the court implicitly rejected FERC's interpretation that the administrative record from each licensing decision constitutes a comprehensive plan.  

Overall, FERC "simply did not mention the extensive and uncon-
In an apparent victory for the intervenors' reform efforts, the court vacated the challenged permits and remanded them to FERC for further consideration of the intervenors' claims under the FPA.\textsuperscript{150} In a point crucial to the ultimate success of the intervenor's efforts, however, the court did not require that FERC adopt the National Wildlife Federation's proposals.\textsuperscript{151} The court held only that FERC's decision to reject these proposals was not supported by the record in the case.\textsuperscript{152}

B. Potential Significance of the Ninth Circuit Decisions

Although the court did not order specific FERC actions, the opinions in \textit{National Wildlife Federation} and \textit{Department of Fisheries} supported the intervenors' reform efforts in four respects. First, the court's discussion of comprehensive planning suggests a change in judicial interpretation of FERC's planning duties under section 10(a) of the FPA. Second, the court's discussion of the potential need for cumulative impact studies suggests that these studies, though not mentioned in the FPA, are one of the relevant factors FERC must consider in its permit and licensing decisions. Third, the court's focus on the function of the preliminary permit process in the federal hydropower licensing regime emphasizes the need for earlier consideration of environmental values in the licensing process. Finally, the opinions reveal the standard of review the court will apply to future challenges to FERC's preliminary permit decisionmaking.

1. Comprehensive Planning

Section 10(a) of the Federal Power Act requires that all hydropower projects licensed by FERC be "best adapted to a comprehensive plan for improving or developing a waterway."\textsuperscript{153} Prior to \textit{National Wildlife Federation}, the courts had interpreted the comprehensive plan requirement of section 10(a) of the FPA to require only a broad consideration of the factors comprising the "public interest" standard of section 4(e).\textsuperscript{154} Indeed, FERC's view is that it satisfies the comprehensive plan requirement of section 10(a) when it bases its licensing decisions on the complete administrative record before it in each proceeding.\textsuperscript{155}

\begin{footnotesize}
\begin{enumerate}
\item[149.] \textit{National Wildlife Fed'n}, 801 F.2d at 1512.
\item[150.] \textit{Id.} at 1513.
\item[151.] See \textit{id.}
\item[152.] \textit{Id.} at 1512.
\item[155.] See supra note 63 and accompanying text.
\end{enumerate}
\end{footnotesize}
The National Wildlife Federation court was the first court directly presented with the question whether FERC must prepare some type of planning document prior to issuing permits or licenses. Although the court did not order FERC to prepare a comprehensive plan, it did indicate that in certain instances "the Commission would abuse its discretion if it issued a preliminary permit without first developing a comprehensive plan" when required information could be obtained only by developing such a plan. The court also stated that the "Federal Power Act requires that a comprehensive plan for river basin development be available before licensing." These statements indicate that the court viewed a comprehensive plan as more than just the administrative record in a licensing proceeding. Instead, a plan should describe a rational outline for river basin development, and the Commission must prepare such a plan prior to issuing preliminary permits if the information needed for an informed licensing decision "cannot be obtained unless a comprehensive plan is first developed."

That conclusion is also supported by the court's rejection of FERC's assertion that uncertainty over how many projects eventually will be constructed makes cumulative impact studies unnecessary. The court reasoned that

[i]f the Commission had first prepared a comprehensive plan for hydropower development in the Salmon River Basin, establishing the optimal number, type, size and location of hydropower projects in the basin, cumulative impacts could be studied on the assumption that all projects detailed in the comprehensive plan eventually would be brought on line.

Not only does this passage reflect the court's view of a comprehensive plan as more than a complete administrative record, it also suggests the elements to be contained in such a plan—i.e. the optimal number, type, size, and location of hydropower projects in a river basin.

By interpreting section 10(a) of the Federal Power Act as contemplating the availability of a comprehensive planning document at some point in the licensing process, the Ninth Circuit's opinion lays the foundation for more active and stringent review of FERC's decisions to rely on the administrative record in lieu of preparing a comprehensive plan for river basin development.

156. Cole, supra note 154, at 665.
158. Id. at 1507-08.
159. Id. at 1509.
160. Id. at 1513.
161. Id.
2. Cumulative Impact Assessment

Another important aspect of the court's opinion was its acceptance of the intervenors' position that the FPA provides a statutory basis for requiring FERC to evaluate the cumulative impacts of multiple hydropower developments. The FPA does not specify cumulative impacts as one of the factors FERC must consider in its licensing decision. The court noted, however, that in some instances "the Commission would abuse its discretion [under the FPA] if it failed to require permittees to make [cumulative impact] studies or gather [cumulative impact] data." By adopting this position, the court indicated that the cumulative impacts of multiple hydropower developments are among the issues relevant to the public interest, which FERC must consider under section 4(e) of the FPA. Because the public interest factors of section 4(e) also comprise the elements to be considered in a comprehensive plan under section 10(a), the court's opinion indicates that comprehensive plans must include the cumulative impacts of multiple hydropower proposals in a river basin. Finally, finding a statutory basis in the FPA for cumulative impact assessment at the preliminary permit stage is especially important for environmental interests in light of the Ninth Circuit's earlier decision in *Sierra Club v. FERC.* In that case, the Ninth Circuit ruled that the requirement to prepare an environmental impact statement under the National Environmental Policy Act, which also mandates the evaluation of cumulative impacts, is not triggered by FERC's issu-

162. *Id.* at 1512.
163. 16 U.S.C. § 797(e) (1982); see infra note 300; see also supra note 61 and accompanying text.
164. *National Wildlife Fed'n*, 801 F.2d at 1509. The court suggested that information on cumulative environmental impact must be collected at the preliminary permit stage if the "cumulative impacts of potential projects can be determined only by requiring permittees to conduct studies or collect data necessary to evaluate such impacts." *Id.*
166. See id; see also Note, supra note 154, at 552-53 ("[C]ourts have insisted on a broader scope of 'considerations' [under section 10(a)] as a prerequisite to a license issued 'in the public interest.'").
167. FERC adopted the view that section 10(a) of the FPA provides a statutory basis for requiring an evaluation of the cumulative impacts of multiple hydropower proposals in its later preliminary permit decisions in the Salmon and Snohomish River Basins. See infra note 207 and accompanying text. Compare Lester Kelley, 25 F.E.R.C. ¶ 61,410 (1983) (denying cumulative impact assessment request based on section 10(a)) with Skykomish River Hydro, 39 F.E.R.C. ¶ 61,361 (1987) (acknowledging need to consider cumulative impacts under section 10(a) while denying specific cumulative impact study requests on other grounds).
HYDROPOWER PERMITTING

3. Earlier Consideration of Environmental Values

Traditionally, FERC has sought to defer evaluation of the environmental impacts of hydropower development until the licensing stage or, in some cases, until after licenses have been issued. Indeed, a congressional report noted that “[i]n more than one case, licenses were issued and concrete poured before fundamental concerns for instream flows, fish and wildlife protection, recreation, and energy conservation were even addressed.”

