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CALIFORNIA LEGISLATURE

ASSEMBLY COMMITTEE

ON

NATURAL RESOURCES

ASSEMBLY MEMBER BYRON D. SHER, CHAIRPERSON

Hearing on

REGULATION OF HYDROELECTRIC DEVELOPMENT IN CALIFORNIA: IMPACT OF RECENT FEDERAL LEGISLATION AND PENDING LITIGATION

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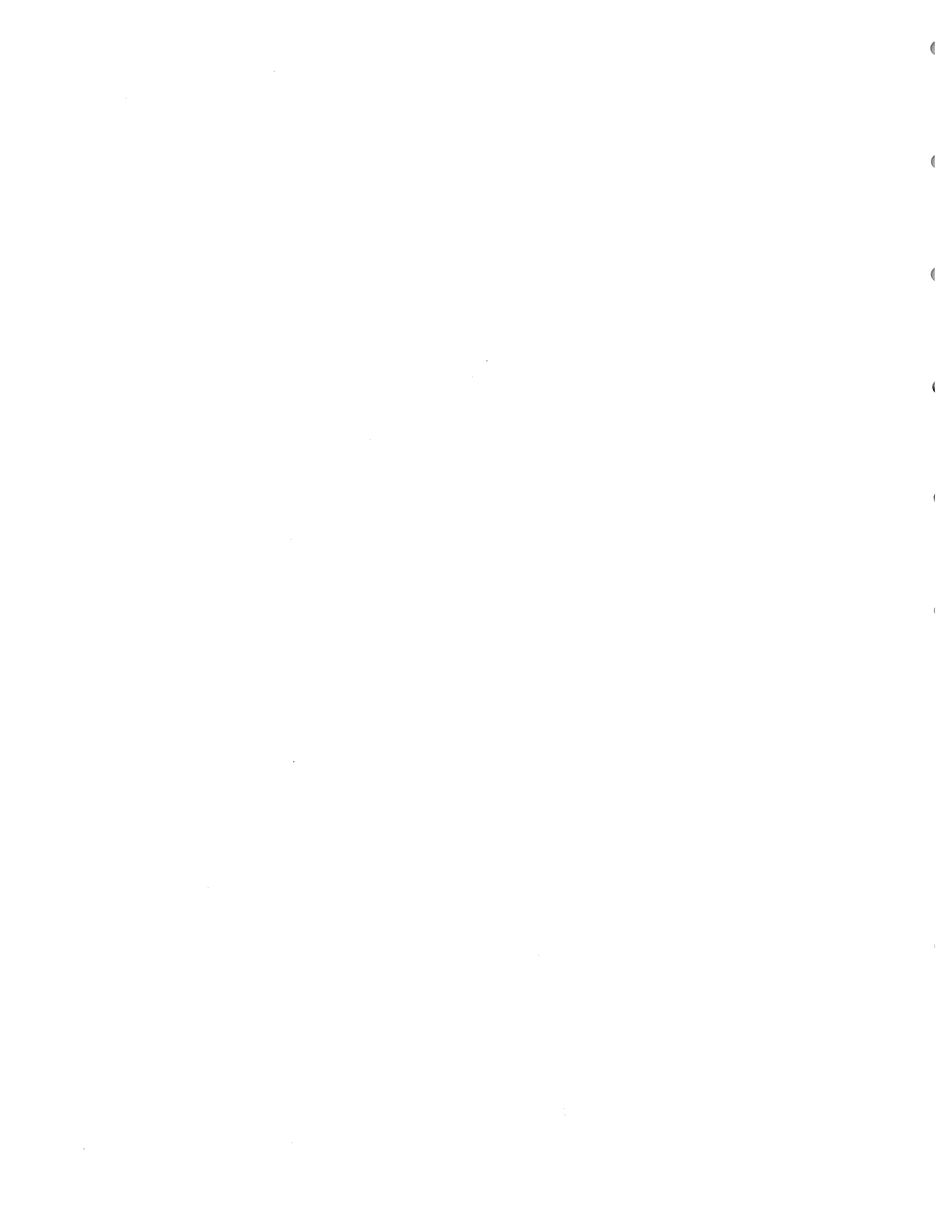

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BRIEFING PAPER

FOR

HEARING ON

REGULATION OF HYDROELECTRIC DEVELOPMENT IN CALIFORNIA:

IMPACT OF RECENT FEDERAL LEGISLATION

AND PENDING LITIGATION

ASSEMBLY NATURAL RESOURCES COMMITTEE
BYRON D. SHER, CHAIRMAN
FEBRUARY 9, 1987

Room 444, 2:00 p.m.
State Capitol
SACRAMENTO, CALIFORNIA

1. Introduction

In 1978, as part of President Carter's National Energy Plan, the Public Utilities Regulatory Policy Act (PURPA) was enacted (Public Law 95-617). PURPA requires electric utilities to purchase energy from qualifying small power production facilities (commonly referred to as "QF's") of 80 megawatts (MW) or less at favorable rates. When combined with the 11 percent tax credit and accelerated depreciation provisions of the Crude Oil Windfall Profits Tax Act (Public Law 96-223) and the Economic Recovery Tax Act (Public Law 97-34), PURPA served to make alternative energy development projects an increasingly attractive investment, particularly during the earlier part of this decade.

The intent of PURPA was to encourage development of new electrical generating technologies which would reduce the country's consumption of oil and gas. This was manifested through companies and entrepreneurs independently developing wind, solar, biomass, small hydro and cogeneration resources for the purpose of generating electricity for sale to the utilities. The prices paid for the power generated from these sources were initially favorable because they were linked to the utilities' "avoided" costs, the costs that would have been incurred had the utilities constructed and operated a new power plant themselves.

According to the California Energy Commission's (CEC) new electricity report (ER 6), the impact of PURPA in California has been significant. Since enactment, PURPA has spawned development of thousands of wind, solar, biomass, hydro power, and cogeneration facilities. This has resulted in a diversification of the state's electricity mix and advancements in alternative energy technologies.

2. Current Energy Supply Picture

In ER 6, the Energy Commission indicates that California currently faces a potential oversupply of electricity that will continue into the next decade. Consequently, there is now growing concern over the ability of the major utilities to use efficiently all of the power currently under contract from alternative energy projects not yet built or operational. When the QF contracts for these projects were initially negotiated, pursuant to standard offer terms and conditions established by the Public Utilities Commission (PUC) in 1983, oil prices and energy demand projections were much higher compared to today. Despite uncertainties regarding the amount of need, the PUC established contract terms favorable to the QF's for a period of ten years. In addition, the demand for these long-term contract offers was uncertain. Consequently, no limitations were imposed upon contract availability or few provisions for curtailment of operation during times of low demand were required by the PUC.

Based on recent reports from the CEC, PUC and utilities, the response by the alternative energy sector to these QF contracts has been substantial. In an informational hearing conducted by the Senate Committee on Energy and Public Utilities last September, the CEC testified that projects representing approximately 2,000 megawatts have been completed and have gone on line. However, the commission also advises that there are currently QF contracts representing 13,000 megawatts of power that have not been developed. Of this amount, the CEC reports that only 3,600 megawatts, representing thermal projects over 50 megawatts in size, are subject to the Energy Commission's siting authority. For those projects exempt from the commission's jurisdiction, no determination will be made as to whether the energy is needed or not. Most of these are in the 20-50 megawatt category, representing 7,100 megawatts. Another 2,300 megawatts are represented by projects below 20 megawatts in size and also exempt from CEC review.

According to the CEC and utilities, if a substantial portion of these projects eventually are constructed and come on line, they will displace cheaper, existing sources of power and increase electrical rates for California ratepayers. For example, PG&E estimated last fall that electricity users in northern California could end up paying $400 million more per year for power if only a fraction of the proposed alternative energy plants holding QF contracts are eventually constructed. This is due primarily to the decline in world oil prices and lower cost for energy the utilities are now facing, compared to the higher prices contained in the QF contracts signed in 1983 and 1984 when oil prices and "avoided" costs were higher.

In response to the combination of a growing energy surplus, backlog of QF projects, and decline in world oil prices, in Spring 1985 the PUC suspended its Standard Offer No. 4 (SO 4) that had been available to alternative energy producers. In consultation with the CEC, the commission is now in the process of developing a new, standard offer contract which is expected to be completed later this year.

3. Development of Hydro Power Projects in California

Since enactment of PURPA, there have been hundreds of proposals for new hydroelectric generating facilities in California. The primary way of measuring the impact of PURPA is the number of hydro license or permit applications filed during the last eight years with the Federal Energy Regulatory Commission (FERC) and State Water Resources Control Board (SWRCB). According to the Department of Fish and Game (DFG), which frequently intervenes in both agencies' permit processes, there have been 904 new hydro projects proposed in California since 1978. Of this amount, 386 projects were proposed by municipal utilities and 518 by private developers and corporations. DFG statistics indicate that 414 of these proposals were subsequently dropped by the applicant or dismissed by FERC, leaving 224 hydro projects that have either been granted licenses or exempted and 266 still pending with the commission. It is unknown, however, how many projects already licensed or still pending before FERC involve new dams or diversions, versus retrofit of existing facilities.

Of the projects already licensed or exempted by FERC, committee staff is advised that 86 have been built since 1978, with 20 more currently under construction. Another 118 have not yet commenced construction. By comparison, the SWRCB reports that it has permitted 88 small hydroelectric projects since enactment of PURPA, with a combined rated capacity of about 1,100 megawatts. Of these, 43 were retrofit projects and did not require construction of new dams. It is unclear, however, how many FERC-licensed projects still must obtain water rights from the SWRCB or are exempt due to possession of riparian rights.

Construction of hydro projects involving new dams and diversions are typically more controversial because of the potential for damage to fishery resources; loss of riparian vegetation and consequent loss of wildlife habitat; degradation of recreational sites; loss of recreational opportunities, including whitewater rafting, kayaking and canoeing; and aesthetic losses and damage to the recreationally-based economies of mountain counties and communities where jobs and revenues are dependent on recreational resources. In 1985, the water board reported that it generally receives protests on water right applications involving new, run-of-the-river projects; most retrofit projects are not. This bias against projects requiring new dams and diversions is also reflected in Section 106.7 of the Water Code which specifies that emphasis should be given to projects utilizing existing dams, diversions and canals, while declaring it to be the policy of the state to generally encourage hydro development.

4. Existing Regulatory Structure for Hydro

Currently, all hydropower projects producing energy for sale must obtain a FERC license, or acquire an exemption from the commission. Preliminary permits allow a developer to secure a first-in-line position for a license while studying the feasibility of the project. Most preliminary permits are granted for an 18, 24, or 36 month period. Within that period the developer must apply for a license to construct and operate the project or else forfeit the exclusive rights granted by the preliminary permit. Parties directly affected by a proposed project may file comments or protests, as well as petitions to

intervene. Notice of application must be published in the Federal Register and in local newspapers. The public commenting period is usually 60 days. Agencies in California most frequently concerned with hydro projects are the SWRCB, Department of Fish and Game, plus the Department of Water Resources.

FERC may deny the license, grant it without conditions, or attach environmental studies or compromises to the right to build. FEPC has typically chosen to exempt certain projects of 100 kilowatts or less. Exemptions for other projects less than 5 megawatts in size are considered on a case-by-case basis. Between 1935 and 1983, committee staff is advised that FERC approved more than 900 applications for licenses or exemptions throughout the country, but disapproved only one strictly on environmental grounds. (This does not include license applications rejected for projects proposed directly on a National Wild and Scenic River or other absolutely protected categories of land.)

Penalties for violating the terms of a FERC license can include revocation of the license, a fine of up to $500 per day of violation, or even imprisonment of the officers of the company. However, in 67 years, FERC has never formally cited or prosecuted an operator for violation of a license, even though it clearly has authority to do so.

In addition to obtaining a FERC license, many hydro projects must also file applications with the State Water Resources Control Board and obtain an appropriative right to divert water. In considering such applications, the water board must determine that the project would put the unappropriated water to a beneficial use. In determining the amount of water available for diversion by a hydro project, the board must take into account the amount of water required to maintain existing instream uses for recreation, plus the preservation and enhancement of fish and wildlife resources. For example, the SWRCB typically imposes minimum bypass flows to protect downstream fisheries as a condition of the water right permit. However, under existing law, their are no criminal or civil penalties for illegally diverting water or violating the terms and conditions of a water right permit. The only mechanism currently available to SWRCB for responding to such activities is obtaining injunctive relief from Superior Court.

Depending on whether the hydro facility is being built on federal land or the builder is a public agency, the water board must also comply with provisions of the California Environmental Quality Act (CEQA). This requires the SWRCB to either prepare or approve an environmental impact report (EIR) prior to granting a water right for the proposed project. In addition, Section 1250.5 of the Water Code requires that the SWRCB consider and act on all permits for (1) hydro projects up to 30 megawatts in size on existing dams and diversions, and (2) all other facilities up to 5 megawatts, within one year from the date of a complete application and filing of an instream beneficial use assessment by the developer.

In addition to a FERC license and water board permit, some hydro projects, particularly those involving construction of new dams and diversions, must execute a "streambed alteration agreement" with the Department of Fish and Game, pursuant to Sections 1601 and 1603 of the Fish and Game Code. These provisions apply to companies or individuals proposing projects or activities that would substantially divert or obstruct the natural flow or any river, streambed or lake. The purpose of this agreement is to protect fish and

wildlife resources, or their habitat, which could be adversely affected by projects, such as construction of bridges, roads, pipelines, dams and certain hydroelectric facilities. Currently, the maximum penalty for violating these provisions or a 1603 agreement is $1,000, six months in jail, or both for a first offense, or up to a $5,000 fine for a second or subsequent offense.

5. Impact of Recent PURPA and Federal Power Act Amendments

In October, the "Electric Consumers Protection Act of 1986," S. 426, was signed into law by President Reagan. This bill, which amended provisions of the Federal Power Act and PURPA, was primarily designed to respond to the issue of preference in awarding power licenses when original hydroelectric licenses expired. However, it also contains key provisions which many expect will require FERC to give greater weight to environmental considerations in future license decisions. These include:

o A requirement that FERC give "equal consideration" to the purposes of energy conservation; protection, mitigation, and enhancement of fish and wildlife; protection of recreational opportunities; and preservation of other aspects of environmental quality along with development aspects it has traditionally considered. "Equal protection," is not defined.

o A stronger and clearer role defined for the U.S. Fish and Wildlife Service Service, National Marine Fisheries, plus state fish and wildlife agencies. This will require FERC to incorporate conditions included by these agencies on all licenses and exemptions issued in the future, unless specific findings are made that the conditions are inconsistent with the purposes of the Federal Power Act.

o A requirement that FERC, in awarding licenses, consider the applicant's need for the project's electricity (including the cost of substitute supplies) and the effect on the communities to be served by the project.

o Elimination of PURPA's "avoided cost" incentives, except where the environment is not harmed. New dams now cannot get such benefits unless FERC finds that they would have "no substantial adverse effects" on the environment, including recreation and water quality. Automatically disqualified are (1) stream segments protected under either federal or state wild and scenic river programs, (2) rivers designated for potential wild and scenic status, and (3) streams which states have determined to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydro development.

o Limiting licenses to 30 years instead of the previous 50, except when substantial construction or redevelopment is involved.

o Increasing FERC's power to enforce license provisions.

Despite these improvements, the new federal legislation allowed hydro projects to continue to qualify for PURPA benefits if they used existing dam structures, or if the application for a license or exemption was filed before enactment or if the applicant demonstrated that it had, prior to enactment, committed

substantial monetary resources to developing the project. New projects, for which no application or substantial monetary commitment has been made, will not be eligible to receive PURPA benefits until the end of the first full session of Congress after FERC completes a study on the PURPA program.

In addition to the changes to PURPA and Federal Power Act, the transition rules for the federal Tax Reform Act extend investment tax credits and accelerated depreciation "grandfather" to all small hydro projects for which preliminary permits had been filed at FERC by March 2, 1986 and are constructed by the end of 1990.

6. Implications of Sayles Flat Lawsuit on State Regulation

Sections 9(b) and 27 of the Federal Power Act appear to require FERC license applicants to comply with state water rights laws. However, in First Iowa Hydro-Electric Cooperative v. Federal Power Commission (1946) 328 U.S. 152, 66 S.Ct. 906, the Supreme Court held that FERC's predecessor, the Federal Power Commission, could license a hydropower project despite the fact that building the project would cause the applicant to violate Iowa laws which require a state permit for dam building and prohibit the dewatering of any Iowa river. Cases following First Iowa have applied this doctrine of federal preemption to authorize FERC licensing of hydro projects in violation of a variety of other state laws.

Last summer, the developers of a 2.9 megawatt hydroelectric project on the South Fork American River in El Dorado County filed suit in federal court in Sacramento seeking to extend the First Iowa doctrine in California (Sayles Hydro Associates v. United States, No. CIVS-86--868LKK). The proposed Sayles Flat project, which has now virtually completed construction, is located next to U.S. Highway 50, which provides access from northern California to South Lake Tahoe. The project would interfere with use of land by Camp Sacramento. Other concerns include impact on Camp Sacramento itself, on recreational use of the river, and on fisheries. The developers of the project contend that they are not obligated to comply with any other state or federal permit requirements because of receiving a FERC license. With respect to state water rights requirements, the developers argue that the SWRCB's authority is limited to determining whether water is available for appropriation.

When this project was issued a federal power license, FERC staff determined that no environmental impact statement (EIS) was required under the National Environmental Policy Act (NEPA). This determination was based primarily on the developer's environmental assessment, even though final plans and specifications for the project had not been prepared, and the full impact of the project unknown.

As a result of this litigation, last fall the Director of Water Resources called on the Senate Committee on Energy and Natural Resources to adopt amendments to the Federal Power Act proposed by the Western States Water Council. These amendments would add language to Section 6 to prohibit the issuance of a license or exemption from licensing unless the applicant proves compliance with state law governing acquisition of water rights. Section 21 would be amended to provide that eminent domain authorized under the Federal Power Act could not be used to acquire water rights. Section 27 would be

amended to further clarify that the Federal Power Act does not authorize the United States or licensees rights to appropriate or use water, and that full compliance with the substance and procedures of state law is required.

Since initiating their lawsuit last summer, the developers have filed a second action seeking to obtain water rights through condemnation. Trial arguments in this lawsuit have not yet occurred. A decision by the federal district court on the preemption case is still pending. If the plaintiffs in the preemption case ultimately prevail, hydroelectric projects in California could become the least regulated form of alternative energy encouraged by PURPA.

7. Issues to Be Examined at Informational Hearing

In response to the large number of hydro energy projects spawned by PURPA since 1978, current prospects for an oversupply of energy through the next decade, recent efforts to revise PURPA and the Federal Power Act, plus preemption issues raised in the Sayles Flat case, the Assembly Natural Resources Committee has scheduled an informational hearing to determine if any changes in state regulations and laws are both necessary and appropriate. Questions the committee may wish to examine include:

1. What has been the impact to date on California streams and waterways from hydro projects built as a result of PURPA and other tax incentives since 1978? What would be the cumulative impact if all of the hydro projects currently pending before FERC and SWRCB are built?

2. Are state agencies with jurisdiction over such projects, such as DFG and SWRCB, adequately equipped to review license applications and monitor compliance with any permit terms or conditions? Are existing enforcement tools adequate?

3. What, if anything, can and should be done to minimize the impact to utility ratepayers from hydro and other alternative energy projects possessing QF contracts, but as yet not constructed? Are there means for terminating any of these contracts? If so, have the utilities used them?

4. Should existing state incentives for development of hydro power projects be curtailed? Should these be limited to projects that do not require construction of new dams or diversions?

5. What impact will the "Electrical Consumers Protection Act of 1986" have on the existing FERC license process? How many projects currently pending before FERC will be covered by the act's new requirements or are exempted? Given FERC's past track record and current budget resources, what assurances are there that the commission is capable of adequately monitoring and enforcing license terms and conditions for hydro projects in California, particularly if state regulation is preempted?

6. In the event that hydro developers prevail in the Sayles Flat case, what are the implications for other FERC-licensed projects that have not yet been granted state water rights? What actions can the Legislature take, other than seeking changes in federal law?

REGULATION OF HYDROELECTRIC DEVELOPMENT IN CALIFORNIA: IMPACT OF RECENT FEDERAL LEGISLATION AND PENDING LEGISLATION

February 9, 1987

CHAIRMAN BYRON D. SHER: Today, the topic is the regulation and development of hydroelectric power plants in California. We're advised that other members of the Committee will be arriving shortly.

The subject today includes, among others, the following questions: an examination of existing the state and federal regulatory structure for such projects; secondly, the impact of the 1978 Public Utilities Regulatory Policy Act or, as it's commonly known, PURPA, and other incentives for these projects; thirdly, the question of the need for these hydroprojects to meet the state's future energy requirements; and, fourthly, the possible change in the state's ability to effectively license and control these projects as a result of pending litigation that we're going to hear about today.

The purpose of the hearing is to determine if any changes in state regulations and laws are necessary or appropriate in this area. It has been almost ten years since PURPA was enacted as part of President Carter's National Energy Plan. As you know, this federal law requires electric utilities to purchase energy from qualifying small power projects, commonly known as "QF's," at the utilities' avoided costs. These are the costs that would have been incurred had the utilities constructed and operated a new powerplant themselves.

In the earlier part of this decade, the Legislature also enacted measures which declare it to be the state policy to encourage development of small hydroelectric facilities and require the state Water Board to expedite the process of permit applications for certain types of projects. In addition, laws were passed which make hydropower projects eligible for funding by the California Pollution Control Financing Authority and the California Alternative Energy Source Financing Authority.

These measures, along with certain federal tax incentives, were, obviously, designed to encourage development of new electrical generating technologies which would reduce the country's consumption of oil and gas and, thereby, reduce energy imports. However, according to the Energy Commission's most recently issued electricity report, ER6, these incentives have had a major impact in spawning the development of both renewable and alternative energy projects in California. This has resulted in a significant diversification of the state's electricity mix and advancements in alternative energy technology.

That's the good news. But there is some bad news. The bad news is that we now may have too much of a good thing. The Energy Commission's electricity report indicates that California currently faces an oversupply of electricity that will continue well into the next decade. If the Commission's assessment is correct, and if a substantial number of alternative energy projects currently holding PURPA contracts come on line, they will displace cheaper, existing, sources of power and, under contract, the utilities will have to take that power and pay more

for it and this will result in increased electrical rates for California ratepayers, who are your constituents and mine.

In the area of hydrodevelopment, the bad news is utilities, water districts, public agencies, and private developers have applied for permits and licenses to build these facilities and many of them require new dams and diversions on virtually every potential site in the state. Between 1978 and 1985, the Water Board permitted 88 small hydroprojects with a combined rated capacity of about 1100 megawatts and less than half of those, 43 to be exact, were retrofit projects and the rest of them required new dams or diversions to be built. As of two years ago, the Water Board had water rights applications pending on about 275 additional hydroprojects. It is unknown how many of those include the 266 projects with power license applications still pending before the Federal Energy Regulatory Commission, or FERC. We'll hear a lot about FERC today, but at least it was thought that you had to get both kinds of licenses, the power license from FERC and the water permit license from the Water Board although, as I say, that may be changed by this pending litigation that we're going to hear about today.

It's uncertain how many of these hydroprojects will eventually be built or how many will require new dams or diversions, but pretty clearly, the cumulative effect on the state's various streams and waterways could be significant. Many of the proposed new hydropower sites are clustered into a relatively few watersheds. Individually, these projects can have the effect of partially de-watering portions of a stream,

blocking passage of fish, shunting fish into the diversion and through the powerhouse, and destroying wildlife habitat through construction of roads, pipelines, powerline routes, diversion structures, and powerhouses. Collectively, it is obvious that the impact can be enormous, particularly if the projects are not adequately mitigated. In some instances the impact of a hydroproject on other types of instream uses, such as recreational boating, cannot be effectively mitigated.