By focusing on the relationship between preliminary permits and license applications, the National Wildlife Federation opinion provides a foundation for earlier consideration of environmental values in the hydropower decisionmaking process. As the court noted, one of the statutory purposes of preliminary permits is to enable permittees to prepare acceptable license applications; thus, permittees must gather the information needed by the Commission to make an “informed judgment” on the license application pursuant to its duty to “consider all relevant facts.” The information required for the Commission to make this licensing decision determines the scope of information that preliminary permittees must obtain. Information on potential fishery impacts, for instance, must be gathered at the preliminary permit stage (prior to licensing) because the effect on fisheries is one of the relevant environmental factors FERC must consider in making an informed licensing decision.

Earlier consideration of environmental values also will lead to a better plan for river basin development—one that benefits both developers and the environment. Earlier consideration of environmental values can identify opportunities to alter a project’s site, design, or operation in order to mitigate adverse environmental effects. Early consideration of environmental values also can benefit project developers by guiding them to sites where development would have the least environmental impact, thus both increasing the acceptability of the project and reducing

171. *Sierra Club*, 754 F.2d at 1509.
176. *National Wildlife Fed’n*, 801 F.2d at 1512 n.16 (quoting *Yakima Indian Nation*, 746 F.2d at 472).
178. *See Proett, supra* note 1, at 92-95.
the potential costs of fending off challenges to the project or of altering the project design to mitigate adverse environmental impacts. Finally, earlier consideration of environmental impacts enhances the integrity of FERC decisionmaking by ensuring that licenses will be granted only after all the costs and benefits of a proposed project have been evaluated.

4. Standard of Review

In National Wildlife Federation, the Ninth Circuit relied on the substantial evidence standard of the FPA in vacating the permits and remanding the decisions to the Commission. Because FERC's decision to deny the petitioners' requests was "not supported by any evidence in the record," it was unnecessary for the court to rely on the more stringent "hard look" standard of review to remand the Commission's decisions. The court's opinion, however, clearly suggests both that it would apply a more stringent hard look review to FERC's preliminary permit decisionmaking on remand and that this standard should guide FERC's consideration of petitioners' requests.

The court's approval of a hard look standard of review follows from the standard of review applied in the cases it cited in National Wildlife Federation. The court cited Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. for the proposition that "[n]ormally, an agency rule [or decision] would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." In a footnote, the court then implied that the hard look standard applied to review of FERC actions in previous cases also would apply to subsequent review of FERC's preliminary permit decisions in the National Wildlife Federation case. Under the cases cited by the court, FERC "has an affirmative duty to inquire into and consider all relevant facts." The court further indi-

180. Id. at 1511.
181. Id.
185. E.g., Yakima Indian Nation, 746 F.2d 466.
186. National Wildlife Fed'n, 801 F.2d at 1512 n.16.
187. Id. (quoting Scenic Hudson, 354 F.2d at 620).
cated that judicial review of FERC's preliminary permit decisions will be based on a "'searching and careful' inquiry into the record to assure . . . that the agency has examined the relevant data and articulated a reasoned explanation for its action including a 'rational connection between the facts found [and] the choice made.'"\(^{188}\)

Although previous judicial review of other aspects of FERC decisionmaking had applied a hard look standard of review, application of that standard in the National Wildlife Federation context is significant in several respects. First, hard look review of FERC's preliminary permit decisions serves as a constraint on FERC's discretion.\(^{189}\) In National Wildlife Federation, FERC argued that preliminary permit issuance and conditions were committed to the Commission's discretion because the FPA does not enumerate any specific requirements for preliminary permit issuance.\(^{190}\) Although the hard look standard does not require FERC to place a specific condition in all preliminary permits, it does require FERC to base permit decisions on a rational analysis of the evidence in the administrative record\(^{191}\) and to link permit conditions with their statutory purpose of allowing permittees properly to prepare license applications.\(^{192}\)

Second, the prior cases applying hard look review to FERC license and permit decisions have involved the review of issues arising from a single development project.\(^{193}\) In National Wildlife Federation, the Ninth Circuit suggested that hard look review also will apply to FERC's decisions regarding review of multiple projects.\(^{194}\) Thus, a decision by the Commission to review multiple hydropower proposals either individually or on a coordinated basis would not rest entirely within the Commission's discretion but instead would be subject to this heightened standard of review.

Finally, the court's repeated reference to the hard look cases is important because it demonstrates that the court will not rely solely on the "substantial evidence" standard of the Federal Power Act\(^{195}\) when reviewing FERC's decisions on preliminary permits. Thus, even though FERC's later decisions may be justified under the "substantial evidence" standard, those decisions still may be challenged under the hard look doctrine on grounds of FERC's failure to consider "all relevant facts."\(^{196}\)

\(^{188}\) Id. (quoting Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1499 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984)).

\(^{189}\) For a discussion of the extent of FERC's discretion, see supra note 106.

\(^{190}\) See National Wildlife Fed'n, 801 F.2d at 1512 n.17.

\(^{191}\) See supra notes 186-88 and accompanying text.

\(^{192}\) See supra notes 186-88 and accompanying text.

\(^{193}\) See National Wildlife Fed'n, 801 F.2d at 1508.

\(^{194}\) See the cases cited supra note 183.

\(^{195}\) National Wildlife Fed'n, 801 F.2d at 1512.


\(^{196}\) National Wildlife Fed'n, 801 F.2d at 1512 n.16.
and to show a "rational connection between the facts found [and] the choice made."\[197\]

Aside from the precedent of previous cases reviewing FERC decisionmaking, the policy behind hard look review is also appropriate in the National Wildlife Federation decisionmaking context. As one commentator has observed, "a judicial hard look attempts to ensure that the agency decision reflects the public's interest and is in accordance with congressional will."\[198\] In National Wildlife Federation and Department of Fisheries, FERC entirely ignored the various expressions of public interest concerns put forth by petitioners.\[199\] FERC also ignored the intent of Congress that the Commission prepare comprehensive plans and consider the full range of public interest factors under the FPA.\[200\] Thus, hard look review is necessary to ensure that, in the future, FERC considers the public interest and congressional intent.

Though not fully adopting the intervening groups' arguments, the Ninth Circuit's decisions contained many elements supporting the groups' efforts to reform FERC's preliminary permit process. The court acknowledged the benefits of comprehensive planning and cumulative impact studies and recognized a statutory basis in the FPA permit and licensing framework for implementing these measures at the preliminary permit stage. As discussed in the next section, however, FERC's later permit decisions in the Salmon and Snohomish Basins failed to adopt the proposals for comprehensive planning and cumulative impact assessment.

IV
FERC'S RESPONSE TO THE NINTH CIRCUIT DECISIONS

After the Ninth Circuit's decision, FERC vacated the challenged permits pursuant to the court's order.\[201\] Almost all of the project applicants whose preliminary permits were vacated by the Ninth Circuit's order eventually abandoned their pursuit of the affected hydro developments.\[202\] FERC was still faced, however, with interpreting the Ninth Circuit's rulings in National Wildlife Federation and Department of Fisheries when later applicants proposed developments in the same river basins.\[203\] FERC's "boilerplate"\[204\] discussions in these later preliminary permit decisions demonstrate how the Commission has resisted
compliance with the Ninth Circuit opinions and, thereby, thwarted the efforts of the National Wildlife Federation and other intervening groups to reform the Commission's consideration of environmental information in its preliminary permit decisions.

A. FERC's Post-National Wildlife Federation Preliminary Permit Decisions

FERC first interpreted National Wildlife Federation and Department of Fisheries in its Skykomish River Hydro permit decision. In Skykomish River, the applicant proposed a project on Troublesome Creek within the Snoqualmie-Mt. Baker National Forest. Troublesome Creek is part of the Snohomish River Basin, the same basin where the projects for the permits challenged in Department of Fisheries were located.

In Skykomish River, FERC conceded that section 10(a)(1) of the Federal Power Act (the comprehensive planning requirement) requires the Commission to consider the cumulative environmental impacts of multiple hydroelectric development proposals for the same "stretches of waterway." As in National Wildlife Federation, the intervenors in the Skykomish River Hydro proceeding asked FERC to require preliminary permittees to collect data on potential cumulative impacts in order to have this information available to the Commission when it considered multiple development applications.

FERC responded with its own interpretation of the National Wildlife Federation and Department of Fisheries decisions. FERC summarized these cases as holding merely "that the Commission had not adequately explained its reasons for not adopting any of the measures requested [by the intervenors] to assess potential cumulative environment-

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204. See infra note 288 and accompanying text.
205. 39 F.E.R.C. ¶ 61,361 (1987). FERC recently affirmed its Skykomish River decision in Skykomish River Hydro, 42 F.E.R.C. ¶ 61,283 (1988) [hereinafter Skykomish River II]. In Skykomish River II, FERC dismissed the appeals from several delegated orders that relied on the original Skykomish River decision to issue preliminary permits in the Salmon and Snohomish River Basins. In Skykomish River II, the intervenors (National Marine Fisheries Service, Washington Departments of Fisheries and Wildlife, National Wildlife Federation, Idaho Wildlife Federation, and several Indian tribes) argued that these preliminary permit decisions were not responsive to the Ninth Circuit's directives in National Wildlife Federation and Department of Fisheries. FERC dismissed these appeals with the same arguments set forth in its original Skykomish River decision, noting that "[the intervenors'] arguments are without merit and reflect a misunderstanding of our [original] Skykomish order." 42 F.E.R.C. ¶ 61,283.
206. Id. app. A.
208. The intervenors were the National Marine Fisheries Service, the Tulalip Tribes of Washington, and the Washington Departments of Fisheries and Game. Id.
tal impacts.” FERC went on to explain that the Ninth Circuit opinions do not require FERC to order cumulative impact studies at the preliminary permit stage when the decision not to require such studies is “based upon stated reasons supported by the record of a particular proceeding.”

Consistent with the Ninth Circuit’s findings, the Commission acknowledged that the evidence in the record of the Department of Fisheries proceedings supported the need for cumulative impact studies prior to acting on development proposals in the Snohomish River Basin. FERC did not agree with the intervenors, however, that explicitly requiring cumulative impact studies at the preliminary permit stage was the “only appropriate method” for gathering the data required for licensing decisions.

Instead, FERC offered its agency consultation procedure as an alternative method to gather the data needed to assess cumulative impacts. The consultation procedure, which is required of all preliminary permittees, operates in three steps. First, prospective applicants must contact “all appropriate agencies” to provide them with detailed information on the proposed project, including environmental protection, mitigation, and enhancement plans. At the second stage, applicants perform all reasonable studies required by the consulted agencies and provide the results to the agencies for their review and comments. The third stage consists of providing copies of the development application to the consulted agencies. For projects of less than five megawatts, the applicant must provide such copies at the time of application. For a project of five megawatts or more, the applicant must provide copies once FERC informs the applicant that the application has been accepted for processing.

According to FERC, these consultation procedures are adequate to ensure that preliminary permittees gather the data on cumulative impacts needed for licensing decisions. Actually, these consultation requirements continue FERC’s traditional project-by-project evaluation
approach, ignoring the arguments presented by the intervening groups in National Wildlife Federation and Department of Fisheries for coordinating the review and evaluation of multiple hydropower projects in a single river basin.\textsuperscript{218}

Additionally, FERC rationalized its decision not to require cumulative impact studies through specific preliminary permit conditions by resurrecting arguments it raised before the Ninth Circuit in National Wildlife Federation and Department of Fisheries.\textsuperscript{219} Once again, FERC noted that the "number of proposed projects in a river basin" may change greatly between the preliminary permit and actual development stages.\textsuperscript{220} Therefore, FERC reasoned, studies required under a preliminary permit might not be useful in evaluating later license applications if the number of proposed projects has changed. In response to the Ninth Circuit opinion, FERC supported its argument with a factual record using filing statistics from 1980-83. That record showed that of 3,835 total permit applications, only 2,049 permits were issued, resulting in only 272 actual licenses or exemptions being issued by the Commission.\textsuperscript{221}

FERC also argued that specifically requiring in the permit that the applicant undertake cumulative impact studies might lead to "large expenditures prior to a permittee's general decision regarding project feasibility."\textsuperscript{222} This time the Commission noted that "studies necessary to assess cumulative impacts . . . increased the overall study costs for a proposed 12-megawatt project by $36,000."\textsuperscript{223} FERC concluded that the revised agency consultation procedures would protect "permittees from incurring unnecessary expenses in the early stages of a permit without reducing the ultimate burden on potential development applicants to conduct the studies needed for the Commission to make an informed decision on projects proposed for development."\textsuperscript{224} FERC then denied the intervenors' request to require the permittee to gather data on potential cumulative impacts and issued a preliminary permit to Skykomish River Hydro.\textsuperscript{225}

**B. Analysis of FERC's Skykomish River Decision**

In Skykomish River, FERC claimed to be addressing the Ninth Circuit's concerns that the Commission adequately consider the intervening groups' proposals to reform the preliminary permit process. A comparison of FERC's decision with the Ninth Circuit's opinions, however,
shows that FERC gave a narrow reading to the Ninth Circuit's ruling and that the Commission again failed to justify its decision not to require cumulative impact studies when issuing preliminary permits for projects in river basins with multiple development proposals. This narrow construction of the Ninth Circuit's opinions and inadequate justification of the Commission's decision led FERC once again to reject the intervening groups' reform measures.