So, these types of conflict have prompted renewed interest in the protections afforded by state and federal wild and scenic river systems. Last year I had a bill, AB 3101, which nominated three new streams for state wild and scenic status, two of which actually faced hydrodevelopment threats. That bill passed and the study is commencing on portions of those three rivers for state protection. In addition, this year there have already been introduced three separate measures in Congress to add the Merced, Kings, and portions of the Kern to the federal system, partially because of the threat of other hydroprojects or proposals.

Even on streams where hydrodevelopment is appropriate, mitigating the environmental impact of these projects typically falls upon the government agencies responsible for issuing the various licenses and permits that are currently required. For example, minimizing the impact on native fisheries requires the establishment of adequate bypass flows. These requirements are generally incorporated as part of the FERC power license or the water right permit issued by the state. Other permits may be

required from the state Fish and Game Commission to insure that the streambed is not adversely affected during the actual construction.

Well, now, coming to the end of my statement, because of litigation which was filed last summer by one California hydrodeveloper, in the case known as Sayles Hydro Associates vs the United States, the state's future ability to license and mitigate these projects faces a major threat. Although this lawsuit directly affects only a single project, it would, or could, establish precedent that would have far-reaching implications for several hundred more that are waiting in the wings. In addition, last fall Congress enacted legislation amending PURPA and the Federal Power Act which could also affect the number and type of projects licensed by FERC, the federal agency. These changes are important because FERC could effectively become the sole licensing agency for the hydropower projects in California.

So, with that general background, I would like to get the hearing underway. We have many individuals scheduled to testify this afternoon, some of whom have come from as far away as Washington. In spite of that long distance you've travelled, I would like, generally, to have the speakers limit their formal statements to ten minutes or less. That means don't read us long statements, summarize if necessary. This will allow us to accommodate all of the witnesses while leaving time for questions from committee members.

I want to begin...we've broken our witnesses down to three panels. First, regulatory agencies; second, interested parties; and the third, utility and energy agencies. So, let's start with the regulatory agencies, and I think it would be appropriate to hear first from Mr. Pete Bontadelli, Deputy Director of the Department of Fish and Game, who I would ask to give us an overview of the projects that the Fish and Game has been tracking in both the FERC and the Water Board licensing processes, I guess, since 1978.

Welcome, and the floor is yours.

MR. PETE BONTADELLI: Thank you, Mr. Sher.

Thank you for this opportunity to address the Committee on the subject of small hydroelectric development in California. The topics I will cover today will include the status of small hydroelectric development in California, a brief overview of the Department of Fish and Game's role with both the FERC and the state Water Resources Control Board regulatory process, the Department's views regarding the Sayles Flat project and the Department's role in the enforcement and compliance of permit and license conditions necessary for the maintenance and protection of California's fish and wildlife resources.

The Department of Fish and Game is the primary state agency responsible for the preservation and conservation of California's fish and wildlife resources. The difficulty of carrying out this responsibility in the face of ever-increasing demands for California's valuable, but limited natural resource base, is a continuing challenge. Nowhere has this challenge been

more visible or more evident than with the advent of the increased interest in the development of small hydroelectric facilities that was spurred on by the economic incentives created by the passage of various federal acts such as the Public Utility Regulatory Policies Act, the Crude Oil Windfall Profits Tax Act, and the Economic Recovery Act. These acts provided private developers with certain tax advantages and returns on their investment. This created a package of perceived Congressional intent of a national energy policy which appears, on occasion, to be in conflict with environmental and fish and wildlife goals set forth elsewhere in both state and federal law.

Since 1978, the Department has been involved in the review and evaluation of approximately 904 new proposals for hydroelectric projects from municipalities and private non-utilities. Three hundred eighty-six of those were municipals and 518 were private. Of the 904 new proposals, 414 have either been surrendered by the applicant or dismissed by FERC for various reasons. Of the 490 remaining active proposals, 224 have received a license or have been exempt from licensing, 115 municipals and 109 private, leaving 266 still actively being reviewed. Of the 224 licensed or exempted projects, 86 have been constructed, with a total capacity of 108,763 kilowatts. Twenty projects are still under construction with nearly 16,000 kilowatts and 118 are awaiting construction, which would provide an additional approximately 122,000 kilowatts. The total energy output of all 224 projects that have been licensed or are exempt to date is over 246,000 kilowatts.

The Department's role in the permitting and licensing of small hydroelectric facilities is quite different from the role of FERC or the state Water Resources Control Board, the two primary agencies involved in the regulation of small hydroelectric projects in California. While these agencies have been empowered with broad authority to balance the many competing uses for California's natural resources, the Department's role, on the other hand, has been one of a primary, single-purpose agency. We have been given the responsibility to determine what is required to maintain and protect fish and wildlife resources and their habitats. The Department accomplishes this task by two items: first, by working with a project developer to insure that information that we require to develop sound fish and wildlife recommendations is available and, second, by providing the regulatory agencies with a thorough review and evaluation of the project from a fish and wildlife perspective along with the Department's recommendations for conditions that we have determined will be necessary for their maintenance and protection. The Department has no veto power over projects. Our successes are measured in our ability to convince a developer and/or the appropriate regulatory agency on the need to incorporate the Department's recommendations into a project. At no time during the period since 1978 has FERC denied a license based solely on fish and wildlife concerns. For those projects where the Department and the applicant have continued to have major disagreement over fish and wildlife issues, and that, by the way, is less than 12 projects out of the total number we've

gone through so far, FERC has either accepted the applicant's recommendation or set a compromise order, essentially splitting the difference between the applicant's recommendations and the Department's recommendations.

CHAIRMAN SHER: Are you telling us that the Department was unhappy on 12 only?

MR. BONTADELLI: There were 12 where we had less than reasonable mitigation. I won't say that we were 100% delighted with all the mitigation packages we've put together, but from what we knew at the time on each of them, and it's been an evolving process, I think we've been making significant progress.

Recent amendments to the federal Power Act and PURPA require the FERC to place more emphasis on resolving fish and wildlife issues. It is too early to tell if the desired positive effects will be achieved.

CHAIRMAN SHER: Does the Water Board in its permit provide a backup? Did you also ask the Water Board to include, or did you simply rely on FERC?

MR. BONTADELLI: Yes, we have in all instances where there has also been a water right required, gone to both the state board and to FERC. And, in many instances where we've had a conflict, we've usually come closer to resolving our concerns with the state board than with FERC.

CHAIRMAN SHER: So you would say that the state board's involvement in this process is important?

MR. BONTADELLI: It's a significant positive from our point of view.

CHAIRMAN SHER: Okay, thank you.

ASSEMBLYMAN LLOYD G. CONNELLY: I have a question. Is one of the twelve Sayles Flat?

MR. BONTADELLI: That is correct.

ASSEMBLYMAN CONNELLY: And you say that you review and make recommendations on mitigation of damaged fisheries. Did you do that for all twelve of those?

MR. BONTADELLI: In most instances, the issue that has separated us, Mr. Connelly, has been the issue of the bypass flow that's required.

ASSEMBLYMAN CONNELLY: I understand. And in those twelve you recommended a higher bypass flow?

MR. BONTADELLI: Than that which was finally granted.

ASSEMBLYMAN CONNELLY: I see. And that's your total role? Once you make the comment, that's it?

MR. BONTADELLI: We make our recommendations and our next role is the one that I'll get to in a moment. And that deals with the 1600 series agreements that we enter into for actual construction, and I'll get to that in just a moment.

ASSEMBLYMAN CONNELLY: Thank you, sir.

MR. BONTADELLI: Due to the tremendous increase in the number of proposed hydroelectric projects requiring the Department's review and evaluation, it has been necessary for the Department to streamline its internal process for consulting with developers and to set a goal to becoming consistent in our approach to developers.

In 1982, the Department published an administrative report entitled "Small Hydroelectric Development in California: The Role of the Department of Fish and Game." The purpose of this report was to assure that we are consistent with developers on the kinds of information and studies that we require in order to properly evaluate a project and to provide regulatory agencies with our recommendations. Copies of that report will be provided to you. I'm also providing you with a copy of a detailed flow diagram, which was prepared by Southern Edison, which is an update of the entire FERC process which shows how, in their stated goal, FERC goal, of addressing fish and wildlife objectives, their method is primarily early consultation with the developer prior to the time it gets to the actual hearings, which is something that they've adopted through modified rules in the last couple of years.

Prior to 1982, the Department relied basically on information provided by our individuals in the field who evaluated and looked at a project and guesstimated the appropriate flow releases that would be required for a project. Since 1982, we have relied more heavily on IFIM studies and things of that nature which provide some basis for at least discussion of the issues if not the resolution of them.

In general, I should note that most retrofits have moved expeditiously through the process, since there is little additional impact from such projects. Most conflicts, and therefore most of the efforts expended by the Department, are on run-of-the-river or newly proposed projects. The precise number

of run-of-the-river versus retrofits was not readily available from our files, so I apologize for not having that breakdown for you today.

Pursuant to state law, which predates FERC's small hydro boom, the Department also enters into 1600 series agreements. This is a streambed alteration agreement, and it is required at any time of a state or local agency or a private party that plans to divert, obstruct, or change the bed, channel or bank of any river, stream, or lake. The Department has prepared an agreement for each small hydroelectric project that has been constructed in this state. These agreements primarily deal with potential impacts that could occur during actual construction or later, during the routine maintenance. For instance, we do not use these agreements to establish permanent fish-flow requirements for a project, since that is outside of the purview.

The use limits placed on streambed alteration agreements has recently been affirmed in a federal court ruling, Mega-Renewables vs. Shasta County and the State Department of Fish and Game. Essentially they ruled there that the Department's 1603 agreement is not a permit that would be used to stop a project but is a reasonable environmental condition for construction and therefore was not covered by First Iowa and therefore is allowable in that federal court case.

CHAIRMAN SHER: Under that case, but under the Sayles case, they're trying to preempt Fish and Game on the 1603 agreement?

MR. BONTADELLI: There was a TRO issued on that, and I'll get to that in just a second.

CHAIRMAN SHER: Okay. All right.

MR. BONTADELLI: When a violation occurs, there are generally two courses of action available to the Department. Our preference is to work informally with the violating party to correct the problem, and when there is mutual cooperation we usually have been able to obtain compliance to achieve the positive desired results.

The other alternative, and that which has been used on occasion, is to issue citations, which our law enforcement officers do, which shifts the responsibility for the violation and enforcement to the courts. At this time, I'm unable to give you a count as to the number of citations that have been specifically issued on small hydroelectric projects, as those citations are mixed in with our overall numbers on 1600 violations. We have a total number of 1600, but I don't have the breakdown on each at this point. We can, and are, attempting to get that for you. It'll take us a while to break out our records which are currently all by hand, and we don't have computer data on those citations yet.

On the subject of deterrence, recent amendments that increase fines for second offenses of 1600 violations, which was carried by Assemblyman Sher, should produce positive results in this area. We'd like to thank you, Mr. Sher, for your efforts in that area.

The Department began its specific review of the Sayles Flat Project in 1981. At that time, very little actual data regarding fish and wildlife resources or streamflow conditions was available. However, based on a field review by Department staff, recommendations for fish and wildlife protection were made to the applicant. Following several rounds of meetings and negotiations, the Department's regional manager agreed to accept the lower bypass flows of 5 CFS, provided the applicant developed and implemented an acceptable fish habitat improvement plan. If such a plan could not be developed and implemented, then the Department requested that the bypass flows go to between 7 and 15 CFS, depending on the time of year.

In the interim, FERC issued a license for the project with the 5 CFS as the interim flows and with the requirement for an instream flow study for use in establishing final flows. In September, 1986, the applicant began construction. Since an acceptable habitat improvement plan had not been developed, the Department informed the applicant that our acceptance of the 5 CFS or the 7 and 15 flows were no longer applicable and that we would provide a new recommendation based upon the results of the soon to be completed instream flow study. The applicant has not, as of today, provided us with the now-completed study. However, our staff has reviewed a copy of the study which was provided to us two weeks ago by the state Water Resources Control Board. I can tell you that, from our preliminary review, and I stress preliminary, review of that study, the flows will probably have to be considerably higher than the 5 CFS originally agreed upon

for the affected reach from a standpoint strictly of fish and wildlife.

ASSEMBLYMAN CONNELLY: How high?

MR. BONTADELLI: Jerry, do you have that?

JERRY: Between 10 and 20 CSF (inaudible).

ASSEMBLYMAN CONNELLY: Was this language included in the 1600 agreement, that is the language that said the 5 CFS were interim and they could be higher based upon the habitat study?

MR. BONTADELLI: No, the bypass flows are not part of the 1600 agreement. The 1600 deals with the construction processes, damming, and that type of thing. The five and the fallback was the initial information that we provided to the state board and to FERC for the licensing process.

ASSEMBLYMAN CONNELLY: I see. So, on that particular issue the Department has no authority.

MR. BONTADELLI: That is correct. We make a recommendation on the bypass flow.

ASSEMBLYMAN CONNELLY: I see. So, both as to the bypass flow and the habitat improvement plan, they were your desire but they can't be your mandate?

MR. BONTADELLI: That is correct.

ASSEMBLYMAN CONNELLY: Is there anything in the 1600 agreement with regard to Sayles Flat that is either being not complied with or...

MR. BONTADELLI: Yes.

CHAIRMAN SHER: But you do have an agreement, a 1600 agreement. They did enter into an agreement?

MR. BONTADELLI: We did enter into a 1600 agreement. It was one of the agreement items that was covered in the FERC process, that a 1600 agreement shall be entered into, which is part of the agreement on Sayles.

ASSEMBLYMAN CONNELLY: Did the people in the FERC process agree that it be an interim agreement, that the interim level be 5 CFS, pending this habitat study? Was there some accedence on the federal level on that?

MR. BONTADELLI: It is my understanding that the 5 is the interim flow pending the results of the final IFIM.

ASSEMBLYMAN CONNELLY: I see. Okay. Thank you, sir.

MR. BONTADELLI: Since the beginning of construction in September, 1986, the Department has filed two violations of the 1603 streambed alteration agreement, and one violation of Section 5650 for fuel oil spillage.

CHAIRMAN SHER: Let me just interrupt. For the benefit of the Committee, can you tell us the kind of damage hydroprojects can cause when a 1603 violation occurs?

MR. BONTADELLI: Most of the violations result...in this particular instance what we have filed on is the fact that all bypass flows were ceased and that a section of stream was completely de-watered. That resulted in the loss of all aquatic habitat, eggs, larvae, it de-watered...,

CHAIRMAN SHER: So, it's designed to protect the fish and wildlife...

MR. BONTADELLI: During the construction period.

CHAIRMAN SHER: Right.

MR. BONTADELLI: We've also filed two formal complaints with FERC; one for inconsistencies with the license regarding design features of the project and one for failure of release flows into sections of the river on four separate occasions. It should be noted that these violations have recently been filed since we had a temporary restraining order issued by a federal judge in the early phases of construction. In addition, the complaints were filed after consultation with the Attorney General's office who is representing both ourselves and the state Water Resources Control Board in the case.

Today, the project is very near completion and testing is planned for some time in the next two weeks. Unless FERC revises the license and/or the courts support the state Water Resources Control Board in the water rights issue, the project will begin operation under the interim flows of 5 CFS, without the implementation of a successful habitat improvement plan.

The Department puts a great deal of time and effort into insuring that when a permitter license is issued by FERC or the state Water Resources Control Board that it contains those conditions necessary to maintain and protect fish and wildlife resources. We have then, essentially, left the responsibility for enforcement and compliance rest primarily with the permitting or licensing agency. A formal complaint, filed with the state Water Resources Control Board recently by the California Sportfish Protection Alliance identified, potentially, 22,000 days of noncompliance with fish-flow requirements and has pointed out that the system has not been working to fully accomplish the

compliance mechanisms that had been sought in the original license. Both the state Water Resources Control Board and the Department recognize the need for developing a more intense program of enforcement and compliance to insure the permit and license conditions developed for the maintenance and protection of fish and wildlife resources are complied with in a continuous manner. The Department, the California Sportfishing Protection Alliance, and the state Water Resources Control Board, as well as various water districts, have been working on this issue for about a year now. In addition, in many of the recent applications, and as a condition for licensing, the state Board and FERC have been requiring that continuously monitoring devices be placed in so that we have a firm record of what the actual flows were on a day-by-day basis.

More efforts are obviously needed to insure that mitigation developed for individual projects actually work and achieve the results desired. And, too, that full and continuous compliance is achieved on the conditions once they are set. This is a big job and one that, very honestly, I don't think has been fully responded to by everyone.

CHAIRMAN SHER: If I can summarized, you think that it's important that the proper conditions be put into licenses that are granted by FERC and the Water Board when they give their permit? It's important that, after the project is built and is in operation, there be enforcement of those conditions? You think it's inadequate now, and you think it's important, with respect to the 1603 agreements, the streambed alteration during

construction, that that process be maintained to protect the fish and wildlife during construction; all those are important?

MR. BONTADELLI: That's correct.

CHAIRMAN SHER: And it would be an unmitigated disaster if the state end of that, through the Water Board and the Fish and Game and the 1603, were preempted by federal law? At least a disaster, if not unmitigated?

MR. BONTADELLI: It would certainly change the emphasis on the projects and put 100% of our time and effort into hearings that would probably be held on the East Coast, rather than the West Coast, and significantly increase costs at the very minimum.

CHAIRMAN SHER: Do you think, on the 1603, would the Department of Fish and Game support legislation requiring some kind of bond, surety bonds, that would be posted for hydroprojects to enforce these 1603 agreements? Is that necessary, or haven't you addressed that? Now, you operate by citations and fines after the fact. One possibility, I guess, that has been mentioned is surety bonds posted up front.

MR. BONTADELLI: That's an option that, if it's introduced, I'm sure we'll review carefully. At this point I'm not sure that it's necessary. Very honestly, many of the projects, we have reached a reasonable agreement with ourselves and the developer and in many instances the developers have, in fact, complied fully with the terms of the 1603 agreements.

There are some instances where we have had repeated and continual problems and I'm not sure that the bonding approach...

TESTIMONY LOST DUE TO EQUIPMENT MALFUNCTION

MR. MADDEN: ...the Fish and Wildlife Service, the National Marine Fisheries Service, and comparable state agencies with respect to the mitigation of project impacts on fish and wildlife resources, including California's fish and wildlife.

In contrast with a license, an exemption does not confer the federal power of imminent domain. The Commission has, therefore, chosen to require an exemption applicant to own all the necessary lands for the project.

Now, Mr. Chairman, you've raised several questions in your invitation and I will address those briefly.

The Commission has issued 64 licenses and 133 exemptions in California since the enactment of PURPA. There are, as of 1/26/87 sixty-seven license applications and 13 exemption applications for hydroprojects in California. Of the 64 licenses that we have issued, 33 involve the construction of new dams or diversions. We do not authorize, currently, exemptions involving the construction of new dams or diversions. Of the 80 pending development applications, both licenses and exemptions, 41 would involve the construction of a new dam or diversion.

Turning to the Electric Consumers Protection Act, ECPA applies to each license exemption and preliminary permit issued after the enactment of it. Therefore, all pending license applications in California are subject to this act. ECPA also imposes a moratorium on the availability of PURPA benefits to projects using new dams or diversion structures, however this

statute provides for certain exceptions to the moratorium as well as to the three new requirements imposed on new dam or diversion projects before they can qualify for PURPA benefits. Of the 41 pending California projects proposing to use new dams or diversions, 31 are excepted from the moratorium and the three new requirements because they were filed and accepted prior to its act. An estimated ten additional California projects will be excepted from the moratorium and two of the three requirements since they were filed prior to ECPA's enactment and will likely be accepted within three years of its enactment.

Regarding the role of state agencies in the licensing of hydroprojects, state agencies have the opportunity to make recommendations for modifications to proposed projects during the preapplication consultation process and during the application review period. Additionally, the new act requires the Commission to include in each license conditions to protect, mitigate, and enhance fish and wildlife. Such conditions shall be based on the recommendations of the federal and state fish and wildlife agencies unless these recommendations are inconsistent with the purposes and requirements of the applicable law and conflicts can not be resolved between the federal and the state agencies, including FERC. This will require greater coordination between the FERC and other federal and state agencies concerning environmental matters.

Further, all interested parties, including private citizens and organizations, are given an opportunity to participate during the public notice that follows the filing of a

license application. In examining an area's need for power, the Commission looks not just at the point a project would be licensed, but also at the projected point the project would be brought on line. The Commission must consider the anticipated growth and the demand for electric power and energy and the ability of the system to meet projected additional load requirements with the same degree of reliability over both the short and long term.

With respect to the relationship between FERC's licensing activities and state permit requirements, the courts have determined that the federal power act does not contemplate a dual system of duplicate state and federal permits and that requiring Commission licensees to obtain state permits would vest in the states a veto power over projects and could subordinate to the control of the states the comprehensive planning responsibilities Congress intended to have resided with the Commission. Thus, Commission licensees are not required to obtain state water permits as a condition precedent to obtaining FERC licenses and exemptions.

CHAIRMAN SHER: Do you ever require it as a condition subsequent? That is, "you have this license, now go out and get your water permit from the state? You can't go forward until you have it?"

MR. MADDEN: Mr. Chairman, the Standard Article 5 in the license provides the licensee up to five years to obtain the necessary water rights through the state. If that licensee is not successful, the Federal Power Act also authorizes, under

Section 21, for the licensee to implement or initiate imminent domain proceedings.

CHAIRMAN SHER: So, what you're saying is that you don't consider it inconsistent with our veto power if..., obviously they need the water to run the project, right? And, if the state agency won't give them the permit for those water rights, then what you're telling me is it's contemplated they can go out and get water somewhere else by condemnation or imminent domain?

MR. MADDEN: For licenses only, Mr. Chairman, not for exemptions. Exemptees, of which 133 have been issued here in California since PURPA, must adhere to state regulations regarding water rights.

ASSEMBLYMAN CONNELLY: But licensees need not.

MR. MADDEN: That's correct. The exemption program...,

ASSEMBLYMAN CONNELLY: Does that bother you? Out of my curiosity. You have to live in the state somewhere.

MR. MADDEN: I live in the District of Columbia, you know.

MR. ROBERT FITZGIBBONS: My personal feelings on that are probably irrelevant to this. It's more a matter of what the federal law provides on this question.

ASSEMBLYMAN CONNELLY: Could I go back to what you meant on the energy, you said you have to look at the energy needs now and at the time that the facility comes on line. The Energy Commission for the State of California just testified that, for the overwhelming bulk of our state, we have more energy than we know what to do with, not just now but at any time that any one

of these projects that are currently in the pipeline would be on line. Were those figures considered in the determination of licensing and exemptions for these various projects?

MR. FITZGIBBONS: The need for power is one of many issues that is considered by the Commission before they license a particular project. Yes, they were considered.

ASSEMBLYMAN CONNELLY: So, specifically, you had the Energy Commission figures from California. Well, how could you, in the face of those figures, approve or how could the Commissioner approve projects that caused clear environmental damage when there wasn't the need now or in the future for that electricity?

MR. MADDEN: I can't speak to any individual licensing action by the Commission, but I assume that the Commission in issuing the license evaluated all the issues associated with that particular license. Now, with respect to the California...,

ASSEMBLYMAN CONNELLY: They considered it and they ignored it, or they considered and concluded it was wrong, or they considered it and they..., (inaudible). I thought you were going to say, "The first time we heard these figures about energy in California was just right now, " and then I was going to beat up on the Energy Commission. But then you said, "No, we got those figures,"...,

MR. MADDEN: I have reviewed in 1985 California's Energy Commission Report and, if I'm not incorrect, I think that report says that the State of California will have an energy shortage within the next ten years. However, I understand that the

California Energy Commission has just come out with a draft report, and that draft report shows that there will be no such energy shortage. So, I think what we have to look at is that at the time the Commission issues a particular license, what information did the Commission have available to it at that particular time? Not what it has available to it now.

ASSEMBLYMAN CONNELLY: Based on the information you have now, would you go back and review any of the licenses that have been issued where capital construction hasn't begun? Have you ever done that?

MR. MADDEN: I don't recall. If there is no license which is subject to a rehearing application where the issue is need for power, I do not believe the Commission would go back and look at that point in time as to whether its decision was correct.

ASSEMBLYMAN CONNELLY: Mr. Chairman, I have additional questions, but I think I should wait until he concludes his testimony.

CHAIRMAN SHER: Why don't we let the witness finish his testimony and then we can...,

MR. MADDEN: One point on that, Mr. Chairman, which I missed, and that is that Section 6 of the Act prohibits the Commission from unilaterally altering the terms and conditions of a license. So, therefore, we are without, essentially, the authority to ask what you are requesting us to do now.

CHAIRMAN SHER: You are without authority to ... You have the authority, though, to follow up on breach of conditions of the license. Is that right?

MR. MADDEN: Yes, Mr. Chairman, I believe we do.

CHAIRMAN SHER: I'm going to ask you, before we get done, what action, if any, you've taken on complaints by the state Water Board and the U.S. Fish and Wildlife on this famous Sayles Flat and the alleged license violations that have occurred there. So, you may want to work that into your testimony or we can do it at the end.

MR. MADDEN: I think I addressed it somewhat in my testimony.

CHAIRMAN SHER: You already have?

MR. MADDEN: I've addressed it somewhat in my testimony that I will present today.

CHAIRMAN SHER: Oh, all right. Well, we're anxious to hear it.

MR. MADDEN: Turning back to FERC's licensing activities relative to the state permit requirements, I want to note that they also apply, at least the legal principles apply, to state fish and wildlife laws. However, we do note that there is an instance where the grant of a state permit may be a condition precedent to the issuance of a license. In this regard we note that water quality certifications granted by the states for projects pursuant to the provisions of Section 401 of the Clean Water Act must be obtained or waived by the state before the Commission issues a license. Additionally, ECPA requires the Commission to include in licenses fish and wildlife conditions based on recommendations submitted by state fish and wildlife agencies so long as those conditions are not inconsistent with the purposes of the Act, and other applicable law.

As far as we are aware, the Commission has never included in a license a condition requiring the licensee to specifically comply with state fish and wildlife laws or state water rights permitting requirements.

CHAIRMAN SHER: Let me just pause there. Because this provision of the new ACT, ECPA, I guess is the acronym, that requires you to look at the recommendations of the state agencies and to incorporate them into your license conditions, provided they're not inconsistent, is it your agency's position that that then preempts the state law and the ability of the state agency to have their own requirements for these projects?

MR. MADDEN: I'll have to ask Rob Fitzgibbons to address that. He was one of the drafters of the legislation before Congress.

CHAIRMAN SHER: Will that put you on the spot? Was that your intention? This is legislative history we're about to hear here.

MR. FITZGIBBONS: ECPA did not, had no intention of altering the preexisting relationship between the federal government and states regarding how hydroprojects are licensed. Instead, what the requirements are that you just referred to were intended to do was to strengthen the coordination that was expected to occur between the federal government and the states. So, in terms of did it preempt California's legislation in this regard, no, ECPA did not preempt it. If the Federal Power Act preempted it, as First Iowa held, ECPA did not change that. If, in fact, the courts then revisit First Iowa...,

CHAIRMAN SHER: So it would be traceable to the original legislation and not to the 1986 legislation?

MR. FITZGIBBONS: That's exactly right. Although, I think it is important to note that Senator Bacchus, on the Senate side, when the Senate was first considering ECPA, raised many of the questions that have been raised in terms of the federal versus state relationship and, in fact, had presented a series of amendments that tracked the Western states water councils' recommendations on how to reverse First Iowa, and the Senate refused to do that. They did hold a hearing between when the Senate originally considered ECPA last spring and when the Senate ultimately adopted the conference report last fall on this very issue, and no changes were made to the conference report to reflect these concerns. So, one could argue..., one interpretation of the action on ECPA was that Congress was well aware of the concerns with First Iowa and did not make any changes to the Federal Power Act.

CHAIRMAN SHER: Okay, thank you.

MR. MADDEN: Regarding PURPA, we do not believe that either FERC's certification or states entering into a PURPA contract can be conditioned on compliance with state environmental requirements. Naturally, in licensing such projects, the Commission frequently includes conditions to ensure projects are constructed and operated so that important fish and wildlife resources are protected and enhanced.

Further, hydroprojects desiring to benefit from PURPA must comply with three new environmental requirements added by

ECPA. And to the extent such projects are exempted from the Federal Power Act's licensing requirements, they will continue to have to obtain their water rights from the state.

There are twenty-four inspectors in the Commission's San Francisco regional office which are responsible for evaluating whether projects are operated and maintained in compliance with all license and exemptions conditions, including fish and wildlife provisions. Inspectors review both the structural and the operational features of the project. The Commission has over fifty fishery and other environmental experts in Washington to provide technical assistance to the regional offices. The Commission also has a complaint procedure to ensure continuous compliance with fish and wildlife conditions by licensees and exemptees. Under the Commission's regulations, any person may file a complaint seeking Commission action against a licensee or exemptee for failing to comply with the terms or conditions related to fish and wildlife.

Finally, it should be noted that Section 12 of ECPA adds a new section, 31, to the Federal Power Act, which requires the Commission to monitor and investigate compliance with each license permit and exemption. In addition, this section establishes new procedures for revoking licenses and exemptions and assessing fines for violating terms and conditions.

Currently, there are nine complaints or actions initiated by staff dealing with license compliance issues in California. In 1985, the Commission approved a consent agreement in which the Oroville-Wyandotte Irrigation District agreed to

refrain from violating the conditions of its license. The agreement also required Oroville to study measures to improve the fishery resources in streams affected by the project.

CHAIRMAN SHER: Let me break in again. Is that the only case in which FERC ever used these monitoring enforcement procedures in California that you have just described? And that led to a consent agreement, no citations or...?

MR. MADDEN: To the best of my knowledge, Mr. Chairman, yes, that is the case. However, there are, as I mentioned, nine pending complaints filed with respect to California. However, I cannot delve into the merits of those particular complaints due to our ex-party regulations.

CHAIRMAN SHER: Were there any complaints prior to these nine? I mean, since 1978, I think, you told us the Commission has issued in California sixty-four licenses and 133 exemptions. Do these enforcement tools apply to the exemptions as well or not?

MR. MADDEN: Yes, they do.

CHAIRMAN SHER: So, that's almost 200. Prior to these nine, were there any complaints about failure to comply with requirements?

MR. MADDEN: If you're talking about pre-1978, I cannot...,

CHAIRMAN SHER: No, I'm talking about those that were issued since 1978. You say there are nine currently pending. Were there more in addition to those, that have been disposed of? We know that one led to the consent agreement, for the Oroville Irrigation District.

MR. MADDEN: There may be, Mr. Chairman. I don't know at this point. However, I can get that information for you upon my arrival in Washington.

CHAIRMAN SHER: See, what I'm trying to determine, it's hard to do without this information, is whether FERC after granting these exemptions and licenses has been an aggressive agency to make sure that these projects are being run properly and without damage to the environment in the streams.

MR. MADDEN: Well, in that regard, Mr. Chairman, I'd like to note for your information that the Commission has implemented a recent policy whereby the regional offices contact the appropriate state and federal agencies so that their representatives can be in attendance at the inspection of any dams. So, as I understand it, the San Francisco Regional Office has contacted your state agencies in advance on these matters.

CHAIRMAN SHER: That's all to the good, and I would applaud that. The thing that concerns me at this time, and I would hope it concerns other members of the Committee, is that there an effort going forward in litigation to preempt the state, to take away its separate enforcement tools. And if that should happen, and I hope it doesn't, we're going to have to rely on FERC. And I'm trying to see how aggressive an agency it has been in monitoring its licenses and exemptions that have been granted, in enforcing the regulations and laws.

MR. MADDEN: Well, I think it's very clear that the new statute gave the Commission a great deal more responsibility than it had under the Federal Power Act. Under the Federal Power Act,

it never had the authority to administratively revoke a license. It does have that authority now. It does have the authority to require the licensees to pay a $10,000 fine in violations if it goes through a number of administrative procedures. However, if the Commission does have that authority, and I believe the Commission is actively involved in determining whether or not the licensees do, in fact, comply with the terms and conditions of the license.

CHAIRMAN SHER: Mr. Connelly?

ASSEMBLYMAN CONNELLY: Does one of nine complaints involve the Sayles Flat?

MR. MADDEN: I believe so, but I cannot tell you. I do think that that is the case.

ASSEMBLYMAN CONNELLY: Can you tell us about the status of those complaints?

MR. MADDEN: I can tell you that staff is currently reviewing those complaints. As to that, I can't go any further into the merits of the complaints, as I mentioned. We are subject to our own ex-party regulations.

ASSEMBLYMAN CONNELLY: Can you tell me if a decision has been reached to use any of this additional administrative control you've got under the Act, either fining authority, license revocation, what have you?

MR. MADDEN: Before the Commission or the Commission's delegatee acts on the complaint, I would assume and I believe that the Commission would use all authority necessary to take the appropriate action, including the new provisions of ECPA.

ASSEMBLYMAN CONNELLY: Are you familiar..., can we get into Sayles Flat a little bit here, or would you rather I not?

CHAIRMAN SHER: He says he can't respond to those questions.

ASSEMBLYMAN CONNELLY: I was just going to ask if you were familiar with the five CFS interim flow restrictions. Can you talk about that?

MR. MADDEN: I am somewhat familiar. Now, what I think is best is that I use my right-hand man to address the 5 CFS question.

ASSEMBLYMAN CONNELLY: Okay. Why don't you talk about that?

MR. FITZGIBBONS: The 5 CFS interim flow that was originally agreed to by the California Board of Fish and Game and are now-licensee; along with that agreed interim flow, there was an agreement to conduct both pre- and post-operational studies of the fishery in the bypass reach. All of those provisions were made part of the license; the interim flow and the preimposed operational fishery study. Along with that, our staff recommended an instream flow study, which has been conducted and is in the process of being reviewed, I understand. The interim flow was projected as just that, to be a flow used for initial operation of the project. With the postoperational studies of the fishery...,

CHAIRMAN SHER: Is it normal procedure to approve these projects without the hydrological data; the instream fish studies?

MR. FITZGIBBONS: Normal is probably not the right word, but it's not unusual. We do license projects with interim flows, and this is just one case. I think the important part to remember here is that all parties at the time of licensing were agreed that a post-operational study of those interim flows would be needed to determine whether or not the 5 CFS was appropriate.

ASSEMBLYMAN CONNELLY: Have you seen the advertised study yet?

MR. FITZGIBBONS: I, personally, have not.

ASSEMBLYMAN CONNELLY: Is it in FERC somewhere?

MR. FITZGIBBONS: I couldn't respond to that, but it was not contemplated at the time of licensing to be the instrument for changing the flow. The post-operational studies were considered to be that.

ASSEMBLYMAN CONNELLY: So it was the intent of FERC then to go forward, allow the operation at the 5 CFS, regardless of what the habitat studies show.

MR. FITZGIBBONS: Not only was it the intention of the license, it was the intention of Cal Fish and Game and the applicant when they agreed to that provision prior to coming to FERC...,

CHAIRMAN SHER: You heard his testimony. He said that, because they didn't receive this document, I guess, that they changed their position. And you say, if I understood the testimony correctly, that it was anticipated when they agreed on this 5 CFS figure that they would have this habitat study -- is that what it's called? -- and it was never forthcoming. Is that what the witness said?

MR. FITZGIBBONS: I, personally, don't understand why anyone would agree to an interim flow that they never expected to see implemented. What would be the purpose of agreeing to an interim flow?

CHAIRMAN SHER: Well, I think, the way I understood his testimony, I think he's left otherwise I'd call him up here, but I think he said it was because it was based on the assumption that that would be available and if it demonstrated that the 5 was too small it would be changed. That was not your understanding?

MR. FITZGIBBONS: No, sir. The postoperational flows were contemplated to determine whether or not the 5 CFS was an appropriate (inaudible). In fact, the flows..., there was a second negotiation of flows that would be imposed post the 5 CFS if it was determined that the fishery had been harmed by the 5. I think it was something like 17 CFS. But there was contemplation prior to licensing of a second round of flows even before the IFIM. The IFIM, the Instream Flow Study, in particular, was a concern of our staff. That's where the requirement came from.

ASSEMBLYMAN CONNELLY: On any one of the instream flow standards that you've set anywhere else, have you gone back and increased them?

MR. FITZGIBBONS: Yes, sir.

ASSEMBLYMAN CONNELLY: What's the time-frame for that in terms of the Sayles Flat project?

MR. FITZGIBBONS: We required the filing of a plan that was prepared in consultation with the California Department of Fish and Game within six months of the license being issued. Included in that plan was to be a schedule for the conclusion of the study and recommendations to be provided to the Commission for changes to the minimum flows if necessary.

ASSEMBLYMAN CONNELLY: Has that been done?

MR. FITZGIBBONS: Well, the study, the postoperational studies obviously have not been performed. The IFIM, which was also part of this license article, has been done. I have not seen the results of that.

ASSEMBLYMAN CONNELLY:: That's all pursuant to the first six months since the license was issued?

MR. FITZGIBBONS: The six month requirement was when they were supposed to file the plan which included what type of postoperational and preoperational studies would be conducted and a schedule for conducting those studies.

ASSEMBLYMAN CONNELLY: I didn't ask the question clearly enough. That six months has run since the date of the license. So, everything is in hand now except..., how long ago did the six months run?

MR. FITZGIBBONS: Well, the six months was, like, in 1983, I believe, when the license was issued.

ASSEMBLYMAN CONNELLY: So, at least in theory, in point of fact you didn't, but in theory you had everything except the postoperation studies in 1983?

MR. FITZGIBBONS: No, sir. The preoperational studies would not have been available then either.

ASSEMBLYMAN CONNELLY: They were done when? I know they were supposed to have been done by 1983, but they've been done just recently, right?

MR. FITZGIBBONS: Right.

ASSEMBLYMAN CONNELLY: Are you going to go back and take a look at that now? Are you going to do that before they operate it and you look at the run level at the CFS of five or are you going to wait now for the whole ball of wax from the fact that five years has passed?

MR. FITZGIBBONS: I think yes, filings are provided to the Commission in accordance with the agreed or the approved schedule, we will look at those and if there is a rationale for providing changes to the flows, they'll be taken at the time.

ASSEMBLYMAN CONNELLY: I'm just going to take a step back and look at the real world in terms of our perspective, okay? First of all, we don't need the energy. Okay? We've got energy running out of our ears. There's an initiative in this county to turn down the nuclear power plant that's up and running, okay? We don't need the energy; that's A. B, the energy that's going to be provided by this baby is going to cost us more than virtually any other source we could identify that's trying to sell us energy. That's the B. The C is that every credible state agency that looked at this baby says that it's a turkey causing environmental damage, impacts recreation negatively, damages the fish. It's bottoms-up bad, right? And

what you're telling us in your testimony is, "We're the federal government, the Senate gave us the authority, we can do what we damned well please. And what we damned well please is to look at those reports, we can take a look at it, we'll evaluate it. Sorry about that, we'll getting on an airplane at 5:00 and going back home." Excuse me, Mr. Madden, I want to get to the question here.

Just for a second, and moving outside from regulations of what you can or cannot do and what the Iowa case is, and God knows what Karlton does with his TRO, what can you do for us? I mean, the real world is that that's what happened. We're building a plant that we don't need that's going to cost the consumers more, that's going to do environmental damage, and we're doing it pursuant to your administration. And we need help, okay? What do you suggest that we do?

CHAIRMAN SHER: In thirty seconds I want you to answer that because we've got a lot of witnesses here. That was a nice statement, Mr. Connelly.

ASSEMBLYMAN CONNELLY: I thought it was very restrained.

CHAIRMAN SHER: That's right.

You're going to take a look at it. That's the answer, isn't it?

MR. MADDEN: I certainly sympathize with the points you make. And, in terms of what we can do for you, I think what you see, particularly in terms of whether you need this project or not, is you're living with the consequences of regulatory decisions that were made years ago.

ASSEMBLYMAN CONNELLY: And what I'm saying to you, is that deep down, you guys normally have the authority and the juice to do a lot of things. For example, you can look at those instream flows right now and make a decision whether or not to go back to the Commission based on new data. You can look at the new Energy Commission information that you've heard today or had for the last six months. There's a lot that you can do, particularly given the violations of this particular actor on this project, and what I mean is that we're going to see, hopefully again, I mean, it'll just be a mess. What I'm saying is that, hopefully, out of this hearing as we get, and I am getting a better understanding of the problems you face, and you have to comply with the law, is that you can understand how this looks to us here, and ask you to take a step back in terms of not just defending it because you can defend it if you want to, but to really assert yourself as a regulatory agency that, quite candidly, and maybe promptly given the law at the time, what any reasonable person would sit down and conclude was a damned fool mistake.

MR. MADDEN: In terms of the need for power and PURPA and the need and the fact that we're generating projects which no longer make economic sense, the Commission is, in fact, going to be going around the country this spring and soliciting people's opinions on how, in fact, PURPA can be implemented in a more responsible fashion. I think that's an important first step. But I think it's also important to point out that it is a partnership between the federal government and the state

government, that, in a large part, the state governments have been given great discretion in how PURPA was to be implemented, including the pricing mechanism for how this power is being purchased. If there's too much of it, it's probably because private investors responded to the financial incentives that were created at the state level in terms of setting the price. And so, I think that it's a partnership and hopefully this fall...,

ASSEMBLYMAN CONNELLY: And I'm asking some of your partnership to look at this turkey and see if you can't cool it down.

CHAIRMAN SHER: Mr. Connelly, I think you've got the point well made. He's responded the best way he can. And hopefully your very perceptive comments will have some impact. Mr. Harvey, did you want to make a comment?

ASSEMBLYMAN TRICE HARVEY: I think they've answered my question in all of this.

CHAIRMAN SHER: Okay, thank you. Had you finished?

MR. MADDEN: Yes, Mr. Chairman, we have.

CHAIRMAN SHER: Okay, well, are there any other questions for these witnesses? I know you've come a long way, and I covered some of the points that I wanted to. You said you could follow up and give us some more information about these enforcement tools, or remedies, and the extent to which they have or have not been used. I think that would be helpful to the Committee.

MR. MADDEN: I will prepare a response on that question as soon as I arrive back in Washington.

CHAIRMAN SHER: Okay. If there are no other questions then we should move on to our other witnesses. Thank you very much. Thank you for coming to California.

Mr. Walsh, for the Water Board. This is what always happens in these hearings. It's such a fascinating subject matter that we get carried away with the early witnesses, so I'm going to have to crack the whip a little bit and hope that we can move expeditiously.

MR. DANNY WALSH: I'd like to offer a couple of suggestions in that vein, to have Clifford Lee from the Attorney General's Office be up here with me as well as Sheila Bassey, our staff counsel, and Ray Walsh, our head of our Water Division.

CHAIRMAN SHER: As long as you're not all going to testify and we're going to... Okay, they are all welcome to come forward.

MR. WALSH: With that, while Ray and Sheila are coming forward, I'd like to extend the greetings of our Chairman, Don Monn, who requested that I give the Board testimony today. My name's Danny Walsh. I'm a member of the State Water Resources Control Board, and I've introduced the other players.

Mr. Chairman, there have been some differences in the numbers being stated. I don't think they're significant. We have another set of numbers as they relate to some of your first questions, but I think you've thoroughly exhausted those first couple of questions. Can I try to hit on those areas where you have not had the discussion or interest?

CHAIRMAN SHER: Please do.

MR. WALSH: Okay.

I think you've covered the second question, which involves needs and the role of the State Energy Commission. Question three; "How does the Board establish minimum flows for fisheries and how are these incorporated as conditions of any water right granted by the Board?" Well, essentially, the applicant -- and I'll try to paraphrase this -- the applicant is required to prepare an instream beneficial use assessment. Preparation of this document will require completion of fishery studies unless an adequate fishery study has been completed previously, within a reasonable period of time.

The information from the fishery studies, from interested parties including the Department of Fish and Game, are then considered by the Board together with information compiled in the environmental impact report. Appropriate permit terms and conditions are developed from this information. The Board is authorized to include any condition in the water right permit which, in the Board's judgement, will best develop, conserve, and use the public interest in the water sought for appropriation. When a fishery bypass condition is proposed, the Board has to then consider the impacts of the condition on the economic feasibility of the project.

Moving on to your next question, in cases where the hydrodeveloper retains riparian water right, how does the need for the project receive consideration and how are minimum fishery bypass flows assured? Well, prior to January, 1987, the state Board had no input concerning the development of small

hydroprojects which were based on a claim of riparian rights. As a result, we could not examine the need for the project nor insure adequate bypass flows. These, however, stating that maybe minorly alarming statement, these traditionally have been pretty small projects without major consequences of the type we're discussing today.

With the enactment of the Federal Consumers Protection Act, Public Law 99-495, FERC must now solicit recommendations from state agencies exercising administration over irrigation, recreation, cultural, and other resources of the state. As a result, FERC must consult with the state water board concerning any proposed project and consider -- and that's the key word -- any conditions which we recommend. However, FERC is not required, not required, to incorporate conditions recommended by the state Water Board.

In addition, FERC must now also consult with the Department of Fish and Game. All conditions deemed necessary by the Department, including fishery bypass flows, must be incorporated into the FERC license and met by the applicant, again, unless FERC makes published findings that the conditions are inconsistent with the Federal Power Act. These provisions apply to all small hydroapplications, whether riparian, appropriative, or pre-1914 water rights, whether or not they are involved.

On the question of whether or not a developer claims a riparian right and how we check into that particular process. The state board staff reviews available information to determine

if the claim is correct. If it cannot determine, based on the available information, the board then requests that FERC require the applicant to provide additional information. If the developer needs a water right permit from the board, we file a petition to intervene in FERC proceedings on the basis that specific sections of the Federal Power Act require compliance with the state water right law before a FERC license is issued.

CHAIRMAN SHER: So that's contrary to what the witness from FERC said, that they must have the water right license first as a condition to get the power license? Your board...,

MR. WALSH: We have that section with us, it's a paragraph, would you like it read?

CHAIRMAN SHER: No, I just want to know if your position is that they're wrong. That under the federal law they have to...

MR. WALSH: Yes.

CHAIRMAN SHER: And that's not just true for exemptions, it's true for ..., it's also true for the licenses?

MR. WALSH: Well, that's obviously one of the key issues in this whole issue of preemption, and Clifford Lee may have something...,

CHAIRMAN SHER: And that's what's involved in this litigation, is that correct?

MR. CLIFFORD LEE: Yes, Mr. Chairman. My name's Cliff Lee. I'm a Deputy Attorney General with the State Attorney General's Office.

CHAIRMAN SHER: Okay, Mr. Lee.

MR. LEE: We have taken the position that Section 27 of the Federal Power Act obligates a FERC licensee to comply with state law relating to control, appropriation, use, and distribution of water. I have some separate testimony dealing with the preemption issues, which I can address later.

CHAIRMAN SHER: You said that the law requires the licensee to comply with state law. That presumes you can get the license first, is that right?, and then comply with whatever the law is about instream flows and all of that, but not in terms of the water rights. Is that right? Or are you going to get to that in your formal...?

MR. LEE: Our position, currently, in the pending litigation does not address the condition precedent question because, in this case, the license was already issued. We have taken the position, however, that the licensee, regardless of the fact that he or she has possession of a license nonetheless must comply with all requirements of state water rights law, including the filing of an application for a water right permit and the compliance with any public interest terms or conditions that the state board chooses to impose.

CHAIRMAN SHER: That's the issue in any case. If you lose, you're going to appeal, right?

MR. LEE: You bet.

ASSEMBLYMAN CONNELLY: What's the status of that litigation?

MR. LEE: I'll be getting into ...

UNIDENTIFIED SPEAKER: Oh, I'm sorry.

CHAIRMAN SHER: We have a question from a committee member.