1. Standard of Review

The flawed reasoning of FERC's Skykomish River decision begins with the Commission's oversimplified interpretation of what the Ninth Circuit found lacking in FERC's prior permit decisions. Apparently, FERC believes that its only shortcoming in the National Wildlife Federation and Department of Fisheries cases was its failure to "articulate reasons for whatever decisions are made."\(^{226}\) This interpretation implies that clearly stated reasons will be enough to justify any FERC decision and ignores the requirements of the hard look review implicitly called for in National Wildlife Federation.\(^{227}\) Under the hard look standard, FERC must support its decisions with a cogent rationale strong enough to withstand later judicial review.\(^{228}\)

This initial oversimplification of the Ninth Circuit's holding in National Wildlife Federation weakens the rest of FERC's analysis in Skykomish River. Because the Commission fails to appreciate the need for an explicit and systematic justification for its decisions, FERC supported its Skykomish River decision with the same series of bland generalizations that the Ninth Circuit rejected when, in National Wildlife Federation and Department of Fisheries, it vacated the earlier permits and called for more detailed analysis.

2. Comprehensive Planning

FERC's Skykomish River decision ignored the comprehensive planning issues raised by the court in National Wildlife Federation.\(^{229}\) Although the intervenors in Skykomish River did not request the Commission to prepare a comprehensive plan for the Snohomish River Basin, the Ninth Circuit's opinions in National Wildlife Federation and Department of Fisheries nevertheless indicate that FERC was required to consider this issue under the Federal Power Act.

In National Wildlife Federation, the court noted that the FPA "requires the Commission to measure proposed projects against a compre-

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226. Id.
227. See supra text accompanying notes 180-200.
228. See National Wildlife Fed'n v. FERC, 801 F.2d 1505, 1512 & n.16 (9th Cir. 1986).
229. See supra notes 153-61 and accompanying text.
hensive plan.” The court also reasoned that, in certain instances, the Commission might “abuse its discretion if it issued a preliminary permit without first developing a comprehensive plan.” The court acknowledged, moreover, that the uncontested evidence in *Department of Fisheries* suggested that the Snohomish River Basin, because of its ecological values and multiple hydropower proposals, was one area where permittees could not gather the information needed by the Commission for an informed licensing decision unless the Commission were to prepare a comprehensive plan prior to issuing preliminary permits.

In light of the court’s reasoning in *National Wildlife Federation* and *Department of Fisheries*, the development of a comprehensive plan is one of the relevant issues that FERC has “an affirmative duty to inquire into and consider” prior to issuing preliminary permits in the Snohomish River Basin. Instead, the Commission simply ignored the issue. Even assuming that the Commission’s duty to consider the comprehensive plan issue in *Skykomish River* is arguable because it was not raised by the intervenors, FERC also ignored the issue in later preliminary permit decisions when intervenors specifically requested the preparation of a comprehensive plan. FERC’s avoidance of the comprehensive planning issue indicates a clear disregard of the Ninth Circuit’s opinions emphasizing the importance of comprehensive plans in the FPA permit and licensing process.

3. Cumulative Impact Assessment

Whereas FERC simply ignored the comprehensive planning issue in its *Skykomish River* decision, it rejected the intervenors’ requests for cumulative impact assessment by reasserting the same three arguments that the Ninth Circuit rejected in *National Wildlife Federation* and *Department of Fisheries*. FERC’s *Skykomish River* arguments focused on (1) the sufficiency of its standard preliminary permit procedures to gather cumulative impact data, (2) the questionable utility of cumulative impact studies because of uncertainty over how many projects eventually would be constructed, and (3) the potential cost to permittees of requiring cumulative impact assessment at the preliminary permit stage.

231. *Id.* at 1509.
232. Washington State Dep’t of Fisheries v. FERC, 801 F.2d 1516, 1518 n.2 (9th Cir. 1986).
233. *National Wildlife Fed’n*, 801 F.2d at 1512 n.16 (quoting Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 472 (9th Cir. 1984)).
234. Western Power, Inc., 42 F.E.R.C. ¶ 62,042 (1988). FERC finally did address the comprehensive planning issue in *Skykomish River II*, 42 F.E.R.C. ¶ 61,283 (1988). The Commission, however, merely reiterated its view that the *National Wildlife Federation* court did not explicitly require FERC to prepare a comprehensive plan. *Id.* FERC also restated its traditional position that the complete administrative record in each license proceeding is an adequate substitute for a comprehensive plan. *Id.; see supra* note 63 and accompanying text.
FERC first argued in *Skykomish River* that its standard procedure concerning preliminary permit articles and consultation regulations "provides the necessary procedures" for acquiring cumulative impact data.\(^\text{235}\) Thus, in *Skykomish River*, FERC again refused to discuss explicitly whether those standard procedures, which review projects case-by-case, properly evaluate cumulative impacts in a complex river basin where numerous development proposals may have multiplicative or synergistic environmental effects.\(^\text{236}\) The consulted agencies, by contrast, generally recognize that FERC's consultation procedures provide an inadequate method to ensure the gathering of data needed to assess cumulative impacts.\(^\text{237}\)

FERC's failure to address these issues in *Skykomish River* is especially problematic because the record in *Department of Fisheries* clearly demonstrated the need for some type of consolidated review and coordinated study of all development proposals in the Snohomish River Basin.\(^\text{238}\) For instance, one National Marine Fisheries Service biologist stated that NMFS could not satisfy its statutory obligations to comment on development proposals if "preliminary permits are issued on a staggered, case-by-case basis."\(^\text{239}\) The Washington State Departments of Fisheries and Game also submitted a detailed proposal explaining "why useful consultation would be severely hampered unless the Commission coordinated further proceedings and studies before issuing preliminary permits."\(^\text{240}\)