ASSEMBLYWOMAN JACKIE SPEIER: ...get to this as well, but in terms of preemption, you're making some very straightforward statements. How do you overcome the preemption challenge?

MR. LEE: The short answer of this is we feel that the compliance with state water rights law is within the long tradition of Congressional deference to state water rights law is a tradition that was developed in the nineteenth century under the equal footing doctrine, renewed by Justice Sutherland in the Portland Cement Company case under the severance doctrine, and vigorously reaffirmed in 1978 by the U.S. Supreme Court in California vs. U.S. It is under the strength of that tradition that we stake our position in this case. I will summarize that in more detail for you in my testimony, but the essence of our position is that compliance with state water rights law is fully and completely in the tradition of Congress's deference to state decision making in this area.

CHAIRMAN SHER: Mr. Walsh?

MR. WALSH: We also have a recommendation for you at the end here. And I'll try to get to that as fast as I can.

Question five; "How does the Board systematically monitor compliance with fishery release requirements? Please identify how many staffers are assigned to this function and the number of enforcement actions that are currently pending for noncompliance. What was the outcome of recent enforcement

actions undertaken by the Board? Has the Board ever rescinded a water right grant or hydrodam operator for violating downstream release requirements?" Maybe that was one question we should have avoided when we had the opportunity, but we will try to answer that.

CHAIRMAN SHER: You don't have to give us all the statistics. We want to know how aggressive you've been in monitoring compliance.

MR. WALSH: This is one reasonable paragraph, Mr. Chairman.

Given the limited staff available for ensuring compliance with water right conditions, the Board has traditionally placed its emphasis on responding to and investigating complaints by public agencies. Prior to PURPA, there was not the deluge of applications and we were able to handle that within our water rights division to, I would say, very good resolution of those issues as they came before us. Although we have permitted, and these were complaints by public agencies, downstream water users, and interest groups, and felt we did a pretty good job prior to PURPA. Although we have permitted 93 small hydroprojects since PURPA, 1979, we have no pending complaints on these projects. While the Board has a specific process for revoking water right permits and licenses, we have not had cause to revoke a license or permit for any small hydroproject. And the attitude, once again, has been that we try to work with the developer, with the entity involved, I think, to a pretty good resolution, at least in terms of some of the past issues that have been brought before us.

Mr. Chairman, I'd like to now, if possible, read the next page and a half, only because it gives you a very good chronology of events as it relates to Sayles Flat. It gives you a historical perspective on the steps that we've taken through the courts and where we're presently at to a recommendation.

CHAIRMAN SHER: How much comes after the page and a half, Mr. Walsh?

MR. WALSH: That's it.

CHAIRMAN SHER: Okay, well, read away.

MR. WALSH: I would think we'd probably get a gold star for the amount of time we'd save going into this.

Number six: (a) "What is the status of the Sayles Flat litigation? (b) What are your views on the impact this lawsuit could have on the ability of the Board to regulate hydrodevelopment?"

In July, 1986, Sayles Hydro Associates and Joseph M. Keating filed suit in the Federal District Court against several federal and state agencies, including the State Water Board, to prevent these agencies from interfering with construction of the Sayles Flat Hydroelectric Project.

The Board subsequently filed a cross complaint against the plaintiffs. The original defendants have now settled with the plaintiffs, with the exception of Fish and Game today, and the Board is the sole remaining active defendant.

After the lawsuit was filed, the Board attempted to get injunctive relief from the Federal District Court to prevent construction pending completion of the water right permitting

process. The Board was unsuccessful. On December 19, 1986, Judge Karlton of the Federal District Court heard both plaintiff's and the Board's motions for summary judgement. The key issue raised in the motion is whether the state is preempted from requiring a FERC license fee to comply with state laws regarding appropriative water rights. Judge Karlton took the matter under submission and has not yet ruled on that issue.

In December, 1986, Joseph Keating also filed a condemnation action against the Board to condemn the right to divert water. Keating, as well as FERC, takes the position that the Federal Power Act authorizes a FERC licensee to acquire water rights necessary for the project by eminent domain. What a horror! The state filed an answer to the condemnation action but the matter has not yet been scheduled for a hearing.

In the meantime, the plaintiffs have apparently completed construction of the project. On January 22, 1987, the plaintiffs notified the court that they would begin start-up testing and energy load testing as soon as possible and that they intended to begin operation of the project on February 15 or as soon as possible, I might add, without the state water right.

(b) If the State Board is unsuccessful in the Sayles Flat litigation, the case could have a drastic effect on the Board's ability to regulate water for hydroelectric projects. At issue is the question of whether the state is preempted from requiring compliance with appropriative water rights law. The Sayles Flat proponents argue that the state's sole role is limited to whether unappropriated water is available, a very

limited scope. If the court finds in favor of the proponents, hydroelectric development will be essentially unregulated in California for projects located on federal lands, on or affecting a navigable waterway, using waters impounded by a federal dam or producing power which affects interstate commerce. If the state Board loses the case, the state's only option is to express its concerns through intervention in the FERC licensing proceedings. These proceedings, however, are costly and time-consuming. In addition, intervention does not guarantee that FERC will be sympathetic to the state's concern.

The bottom line on this particular point, and these are my words, is that if you have a project constructed instream in a sensitive area without an appropriative water right.

Number seven: "What are the Board's recommendations for legislation that may be appropriate and feasible to improve the ability of the state to regulate hydroelectric development in light of the Sayles Flat case?" The major issue in the Sayles Flat case centers on the extent to which the state is preempted by federal law from requiring FERC licensees to comply with state appropriative water rights. As a result, legislation at the state level will not address the basic legal concern. The only option available to the Legislature would be enactment of a resolution memorializing Congress and the President to amend the Federal Power Act to require FERC to incorporate both Board and Department of Fish and Game recommendations into their licenses. The Western States Water Council has proposed amendments to the Power Act to address our concerns. The amendments would add

language prohibiting the issuance of a license, or an exemption from licensure, until the developer demonstrated compliance with state appropriation law. In addition, the amendments would prohibit the use of eminent domain to acquire water rights.

Number eight, and I don't know how deeply you want to get into that, "What impact would the change from General Fund appropriation...

CHAIRMAN SHER: No, I think we'll want to finesse that at this point. Well, you paint a dismal picture. In other words, what we heard from the FERC witnesses is they're prepared to listen to your recommendations. Presumably, they make the water rights decision, under this analysis. If they issue the license, that's it. The ballgame's over. And then the licensee can go out and condemn the water rights. Isn't that their theory?

MR. WALSH: That is one of two theories they are presently proceeding under.

CHAIRMAN SHER: All right. Well, I think we should hear from the Attorney General representative who is going to give a little more detailed description of this.

ASSEMBLYMAN CONNELLY: Mr. Walsh, I just wanted to thank you and the State Water Resources Board. You've been aggressive and good on this issue, and it's appreciated.

MR. LEE: Mr. Chairman, my name is Clifford Lee. I'm a Deputy Attorney General with the State Attorney General's Office and I am one of the Counsel of Record on the two federal actions currently pending before the U.S. District Court: the Sayles

Hydro Associates vs. the United States case, and the Keating vs State of California case. I was asked by you, sir, to appear here and to discuss the federal preemption question in general and the Sayles Flat litigation in particular. I'd like to cover three rough areas and I will not try to repeat the material that's already been stated.

CHAIRMAN SHER: You do agree with Mr. Walsh that this is an issue that the federal courts are going to decide and there's nothing in state legislation that would be helpful at this point?

MR. LEE: I would say, generally, that the ballgame right now is in the federal courts. However, individual state legislation might, or might not, be appropriate depending upon the level of its impact a particular project. So, I think I would prefer, if you are asking me for an absolute answer, to say, I'd have to take a look at the proposed legislation on a case-by-case basis.

CHAIRMAN SHER: Let me ask you this. Let's just project for a moment, I know you want to get to the points we asked you to discuss, but if the state should lose, the Water Board should lose, then we do have the power, don't we, to make these projects very unattractive in terms of what the power can be sold for through the PUC? That would not be preempted, that's not involved in this case, is it, the PUC's power to, on the standard offers for the power? We can control that, can't we?

MR. LEE: I think it would depend on the nature of the control, Mr. Chairman. There is a rough sense of a continuum. And I might say..., and I want to stress for the record that I

feel confident that all the state laws that we are currently seeking to enforce against the project proponent here we feel comply with the preemption question.

CHAIRMAN SHER: So you aren't going to lose, you're telling us. You're going to win.

MR. LEE: No, we feel we have a very strong case. Nonetheless, I recognize that there is, in fact, a continuum here. It's not a yes or no question. I think areas relating to water resource management will probably be more likely to be subject to deference by federal agencies and facilities that aren't blanket prohibitions, I mean legislation that's not blanket prohibitions of projects, are less likely to be successful. So, you see a long continuum of modification versus prohibition from general law to water rights law. My sense of it is that the strongest state legislation to survive preemption is water resource legislation that imposes reasonable terms and conditions on facilities.

CHAIRMAN SHER: Okay. Well, go ahead with your point.

MR. LEE: As Mr. Walsh has already indicated, we have a very complicated and detailed state water rights system currently. Under existing law, any entity that seeks to appropriate water from a stream system must apply to a state agency, obtain a water right permit, and can only do so after that entity demonstrates that the project that they are proposing will be beneficial, will be reasonable, will meet the public interest, and will comply with the public trust doctrine. In the absence of other forms of state water rights, such as riparian

water right or pre-1914 rights, under California law, you cannot obtain the right to store or divert water within the watersheds of this state unless you meet very clear environmental protections under our public interest, public trust, and reasonable and beneficial use doctrines.

Now, we are not unusual in comparison to other western states. Virtually all of the western states have a very similar kind of system, that is, where you go to a state entity, you seek a water right permit, that entity makes a determination as to whether there's unappropriated water in the stream, and then imposes reasonable terms and conditions on any permit or license that it issues. And Congress has traditionally recognized that the Western states, individually, are best capable of dealing with the problem of water resource management within their watershed. That's been recognized, as I mentioned earlier, regarding the severance doctrine, the equal footing doctrine, where under those doctrines Congress delegated to the states the power to allocate their water resources. I might further add that this was reflected in the early water resource legislation adopted by Congress, in particular, in the Federal Reclamation Act of 1902. Now, what that Act did is it authorized the construction of federal reclamation projects, as you all are aware; project such as the Central Valley Project, the New Melones Project, and other such projects. Now, when Congress adopted that Act, it indicated that, under Section 8 of the Reclamation Act, that, in fact, those projects have to comply with state law relating to the control, appropriation, use, or

distribution of water. And it is pursuant to Section 8 of the Reclamation Act that the State of California in the 1978 Supreme Court decision, California vs U.S., was in fact able to secure compliance with the federal projects to California water rights law.

Now, at the time the Federal Reclamation Act was adopted in 1902, there was also an ongoing recognition that water and power was an interest that Congress sought to analyze and take a look at. And in 1920, they passed the Federal Power Act, which is the authorizing statute for then, the Federal Power Commission, and now, the Federal Energy Regulatory Commission. And the Federal Power Act involved the system that, as it was explained to you earlier today, related to permitting and licensing of hydroelectric facilities. However, and this is a critical point, in adopting the Federal Power Act in 1920, they adopted a provision, Section 27 of that Act, that specifically traced from the Section 8 of the Reclamation Act. In fact, it said that the licensees shall, in fact, have to comply with state law relating to the control, appropriation, use, and distribution of water. And in the legislative history of the Federal Power Act, Congress recognized that it was adopting Section 27 of this provision and in this Act as a way to duplicate the kinds of policies it had previously adopted in Section 8 of the Reclamation Act of 1902.

CHAIRMAN SHER: Mr. Lee, I don't want to cut you off, but I think, perhaps, in our question, this is not the forum for you to..., what you're doing is really making the case that

you're arguing now in the federal courts, and you have strong case as you see it, and I hope you're right. It sounds like you've got a good solid case. I guess what the Legislature, what we're really interested in..., there's a concern here. Mr. Walsh is concerned, I'm concerned, about what happens if you should lose this litigation and whether there's anything that we ought to be looking at here, in the Legislature, to do about it. So, I think I'd like to move to that. Do you have any views on that, for example, I tried earlier in an artful way to suggest that even if you lose this case, it's possible the State Water Board has rules and regulations about state water rights and could that be built in, compliance with those, be built in to the standard offer contract mechanism that's administered by the PUC, or something like that so that there would be a role to be played by the State Water Board even if it turns out direct. Now maybe that's not what you can testify to, but we're looking for ways here to preserve the state's proper role in this matter. Obviously, the best way is by being fully supportive of your activities on this direct challenge. And hopefully, we'll win on the direct challenge. But we're trying to explore other, indirect, ways to help protect the jurisdiction of the Water Board. Do you have anything to say about that?

MR. LEE: Well, I'm hesitant to make recommendations assuming that my briefs are not going to be persuasive.

CHAIRMAN SHER: No, I understand that. We assume they will be, but in the meantime these are backup positions.

MR. LEE: I understand. Obviously, Mr. Chairman, it will depend on the kind of test that is outlined by the Supreme Court when it renders a decision in our case. It may provide us with very little legroom for state legislation. It may prohibit state legislation. On the other hand, it may provide us with considerable leeway. I think it would be premature for me to suggest, "If we lose, what can we do?" until we know what the terms are that we do lose on. I am hopeful that this court, given, in particular, that the current Chief Justice is the author of the California vs. the United States decision, will look with favor on our position regarding to deference of state water rights law. But I think it would be premature for me to render a judgement without knowing how that court will rule.

CHAIRMAN SHER: Well, do you agree with me that I should cut you off and not have you argue your case here because there's nothing that we can do about it and we'll stipulate that we have the better case here and that you're going to win.

MR. LEE: Well, if you have any questions on the nature of our proceeding, what the procedures are, we can pursue that some other time. We have vigorously sought a temporary restraining order and a preliminary injunction, and we have sought to prohibit both construction and operation of those facilities. Unfortunately, those have not prevailed in the federal court. We are expecting a decision from the U.S. District Court, hopefully, within a reasonably short period of time. The matter was submitted in December. In any event, we intend to pursue all of our appellate options in this case and hope for the best.

CHAIRMAN SHER: Is your case weakened if they get underway and start actually using this facility?

MR. LEE: I think the case or controversy of this case extends even if the facility is constructed. We are seeking, in this case, to ensure that reasonable terms and conditions are imposed on this project in the review of the permitting process and that the permit be reviewed and that reasonable conditions can be imposed. The simple construction of the project doesn't mean that such conditions can't be imposed.

CHAIRMAN SHER: If you win totally, they then have to go before the Board, don't they, and get their water rights permit?

MR. LEE: Currently they have water right application pending and information, in fact, has been exchanged between the parties. Perhaps Counsel would...,

CHAIRMAN SHER: I thought they had the condemnation proceeding pending. They also have an application for the water right?

MR. LEE: The parties in this case have been active in many forms.

CHAIRMAN SHER: Moving on all fronts, right?

MR. LEE: I have had a chance to be present at most of them.

CHAIRMAN SHER: They don't see anything inconsistent with saying, "We're applying to you for the water rights, but even if you don't give them to us we're going to take them," right?

MR. LEE: They have filed a federal condemnation action, which seeks to condemn the state's sovereign role to regulate its resources. We've filed answer, the matter has not yet proceeded beyond that.

CHAIRMAN SHER: Okay. Mr. Walsh?

MR. WALSH: Just very briefly: the Board has had some preliminary discussions of what we might have to do, and we'll be continuing that discussion to the point where we will probably even direct our Chief Counsel to develop some options for us. We would be happy to...,

CHAIRMAN SHER: Does that include a recommendation to the Governor and the Legislature that we secede from the Union? That's not one of the options you're looking at, is it? No.

MR. WALSH: That's one of the questions.

Mr. Chairman, I do have copies of our testimony, in detail, that will assist your committee members, and, because we didn't answer the question, but as called for in your question, we've developed a map with the pending hydroelectric applications. On a county-by-county basis, it would've been too difficult and I don't think you would have gotten benefit out of identifying each one, but this we will also leave with you.

CHAIRMAN SHER: Our able consultant, whom I should have introduced, and who wrote the background paper, Jeff Shellito, will look at your map and we will digest that information.

Thank you very much, all of you, for your testimony.

Mr. Somach, are you still here?

MR. STUART SOMACH: I'm here.

CHAIRMAN SHER: Are you looking forward to coming and telling us that we've been going down the wrong track? And then, after that, we're going to ask...maybe we should get that, if you don't mind sharing the...(just to save time), can we get all the other interested parties: Andrews, Crenshaw, Kottcamp and Henwood, are all invited forward, but we'll hear first from Mr. Somach, who is central to this question, and probably disagrees with ninety-five percent of everything that has been said here today, at least by members of the committee.

MR. SOMACH: Surprisingly, not. I actually agree, to some great measure, with the recommendation that Mr. Walsh has just given the committee, and I would like to explore that in a moment.

To my right is Steven Strasser, who is the Vice President and General Counsel of the Shoop Energy Development Company, which is one of the project proponents of the Sayles Hydro Associates. He is my client on this particular matter. I've asked him to come to give some background, with respect to their involvement in this particular project, which appears to have (although I know Mr. Connelly is no longer here)...

CHAIRMAN SHER: He'll be back.

MR. SOMACH: I was kind of looking forward to it, actually, but I thought that, perhaps, some background from Mr. Strasser might be helpful on this project, which appears to be at the eye of a considerable storm, so let me do that, and then I'd like to comment ...

CHAIRMAN SHER: You do agree, don't you, that it has large implications, not just for this project, but for this whole hydro ...

MR. SOMACH: No, I don't ...

CHAIRMAN SHER: You don't think it's peculiar to your own project?

MR. SOMACH: I think it's peculiar to a limited number of projects that are still pending and were in effect prior to the enactment of the new legislation, which we've heard lots of discussion on.

CHAIRMAN SHER: But the FERC people said that if the theory of your action is correct, it goes back to the original legislation, not the new action. You don't agree with that.

MR. SOMACH: No. I agree to the extent that the federal preemption issue, as to the water rights issue, I think that is a central issue and will have precedent beyond just this case. I don't think there's any question about that, but we've talked about many and varied issues here today.

CHAIRMAN SHER: Well, that's the one I was talking about...

MR. SOMACH: I'll get to that. Let Mr. Strasser address you briefly here.

<u>MR. STEVEN STRASSER</u>: What I thought I'd do is give you the perspective from the other side. Just to give you a bit of background, Shoop Energy is a very small company of eight employees, in Bellevue, Washington. There are two principals in it: myself and Mr. Shoop, who is a civil engineer with an

extensive background in hydro development. He has completed, I think, under construction something like 64 major projects in the area; a lot in this area as well.

We are in the business of developing, financing, constructing small- to medium-size hydro projects. What we do is we evaluate a project depending on three criteria: it's technical, economical and, of course, legal to see whether we can legally build a project.

In this particular case we looked at the project about a year ago, talked to Mr. Keating, who is a licensee, and in effect, took over the financing, construction, development, although not the permitting process until last April, so it is hard for me to speak as to what happened before. I can certainly speak as to what's happened since April.

CHAIRMAN SHER: You were not the original principals; you bought this from somebody else. Is that right? You took it over. Were they California residents? The originals?

MR. STRASSER: Yes.

CHAIRMAN SHER: But now all the profits out of this thing, you tell me, are going to flow to Washington?

MR. STRASSER: No. They get nicely taxed in California, since it is a California partnership.

CHAIRMAN SHER: Okay.

MR. STRASSER: There may be no profits flowing anywhere, actually.

I think what's important is, perhaps, for the committee to get a viewpoint as to how the developer sees it. The first

thing you do is take a look at what gives birth to a project? The FERC license does. And the FERC license is not a simple little document; it's an extensive document that outlines plans, environmental mitigations, economic feasibility. Based on these plans and the license, which this particular license, I think, has 44 articles, you perform a feasibility study to see if you want to go ahead.

We did that, we went through it and had attorneys, engineers look at this license, and little did we know what we were getting into. What I want the committee to understand is that it seems that there are two camps here. You've got "develop is bad"; "environmental is good" and somewhere in the middle is the truth of the matter. This project is a small project. It was licensed, I believe, in 1983, and what happens is that people (usually, small business people in these projects) tend to rely on legislation that exists at the time and the license. And, it was our opinion that this project was properly licensed and that included the various mitigation, environmental mitigation measures, that were included in the license, and ...I don't know if you've ever read the license...

CHAIRMAN SHER: But wasn't the prevailing wisdom, in 1983, that you had to go both to the State Water Board and get your permit for the water and you had to go to FERC, so when they looked at it, they thought they had to go to both, but when they got the license, now they figure they can finesse the one. Isn't that right?

MR. STRASSER: No. That's not correct. In fact, ...

CHAIRMAN SHER: You mean, from the beginning these folks thought that they were going to bring this lawsuit to challenge it.

MR. STRASSER: No. Not at all.

CHAIRMAN SHER: Well, tell me what's correct then.

MR. STRASSER: Let me just tell you that most of -- a lot of these provisions in the license refer to consultation with state agencies. I think the problem that you have here is a legal problem that Stuart will address as to jurisdiction final saying. It is not a question of ignoring agencies. It's -- Judge Karlton put up a turf battle right now, and we're kind of a victim of a turf battle.

CHAIRMAN SHER: But now I want to go back to my question. It wasn't considered a turf battle in 1983. In 1983, there was the assumption you had to go to the state agency and you had to go to a federal agency, so there was no fight, but some of us think you're trying to change that basic assumption by saying, we can bypass the state agency.

MR. STRASSER: No.

CHAIRMAN SHER: No?

MR. STRASSER: Well, in fact, all the applications, as was stated, including the water board testified, have been made to the state agencies. They were not ignored. What we ran into was a position taken by some of the state agencies, which were contrary to the FERC license. In other words, these were, what we felt, in our own right, were a legal position.

CHAIRMAN SHER: You mean, you thought, you got...it was in the wind that they somehow were going to deny your application for the permit on grounds that were inconsistent with the FERC ...

MR. STRASSER: Absolutely not.

MR. SOMACH: The situation that occurred was I was retained in April by the partnership to represent them in some litigation in 9th Circuit; and in addition to that to move through the permitting process, including the State Water Resources Board permitting process, as expeditiously as possible.

I met with representatives of the State Water Resources Control Board to find out why the application, that had been filed prior to the time that the license had been issued had been languishing at the State Water Resources Control Board, sir, some three or four years. When I met with them, we discussed the relative roles of the FERC and the State Water Resources Control Board in the process. I readily conceded to the State Water Resources Board that I believed, as I do now, that they have a legitimate role in the water permitting process, but I also indicated to them at that time that I thought that that did not necessarily mean that they could review and redo and re-decide each and every issue that had already been before the Federal Energy Regulatory Commission and upon which a license had been issued. It was on that grounds that the controversy, in fact, that exists now, is based, and it is upon those grounds that we proceeded through litigation.

CHAIRMAN SHER: So, what you're telling me is that the process at the federal level, the FERC license, that does include the appropriative water rights.

MR. SOMACH: Absolutely not. What the FERC process does is review environmental factors; it takes a look at the construction factors; it takes a look at the feasibility and reasonableness of the project under Section 10 of the Federal Power Act. Now, what is left to the state under First Iowa is to determine whether or not there had been prior vested rights to water outstanding; that the project proponents need to deal with before they can operate the project.

CHAIRMAN SHER: And your position is they still have (the State Water Resources Board) still has that power to look at that narrow question.

MR. SOMACH: Absolutely. And we have never done anything in the context of litigation or elsewhere to say anything other than that.

Now there is a secondary issue that's involved in the case, and the secondary issue is whether or not there are federal doctrines of water rights out there that grant actual water rights. Those are separate and distinct issues in the context of the litigation, and they are doctrines that, as I said, are wholly apart from the fundamental issues that are being litigated in the context of the litigation; that is whether or not or how FERC licenses vis-a-vis state water rights.

CHAIRMAN SHER: So, it isn't your position that you can just totally ignore the State Water Resources Board.