Next, as in *National Wildlife Federation*, FERC rationalized its decision not to require cumulative impact studies by pointing to the high cost of such studies and the high attrition rate from the preliminary permit stage to the licensing stage.\(^\text{241}\) The court in *National Wildlife Federation* refused to consider these arguments in the absence of specific information as to how much costs would increase and how many projects would be abandoned in the river basin at issue.\(^\text{242}\) The *Skykomish River* decision does add some general information on the potential cost of cumulative impact studies and the general attrition rate for hydropower projects.\(^\text{243}\) None of this information, however, is specific enough to

\(^{236}\) *Department of Fisheries*, 801 F.2d at 1518 n.2.
\(^{237}\) *Small Hydro Hearings*, *supra* note 1, at 7 (letter from William R. Wilkerson, Director, Wash. State Dep't of Fisheries); *id.* at 349 (letter from G. Ray Arnett, Assistant Secretary for Fish & Wildlife & Parks, Dep't of the Interior, regarding problems with FERC hydro-power regulation); *Bodi & Erdheim*, *supra* note 24, at 33-36 (describing inadequacies of FERC's agency consultation procedures).
\(^{238}\) *Department of Fisheries*, 801 F.2d at 1518.
\(^{239}\) *Id.* at 1518 n.2.
\(^{240}\) *Id.* at 1519 n.4.
\(^{242}\) See *National Wildlife Fed'n*, 801 F.2d at 1513.
meet the requirements of the Ninth Circuit.

FERC entirely failed to address the Ninth Circuit’s view that the Commission’s general experience with preliminary permits is inapplicable to multiple hydropower proposals in ecologically sensitive and complex areas such as the Salmon and Snohomish River Basins.244 For instance, FERC noted that the costs of cumulative impact studies for a 12-megawatt hydro project might increase overall study costs for the project by $36,000.245 Yet FERC did not explain how much cumulative impact studies might increase study costs for the Troublesome Creek project considered in Skykomish River, nor did the Commission explain what proportion of the total project cost $36,000 represents.246

The aggregate attrition data presented by FERC in Skykomish River also fail to respond to the Ninth Circuit’s ruling that attrition figures must show how many projects will in fact be abandoned in a particular basin and for what reasons.247 For example, in Skykomish River, FERC did not discuss the reasons for the high rate of attrition. This omission occurred despite the Ninth Circuit’s explicit recognition in National Wildlife Federation that “abandonment for reasons which would surface before the studies were conducted, for example, would impose no burden on the permittee”248 and, therefore, could not support FERC’s refusal to require coordinated cumulative impact studies.

In Skykomish River, FERC once more advanced the argument that the “if the number of proposed projects in a river basin changes greatly from the permit stage to the development stage, any studies that [the Commission] may have required under a permit to evaluate cumulative impacts may not be useful in assessing subsequent development applications.”249 As the Ninth Circuit noted, however, FERC must deal with this uncertainty because “[s]ome uncertainty will exist until all projects are completed.”250 Nevertheless, FERC did not address specifically any of the alternatives raised by the court for dealing with this uncertainty.251 For instance, if FERC initially had prepared a comprehensive plan for hydroelectric development in the Snohomish River Basin (as contemplated by the FPA), then cumulative impacts could be evaluated “on the assumption that all projects detailed in the comprehensive plan eventu-

244. See National Wildlife Fed’n, 801 F.2d at 1512.
246. For instance, if $36,000 represents only a 10% to 20% addition to overall study costs, FERC’s argument would be weaker than if the $36,000 increase represented a 50% or greater increase in overall study costs.
247. See National Wildlife Fed’n, 801 F.2d at 1513.
248. Id.
251. See supra notes 144-48 and accompanying text.
ally would be brought on line.” 252 FERC also could require permittees to conduct cumulative impact studies based on a variety of other development assumptions. 253

Finally, FERC expressly avoided the Ninth Circuit’s requirement from *National Wildlife Federation* that the Commission balance the costs and benefits of requiring coordinated cumulative impact assessment studies from all permittees. 254 FERC stated that its agency consultation procedure “protects permittees from incurring unnecessary expenses in the early stages of a permit without reducing the ultimate burden on potential development applicants to conduct the studies needed for the Commission to make an informed decision on projects proposed for development.” 255 By focusing only on protecting permittees and satisfying FERC’s needs, however, this argument fails to balance costs imposed on the consulting agencies through FERC’s project-by-project environmental consulting approach. A balancing of just these types of costs and benefits clearly was contemplated by the Ninth Circuit in *National Wildlife Federation*, 256 and it has been suggested by the Supreme Court in a similar context. 257

In summary, FERC’s *Skykomish River* decision simply reasserts the Commission’s previous arguments regarding cumulative impact study requirements at the preliminary permit stage. FERC’s three main arguments all were reviewed and rejected by the Ninth Circuit as inadequately supported in *National Wildlife Federation*. Instead of addressing the issues and shortcomings raised by the Ninth Circuit, however, FERC simply reaffirmed its previous decisions with a little added gloss.

Given the opportunity to reevaluate and improve on its preliminary permit decisions for the Salmon and Snohomish River Basins, FERC instead chose to ignore the Ninth Circuit’s criticisms. In so doing, FERC also thwarted the efforts of the intervening groups to reform the Commission’s consideration of environmental information in preliminary permit decisions. FERC’s *Skykomish River* decision reads much like the originally challenged permit decisions, and the results are identical: no comprehensive plan, no coordinated review of cumulative impacts, and

253. Id.
254. Id.
256. 801 F.2d at 1513.
257. See *Udall v. FPC*, 387 U.S. 428, 450 (1967). In *Udall*, the majority held that: The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee... The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the ‘public interest’... .

*Id.*
no requirement for permittees to collect data on cumulative impacts. The next section evaluates why the efforts of the intervening groups failed to reform FERC's consideration of environmental values in its preliminary permit procedures, despite the groups' apparent victory in the Ninth Circuit.

V

NATIONAL WILDLIFE FEDERATION'S FAILURE TO REFORM FERC'S CONSIDERATION OF ENVIRONMENTAL INFORMATION

The reform approach of the petitioners in National Wildlife Federation and Department of Fisheries failed for two reasons. First and foremost is FERC's traditional response to demands for environmental policy considerations in the Commission's hydropower program. As the following discussion indicates, FERC historically has sought to ignore or minimize its duties to consider environmental information in its hydropower decisionmaking. The second reason for failure is the inherent limitation of judicial review as a tool to reform FERC's consideration of environmental information. These two reasons demonstrate the need for legislative reforms explicitly requiring the comprehensive planning and cumulative environmental impact assessment sought by the intervenors.

A. FERC's Historical Response to Environmental Policy Demands

In the National Wildlife Federation and Skykomish River preliminary permit proceedings, the intervening groups attempted to ensure adequate consideration of environmental factors in FERC's preliminary permit decisionmaking. FERC's response of resisting these requests, despite the Ninth Circuit's decisions, represents more than simple bureaucratic inertia. The Commission has a long history of resisting new environmental policy demands placed on it by judicial decisions or statutory directives.

Indeed, the Ninth Circuit alluded to this pattern of FERC response when it noted the similarity of the issues presented in the National Wildlife Federation litigation and in the Commission's inadequate consideration of environmental impact issues twenty years earlier in Udall v. FPC. In Udall, the Supreme Court vacated the Commission's issuance of a license to construct a hydroelectric dam on the Snake River one mile upstream from its confluence with the Salmon River. The Court found that the Commission failed to explore "all issues relevant to

258. See supra text accompanying notes 21-29.
261. Id. at 451.
the 'public interest' in its license decision. Specifically, the Commission failed to consider the effects of the project on anadromous fish and whether the region would need or be able to use the power to be produced by the project.

Other cases also demonstrate FERC's historical pattern of deferring, minimizing, or resisting the consideration of environmental factors in its decisionmaking. In Scenic Hudson Preservation Conference v. FPC, for example, the Second Circuit vacated a license issued by the Commission for the Storm King hydroelectric project on the Hudson River. The Scenic Hudson court held that the Commission's licensing determination violated the Federal Power Act by failing to consider the environmental impacts of, and alternatives to, the proposed project. More recently, in Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, the Ninth Circuit held that, under the Federal Power Act, FERC could not defer the consideration of fishery issues until after its relicensing of the Rock Island Dam on the Columbia River. Finally, in Escondido Mutual Water Company v. La Jolla Band of Mission Indians, the Supreme Court held that the Federal Power Act does not allow FERC to reject conditions that the Secretary of the Interior has specified in order to utilize and protect federal land resources.

FERC's historical response of resisting environmental considerations also has been recognized by Congress, fish and wildlife agencies, and commentators. Congress noted the Commission's inadequate consideration of environmental values when it amended the

262. Id. at 450.
263. Id.
264. See, e.g., The Steamboaters v. FERC, 759 F.2d 1382, 1392 (9th Cir.) (FERC "inexplicably" failed in its obligations to prepare an Environmental Assessment before issuing a licensing exemption to a small hydropower project on Oregon's North Umpqua River), reh'g denied, 777 F.2d 1384 (9th Cir. 1985); Tulalip Tribes of Wash. v. FERC, 732 F.2d 1451, 1455 (9th Cir. 1984) (invalidating as contrary to congressional intent FERC's 1982 final rule allowing some new dam projects to be included in licensing exemptions to the Federal Power Act).
266. Id. at 625.
267. Id. at 612.
270. See, e.g., Small Hydro Hearings, supra note 1, at 4 (letter from William R. Wilkerson, Director, Wash. State Dep't of Fisheries); id. at 342-51 (letter from G. Ray Arnett, Assistant Secretary for Fish & Wildlife & Parks, Dep't of the Interior, regarding problems with FERC hydropower program).
271. E.g., Blumm, supra note 1, at 3; Bodi & Erdheim, supra note 24, at 12; Proett, supra note 1, at 80.
Federal Power Act in 1986\textsuperscript{274} to change and improve FERC’s evaluation of environmental factors in its hydroelectric program.\textsuperscript{275} The House report on the Electric Consumers Protection Act observed that “[m]ore often than not . . . [the Commission’s licensing procedures] have resulted in non-power resources being treated as secondary concerns. Cumulative impacts of several projects on a waterway are too often ignored.”\textsuperscript{276}

FERC’s failure to respond to the issues raised in \textit{National Wildlife Federation} and \textit{Department of Fisheries} is symptomatic of the Commission’s traditional response to environmental policy demands. The factors underlying the Commission’s resistance to these demands indicate that FERC is both unwilling and unable to gather and evaluate the information needed to consider adequately the \textit{National Wildlife Federation} petitioners’ proposals for comprehensive planning and cumulative impact assessment.

Underlying FERC’s longstanding resistance to environmental considerations is the Commission’s orientation toward development values and its limited budget and personnel. The Commission’s programs focus primarily on the regulation and promotion of hydropower development and other energy concerns.\textsuperscript{277} FERC does not have the same organizational interest in and commitment to environmental resource values as, for instance, the state and federal fish and wildlife agencies that so often are at odds with FERC.\textsuperscript{278} One precondition of successful policy implementation is assignment of a program to an agency committed to that program’s implementation.\textsuperscript{279} FERC’s focus on development suggests that the Commission will find it difficult to strike the balance Congress desired between hydropower and environmental values.

FERC’s response to the Ninth Circuit’s opinions is also a function of the Commission’s limited resources. The sudden growth in hydropower development applications in the early 1980’s\textsuperscript{280} overwhelmed

\textsuperscript{275} H.R. CONF. REP. No. 934, supra note 271, at 21, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 2537-38 (“The provisions are adopted with a view of not merely codifying existing practice at [FERC] under these sections, but to change and improve it.”).
\textsuperscript{276} H.R. REP. No. 507, supra note 173, at 10, 17, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 2497, 2504.
\textsuperscript{277} In addition to its hydropower licensing responsibilities, FERC is responsible for setting rates and charges for the transportation and sale of natural gas, for the transmission and sale of electricity, for the transportation of oil by pipeline, and also for the valuation of these pipelines. Office of the Fed. Register, \textit{U.S. Government Manual} 278 (1987).
\textsuperscript{278} See, e.g., Washington State Dep’t of Fisheries v. FERC, 801 F.2d 1516 (9th Cir. 1986); \textit{Small Hydro Hearings}, supra note 1, at 342-51 (letter from G. Ray Arnett, Assistant Secretary for Fish & Wildlife & Parks, Dep’t of the Interior).
\textsuperscript{280} FERC received only four preliminary permit applications for small hydro projects in
FERC's environmental staff. The thirty-five environmental specialists on FERC's staff are responsible for reviewing all the environmental information in the hundreds of development applications submitted to the Commission each year. Given its limited budget and environmental staff, FERC attempts to minimize its duties to gather environmental information and to oversee the hydroelectric development process.