MR. SOMACH: It never has been our position. In fact, I...it is not, somehow, inconsistent or bizarre that we're proceeding in both of those forms. It is, we believe, to be the proper legal position today.

CHAIRMAN SHER: If, back in '83, they had moved expeditiously in the State Water Resources Board and made a determination that this is not a good project, and had denied the application, then what might have happened?

MR. SOMACH: If they had done that, certainly prior to the time of construction of the project, I would say we would have a different ballgame here, but that's not the case. They did not act in a responsible fashion.

CHAIRMAN SHER: They just sat on it.

MR. SOMACH: They just sat on it. That's absolutely right.

MR. STRASSER: If I may add the reality of it is that when you (inaudible) one of these licenses or projects, you do start to invest money at a certain point, and I know that may be not important to some people, but for people like ourselves, we're really a small company, it's life savings. We have personally guaranteed loans on these projects. Now that's based on law. We had a federally issued license; we had applications before the government committees; and I'm an attorney; I used many attorneys; we didn't do it foolishly or recklessly. It existed. And, there is a lot of suffering that goes along with us from the personal side from the developers, the projects proponents view as well. We do believe strongly that the

environmental mitigation measures were looked after in the first process. The agencies had the opportunity to comment at that time, and we have consulted since then. In fact, and Stuart can attest to this, even after litigations, we have come to an arrangement and a settlement every single agency, with the exception of the State Water Resources Board, because of this fundamental legal question.

CHAIRMAN SHER: Well, the Fish and Game witness didn't seem too happy when he was here...

MR. SOMACH: Well, he's not happy, but ...

CHAIRMAN SHER: ...because you were holding back on some kind of document, or it hadn't been forthcoming.

MR. STRASSER: I disagree with you on that. For example, ...

CHAIRMAN SHER: You disagree with me about what he said?

MR. STRASSER: No. I disagree with him, not with you.

CHAIRMAN SHER: Oh. Okay.

MR. SOMACH: And fundamentally, if you listen to what he said, was that we didn't give him a copy of the document, but the State Water Resources Board gave him a copy of the document. The bottom line is, we have not withheld any...the document's there; we've attempted to provide it to every, god, every state agency from CALTRANS to the State Water Resources Control Board to the Department of Fish and Game. There has been absolutely no attempt to withhold any information, any documents, from any agency. They've got one; they got it from the State Board; we gave it to the State Board; if they hadn't gotten a copy they

could certainly have called me on the telephone and I would have hand-delivered a copy to them.

MR. STRASSER: The Fish and Game people may not be happy, but we did reach settlements on most of the issues.

CHAIRMAN SHER: Okay.

MR. STRASSER: We're not happy, ourselves, too.

CHAIRMAN SHER: Are you still in the business of developing these hydro projects?

MR. STRASSER: Probably not in California. (Laughter)

CHAIRMAN SHER: Okay. Did you want to tell us anything further?

MR. SOMACH: I want to run down a couple of things. I represent, also, Mega Renewables, which you heard some discussion of earlier in the context of the 1603 agreements, the Department of Fish and Game agreements. I think that the representative, Mr. Bontadelli, somewhat misrepresented, although not intentionally, the status of that litigation. That litigation found that 1603 was not unconstitutional on its face. It left open the question of whether or not 1603 was unconstitutional as it was being applied to the various projects, in any given situation. That litigation is still pending before the Federal District Court. Moreover, a decision by the project proponents as to whether or not to appeal the District Court's decision has not yet been made. A lot will depend on various things that occur. I think that one of the interesting things, in terms of the way state agencies, who I believe have been characterized by members here as always acting in a responsible fashion, is...

CHAIRMAN SHER: Who said that? Nobody said that. Usually I look to the federal government to protect us against our own state agencies but this one case seems to be where we need the reverse.

MR. SOMACH: I'm not too sure that's the case. In any event, in the Mega case, as in the Sayles case, we attempted to get 1603 agreements from the Department of Fish and Game and we were refused those agreements by the Department of Fish and Game until, in both cases, I filed litigation against the department. Almost immediately upon the date that I filed litigation, all of a sudden, miraculously, we had 1603 agreements. I find that to be somewhat interesting. It is difficult to find something unconstitutional on its face in terms of these things if the minute one gets into the litigation, they moot it out by filing the documents, but I find that to be one "heck" of a situation that one can only get a state agency to move if you file litigation against them.

CHAIRMAN SHER: You should try to get them to clean up a toxic dump here in California. You think you got problems.

That's not Fish and Game, I should say.

MR. STRASSER: It may be the State Water Resources Board.

CHAIRMAN SHER: No. It's the Department of Health Services, actually.

MR. SOMACH: I wanted to indicate, too, that...and this really comes around to my saying that I didn't necessarily disagree with everything that the State Water Resources Control

Board said. In fact, I agree with what Mr. Walsh indicated was a viable solution, and that is, simply, as Mr. Strasser stated and as I can state for you from Mr. Castagna, the principal in Mega, hydro operators simply attempt to act within the constraints and the framework of the law. They went through considerable expense to obtain their federal licenses, under the reasonable expectation that that was what was required to operate one of these facilities.

If that's not the case, if First Iowa is not the law, or if you don't want it to be the law, rather than milking every drop of money out of these small businessmen, the proper way to proceed, we believe, is through obtaining federal legislation to cure the problem. I wholeheartedly endorse, as do my clients endorse (at least, conceptually), I mean they may when legislation is proposed, want to have a hand in some of its language, but in terms of reasonable expectation, so that when a licensee comes out of that process with a license, he understands what's going to be done to him, and how many more regulatory hoops he has to jump through, and how many more millions of dollars he is going to have to spend before he can get his project on line. He, at least, can make that legitimate decision that everyone is entitled to make, and that is, it's not worth it; I'm not going forward with this; or, at least I know what's in front of me and we can proceed.

CHAIRMAN SHER: I understand that position, but how about the beauty of the federal system? We have two levels of government here, right? And we heard from Mr. Lee about their

traditional deference to the states as far as water rights. You say go to the federal government, let them decide the thing. We're a State Legislature and, unfortunately, we don't have a lot of control over what happens in Congress. We're looking for ways -- and I'm not looking at your project, particularly. I grant you that you made an application, and you were there earlier. I'm looking for what, if anything, we ought to be doing for the future here. I am concerned about what I perceive as an attempt to bypass the State Water Resources Board. You don't agree with that, but I'm supportive of the State Water Resources Board and the Attorney General on litigating that question. But, I'm worried about an overabundance of these, and what PURPA has done to California in terms of producing high cost energy that my constituents are going to have to pay for through their utility bills, so if you have some suggestions for that and it won't hurt you because you're not going to do business in California anymore (you said) so give me a clue. How can we stop this for the future?

MR. STRASSER: The reality of these projects are, I think there's a large misconception. There are a lot of licenses: outdoor permits and applications. Very few, actually, I believe from now on will get done, for many reasons.

CHAIRMAN SHER: Won't they come in like you and say, listen, we're business people; we investigated this; we invested money in the engineers and the people who did the research; and we ought to be grandfathered in; we ought to get the benefit of these PURPA contracts and be able to sell this energy, if we decide we want to do it. I mean, how do we deal with that?

MR. STRASSER: Well, as I said, a lot of these projects no longer have the kind of contracts you're referring to. These are...

CHAIRMAN SHER: And they won't be built will they?

MR. STRASSER: No. They won't be built.

CHAIRMAN SHER: You can't build them without these beneficial ...

MR. STRASSER: Probably not. Probably not. Most of them. The tax laws have changed; in fact, I'm not against it. I think there's a lot of products that probably are not feasible and should not be built.

There was a gold rush in 1973. So, what I'm saying is two things: 1) I think that there may be an over reaction but, yes, there is a lot of application, but a study should be done as to how many are really being seriously pursued; 2) I don't know what it is, but I think it's important, just as if you were buying a house or if you were going to go build a house, you have to know what to rely upon, and it is a very difficult legal area, and it's something that I believe that you discuss with FERC, and I think the new electric law (EPCA), well, I think that really goes a long way to address a lot of your concerns. My recommendation is to take a look at the project spending and see if they're for real. A lot of them aren't.

CHAIRMAN SHER: Thank you for your testimony. Thank you for sitting here, and I'm sorry Mr. Connelly wasn't here. I thought he would make it back.

Now I think we have three people representing environmental groups: Friends of the River; also we have the Independent Energy Producers, but let's hear Friends of the River, the California Sportfishing Alliance, and Save Our Streams Council. Are you all represented here? Let's have brief statements from each of you, if we may, and then we'll hear from Mark Henwood, who is...would you prefer to go first? Is there some logic that I'm missing here?

MR. HENWOOD: I'm here at your pleasure. Whatever order you'd like.

CHAIRMAN SHER: Okay. We need to get on with it so I'm going to ask you to be brief, if you will.

MS. BETTY ANDREWS: Good afternoon. My name is Betty Andrews. I'm a Conservation Director for Friends of the River. We're a nonprofit California organization with approximately 7,000 members, and I have worked on a number of hydro-related issues throughout my seven years with the organization.

I have developed a statement of some length today, which I will happily leave with you, and you won't have to hear it. What I would like to do, basically, is to run through the gist of what I had to say, touching, in a little more depth, on areas that have not, yet, been addressed by some of the other speakers. And, before I begin, let me mention, also, that I am, in my comments today, representing as well, the views of California Trout, another nonprofit membership organization.

As we heard so eloquently stated earlier today by Mr. Connelly, Assemblyman Connelly, there are a lot of projects

proposed in this state, at a time when we have energy coming out of our ears, and we don't really need them. I wanted to make just a couple of comments, in addition, about why hydro (additional hydro, in particular) is not an especially attractive resource for the state of California. Part of it has to do with the reliability risk. We presently rely on hydro to supply about 20% of our electricity in this state, and what happens when you build additional projects, is that you run into even greater risks in dry years. And, by building additional projects, and relying on those, we would be exacerbating that reliability risk.

In addition, as was mentioned briefly, earlier, small hydro projects, in particular, do not generate power at the times when California most needs it. They generate the most in the springtime when power is plentiful, and least in the summertime when our needs are at their peak.

One issue related to the desirability of hydros as an electricity source is how much we pay for it. I expect Mr. Kottcamp, in his presentation, to discuss, in some greater detail, the question of whether or not it really makes sense for us to allow hydro projects to go ahead that have signed those older, very lucrative, and, in fact, overpaying contracts that the PUC had authorized but rescinded in April of 1985. It is Friends of the Rivers' position that any project that fails to meet any provision of its interim contract should not be allowed to proceed. We simply have no need for the projects, nor for the damage which they can cause.

CHAIRMAN SHER: Well, who would do that? The PUC should be forced to do that? Is that what you're saying? Are they the ones? They gave the contract, subject to certain deadlines and milestones. Is that right?

MS. ANDREWS: That's my understanding. I believe Mr. Kottcamp will address that in greater detail in his presentation.

CHAIRMAN SHER: I'm looking for the nuts and bolts of how you can carry out the recommendation, assuming we decide that's good policy (which we haven't decided).

MS. ANDREWS: Exactly. One thing I'd like to do is just briefly run through some of the kinds of problems that hydro projects can cause in terms of the environment. We haven't really heard that from any of the speakers. Projects can cause flooding. If you build a dam or diversion, depending on the size of it, you can flood out a considerable area. Some of the kinds of areas that could be flooded are important ecological areas, cultural areas and recreational areas.

In addition, and this is very common with small hydro projects where you have a diversion out of the stream bed, there can be many miles of the stream that are left with very little water in them because most of the water is being diverted into a pipeline, later to go to a powerhouse. What happens with those reduced flows, or degradation of many instream values associated with the stream, for example, fisheries, vegetation and, particularly, recreational opportunities.

One problem area, in terms of trying to protect some of those uses is that we have agencies who set certain stream flows

that they believe, at a minimum level, can protect those uses. I'm not sure that California wants to be a state that has minimum stream flows in all of its rivers in the state.

There are also some other problems in terms of the stream flow requirements, which I will mention later.

Lastly, a major impact these projects can have is the construction of dams and transmission lines and access roads in areas that were previously pristine or largely natural in character. We can see an entire shift in the shape of California's geography with the construction of these many projects.

In terms of the regulatory system that we have in this state, the analogy that came to mind was that our regulatory system is something like a fence we've put around a farmer's field, but in this case, the fence pickets are a foot apart, which does a great job of keeping the cows out but the rabbits are having a heyday. The system that we have in place for environmental review was largely developed for the many large projects that, historically, were built in this country. The agencies that we have to deal with those environmental impacts are the FERC and the State Water Resources Board, with some of the broader responsibilities (as you heard described earlier), in addition to the many resource agencies, who are charged with the responsibility of protecting particular natural resources.

CHAIRMAN SHER: I am going to ask this witness to...I think we're aware of... Are there specific recommendations about how to cure these?

MS. ANDREWS: I have those at the end.

CHAIRMAN SHER: Well, I'm getting very nervous about our time, because we have several witnesses, and I want to wrap up by 5:00 o'clock, so would you go right to your recommendations, now? I think we understand the frustration we all feel about the relationship of the federal to the state, and, indeed, whether the state regulation is going to be preempted totally.

MS. ANDREWS: Well, I'll discuss the rest of my comments in relation to my recommendations, then.

First recommendation is that we identify some agency level advocates for such public interests as recreation, et cetera, in the regulatory process and/or supply financial support for the involvement of citizens' representatives in the regulatory process. And, I raise that, simply because there are some significant public interests, such as recreation, that have no agency advocates at this time.

CHAIRMAN SHER: This would be agency advocates in the federal process for a FERC license?

MS. ANDREWS: As well as in the state process.

CHAIRMAN SHER: Assuming there's anything left of the state process.

MS. ANDREWS: Assuming anything is left, exactly.

And, particularly important is recreation. That is one area that has clear importance to the people of California and there is nobody representing that interest in these proceedings, in an effective way.

CHAIRMAN SHER: So, what you're looking for is something like the process the PUC has for public interest groups that are compensated up front.

MS. ANDREWS: That's a possible way to address it. It's true.

CHAIRMAN SHER: Possible, but difficult. Okay. All right.

MS. ANDREWS: You didn't ask, but I'm difficult.

CHAIRMAN SHER: Don't you folks...you more appear in forums like this and not on particular applications before a particular state agency? Is that right?

MS. ANDREWS: We have been involved in some particular projects, but when you have hundreds of applications, which is what we have faced in California, there was no way possible for us to even begin to address all the projects that concerned us.

CHAIRMAN SHER: All right. That was recommendation 1. What's recommendation 2?

MS. ANDREWS: Recommendation 2 concerns securing additional funding for responsible agencies to enable both a better response to project proposals and the establishment of an effective monitoring and enforcement program. We've certainly seen some reason for an expectation of improvement on the federal level. We have a whole state system, but, also, it needs to be monitoring and enforcing its ...

CHAIRMAN SHER: More money for agencies and the Gann, here. Okay. That's recommendation 2. Got another one?

MS. ANDREWS: I think it's important to note that these conditions refer not just to the projects that have been licensed since 1978, but the hundreds of projects which exist in the state and have been licensed by FERC and the State Water Board.

CHAIRMAN SHER: Licensed and are operating for enforcement, is that what you're talking about?

MS. ANDREWS: Exactly.

CHAIRMAN SHER: Okay.

MS. ANDREWS: In terms of monitoring, we don't have any system to see whether these conditions that we place on projects have any effect whatsoever. We can't tell -- we don't know whether the fisheries requirements that we have set, have achieved the goals.

CHAIRMAN SHER: Are those state conditions? Or under the federal?

MS. ANDREWS: Both. In a few cases we have some close project monitoring studies, but by-and-large, that is not the rule.

The third recommendation concerns adopting a policy of terminating the existing long-term contracts of hydro developers whose projects fail to meet the requirements.

CHAIRMAN SHER: We talked about that earlier and that would have to be done by the PUC, presumably, because to terminate these beneficial contracts, if they haven't kept track, or terminate the water rights, an appropriation of the State Board.

MS. ANDREWS: They'd have to come through the PUC, which could potentially be affected by the actions of the State Legislature.

CHAIRMAN SHER: If we cleaned out a lot of these it would be a lot clearer picture of how many potential ones are still there. Is that what you're saying? Get rid of the deadwood, and the ones that are just lying around?

MS. ANDREWS: Well, I think that if we're going to have to accept hydro projects that have these contracts, and we don't want to accept any more than we have to, we should certainly get rid of the ones that we don't need to see built.

CHAIRMAN SHER: Okay. Thank you for that suggestion.

MS. ANDREWS: Fourthly, and this is, perhaps, most critical -- a creation of a better mechanism for state review of the need for power from hydro projects. We've heard a lot of testimony today, on whether or not these projects are needed, yet I submit to you, that there is no agency who ...

CHAIRMAN SHER: How about the Energy Commission? They are not doing a good job?

MS. ANDREWS: Well, as Chairman Imbrecht told you, they have no jurisdiction, whatsoever, over hydro projects.

CHAIRMAN SHER: They don't have the jurisdiction to grant them, but they do the projection, don't they? Isn't that what you're saying? We need the projection about whether they're needed or not, in a general way?

MS. ANDREWS: We need some agency that can take the information and say, "on the basis of this information, we do not need this hydro project, therefore, it shall not be built."

CHAIRMAN SHER: You think that all these projects should have to get a permit from the Energy Commission, as well as the State Water Board and FERC.

MS. ANDREWS: That's not necessarily what I'm proposing, because I don't think, given the complex usage of water in the state of California, I don't think it's appropriate for the Energy Commission to be put in a position of saying yes or no to a given project.

CHAIRMAN SHER: You want a new agency?

MS. ANDREWS: I think it would require some -- it's a joint jurisdiction between the State Water Resources Control Board and the Energy Commission, and we need to figure out a process that can involve both of those agencies in making a determination of the need for power.

In terms of FERC's review of power (and I only want to characterize it, briefly), they take a very perfunctory look at whether or not power is needed.

CHAIRMAN SHER: You've got more confidence in the state agencies than you do in the federal? In this case.

MS. ANDREWS: Far more. They have lumped California, in recent cases, together with six or seven other western states, when looking at a need for power (when we're talking about very small projects).

CHAIRMAN SHER: May I thank you for your testimony and move on to the next witness?

MS. ANDREWS: Okay. You may.

CHAIRMAN SHER: Jackie Speier, you have a question?

ASSEMBLYWOMAN SPEIER: Well, I think, Mr. Chairman, you've covered it, but just for clarification. There is no agency that is responsible in the state of California for responding to FERC about the potential need in the state for the hydropower.

MS. ANDREWS: There is no agency that has to give FERC that information. We see that FERC is provided with that information, and have sometimes prompted the Energy Commission to supply it, but FERC has no responsibility to ...

ASSEMBLYWOMAN SPEIER: I understand that but so, in past history, it has been the Energy Commission who, on occasion, has provided that information regarding need?

MS. ANDREWS: Not, except in the form of their published reports.

CHAIRMAN SHER: Well, there is no state agency that could deny one of these applications on the grounds that the power wasn't needed. Is that what you're saying?

MS. ANDREWS: I'm saying that there is not an agency set up to do that. There is an agency that could, theoretically, do that if we win the Sayles Flat case. The State Water Resources Control Board...

CHAIRMAN SHER: Could deny it on the grounds that we don't need the energy?

MS. ANDREWS: That's one of the issues they have to look at. They're not equipped to really deal with that question...

CHAIRMAN SHER: But they could do it on that ground alone. Even if the water is there and the water rights are

available, they could deny the permit on the ground that we don't need the energy.

MS. ANDREWS: They're responsible to issue only licenses for use of water that will best serve the public interest.

CHAIRMAN SHER: Okay. So, in other words, what you're saying is that they need that information. We have an agency that has that power but it's not being utilized. Is that right?

MS. ANDREWS: More or less, that's correct.

CHAIRMAN SHER: Okay. Let's go to the next witness. I'm sorry to rush through but it is 20 to five. Go ahead.

MR. MARK HENWOOD: I did prepare a short presentation paper which I will leave with the sergeants.

CHAIRMAN SHER: Okay.

MR. HENWOOD: I'd like to tell you just briefly, for the record once again, who the Independent Energy Producers Association is. It is a trade group which represents a wide variety of independent power production companies in the state of California, some of which are hydro, some of which represent many other technologies.

In California, since 1980, independent power production has had the very noteworthy success of now producing approximately 10% of all the energy produced in the state of California.

CHAIRMAN SHER: That's hydro, or all of it?

MR. HENWOOD: All of it.

CHAIRMAN SHER: That's windmills, that's solar, that's cogeneration. I'm hurrying, because I want to get to it because

the subject of this hearing is hydro, and we've got a whole bunch of witnesses still to hear from.

MR. HENWOOD: All right. I understand. The hearing, as requested to me, appears to be an analysis of what should or should not be done in the event the Sayles Flat case was lost by the state of California. The hearing, after being here all today, appears more to be a hearing on the overall merits of PURPA contracts and whether or not more hydro projects, per se, should be brought in to the state of California, and utilized.

I want to address my comments in a slightly more general fashion. The point being is that the independent power production industry, which hydro is a part of, has been very successful in providing power in California, and when its success and when individual's projects merits are measured in a need context, the context is improperly drawn when they're compared against short-run power prices, which are present today.

Utilities in California, by virtue of having hydro projects and all the other projects that have been produced, have been able to avoid building several major coal-fired power plants. Most notably, about 1980, the major utilities were proposing to build the (inaudible) Valley Coal Plant, the Montezuma Coal Plant and California Coal Power Plant. None of those coal plants have come into being.

CHAIRMAN SHER: I agree with that. I want you to know I agree with that and I think I've been a very strong supporter of these alternative technologies, but does that lead you to a conclusion that nothing should get in the way and we should keep going in that direction, that circumstances can't change?

MR. HENWOOD: It leads me to the conclusion that when looking at power economics under contracts which the state agencies have authorized and approved, there needs to be some perspective on the issue, rather than the current precipitous decline in oil prices (which has only taken place in the last twelve months).

CHAIRMAN SHER: But I'm asking you a more general question. Obviously, you represent people who have an interest in going forward and doing more of these projects. That's their business. But, is it possible that circumstances can change so that as a matter of public policy, taking what Chairman Imbrecht said, that when you achieve a certain balance, that you can get out of balance. I mean, we were out of balance when we were so dependent on fossil fuel, and through your efforts, which I strongly supported, and your members, we've rectified that, but that doesn't mean the balance can't shift the other way, particularly if it is high-priced power.

MR. HENWOOD: Well, in terms of perspective problems, my sense of the matter is that the state does not have a major perspective problem, with the exception of a group of power projects which are already in the pipeline now. I did prepare some detailed figures for your consideration so you would have some idea of whether we're talking hundreds and thousands of projects or whether we're talking dozens of projects.

CHAIRMAN SHER: Are there a lot of projects out there with licenses that are not going to go forward?

MR. HENWOOD: The key parameter, right now, is whether or not a project has a power contract. As the gentleman from FERC...

CHAIRMAN SHER: Not its license, a power contract, because that's the economics of the project.

MR. HENWOOD: And, as the gentleman from FERC testified, and as ECPA states and ECPA provides, there is a moratorium on providing new PURPA power contracts to hydro projects.

CHAIRMAN SHER: How many of them out there have (you have the figures) have the contracts and haven't yet started?

MR. HENWOOD: I certainly do have the figures ...

CHAIRMAN SHER: How many?

MR. HENWOOD: ...and I think they'll be very enlightening. I broke the figures down in a variety of ways. I broke them down based on run-of-the-river projects and everything else.

In the whole state, there were 263 power contracts signed in the PG&E and Edison territories. There may be one or two in one of the other utilities, but this is where the vast bulk of the contracts are located. Of the 263 power contracts, which have been executed to date, 160 of them relate to one of the run-of-the-river projects; and 103 relate to all other kinds of power projects.