Two aspects of FERC's preliminary permit decisionmaking in the Salmon and Snohomish River Basins demonstrate this response. First, FERC's agency consultation procedures, described in Skykomish River, place the burden on permittees to consult with the appropriate agencies regarding the studies needed to evaluate the environmental impacts of proposed developments. FERC reviews agency comments that have been filtered through the permittees and retains the authority to veto any studies required by the consulted agencies. FERC's failure to consult directly with the agencies arguably violates its duties under the Fish and Wildlife Coordination Act. More importantly, the filtering of environmental information through the permittees, coupled with FERC's authority to veto study requirements, limits the amount and quality of environmental information evaluated by the Commission. Second, the Commission's boilerplate discussions in a wide variety of preliminary permit decisions in the Salmon and Snohomish Basins illustrate the...
Commission's attempts to minimize the project-specific environmental information required for each permit determination. 289

The limited flow of environmental information into the Commission's decisionmaking process has two major shortcomings. First, it leads FERC to minimize or ignore the nonpower values it is required to consider under the Federal Power Act and other statutes. 290 This response further impairs the Commission's ability to obtain the resources and staff needed to fulfill its statutory duties, because FERC's reluctant implementation of its environmental responsibilities reinforces congressional desire to withdraw funds, staff, and authority from the Commission. 291 Second, the limited flow of information prevents the Commission from obtaining and considering the information necessary for an adequate balancing of the competing public interest values under the Federal Power Act. 292 Minimizing the inflow of environmental information also prevents the Commission from being receptive to information and techniques that might improve agency decisionmaking and make FERC better able to comply with congressional and judicial directives, as well as the concerns of hydropower developers, environmental organizations, and state and federal resource agencies.

In sum, FERC's response in Skykomish River to the National Wildlife Federation decision is representative of FERC's historical response of resisting new environmental policy demands. Underlying this resistance are the Commission's development orientation and its limited resources. These factors combine to reduce the flow of environmental information into the Commission's decisionmaking, which in turn reinforces FERC's traditional resistance to environmental policy considerations.

289. Even though agencies traditionally attempt to minimize constraints on the exercise of their discretion, FERC's continued use of boilerplate language in the Salmon and Snohomish River Basins is noteworthy for two reasons. First, the National Wildlife Federation court expressed disapproval of the practice. 801 F.2d 1505, 1512 (9th Cir. 1986). Second, using the identical reasoning in such a broad range of preliminary permit situations fails to respond to the Ninth Circuit's suggestion that project-specific information is required to consider adequately petitioners' requests for comprehensive planning and cumulative impact assessment. 801 F.2d at 1513. See supra notes 241-49 and accompanying text.


291. See, e.g., Small Hydro Hearings, supra note 1, at 178-80. Representative Swift, responding to FERC chairman O'Connor's refusal to admit that even 1,000 preliminary applications in a single river basin might trigger the need for a cumulative impact assessment, stated:

It seems to me that if you don't have the resources, there are two possibilities. One is to give you more resources, and, after your answer, I don't think we want to do that. The other one is to give that responsibility to somebody else and we will consider that.

Id. at 179-80.

292. See National Wildlife Fed'n, 801 F.2d at 1513.
B. Judicial Review of FERC's Decisionmaking

FERC's response in *Skykomish River*, as well as its history of resistance to environmental policy demands in the face of several adverse judicial decisions, indicates that judicial review may be largely ineffective in reforming FERC's consideration of environmental values. FERC's *Skykomish River* decision interpreting *National Wildlife Federation* emphasizes the limits of judicial review in reforming FERC's decisionmaking. These limits stem from the general principles governing judicial review of decisions by administrative agencies.

Despite the Ninth Circuit's disapproval of FERC's preliminary permit decisions in *National Wildlife Federation*, the court refrained from specifying the exact procedures FERC should follow on remand to ensure adequate consideration of the intervenors' requests. This restraint is consistent with the principle of administrative law that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Thus, a reviewing court can specify factors for the Commission to consider and can determine whether the consideration of the relevant factors is adequate. But a reviewing court cannot instruct the Commission how to make its evaluation in the first instance.

The *National Wildlife Federation* court's restraint in not specifying procedures for the Commission to employ on remand is also consistent with the principle that when, as in *National Wildlife Federation*, the agency "has not considered all relevant factors," the proper course is "to remand [the decisions] to the agency for additional investigation or explanation. The reviewing court generally is not empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Finally, the *National Wildlife Federation* court was limited by the familiar rule that the reviewing court may not "substitute its judgment for that of the [administrative] agency."

The result of the application of these principles in *National Wildlife Federation* is that it is up to FERC in the first instance to come forward with a decision and analysis that adequately considers the comprehensive planning and cumulative impact issues raised by the Ninth Circuit. When interpreting *National Wildlife Federation* in *Skykomish River*, FERC fully exploited this deference to administrative initiative by using

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293. *See supra* notes 258-70 and accompanying text.
294. *See supra* notes 126-52 and accompanying text.
its discretion to reject the intervenors’ requests for cumulative impact assessment. Because the Ninth Circuit properly did not order the Commission to follow any specific approach in responding to the intervenors’ requests, the Commission in Skykomish River simply reasserted its previous arguments without supporting them with the level of information and analysis that the Ninth Circuit clearly suggested was necessary to support FERC’s determination.299

FERC’s inadequate response to National Wildlife Federation, together with the Commission’s historical response of resisting environmental policy demands, indicates that when the Commission’s interpretation and response is deeply entrenched in a history of noncompliance and an orientation favoring development values over environmental values, judicial review alone will be insufficient to bring about fundamental change in the Commission’s decisionmaking procedures. These factors in turn suggest that legislative reforms are necessary to improve FERC’s consideration of environmental values in the preliminary permit process.

C. Legislative Reforms

Although the recent Electric Consumers Protection Act (ECPA) amendments to the FPA specify additional environmental factors for FERC to consider when issuing a license,300 the ECPA amendments are silent as to the environmental considerations to be evaluated at the preliminary permit stage. Thus, the ECPA amendments do not address the preliminary permit issues raised in National Wildlife Federation and Department of Fisheries. The Ninth Circuit opinions in those cases emphasize the importance of the preliminary permit in FERC’s hydropower licensing scheme301 and the value of gathering and considering environmental information early in the hydropower decisionmaking process.302 These factors indicate that the ECPA reforms may not be completely

299. See supra text accompanying notes 226-57.
300. The Federal Power Act, as amended, provides:
   In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.
   16 U.S.C. § 797(e) (Supp. IV 1986). See id. § 803(a)(1) (comprehensive plan factors include “adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)”; id. § 803(a)(2)(A) (to “ensure that the project adopted will be best adopted to the comprehensive plan,” FERC must consider comprehensive plans developed by federal or state agencies for “improving, developing, or conserving a waterway or waterways affected by the project”).
301. National Wildlife Fed’n, 801 F.2d at 1508-09, 1514; Department of Fisheries, 801 F.2d at 1517. See supra notes 128-39 and accompanying text.
302. See supra text accompanying notes 172-79.
effective in improving FERC's consideration of environmental values unless the information needed to consider and evaluate these values is gathered at the preliminary permit stage.\(^{303}\)