Now, of the non-run-of-the-river, or the retrofits, the canals, the pipelines, everything but run-of-the-river projects, we've actually seen -- they comprise about 500 megawatts. And, of that 500 megawatts, there has been about a 45% success rate in

getting those projects on-line to date. Not a bad success rate in the retrofit business.

Of the run-of-the-river contracts, all 160 represent 500 megawatt of power. And for perspective, the California Energy Commission has pending before it, several very large gas fired cogen power plants which represent about that amount of power. Now, of that 500 megawatts, of run-of-the-river power that has contracts, all of 40 megawatts of it has been able to negotiate its way through the environmental constraints which are placed on projects in California.

CHAIRMAN SHER: What happened to the rest of them?

MR. HENWOOD: They haven't gotten anywhere, yet.

CHAIRMAN SHER: Yet.

MR. HENWOOD: And I think looking at a success rate of 7.8% to date has to give us the indication that the success rate is certainly not going to be 100% of the balance.

CHAIRMAN SHER: But wouldn't it all clarify if we could -- a lot of those are behind where they're supposed to be. If we could wash those out so that we -- and from your perspective, I would think it would take some of the hysteria out of it because ...

MR. HENWOOD: It's a very good point and, in fact, the Independent Energy Producers Association did propose, participate in and help craft the QF milestone procedure, which is now the tool that the Public Utilities Commission has in place for doing exactly that.

CHAIRMAN SHER: Are they using it?

MR. HENWOOD: Of course they're using it.

CHAIRMAN SHER: They've pulled the chain on some of these because they haven't met the milestone?

MR. HENWOOD: There have been projects who have abandoned their contract.

CHAIRMAN SHER: But the PUC hasn't pulled the chain on them. I mean they've abandoned them. Is there some formal mechanism where they abandon and lose it? Use it or lose it, so-to-speak?

MR. HENWOOD: In PG&E's territory...

CHAIRMAN SHER: But wouldn't it be better to clarify the picture? Let's find out. You say 7.8%, or whatever it is, but it looks overwhelming if you just look at the total numbers of what could happen.

MR. HENWOOD: What I'm trying to say to you is that effectively that is the case, and it is a very complicated industry, and you're attempting, in a two-hour period, to get a good understanding of why only 7.8% of these projects have been successful when the so-called "gold rush" took place ...

CHAIRMAN SHER: Well, let me put it this way. Would you resist legislation that would tell the PUC to cancel all of those contracts where the holder of the contract to sell the power has failed to meet the QF milestones? Would you oppose that?

MR. HENWOOD: I think it's safe to say our association is for the continued legal enforcement of the QFMP.

CHAIRMAN SHER: This would be legal, because contracts have conditions, and one of the conditions is you meet these

milestones; they failed to meet them, so we're telling the PUC not to breach the contract, but to enforce the contract and not extend it.

MR. HENWOOD: Then I believe it appropriate that hydro developers, like any other developer, have to meet their contractual obligations.

CHAIRMAN SHER: Okay. Maybe we can work together on this to clarify the picture, because I do think for those ...

MR. HENWOOD: The mechanism is in place now. What more is needed? There is a mechanism...

CHAIRMAN SHER: We need a PUC that will move on these things, and we'll help them. We'll give them a little push.

MR. HENWOOD: I really don't know that there is any evidence that PUC is being lax in their duties to...

CHAIRMAN SHER: Well, you tell me that a couple of these have been abandoned but there is no definitive of mark to show they're lost forever. I'm trying to clarify the picture so that we know what the potential from these is. If the potential is small on these run-of-the-river projects, you're going to get a lot of people who are worried about the rivers off your back. Maybe.

MR. HENWOOD: (inaudible) I believe the potential is small then.

CHAIRMAN SHER: Well, okay. I think we're talking the same language here.

MR. HENWOOD: The total universe of projects that are concerned are 160 projects in California. Of those

run-of-the-river projects there are 123 which are not operating. That is the total quantity of projects.

CHAIRMAN SHER: Okay. Those are helpful figures.

Mr. Harvey?

ASSEMBLYMAN HARVEY: Yes, if I may, Mr. Chairman. Thank you.

I have trouble following all the statistics and to get through part of it (those statistics) is interesting, but if I followed you, out of the 263 power contracts signed, you say that 160 run-of-the-rivers have 500 megawatts and 40 megawatts is all that has made it through so far with a 7.8%.

MR. HENWOOD: That's correct.

ASSEMBLYMAN HARVEY: Now, I didn't hear the (inaudible), if I might, Mr. Chair, all of those other, which would be 460, have the potential to go through the process, possibly get there, if they're signed. Is that correct, or not?

MR. HENWOOD: It is potential, however, every last one of those projects had better be on line by early 1990, when all those contracts will extinguish by operation of contract, which the standard off the floor contracts which are of such great concern have a five year time horizon on them. If you're not operating within that period, your contract ceases to exist so the problem goes away entirely in 1990.

ASSEMBLYMAN HARVEY: And, if I may, one other ...

CHAIRMAN SHER: That is, unless you get the PUC to extend those contracts. Do you have an application pending before the PUC, your organization to extend?

MR. HENWOOD: Absolutely not.

CHAIRMAN SHER: ...these milestones of...

MR. HENWOOD: Absolutely not. There is no petition to extend the viable time line for contracts.

CHAIRMAN SHER: Okay. I'm sorry, Mr. Harvey.

ASSEMBLYMAN HARVEY: Well, I guess the one on the contractual obligation, I hear said, repeated through the day, and I'm assuming you folks know what you're talking about (I'm new here; not only a Freshman, but on this committee) and the contractual obligations, which folks aren't meeting at this time through the application process, could someone share with me what those contractual obligations are that they're not meeting? If we're going to withdraw from that?

CHAIRMAN SHER: The PUC has required the utilities to offer contracts to these power generators to sell their power at a certain price. That's an important part of the economics of the project. There was a very favorable, Standard Offer 4, I guess it was called, is that right?

MR. HENWOOD: It is now viewed favorably. There were a number of people associated ...

CHAIRMAN SHER: At the time, maybe it wasn't.

But there are conditions in those contracts. They have to move forward at a certain pace; that means this power be developed and there are certain milestones that have to be met, and many of the people who are given those contracts under the PUC requirement that they be offered by the utility, have not met those progress...

ASSEMBLYMAN HARVEY: Will these be the same, Mr. Chairman, which I'm familiar with from the district I represented, wind energy and also cogeneration?

CHAIRMAN SHER: Yes.

ASSEMBLYMAN HARVEY: Same process?

CHAIRMAN SHER: Same thing.

ASSEMBLYMAN HARVEY: No different between them and these?

CHAIRMAN SHER: Right.

ASSEMBLYMAN HARVEY: Okay. Thank you.

MR. HENWOOD: I want to reemphasize that the impression I'm left with after the hearing today, is that the environmental regulation is not effective and there are a large number of projects out there creating a great environmental damage. And, there are a couple of things that came out today that I think are very interesting; that is, that out of all the projects that California Fish and Game has reviewed, they have only taken exception on twelve of those projects.

CHAIRMAN SHER: That came out today. Right?

MR. HENWOOD: That came out today and I think it's a very ...

CHAIRMAN SHER: It shows that the ones out there are all being done impeccably or else the Fish and Game doesn't have the resources and the commitment to go out and see if there are more problems out there.

MR. HENWOOD: What it means, though, is, perhaps I can restate what Mr. Bontadelli was saying. He was saying that in

all the twelve project cases, the developers agreed, came to agreement, voluntary agreement, with Fish and Game, as to the terms and conditions to be placed in their license for their exemption.

CHAIRMAN SHER: Of course, then there is the other perspective of damming and diverting other of the remaining free-running waters. That's not Fish and Game. It's just what it does to recreational opportunities and so forth.

MR. HENWOOD: And, I agree with Betty Andrews that there is no state agency which is exercising any source of balanced purview in terms of reviewing these projects and making recommendations to FERC. The problem, of course, is that Fish and Game is the lead agency in terms of recommending to FERC, and what's happening is they're solely interested in wildlife concerns, and yes, indeed, there may be recreational concerns and there may be recreational benefits on some of these projects, which the public is not being able to take advantage of, and my suggestion for that would be the resources agency as an existing organizational shelf for bringing together resource recommendations. Yet, right now, all the resource agencies (inaudible) act as an agency to collect comments and place them under a common letterhead.

CHAIRMAN SHER: I'm going to ask you, you ought to move on, briefly, to our other witnesses. I don't know what we're going to do about our regulatory friends, because you reach a point of diminishing returns here from lost members of the committee, and you're about to lose me. I've been sitting here

three hours, almost, so I do want to hear from these witnesses who have been here and then we'll have to decide what we're going to do about PUC and the utilities. But, let's hear from you first.

MR. GLENN KOTTCAMP: My name is Glenn Kottcamp. I'm an attorney in Fresno. I represent California Save Our Streams Council.

CHAIRMAN SHER: Do you have a pending complaint before one of these agencies?

MR. KOTTCAMP: Yes. I, myself, don't, but my client does. Save Our Streams has filed an action with the PUC concerning the failure to meet the deadlines under the QFMP problem.

CHAIRMAN SHER: Okay. Go ahead.

MR. KOTTCAMP: In addition to Save Our Streams, I represent the Sierra Association for Environment, another environmental group located out of Fresno which opposed the Peavy Creek Project, and now opposes the Rogers Creek Crossing.

Prior to being a lawyer, I was a ranger at Yosemite and I have a Master's degree in biology and have some background in environmental issues.

I have provided a written statement to you. A lot of this has been mulled over during the course of the hearing and I'll save you the boredom of reading it to you and we'll attempt to touch a few highlights in the context of your discussion today.

The position Save Our Streams has with respect to the small hydro is that these projects, by themselves, generally are not economically feasible. They're constructed through only three major subsidies that we call triple-dipping. The first is Standard Offer No. 4, which was a product of PUC making calculations for level payment when the price of oil was approximately $40 per barrel. There have been references now that we have a different oil structure that this is a temporary decline. If you look at the history of oil, there has only been one time in the history that it has been very expensive, so whatever the norm might be, I think it's left to speculation. But the calculations for PURPA were based on about $40 a barrel and escalating prices thereafter, which has never come to light.

The next is the energy tax credit, which was not changed with the 1985 tax bill amendment in Congress. It was grandfathered in to 1988, so the energy tax credit savings, which is a manner of getting the equity out of the project to the energy tax credits, still exists.

The next area of economics that these people rely upon is the virtually free use of public lands. For instance, there is a project that currently is being proposed in Madera County on the Lewis Creek. FERC has valued that land at approximately $400 per year. By conservative estimates, if you went to lease such land, it would be $30,000 per year.

You plug in all these cheap numbers and the tax credits, and these projects are built for the benefit of very few at the expense of many.

One of the problems we have is the lack of a database to measure some of the long-term affects of projects on streams. No one -- there has been little discussion about the direct affects of these projects on the environment. Everyone says that they have minimal effect when measured against Tranoble or other major environmental consequences of some forms of energy, this is true, but the cumulative effect, the loss of critical riparian habitat, the loss of fish habitat and the associated loss of wildlife from these projects, is critical.

We propose that -- there is a project entitled the Iowa Canyon Project -- we propose that we develop it, as an experiment, with pre- and post-project monitoring through UC Davis, all of which is to be funded by the developer.

Which leads me to another point. We've talked about the Department of Fish and Game's role in these projects, and the fact that they only objected, in essence or in substance, to twelve of the projects. If you've ever been involved with one of these projects, they go out, they look at the stream and spend about ten minutes on the stream, and say 10 cfs or 5 cfs, write it down on a piece of paper, and that's the end of it.

They are totally understaffed. They don't have the personnel to go out and adequately conduct the survey that is necessary on a stream. As a remedy, we propose that the developer be required to provide, as part of the licensing process, the fund the studies the Department of Fish and Game and other appropriate environmental agencies, the trustee agencies of our environment. That way we will receive proper evaluation as to the impacts, preconstruction evaluation as to affect...

CHAIRMAN SHER: You mean on an application? By application basis? Or are you talking about a general study about the cumulative ...

MR. KOTTCAMP: well, I would like to see a moratorium, and I think until the energy ...

CHAIRMAN SHER: But we can't do that. We don't have the power, do we, to put a moratorium on licensing by FERC?

MR. KOTTCAMP: No. That's another issue.

CHAIRMAN SHER: Where do we have the power to put a moratorium on?

MR. KOTTCAMP: The issuing of appropriated licenses by the state.

CHAIRMAN SHER: By the State Water Board?

MR. KOTTCAMP: Yes.

CHAIRMAN SHER: Tell the State Water Board, no more in the future.

MR. KOTTCAMP: At least until we've had a chance to establish a database, by which we can intelligently evaluate the impact of a project.

CHAIRMAN SHER: This would be for those who haven't yet gotten their permit from the State Water Board. We're talking about that potential body of applications, right?

MR. KOTTCAMP: Yes.

CHAIRMAN SHER: You're not talking about the ones that are out there that already have gotten their permits, and it assumes, of course, that the Sayles Flat case doesn't preempt that.

MR. KOTTCAMP: I don't think any further construction should be permitted at this time.

CHAIRMAN SHER: So you are suggesting legislation to put a moratorium on the issuance of any further -- well, that's what Mr. Lee said would be more difficult to sustain in litigation, but that is your recommendation?

MR. KOTTCAMP: Yes.

CHAIRMAN SHER: Is there a danger that there are going to be a lot more applications coming in at this point? I guess, Mr. Henwood suggested "no." But anyway, all right. I'm trying to get recommendations here for legislation and that's a recommendation and we've taken note of it.

MR. KOTTCAMP: The other area of that recommendation is that after a project has been built, that the project developer be required to assist financially with funding to the Department of Fish and Games so the projects can be monitored to make sure the license requirements can be met. The Department of Fish and Game, itself, I believe, has discovered few, if any, license violations. The Sportfishing Alliance people, who are present here today, are the ones that are responsible, a private organization, for finding these problems.

CHAIRMAN SHER: By complaint. They respond to complaints so they rely on you to do the complaints and they're not out there looking for compliance on these projects that are...

MR. KOTTCAMP: Think of the money that'll save. That way the developers won't have to pay the fines for not being in compliance.

CHAIRMAN SHER: Can that be done retroactively for those that are out there operating now?

MR. KOTTCAMP: There may be difficulty with retroactive application. Yes, because...

CHAIRMAN SHER: So, again, you're looking toward the future. Any new ones to build in some kind of annual registration, or something, with a fee that would fund the Fish and Game people so they can go out and see if there is compliance. Is that right?

MR. KOTTCAMP: Absolutely.

CHAIRMAN SHER: Okay.

MR. KOTTCAMP: And that money should be earmarked and can't be diverted to any other agency.

CHAIRMAN SHER: Any other recommendations for us?

MR. KOTTCAMP: The other is that the Department of Fish and Game conduct, in public, its review of the contract gain, or the civil agreement that's reached with the developers so that the public has the opportunity to provide input and participate in the hearings, just as they do before the State Water Board. These are often done, and briefly, behind closed doors at the Department of Fish and Game and there is no opportunity to...

CHAIRMAN SHER: Some way to shine the light of day on these agreements because they lead to the statistic that there have been only twelve complaints. That's right. It's all been agreed to, so let's find out what's going in to those agreements and let the public participate?

MR. KOTTCAMP: Absolutely.

CHAIRMAN SHER: Okay. Anything else?

MR. KOTTCAMP: Yes, sir. I'm going through this as...

MR. KOTTCAMP: Water Code Section 106.7 provides that projects must be environmentally compatible. That should be abolished. Simply, the small number of benign projects does not justify the enormous effort in opposing projects, such as El Portal, Sayles Flat and Lewis Fork. This environmentally compatible hydro has led to such ambiguity that if it's not Tranoble, and we don't kill 10,000 people with cancer by a project that's environmentally compatible, therefore we should build it. This has been used by the developers ...

CHAIRMAN SHER: Are you the man who challenged the El Portal proposal?

MR. KOTTCAMP: No, sir.

CHAIRMAN SHER: Were these people here before, the ones of the proponents of that?

MR. KOTTCAMP: Mr. Keating from Sayles Flat is the developer in El Portal, and that's one of the real problems you have with ...

CHAIRMAN SHER: A more misguided project I've never come across. That was where the river was going to disappear and go underground there at the entrance to Yosemite Park?

MR. KOTTCAMP: I was a ranger at Yosemite; I'm familiar with that area, and I couldn't agree with you more. Let me ...

CHAIRMAN SHER: I wish I had made that connection when he was here.

MR. KOTTCAMP: Mr. Somach was suggesting that they spent all this money on needless litigation, and I really feel sorry for him. He was the one who initiated the litigation; he was the one who elected to bypass the state licensing requirements, because he felt he could run the gambit in the federal court and completely build the project by sidestepping the state.

CHAIRMAN SHER: That's not what he said here. He said that the State Water Resources Board has a role, if a narrow one, to play, but...

MR. KOTTCAMP: It was only in the last year that the FERC license was in place. Any delay by the State Water Resources Board didn't cause him a problem.

CHAIRMAN SHER: He said it languished four or five years. That was their own fault? They hadn't completed the application?

MR. KOTTCAMP: I am the attorney for Harriet La Flamme, the woman in the audience, who, by herself, opposed Mr. Keating and the Sayles Flat project, the licensing process before FERC. That case went before the Ninth Circuit...

CHAIRMAN SHER: But he said that their application was languishing in the Water Board for three or four years, and that is not accurate? Well, anyway, it's not...

MR. KOTTCAMP: It came before the Water Board -- the adjectives and adverbs that he attached to the time it spent in the Water Board, I think, was probably inaccurate.

CHAIRMAN SHER: Okay.

MR. KOTTCAMP: I'm not sure it caused him any harm, at all.

A couple of other comments about the man from FERC that spoke here today. They talked about taking into account the environmental considerations. They take into account recreation and the impacts to people. FERC has turned down one project in its history and its predecessor, the FPC. One project on environmental grounds and that's it.

CHAIRMAN SHER: He said the law requires them to take it into account.

MR. KOTTCAMP: They take it into account and then they rubber-stamp the project.

CHAIRMAN SHER: Okay.

MR. KOTTCAMP: That's where the trouble is. Taking it into account is very simple, you write two pages about it: we reviewed it, we considered it and now we give you the license. And that's what they do, if you review the licensing process with FERC.

CHAIRMAN SHER: You're a state's rights man. You want us to rely on our state agencies and not on this federal agency, right?

MR. KOTTCAMP: Actually, I think the secession line should be drawn at the 100th meridian. Anything less than that would probably be western ...

CHAIRMAN SHER: Okay. Could I move to these other witnesses now? And, thank you very much. We've got your written testimony, or copy of your statement we can get, and we will look at those recommendations.

MR. KOTTCAMP: Thank you, sir.

CHAIRMAN SHER: Thank you. Again, I'm sorry that I had to rush through it. You are?

MR. JIM CRENSHAW: I'm Jim Crenshaw. I also have my consultant, Bob Baiocchi. We're with the California Sportfishing Protection Alliance. We have written testimony that we'll leave with you also, and I guess for the interest of expediency, we won't go through and read it, although there are a lot of things in it that really no one has touched on, today.

Among those is the FERC information on how they develop their environmental information, and we don't believe that they really look at it correctly. We do believe that they can do what they would like as far as the environmental requirements, so what we would like them to do is start requiring the requirements of the Department of Fish and Game and the State Water Resources Board in their things.

We don't think it is very reasonable for them to grant a license, and then for the permittee, or licensee, to go ahead and build the project and then have somebody else come back in and say, "well, no, you don't have the proper bypass flow, so we're going to have to up those and make your project infeasible."

CHAIRMAN SHER: That was the point Mr. Connelly was reviewing with them.

MR. CRENSHAW: Exactly. So, rather than do that, the FERC should be required to make the final determination for bypass flows before they ever grant a license or ever let anybody begin construction.

CHAIRMAN SHER: You're telling us that this committee and this Legislature maybe should get in touch with Congress to say that the oversight committee for FERC ought to shape up?

MR. CRENSHAW: That's our recommendation.

CHAIRMAN SHER: Okay. Thank you. That's a good recommendation.

MR. CRENSHAW: The first one we have is the California Legislature should recommend emergency legislation to Congress that grandfathers the right of the state of California to determine specific terms and conditions in water rights pertaining to hydro power uses.

CHAIRMAN SHER: But, without admitting we don't already have it. That's the important thing. Our Attorney General tells us we already have that, so we don't want to concede that we don't.

MR. CRENSHAW: Yes. We also think that the State Water Resources Control Board should immediately file petitions of intervention with the FERC on every new application for license for hydro power development in the state, including petitions of intervention on re-licensing of every hydro project in the state.

One of the FERC guys said that they have issued licenses for fifty years. Well, given FERC's lack of monitoring enforcement and its frequency of granting extensions of fifty year licenses, we think fifty years without any change or remitigation for unforeseen damages is much too long. FERC shouldn't be allowed to do that. Basically, they say fifty years -- that's it! If somebody comes along afterwards and says there

have been problems, hey, that's life! And then they go ahead and ...

CHAIRMAN SHER: Don't they have the power to lift the license?

MR. CRENSHAW: Well, they've never done it.

CHAIRMAN SHER: No, they've never done it. That's part of your oversight that you want to see, both up-front and during the enforcement of any conditions. Okay.

MR. CRENSHAW: We, as was alluded to earlier, we uncovered over 23,000 days of noncompliance on five licensees in the state, FERC licensees.

MR. BAIOCCHI: Those are major projects, not small projects.

CHAIRMAN SHER: Right.

MR. CRENSHAW: And, what we would really like to see is some monitoring enforcement of that.

CHAIRMAN SHER: Okay, and I want to say, and I should have said it earlier, that Congressman Fazio was very helpful in arranging to have the FERC representatives come out here, so we are going to share with him what we've learned, informally, and perhaps even formally if we can get the Legislature to take some kind of action. So these are helpful comments.

MR. CRENSHAW: Well, as was alluded to, by both the FERC and the State Water Resources Control Board, they don't have any monitoring enforcement. FERC said something about they had fifty people working on this problem. Well, I'd like to know what streams they're working on because ...

CHAIRMAN SHER: They said they were out here in California, actually.

MR. CRENSHAW: We've identified a number of problems since our original complaint. In fact, just today I've got some information about Southern California Edison that says, in 1980, on two projects in one year, they were 365 days in violation.

CHAIRMAN SHER: Now, I wish you hadn't said that because I was going to try to cut off the utilities here, and not invite them to come forward since their lobbyists are here all the time anyway, but you say something like that, you've got to give them a chance to respond. Right?

MR. CRENSHAW: I would hope they would, because we just looked at this and I'd like to know what is happening. And it's not just Southern -- I'm not trying to pick on them -- it is a ubiquitous problem. It is statewide.

CHAIRMAN SHER: So, there are violations out there, and either through the state agency or the federal agency, there ought to be the resources there to do something about it.

MR. CRENSHAW: We were talking about contractual agreements, earlier, and it seems to me that that is a contractual agreement.

CHAIRMAN SHER: Well, those are conditions of the license, actually.

MR. CRENSHAW: And many times, zero flows, which is pretty hard on the fish.

MR. BOB BAIOCCHI: Incidentally, the Department of Fish and Game has fish and wildlife agreements with the licensee. It

advocated that their two permitting agencies that are responsible for monitoring or enforcing the minimum three foot flow requirement and/or other fishery protective measures, when in fact, they have a fish and wildlife written agreement with the licensee with specific, mandatory conditions.

CHAIRMAN SHER: In every case? In every one of these hydro ...

MR. BAIOCCHI: Yes. In every case.

CHAIRMAN SHER: It's an agreement...

MR. BAIOCCHI: Yes. In any case, they're not enforcing it.

CHAIRMAN SHER: That's not the 1603?

MR. BAIOCCHI: No.

CHAIRMAN SHER: This is -- Fish and Games has contracts with every hydro operator ...

MR. BAIOCCHI: Representing the state of California, and it is our belief ...

CHAIRMAN SHER: That's required by the State Water Board, that they don't have ... well, why do they have those agreements?

MR. CRENSHAW: Most of these were done before the State Water Board really got involved.

CHAIRMAN SHER: These are old projects...

MR. CRENSHAW: ...rubber-stamped by the State Water Board.

CHAIRMAN SHER: ...old projects, and was there some state law under which those agreements were required?

MR. BAIOCCHI: To my knowledge, no, but, incidentally, those agreements still exist. They are ongoing; it is a continuation; they are not just on existing projects; they're on new projects. And, it is my belief that when a licensee, a company such as the Pacific Gas & Electric Co., who incidentally, we have several complaints against...

CHAIRMAN SHER: Well, you did it again.

MR. BAIOCCHI: ...and they breach. When they breach official law and agreements, okay, and there are impacts to the resources that the state of California through the Attorney General's Office, it takes some action.

CHAIRMAN SHER: I want to look at this question of these agreements and under what authority of what law they're entered into, and then we'll see whether Fish and Game has gone to sleep on them.

MR. CRENSHAW: There's another thing that I would like to talk about, and that's your legislation that puts...

CHAIRMAN SHER: You going to say something nice about it?

MR. CRENSHAW: ...more fines -- yes, I agree with Mr. Bontadelli that this is an excellent piece of legislation, however, I'm a little concerned over Mr. Bontadelli's quote that says, "preference to work informally with the violating party to correct the problem." That means to me, that instead of two violations, there are going to have to be three violations in the 1603.

CHAIRMAN SHER: But that's typical, you know. You get violations; the agencies want to get them cured; they don't want them to keep going; it's expensive and drawn out to go and fight these things out, so that's always the approach of the regulatory.

MR. CRENSHAW: But my recommendation is to do both. It wouldn't hurt...

CHAIRMAN SHER: Well, they have to, occasionally, use the big stick in order for it to provide a deterrent for the most aggrieved violations, and that's why we increased the penalties in that legislation that I carried.

MR. CRENSHAW: But my concern is that three violations of potentially drying up the stream have a pretty detrimental effect on the fishery.

CHAIRMAN SHER: Okay. We came here to pick on FERC; now you're picking on Fish and Game.

MR. CRENSHAW: I pick on everybody.

CHAIRMAN SHER: Okay. Thank you for your testimony.

MR. KOTTCAMP: Mr. Chairman, may I have thirty seconds?

CHAIRMAN SHER: Yes. Sure.

MR. KOTTCAMP: I forgot there are two other recommendations. One of them, I think, we've been talking about First Iowa and what should be done with respect to federal preemption, and Mr. Lee discussed the efforts the state's making in the court. I wish I shared his enthusiasm for the outcome, but I don't, for (inaudible) and First Iowa and its progeny.

I think a safe course -- the course that should be adopted, is to concurrently don't wait for the outcome of the federal litigation, but at this point in time, pursue changes in federal legislation by hitting up the Congressmen from this state to change the Federal Power Act, though it specifically puts the states (and obviously, California is included) in a position to regulate its own resources. Unless, and until that's done, I don't believe you're going to see a big change. First Iowa was decided in 1946 and Congress hasn't seen fit, for whatever reason, to change it, so you've got adoption by acquiescence by the Congress in First Iowa. I think that there should be steps taken immediately to make those changes.

The other area I want to talk about is QFs. I won't read it to you. It's in my written testimony concerning the status of the PUC ex parte approval of the violators, and virtually, total unenforceability of that bumping doctrine. That needs to be enforced.

CHAIRMAN SHER: All right. Thank you. We'll look at that in your testimony.

MR. BAIOCCHI: I have one more thing. I'm sorry, it'll just take me a minute. We have complaints before both FERC and the State Board. The State Board has responded to four of them and has the plans of compliance. We complained to the FERC before we complained to the State Board, and that was over three years ago, and since then they have done nothing.

CHAIRMAN SHER: These are for projects that they've already licensed and are operating?

MR. BAIOCCHI: Projects that we had already...

CHAIRMAN SHER: Okay. That fits in with what you said earlier, about the need for better enforcement at both levels.

Thank you for your testimony. Now I'm going to exercise, I'm sure Mr. Harvey with your concurrence, we do have representatives of the utilities out there and of the Public Utilities Commission, and I would desperately like to hear from them but I am afraid that we've kind of run out of time here, and we've reached the point of diminishing return. Is anybody there who feels -- I should allow, was it Edison who was the subject of a comment earlier? If you feel you want to respond to that, I certainly would want to give you the opportunity, but if not, I would think this is a subject that...is there somebody who wants to testify? It is 5:20. We've been going three hours and twenty minutes, but this is one point...You're from?

MR. HOWARD GOLUB: I'm Howard Golub. I'm Vice President and General Counsel for PG&E and I'll give you two sentences.

CHAIRMAN SHER: Okay. Surely. You know, if everyone wants to come forward and give each two seconds, that's fine, but, and I apologize for hurrying you through this way, but ...

MR. GOLUB: Basically, I simply want to suggest that perhaps you should come back to this issue at an appropriate time. Even if you took all the steps you have discussed today, all those steps about clearing away the deadwood, our calculations are if you achieve all of those, rate pairs by 1990, we will be paying $857 million in excess of the fair value of the PURPA power, each year.

CHAIRMAN SHER: Is there anything we can do about that?

MR. GOLUB: I think there is, but that's...

CHAIRMAN SHER: That's for another time.

MR. GOLUB: I wish we had time today. It's so important that I want you to understand the significance of the issue.

CHAIRMAN SHER: Well, that's good, and I would appreciate hearing from you through our staff, or directly, of steps that we might take to try to do something about that problem. We recognize that is a major problem.

MR. GOLUB: It is of such significance that I have to say, I understand that other concerns expressed today, but it dwarfs some of them, and I really think it deserves some serious consideration at some time.

CHAIRMAN SHER: But, -- yes, Mr. Harvey?

ASSEMBLYMAN HARVEY: I just wanted to say (inaudible) if we've cut you short, being there are only two of us here, obviously, I will be happy -- my door will be open to meet with you folks if you want to get into further detail, in fairness to you, just give me a call and I'll meet with you.

CHAIRMAN SHER: Fine.

MR. DUNCAN WYSE: I'm Duncan Wyse from the PUC. I would like to follow up on a little discussion of the QFMP (not here) but I think there was a little misunderstanding of how that process works, and suffice to say, I think utilities are enforcing their contracts, and those who aren't meeting the contract terms and conditions, are -- there is a process for ...

CHAIRMAN SHER: The PUC watches that to make sure?

MR. WYSE: Yes.

CHAIRMAN SHER: And they terminated? How many contracts have been terminated?

MR. WYSE: The fact is, the QFMP doesn't give us the tools we need, yet, to really do the job. We're doing the best we can with the tools.

CHAIRMAN SHER: The tool being the order of the PUC?

MR. WYSE: That's one tool that was recently given to us and is very helpful, but it really is not enough to do nearly the job at hand.

CHAIRMAN SHER: What tool do you need? That's what you're going to tell me about?

MR. WYSE: Well, that's because you told me I shouldn't take the time.

CHAIRMAN SHER: Well, there are two categories. There's the deadwood -- the ones that haven't got started; that's one category, and you need -- I was talking about that earlier, tools to clear that underbrush away so we know what the magnitude of this problem is. Then I thought, when you gave us this $857 million, you're talking about the ones that are already operating under...no?

MR. GOLUB: The ones that are not yet constructed as to which there is no significant investment but as to where these entities have these very lucrative contracts. They're going to build these unneeded projects.

CHAIRMAN SHER: Have they fallen behind in the milestones?

MR. GOLUB: No, because they haven't. The fact is, many of them can stay within the deadlines, and I'm talking about, the $857 million assumes only 38% of them go ahead. I'm assuming the others drop off.

CHAIRMAN SHER: Oh, and your lawyers say that even those with respect to -- that have the contracts, where they haven't got started, there is some legal way to look at those again?

MR. GOLUB: This Legislature could do it.

CHAIRMAN SHER: Okay. That's what we want to talk to you about. Thank you.

MR. WYSE: There is great disagreement on that number; don't assume that as a ...

CHAIRMAN SHER: Yes, will you put the microphone in front of you so we can get you on the tape?

MR. SEBASTIAN NOLA: Mr. Chairman, committee members, my name is Sebastian Nola. I'm Manager of Cogeneration Small Power Development with the Southern California Edison Company. I know time is limited. We would be more than happy to address this forum at some date of your pleasure.

CHAIRMAN SHER: Thank you very much. This is obviously a very important problem for the Legislature, for the ratepayers, and so I wanted to hear from you but I think we've reached the point of diminishing return. I thank you for your patience. Thank you for sitting through that and we'd be glad to talk to you individually, but we may come back to this as a committee as well. Thank you very much.

The meeting is adjourned.

A P P E N D I X

STATEMENT OF

KEVIN MADDEN
ROBERT FITZGIBBONS
J. MARK ROBINSON

FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
CALIFORNIA LEGISLATURE
ASSEMBLY NATURAL RESOURCES COMMITTEE

February 9, 1987

Mr. Chairman and members of the Committee:

I am Kevin Madden, Legal Advisor to Chairman Martha Hesse of the Federal Energy Regulatory Commission (FERC). Accompanying me today are Robert Fitzgibbons, Associate General Counsel for Hydroelectric and Electric and J. Mark Robinson Chief, Biological Resources Branch.

We appreciate this opportunity to appear before you, in response to Chairman Sher's invitation to the Federal Energy Regulatory Commission to present testimony on how the "Electric Consumers Protection Act of 1986" (ECPA) will affect FERC's hydroelectric licensing process. Although our comments here today on the seven questions raised in Chairman Sher's invitation represent our own views and not necessarily those of the Commission, we hope that our statement will be helpful to the Committee.

Our written statement and attachments today give a brief background of the FERC's hydroelectric authority and responsibilities under the Federal Power Act and ECPA. The material then addresses the questions asked in Chairman Sher's letter.

The Federal Energy Regulatory Commission (formerly the Federal Power Commission) regulates the development of non-Federal hydroelectric projects that are subject to Congress' Commerce Clause and Property Clause jurisdiction. These projects comprise about half of the Nation's developed hydroelectric power capacity.

By way of background, the Commission grants three forms of authorization with respect to hydroelectric development:

First, the Commission grants preliminary permits. A permit does not authorize any project construction. Obtaining a permit is not a prerequisite to applying for or receiving a license for the site.

Second, the Commission issues licenses for hydroelectric projects for up to a statutory maximum of 50 years. Licenses are to be issued only for projects that, in the Commission's judgment, will be best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enforcement of fish and wildlife and for other beneficial public uses, including irrigation, flood control, water supply, and recreational purposes. In deciding whether and under what terms to license a project, the Commission must explore all issues relevent to the public interest.

Finally, the Commission has been empowered to exempt from some or all of the licensing requirements of Part I of the Federal Power Act certain categories of hydroelectric projects:

All exemptions are subject to the mandatory conditioning authority of the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and comparable state agencies with respect to the mitigation of project impacts on fish and wildlife resources.

In contrast with a license, an exemption does not confer the Federal power of eminent domain; the Commission has therefore chosen to require an exemption applicant to own all the necessary lands for the project.

Now, Mr. Chairman, you raised several questions in your letter of invitation.

The Commission has issued 64 licenses and 133 exemptions in California since the enactment of PURPA in 1978. There are currently (1/26/87) pending before the Commission 67 license applications and 13 exemption applications for hydroelectric projects in California. Of the 64 issued licenses, 33 involved the construction of new dams or diversions. Currently, we do not authorize exemptions involving the construction of new dams or diversions. Of the 80 pending development applications, 41 would involve the construction of a new dam or diversion.

ECPA applies to each license, exemption, and preliminary permit issued after the enactment of ECPA. Therefore, all pending license applications in California are subject to ECPA. ECPA also imposes a moratorium on the availability of PURPA benefits to projects using new dams or diversions. However, ECPA provides for certain exceptions to the moratorium, as well as to the three new requirements imposed on new dam or diversion projects before they can qualify for PURPA benefits. Of the 41 pending California projects proposing to use new dams or diversions, 31 are excepted from the moratorium and the three new requirements because they were filed and accepted prior to enactment of ECPA. An estimated ten additional California projects will be excepted from the moratorium and two of the three new requirements, since they were filed prior to enactment of ECPA and will likely be accepted prior to three years following enactment of ECPA.

Regarding the role of state agencies in the licensing of hydro projects, state agencies have the opportunity to make recommendations for modifications to proposed projects during the pre-application consultation process and during the application review period. Additionally, ECPA requires the Commission to include in each license, conditions to protect, mitigate, and enhance fish and wildlife; such conditions shall be based on the recommendations of the Federal and state fish and wildlife agencies, unless their recommendations are inconsistent with the purposes and requirements of applicable law, and the conflict cannot be resolved. This will require greater coordination between the FERC and other Federal and state agencies concerning environmental matters.

Further, all interested parties, including private citizens and organizations, are given an opportunity to participate during the public notice period that follows the filing of a license application.

In examining an area's need for power, the Commission looks not just at the point a project would be licensed but also at the projected point the project would be brought on line. The Commission must consider anticipated growth in the demand for electric power and energy and the ability of the system to meet projected additional load requirements with the same degree of reliability over both the short and long term.

Installation of a hydroelectric project to defer or displace more expensive thermal energy generation may produce economic benefits and thus demonstrate project need. Additionally, ECPA requires the Commission to consider the energy conservation programs of state, municipal, and public utility license applicants to determine whether need for the project could be eliminated by the use of better conservation measures.

With respect to the relationship between FERC's licensing activities and state permit requirements, the courts have determined that the Federal Power Act does not contemplate a dual system of duplicate state and Federal permits and that requiring Commission licensees to obtain state permits would vest in the states a veto power over projects and could subordinate to the control of the states the comprehensive planning responsibilities Congress intended to have reside with the Commission. Thus, Commission licensees are not required to obtain state water rights permits as a condition precedent to obtain FERC licenses and exemptions.

These legal principles are equally applicable to state fish and wildlife laws. However, we do note that there is an instance where the grant of a state permit may be a condition precedent to the issuance of the license. In this regard, we note that water quality certifications granted by the states for projects pursuant to the provisions of Section 401 of the Clean Water Act

must be obtained or waived by the state before the Commission issues a license. Additionally, Section 10(j) of the FPA, as amended by the Electric Consumers Protection Act of 1986, requires the Commission to include in licenses fish and wildlife conditions based on recommendations submitted by state fish and wildlife agencies, so long as the conditions are not inconsistent with the purposes and requirements of the FPA and other applicable law. Thus, although inclusion of these recommended conditions is not *per se* mandatory, ECPA has mandated closer Federal and state cooperation by providing the state fish and wildlife agencies with a significantly enhanced role in crafting provisions for the protection, mitigation of damage to, and enhancement of fish and wildlife.

As far as we are aware, the Commission has never included in a license a condition requiring the licensee to specifically comply with state fish and wildlife laws or state water rights permitting requirements.

Regarding PURPA, we do not believe that either FERC certification or a state's entering into a PURPA contract can be conditioned on compliance with state environmental requirements. Naturally, in licensing such projects, the Commission frequently includes conditions to ensure projects are constructed and operated so that important fish and wildlife resources are protected and enhanced. Further, hydro projects desiring to benefit from PURPA

must comply with three new environmental requirements added by ECPA. And, to the extent such projects are exempted from FPA licensing requirements, they will continue to have to obtain their water rights from the state.

The 24 inspectors in the Commission's San Francisco Regional Office are responsible for evaluating whether projects are operated and maintained in compliance with all license and exemption conditions, including fish and wildlife provisions. Inspectors review both structural and operational features of projects. The Commission has over 50 fishery and other environmental experts in Washington to provide technical assistance to the Regional offices.

The Commission also has complaint procedures to ensure continuous compliance with fish and wildlife conditions by licensees and exemptees. Under the Commission's regulations, any person may file a complaint seeking Commission action against a licensee or exemptee for failing to comply with the terms and conditions related to fish and wildlife.

Finally, it should be noted that Section 12 of ECPA adds a new Section 31 to the FPA to specifically provide that the Commission shall monitor and investigate compliance with each issued license, permit and exemption. In addition, this section establishes new procedures for revoking licenses and exemptions and assessing fines for violations of terms and conditions.

Currently, there are nine complaints or actions initiated by staff dealing with license compliance issues in California. In 1985, the Commission approved a consent agreement in which the Oroville-Wyandotte Irrigation District agreed to refrain from violating the conditions of its license. The agreement also required Oroville to study measures to improve the fishery resources in streams affected by the project.

Section 10(a) of the Federal Power Act requires the Commission, in considering applications for license, to consider all aspects of the public interest in utilizing a waterway. ECPA added to Section 4 of the FPA a new provision to require the Commission to give equal consideration in licensing projects. Thus, the environmental and other values which prompted the state to include a river in its wild and scenic river system or designate it a "state-protected waterway" would be considered fully by the Commission before it acted on a license application for a project to be located on such a river.

Also, Section 8 of ECPA amended Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) to deny PURPA benefits to projects located on (a) any segment of a natural watercourse which is included in (or designated for potential inclusion in) a state or national wild and scenic river system or (b) any segment of a natural watercourse which the state has determined, in accordance with applicable state law, to possess

unique natural, recreational, cultural, or scenic attributes which will be adversely affected by hydroelectric development.

Mr. Chairman, we hope you and the Committee will find these responses and the responses attached to the testimony useful. We would be pleased to respond to any questions you might have on our testimony.

ATTACHMENT

Response to the January 9, 1987, letter from the California Legislative Assembly Natural Resources Commission

Question 1

The number of small hydro projects in California issued power licenses by FERC since enactment of PURPA, plus the number of projects with license applications still pending. Please estimate the number of projects that involved construction of new dams or diversions versus retrofit of existing dams.

Answer 1

The Commission has issued 64 licenses and 133 exemptions in California since the enactment of PURPA in 1978. There are currently (1/26/87) pending before the Commission 67 license applications and 13 exemption applications for hydroelectric projects in California. Of the 64 issued licenses 33 involved the construction of new dams or diversions. Currently, the Commission does not authorize exemptions involving new dams or diversions. Of the 80 pending development applications, 41 would involve the construction of a new dam or diversion.

Question 2

The number of projects with license applications still pending that will be subject to the new requirements of ECPA compared to those exempted.

Answer 2

ECPA applies to each license, exemption, and preliminary permit issued after the enactment of ECPA (October 16, 1986). Therefore, all pending license applications in California are subject to ECPA. ECPA also imposes a moratorium on the availability of rate benefits under the Public Utility Regulatory Policies Act of 1978 (PURPA) to projects using new dams or diversions and, once the moratorium is lifted, added three requirements for such projects to be eligible for PURPA benefits. First, the project must not have substantial adverse effects on the environment. Second, the project cannot be located in a state or national wild and scenic river system or in a river segment which under state law has been determined to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by the project. Third, the project is subject to mandatory conditions imposed by state and Federal fish and wildlife agencies. However, ECPA provides for certain exceptions to the moratorium, as well as to the three new requirements. Of the 41 pending California projects proposing to use new dams or diversions, 31 are excepted from the moratorium and the three new requirements because they were filed and accepted prior the to

enactment of ECPA. An estimated additional 10 California projects will be excepted from the moratorium and the first and third new requirements, since they were filed prior to enactment of ECPA and will likely be accepted prior to three years following enactment of ECPA. Finally, a project applied for after enactment of ECPA can be excepted from the moratorium and the third new requirement if the applicant files a petition within 18 months of enactment of ECPA demonstrating that (1) prior to the enactment of ECPA it had committed substantial monetary resources directly related to the development of the project and to the diligent and timely completion of filing an acceptable application and (2) the project will not have substantial adverse effects on the environment.

Question 3

The role of state agencies under FERC's licensing process. Please explain how state fish and wildlife agencies may participate in suggesting modifications to proposed projects, such as minimum fishery bypass flows established as a condition of the license. What is the forum for these concerns to be addressed in the FERC licensing process? Does this forum also allow for participation by interested parties other than representatives of government agencies, such as private citizens?

Answer 3

State agencies have the opportunity to make recommendations for modifications to proposed projects during the pre-application consultation process and during the application review period. Additionally, ECPA requires the Commission to include in each license conditions to protect, mitigate, and enhance fish and wildlife. Such conditions shall be based on the recommendations of the Federal and state fish and wildlife agencies, unless their recommendations are inconsistent with the purposes and requirements of applicable law, and the conflict cannot be resolved. This will require greater coordination between the FERC and other Federal and state agencies concerning environmental matters.

All interested parties, including private citizens and organizations, are given an opportunity to participate during the public notice period that follows the filing of a license application. Comments are solicited from the general public by publishing notices in local newspapers in the project area. Should an environmental impact statement be required, additional opportunity for public comment and participation is afforded interested parties.

Question 4

How the Commission determines the need for power that would be generated by a particular hydro project, given the current supply of energy available in California from existing facilities and recently licensed projects.

Answer 4

In examining an area's need for power, the Commission looks not just at the point a project would be licensed but also at the projected point the project would be brought on line, which can be half a decade later. The Commission must consider anticipated growth in the demand for electric power and energy (due to population growth, continuing demand for additional amenities, etc.) and the ability of the system to meet projected additional load requirements with the required degree of reliability over both the short and long term. Timing of the need varies in different systems dependent upon, among other things, the rates of load growth, the load characteristics, the available existing power resources, and the reliability criteria established for each system. Additionally, pursuant to ECPA the Commission must consider the energy conservation programs of state, municipal, and public utility license applicants to determine whether need for the project could be eliminated by the use of better conservation measures.

In some instances, installation of a power resource prior to the existence of a reliability need is justified if installation of the resource will, over its operating life, provide operational benefits compared with the most likely alternative resource installed to meet the reliability need when it occurs. Also, the installation of a hydroelectric project to defer or displace more expensive thermal energy generation may produce economic benefits and thereby demonstrate project need.

Question 5

Your views on whether issuance of a FERC license exempts a hydro developer from the need to obtain state water rights and comply with state fish and wildlife laws. We would also appreciate knowing if compliance with such state laws is ever included as a condition of a FERC license, or could be made mandatory by the state PUC as a condition of a PURPA contract without conflicting with Federal law.

Answer 5

On September 12, 1986, Christopher J. Warner, then Acting General Counsel for the Commission, testified before the Senate Committee on Energy and Natural Resources at an oversight hearing on the consideration of applicable water law during the Commission's hydroelectric licensing proceedings. As explained in more detail in Mr. Warner's prepared statement, a copy of which is attached, the courts have determined that the Federal Power Act (FPA) does not contemplate a dual system of duplicate state and federal permits and that requiring Commission licensees to obtain state permits would vest in the states a veto power over projects and could subordinate to the control of the states the comprehensive planning responsibilities Congress intended to have reside with the Commission. Thus, Commission licensees are not required to obtain state water rights permits.

Although licensees are not required to obtain state water rights permits, they are required to obtain within five years from the date they receive their licenses all property rights, including water rights, necessary to construct and operate their projects. In order to fulfill this requirement, licensees frequently obtain state water rights permits or purchase the necessary water rights from others. However, if water rights cannot be obtained in this manner, licensees can acquire these rights by eminent domain pursuant to Section 21 of the FPA, 16 U.S.C. § 814, upon payment of compensation for the rights so acquired.

The legal principles discussed in Mr. Warner's prepared statement are equally applicable to state fish and wildlife laws. However, we do note that there is an instance where the grant of a state permit may be a condition precedent to the issuance of a license. In this regard, we note that water quality certifications granted by the states for projects pursuant to the provisions of Section 401 of the Clean Water Act must be obtained or waived by the state before the Commission issues a license.

As noted above, Commission licensees are not required to comply with such laws if such compliance would interfere with the provisions of the licenses or would result in the vesting of a veto power over the projects in the states. However, Section 10(j) of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495 (Oct. 16, 1986), requires the Commission to include in licenses fish and wildlife conditions based on recommendations submitted by, inter alia, state fish and wildlife agencies, so long as the conditions are not inconsistent with the purposes and requirements of the FPA and other applicable law. Thus, although inclusion of these recommended conditions is not per se mandatory, ECPA has provided the state fish and wildlife agencies with a significantly enhanced role in crafting provisions for the protection, mitigation of damage to, and enhancement of fish and wildlife.