As National Wildlife Federation and Department of Fisheries suggest, FERC's consideration of environmental values at the preliminary permit stage could be improved by preparation of a comprehensive plan for river basin development\(^{304}\) and by gathering the information needed to evaluate cumulative environmental impacts.\(^{305}\) Additional legislative reforms of FERC's decisionmaking procedures, therefore, should include an explicit requirement for FERC to prepare a comprehensive planning document for river basins in which multiple hydropower developments are proposed. This plan should evaluate the various developmental and environmental considerations outlined by the ECPA amendments\(^{306}\) and should establish the "optimal number, type, size, and location of hydropower projects in the [river] basin."\(^{307}\) An explicit planning requirement, including a list of elements to be evaluated and procedures to be followed, is necessary because FERC's past and current practice indicate that the Commission does not view the current comprehensive plan requirement to impose such a duty.\(^{308}\) Moreover, even if a court were to require FERC to prepare a comprehensive plan under the FPA prior to licensing, the Act's current comprehensive plan requirement is phrased in general terms that would leave much of the content and planning procedures up to FERC's discretion.\(^{309}\) Thus, explicit statutory requirements are needed to constrain the Commission's discretion and to ensure consideration of environmental values.\(^{310}\)

\(^{303}\) See Proett, supra note 1, at 134 n.311 (noting that the ECPA reform "does little to modify FERC's existing decisionmaking procedures").

\(^{304}\) National Wildlife Fed'n, 801 F.2d at 1510 n.11, 1513; Department of Fisheries, 801 F.2d at 1517. See supra notes 153-61 and accompanying text.

\(^{305}\) National Wildlife Fed'n, 801 F.2d at 1510 n.12, 1513; Department of Fisheries, 801 F.2d at 1518 & n.2, 1519 n.4. See supra notes 162-71 and accompanying text.

\(^{306}\) See supra note 300.

\(^{307}\) National Wildlife Fed'n, 801 F.2d at 1513. The court indicated that had a comprehensive plan been prepared, including this information, "cumulative impacts could be studied on the assumption that all projects detailed in the comprehensive plan would be brought on line." Id.

\(^{308}\) See supra note 63 and accompanying text.

\(^{309}\) Cole, supra note 154, at 667.

\(^{310}\) There is precedent for Congress imposing specific statutory planning requirements. One example is the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (1982). The Northwest Power Act requires the Pacific Northwest Electric Power and Conservation Planning Council, an interstate compact organization created by the Act, to develop a conservation and energy plan for the Pacific Northwest, id. § 839b(d)(1), and to develop a fish and wildlife conservation program for the Columbia River and its tributaries, id. § 839b(h)(1)(A). See National Wildlife Fed'n, 801 F.2d at 1507 n.5, 1513 n.19.

Another example of Congress imposing specific planning requirements is the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) This Act requires the U.S. Forest Service to prepare land and resource management plans for the national forests and specifies the standards and elements to
With the ECPA amendments that sought to increase the consideration FERC gives to state and federal fish and wildlife agencies, Congress acknowledged FERC's failure to consider adequately the input of these agencies and their expertise in fish and wildlife issues. Given the expertise of these agencies and FERC's limited environmental staff, increased FERC deference to these agencies in the preliminary permit process would improve the gathering of information needed to evaluate the cumulative impacts of multiple hydropower developments.

Specifically, the preliminary permit consultation procedures should be revised to require FERC to defer to determinations by the state and federal fish and wildlife agencies of the studies required of permittees. FERC should be allowed to veto such study requirements only if the Commission can show that the studies would be unduly burdensome or duplicative for the permittee or that the studies probably would not lead to information useful in making the licensing determination. Additionally, the consulted agencies must be given adequate time to consider and respond to the results of these studies.

Although these revised consultation requirements may increase the study burden for individual project applicants, FERC could reduce this burden through improved comprehensive planning efforts. By outlining alternative development scenarios, FERC would allow permittees and consulted agencies to determine how an individual project fits into the overall plan for river basin development and, thus, to determine the studies necessary to assess the individual and cumulative environmental impacts of the project.

CONCLUSION

In National Wildlife Federation and Department of Fisheries, several intervening groups attempted to improve FERC's evaluation of the potential cumulative environmental impacts of multiple hydropower developments in the Salmon and Snohomish River Basins. These groups asked the court to find that, under the Federal Power Act, FERC had a duty to prepare a comprehensive plan for these river basins prior to issuance of permits. The court directed FERC to incorporate these plans into its permitting process.


312. See supra notes 281-82 and accompanying text.

313. Presently, the consulted agencies are allowed only 30 or 60 days, depending on project size, to respond to study results contained in draft license applications. 18 C.F.R. § 4.38(b)(2)(ii)(A)-(B) (1987). See Small Hydro Hearings, supra note 1, at 6-7 (letter from William R. Wilkerson, Director, Wash. State Dep't of Fisheries, noting inadequacy of FERC-imposed response times); id. at 69-70 (letter from Raymond J. O'Connor, Chair of FERC, discussing agency response times for draft license applications).

314. See National Wildlife Fed'n, 801 F.2d at 1513.
ing preliminary permits and to require permittees to gather the data needed to assess cumulative impacts. Although the Ninth Circuit did not grant all of the intervenors' requests, the court did remand the preliminary permit decisions to the Commission for a more detailed consideration and evaluation of the merits of the intervenors' proposals.

Despite the Ninth Circuit's criticism of FERC's decisions and the wealth of evidence presented to the agency supporting the intervenors' proposals for cumulative impact assessment, FERC's later preliminary permit decisions in these river basins reveal only the smallest incremental change in the Commission's evaluation of the requests for coordinated review and cumulative impact analysis. FERC's refusal to evaluate these requests carefully is but one example of the Commission's historical failure to obtain, consider, and include sufficient environmental information in its hydropower decisionmaking. FERC's continued refusal to evaluate any of the intervening groups' requests, even after the Ninth Circuit's rebuke, also illustrates the limited potential for judicial review to improve the Commission's preliminary permit decisionmaking.

FERC's history of ignoring new environmental policy demands suggests that, in addition to litigation, explicit statutory reforms are needed to improve the Commission's evaluation of environmental information. For FERC's preliminary permit decisionmaking, the legislative reforms suggested in this Note include specific requirements that FERC engage in comprehensive planning and that the Commission be more responsive to the determinations of state and federal agencies charged with protecting environmental values. These reforms are necessary to improve FERC's hydropower decisionmaking so that it more closely conforms with congressional intent, judicial interpretation, and the public interest in well-planned hydropower development and in conservation of natural river values.