As far as we are aware, the Commission has never included in a license a condition requiring the licensee to specifically comply with state fish and wildlife laws or state water rights permitting requirements.

Regarding PURPA, we do not believe that either FERC certification or state's entering into a PURPA contract can be conditioned on compliance with state environmental requirements. Naturally, in licensing such projects, the Commission frequently includes conditions to ensure that projects are constructed and operated so that important fish and wildlife resources are protected and enhanced. Further, hydro projects desiring to benefit from PURPA must comply with three new environmental requirements added by ECPA. And, to the extent such projects are exempted from FPA licensing requirements, they will continue to have to obtain their water rights from the state.

Question 6

How the Commission monitors compliance with license terms and conditions, such as minimum releases for fisheries. Please identify the number of staff assigned to this function in California, plus the number of successful enforcement actions undertaken or license revocations for noncompliance since enactent of PURPA.

Answer 6

The Commission is responsible for ensuring compliance with all license and exemption conditions, including those related to fish and wildlife.

The 24 Commission inspectors in the San Francisco Regional Office evaluate whether projects are operated and maintained in compliance with all license and exemption conditions, including fish and wildlife provisions. Inspectors review both structural and operational features of projects. Structural facilities relating to environmental compliance include fish passage structures, intake screens, and physical streambed modifications. These project facilities are inspected to ensure that they are structurally sound, are maintained properly, and are operating as designed. Operational measures include providing adequate minimum flow releases, minimizing streamflow fluctuations, and minimizing reservoir fluctuations. The inspection of operational measures includes reviewing streamflow records, reviewing reservoir operating rule curves, and visually inspecting the entire project, including tailwater gaging devices. The regional office staffs include structural and hydraulic engineers, as well as a comple-

ment of environmental specialists including fishery biologists, wildlife biologists, environmental protection specialists, and recreation specialists. The educational background and the on-the-job experience of these inspectors make them well qualified to inspect all aspects of operating projects and to evaluate compliance with all license and exemption conditions. To the extent that the regional office might require assistance in a particular case, the Commission has over 50 fishery and other environmental experts in Washington to provide technical assistance.

In order to increase the efficiency of its compliance monitoring, Commission staff has established a computerized compliance tracking data base, the Hydro License Compliance Tracking System (HLCTS), which is now fully operational. The HLCTS contains data regarding compliance requirements for all issued licenses, exemptions, and preliminary permits nationwide. At this time, there are approximately 9,900 compliance requirements in the files. The HLCTS provides the staff with a description of each compliance requirement, the date by which the requirement must be met, and whether or not the requirement was met by the specified date. The files are updated continually. If a compliance date is not met, the staff contacts the licensee or exemptee to find out why the deadline date has not been met, and determines the appropriate action to ensure compliance.

The HLCTS is fully integrated into the Commission's inspection program, which is carried out primarily by the inspectors at the regional offices. When these inspectors visit the project sites, they have a complete checklist of the compliance requirements applicable to the specific projects, and the current status of each, based on the HLCTS. As noted above, the inspectors are responsible for determining whether all compliance requirements are being met. These inspections take place at regular intervals. In the case of dams classified as having a high hazard potential, inspections are made annually. Projects with dams that are not so classified are inspected at least once every three years.

Additional reliance is placed on the Commission's complaint procedures to ensure continuous compliance with fish and wildlife conditions. Under 18 C.F.R. §385.206 (1986), any person may file a complaint seeking Commission action against a licensee or exemptee for failing to comply with, _inter alia_, terms and conditions related to fish and wildlife. The Commission obtains an answer from the respondent to a complaint, investigates the matter, and takes appropriate action against the licensee or exemptee.

In addition to the formal complaint procedures, any person may request the Commission to institute an investigation under 18 C.F.R. Part 1 (b) (1986) regarding, _inter alia_, compliance with fish and wildlife terms and conditions. Also, it should be noted

that Section 12 of ECPA adds a new Section 31 to the FPA to specifically provide that the Commission shall monitor and investigate compliance with each issued license, permit and exemption. In addition, this section establishes new procedures for revoking licenses and exemptions and assessing fines for violations of terms and conditions. While the Commission is still evaluating the provisions of Section 31 and their interrelationship with existing enforcement provisions of the FPA and the Commission's regulations, it appears that this section will provide the Commission with effective new enforcement tools.

The Commission's policy regarding enforcement of license or exemption conditions is one of prevention. Inspection and monitoring coupled with the Commission's complaint resolution procedure have obviated the need to undertake formal enforcement or revocation actions in California to date. Should these procedures prove insufficient to correct instances of non-compliance in the future, the Commission will institute formal enforcement, and if necessary, revocation procedures.

Question 7

How license applications will be treated for projects proposed on streams already included or nominated for study as components of the California Wild and Scenic Rivers System. In addition, how would FERC handle applications on streams designated as "state-protected waterways," a new category recognized by Congress in ECPA?

Answer 7

Section 10(a) of the Federal Power Act requires the Commission, in considering applications for license, to consider all aspects of the public interest in utilizing a waterway. Thus, the environmental and other values which prompted the state to include a river in its wild and scenic river system or designate it a "state-protected waterway" would be considered fully by the Commission before it acted on an application to license a project on such a river.

Section 8 of ECPA amended Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) to provide that licenses or exemptions at new dams or diversions are not eligible to receive PURPA benefits if, at the time the application for the project is accepted by the Commission, such project is located on (a) any segment of a natural watercourse which is included

in (or designated for potential inclusion in) a state or national wild and scenic river system or (b) any segment of a natural watercourse which the state has determined, in accordance with applicable state law, to possess unique natural, recreational, cultural, or scenic attributes which will be adversely affected by hydroelectric development. For licenses or exemptions at existing dams or those at new dams or diversions where PURPA benefits are not sought, Section 8 of ECPA did not alter pre-ECPA law.

The Commission will continue to evaluate each type of application for conformance with current law. The views of the state with regard to river conservation plans will be given full consideration before any action is taken on an application that would affect any such stream. For projects proposing new dams or diversions seeking PURPA benefits, the Commission will ask the State of California to certify whether a proposed project is on a stream already included in, or nominated for study as, a component of the California Wild and Scenic Rivers System or is on a stream designated as a "state-protected waterway."

In addition to state river preservation laws, the Wild and Scenic Rivers Act (WSRA) currently designates fifty-five rivers as components of the national wild and scenic rivers system. The WSRA also currently designates ninety-one rivers to be studied for potential addition to the national wild and scenic rivers system. The WSRA prohibits the Commission from issuing a license or an exemption from licensing for any hydroelectric project on or directly affecting a national wild and scenic river or a river being studied for potential designation as a national wild and scenic river. Since the Commission may not even approve the construction of a hydroelectric project on or directly affecting a current or potential national wild and scenic river, PURPA benefits are clearly not available to such proposals. The changes made to PURPA by ECPA do not change the law as it stands under the WSRA but only reiterate it by prohibiting the Commission from granting PURPA benefits to hydroelectric projects at new dams or new diversions that would be located on current or potential national wild and scenic rivers.

STATEMENT OF
CHRISTOPHER J. WARNER, ACTING GENERAL COUNSEL
FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

September 12, 1986

Mr. Chairman and members of the Committee:

I appreciate this opportunity to appear before you, in response to Chairman McClure's request of September 4, 1986, at this oversight hearing on the consideration of applicable water law during the Federal Energy Regulatory Commission's hydroelectric licensing proceedings. While my comments here today represent my views and not necessarily those of the Commission, I hope my statement will be helpful to the Committee.

The Federal Energy Regulatory Commission (formerly the Federal Power Commission) regulates the development of non-federal hydroelectric projects that are subject to Congress' Commerce Clause and Property Clause jurisdiction. These projects comprise about half of the Nation's developed hydroelectric power capacity.

The Federal Water Power Act of 1920, amended and recodified in 1935 as Part I of the Federal Power Act (FPA), embodies two basic objectives: to help meet the Nation's growing demand for electric power by facilitating the development of hydroelectric power, and to protect the public interest in the use of valuable national resources -- streams affecting interstate commerce and federal lands -- to develop such power.

The Commission has the exclusive jurisdiction to authorize non-federal hydroelectric projects that

- are on navigable waters of the United States;
- are on non-navigable waters over which Congress has Commerce Clause jurisdiction, were constructed after 1935, and affect interstate or foreign commerce;
- are on the public lands or reservations of the United States (excluding National parks and monuments); or
- utilize the surplus water or water power from any federal dam.

The Commission grants three forms of authorization with respect to hydroelectric development:

Preliminary Permit

A permit, issued for up to a statutory maximum of three years, maintains priority of application for license while the permittee studies the site and makes the financial arrangements necessary to apply for a license. States and municipalities are given a statutory preference in securing a preliminary permit. A permit does not authorize any project construction. Obtaining a permit is not a prerequisite to applying for or receiving a license for the site.

License

A license is issued for up to a statutory maximum of 50 years. The license cannot be unilaterally altered or terminated. Licenses are to be issued only for projects that, in the Commission's judgment, will be best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes, pursuant to Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a). This requires the Commission, when deciding whether and under what terms to license a project, to explore all issues relevant to the public interest. (Udall v. Federal Power Commission, 387 U.S. 428 (1967).) Typical, and sometimes competing, uses of a waterway include hydroelectric power, irrigation, flood control, navigation, fish and wildlife preservation, and recreation.

In situations involving an initial license when no preliminary permit has been issued, states and municipalities have a statutory preference. The Commission has held that this preference does not overcome the priority of application accorded to one who files a license application pursuant to his preliminary permit.

Exemption

The Commission has been empowered to exempt from some or all of the licensing requirements of Part I of the Federal Power Act certain categories of hydroelectric projects:

- hydroelectric facilities under 15 MW using a man-made conduit operated primarily for non-hydro purposes ("conduit exemptions"), pursuant to Section 213 of the Public Utility Regulatory Policies Act of 1978.
- hydroelectric power projects of 5 MW or less using an existing dam or natural water feature ("5-MW exemptions"), pursuant to Section 408 of the Energy Security Act of 1980.

Both types of exemption are subject to the mandatory conditioning authority of the U.S. Fish and Wildlife Service and comparable state agencies with respect to the mitigation of project impacts on fish and wildlife resources.

In contrast with a license, an exemption does not confer the federal power of eminent domain; the Commission has therefore chosen to require an exemption applicant to own all the necessary lands for the project. Where a project would occupy U.S. lands or reservations, an exemption applicant must obtain a use permit from the appropriate federal agency. Additionally, in issuing regulations to implement the exemption from licensing

program, the Commission has decided that the municipal preference provision of Part I of the FPA shall not apply with respect to exemption applications.

Mr. Chairman, I think it would be useful at this time to quickly summarize relevant provisions of the FPA with regard to state water rights and how they have been interpreted by the courts. I believe this will help clarify both the Commission's approach to the water rights issue and the principles underlying that approach.

As I noted previously, Mr. Chairman, the Commission is required by Section 10(a) of the FPA to explore all issues relevant to the public interest in determining if a project will be best adapted to a comprehensive plan for improving or developing a waterway. Review of the legislative history of the Federal Water Power Act of 1920, the predecessor to the FPA, reveals that the framers, in order to avoid the previous fragmented and piecemeal control over hydroelectric projects, intended to vest in one agency -- the Commission -- the exclusive authority to carry out these public interest responsibilities. However, they also included in the FPA Section 27, 16 U.S.C. § 821, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

They also provided in Section 9(b) of the FPA, 16 U.S.C. § 802(a), that the Commission could require license applicants to submit:

> Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes.

The interrelationship of these two provisions with the Commission's exclusive licensing authority was addressed in the landmark United States Supreme Court decision in First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946). The predecessor commission, the FPC, in that case had dismissed a license application for a project to be located on a navigable river in the State of Iowa, because the applicant had not submitted evidence under Section 9(b) of the FPA that it had obtained a permit required under state law to construct the project. The court of appeals affirmed the Commission. However, the Supreme Court, after reviewing the relevant legislative history, reversed, holding that the FPA did not contemplate a dual system of duplicate state and federal permits and that the Commission's interpretation of the FPA would vest in the state a veto power over the project and could subordinate to the control of the state the comprehensive planning responsibilities Congress intended to have reside with the Commission. The Court interpreted Section 9(b) as only requiring that an applicant present such evidence of compliance with state laws as, in the Commission's judgment, would be appropriate to effect the purposes of the federal

license. With regard to Section 27, the Court interpreted that section as only protecting "proprietary" rights; in other words, only establishing a right of compensation for vested water rights taken by a Commission licensee.

First Iowa's holdings regarding the scope of Section 9(b) and compliance with state law were followed by the United States Court of Appeals for the Ninth Circuit in State of Washington, Department of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954). The court held that the licensee did not have to show compliance with the laws of the State of Washington, including a statute requiring it to obtain a permit for the diversion of water, prior to obtaining a Commission license, and that state laws cannot prevent the Commission from issuing a license or bar a licensee from acting under its license to build a dam on a navigable stream.

In 1954, the Supreme Court in FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954), clarified its First Iowa "proprietary" rights statement by clearly holding that water rights, like other property rights taken by licensees, are compensable under the Federal Power Act.

The following year, the Supreme Court issued its Pelton Dam decision. (FPC v. Oregon, 349 U.S. 435 (1955).) The State of Oregon contended in that case that entities proposing to construct hydroelectric projects on lands constituting reservations of the United States had to obtain the permission of the states. The Court

rejected the state's contention that federal public lands legislation had transferred to the states control over projects to be located on reservations, and held that to allow the state to veto a project to be located on reserved lands by requiring the state's additional permission would result in the very duplication of regulatory control precluded by the First Iowa decision. Thus, the Court extended its First Iowa holding and rationale to projects to be located on reserved lands.

Two final decisions of relevance are the Ninth Circuit's decisions in Portland General Electric Co. v. FPC, 328 F.2d 165 (9th Cir. 1964), and State of California v. FPC, 345 F.2d 917 (9th Cir. 1965). In the first case, the court stated that the only purpose of Section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another of a license granted by the Commission, and held that that section did not stand in the way of the Commission imposing navigation conditions in a license that could interfere with the licensee's retention and exercise of its state-granted water rights. In the second case, the court applied the same rationale to conclude that the Commission had authority to impose conditions which could impair a licensee's full use of irrigation water rights in future years, stating that, if an applicant wants a license, it must accept the reasonable restrictions and obligations attached thereto by the Commission.

The First Iowa and Pelton Dam decisions caused considerable apprehension and concern, particularly in the western states, because of the perceived effect of those decisions on western water rights and relationships between the federal government and the states. The concerns were by no means limited to those respecting hydroelectric licensing actions under the FPA, but rather focused on the broad and complex area of the respective interests of the United States and of the states in the use of the waters of certain streams, and involved various other statutes, including the Reclamation Act and the Flood Control Act of 1944. Examples of Congressional hearings on federal-state water rights questions, arising largely as a result of the First Iowa and Pelton Dam decisions, are those held on June 15 and 16, 1961, before the Committee on Interior and Insular Affairs, United States Senate, and on March 10-13, 1964, before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate.

By the time of these hearings, it appeared quite clear that if a water power development, authorized indirectly by the Congress through a license under the FPA, would interfere with or take over or use a vested water right, the licensee must pay compensation. The second major issue, as indicated by the FPC at the hearing, concerned the question of who should control the comprehensive development of the national resources referred to in the First Iowa and Pelton Dam cases. The representatives of the FPC pointed out that if the policy of the FPA is to be continued in effect, then

the federal government through its commission should have the ultimate control as to what constitutes comprehensive development, and the individual states should not have an effective veto authority. Although various legislative proposals had been made during that period, no amendments to the FPA were made concerning the First Iowa and Pelton Dam cases.

Along with the tremendous increase in applications for non-federal hydroelectric projects that occurred in the late 1970's and continued into the 1980's, there appeared increased concern as to the respective interests of the United States and the individual states in the use of waters of various streams. Some of the more general concerns apparently reflect a perception by the states of a lack of cooperation and communication and a lack of acknowledgement or understanding, on the part of the Commission, of the concerns of the states.

These general concerns or issues appear to fall into three groups. First, there is the situation where the grant or expected grant of the water right for a hydroelectric project, to someone other than an applicant seeking Commission authorization for the project, is urged as sufficient grounds for denial of the applicant's proposal. This argument may be advanced by a competing applicant or someone else opposed to the applicant's proposal.

A second group would consist of situations where the Commission is urged to include, as a condition of its authorization, a requirement that the holder of the authorization agree to subordinate its

water rights for the project and its operation of the project to such things as a possible future increase in upstream depletions of flow or to some state or regional plan.

A third group would consist of situations where the assertion is made that the Commission cannot or should not condition an authorization so as to require, for example, a minimum flow for protection of the fishery resources, when such a condition would be inconsistent with or detract from the water rights granted for the project.

With respect to the first group, the Commission has held that a license applicant's lack of water rights for a project, at the time of Commission action, is not a sufficient basis for denial of the application, because the property rights that cannot be acquired by the licensee by purchase or agreement can be acquired by eminent domain pursuant to Section 21 of the FPA, 16 U.S.C. § 814, with compensation for the property rights so acquired. Although such eminent domain proceedings can be brought in either federal district court or state court, state law will be used for determining the amount of compensation. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), *cert. denied*, 450 U.S. 936 (1981). With regard to exemptions, the Commission has not required that exemption applicants must have water rights to be granted an exemption. This policy stems in part from the fact that some states will not grant a water rights permit until an exemption is obtained. Since an exemption-holder does not have the right of eminent domain by reason of the exemption, if the exemption-holder did not have the

property rights needed for the project, he would need to acquire the needed water rights without resort to eminent domain for the project to proceed.

Regarding the second group, the Commission can require the subordination of a licensee's water rights to possible future increases in upstream depletions if it determines that the subordination would be in the public interest. The Commission has cases pending before it that involve issues as to subordination of water rights. Because the cases are pending, it would be inappropriate to discuss the merits of those cases.

With respect to the third group, the situation can be, at least in some respects, quite similar to that involved in the <u>California v. FPC</u> case discussed briefly earlier. In that case the FPC had imposed a condition in the license that could operate to require future releases of water for the protection of fishery resources; the authority to so condition was upheld, even though the condition could impair the licensee's full use of irrigation water rights in future years. In another case now pending before the Commission, involving an application for a new license for Brazos River Authority's <u>Possum Kingdom</u> Project No. 1490, the applicant has apparently challenged requests by federal and state agencies for minimum flow requirements, claiming impairment of its water rights and asserting distinguishing differences from the <u>California v. FPC</u> case.

The Commission procedures for processing the various hydroelectric applications appear to provide an adequate mechanism

for those wishing to be heard to be able to bring their concerns before the Commission and provide whatever factual support and argument they wish to make. Because the Commission must make its decisions on the basis of the record before it, and because its decisions must be supported by substantial evidence, it is important that those who wish to be heard provide substantial support for any relief they seek.

With respect to applications for license and amendment of license, the Commission's regulations require that the applications address the "statutory or regulatory requirements of the state or states in which the project would be located that affect the project as proposed with respect to bed and banks and the appropriation, diversion, and use of water for power purposes." (18 CFR §§ 4.41, 4.51, 4.61, 4.201 (1986).)

When an application is filed with the Commission, it is examined to determine if it has complied with the requirements of the Commission's regulations. If found deficient, the applicant is given additional time to correct the deficiencies. If found patently deficient, the application is rejected.

When the application is found to conform to the regulations, public notice is issued. That notice is published in a newspaper circulated in the vicinity of the project and published in the Federal Register. Copies of the notice are mailed directly to federal, state, and local agencies that may be interested in the proposed project. A copy of the application itself is sent to each agency by the applicant at the same time it is initially filed with the Commission. The public notice solicits the comments of all

interested agencies, organizations, and members of the public on the proposal submitted to the Commission. Comments, protests and motions to intervene form part of the record considered by the Commission before acting on the pending application.

I recognize that the Commission's jurisdiction is bound by the statutory authority delegated to it by Congress, and that Congress always retains the discretion to modify that legislative grant of authority consistent with the United States Constitution. To the extent Congress chooses to modify the Commission's jurisdiction under the Federal Power Act, for example, the Commission is obligated to exercise that jurisdiction consistent with the new boundaries drawn by Congress.

Mr. Chairman, the issues raised in this hearing are more broad than the Federal Power Act and the Commission's jurisdiction as delegated by Congress. Water rights involve competing state and federal interests under our system of federalism. For this reason, my comments are technical in nature, but I recognize the importance and sensitivity of water rights questions as they may arise in any and all proceedings before the Commission, the need for a balanced approach which seeks, to the extent practicable and consistent with the Commission's jurisdiction, to defer to the states on these important questions.

Mr. Chairman, I would be pleased to respond to any questions you might have.

GLENN M. KOTTCAMP
ATTORNEY AT LAW

TESTIMONY OF GLENN M. KOTTCAMP
. BEFORE THE
ASSEMBLY NATURAL RESOURCES COMMITTEE

FEBRUARY 9, 1987

Gentlemen/Ladies:

I am an attorney in private practice in Fresno, California. I represent California Save Our Streams Council. I am also the attorney for Sierra Association for Environment, which is concerned with hydroelectric development. I also represent Harriett La Flamme in an action now pending before the Ninth Circuit in her appeal of FERC's decision to license Joseph Keating's project at Sayles Flat.

I hope that you can share my frustration that "justice delayed is justice denied". In oral argument of the Sayles Flat case, one of the justices remarked that they should have granted a stay of FERC's license which we had requested. I agree.

Sayles Flat is a travesty of judicial scrutiny, known as litigation by bulldozer.

Before I went to law school, I was trained as a wildlife biologist, having earned Bachelor's and Master's degrees at California State University, Fresno, and worked as a park ranger in Yosemite. I am an active member of the Audubon Society, which has taken a strong role nationally in curbing unnecessary and undesirable hydroelectric projects.

Thank you for the invitation to testify regarding hydroelectric projects and their legal environment. What we regard as an epidemic of hydroelectric projects emerged from legal artifacts stemming from well-meaning legislation, in particular, the Energy Security Act of 1980 granting "natural water feature" projects qualifying facility status for avoided cost under the Public Utility Regulatory Practices Act (PURPA). The amendment itself was not controversial. Conservationists assumed it would be applied to a few perched lakes on the relatively benign water mill technology.

FERC, on the other hand, issued regulations defining dams lower than 10 feet as "natural water features." The phenomenon we call "hydromania" erupted overnight.

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In California alone, dozens of developers pored over topographical maps and hydrological records to file hundreds of applications, often without visiting the actual sites. Further impetus was provided by a FERC ruling that these small dam projects were exempt from licensing, a ruling which was reversed by the Ninth Circuit in the Tulalip Tribes case. Having geared up to build projects, however, many of the developers converted to licenses.

Let me pass to the second turbocharger: the California Public Utilities Commission (PUC).

In a long and complex series of proceedings known generically as Order Instituting Rulemaking No. 2 (OIR2) the utilities were ordered to adopt long-term standard offers to all projects with so-called levelized costs. That is, higher payments above predicted avoided cost in the earlier years in exchange for lower payments in the later years.

Those terms were based on oil at a price of approximately $40.00/barrel and escalating rapidly over the first ten years. No capacity limit was imposed on eligibility for this generous transfer of ratepayer money.

PG & E has over 9000 MW of Third Party Producer contracts signed and in force. SCE also has a large number of Standard Offer No. 4 contracts in force.

No one knows how many of these third party projects will actually materialize. For planning purposes, a range from 30% to 80% was as close as Energy Commission staff could prudently predict.

A crucial feature of the contracts is called hydro-spill only curtailment. This provides that the utility must buy Third Party power at the fictitious price set in 1983 even when it could generate itself or buy from others more cheaply, unless it would have to spill hydro water.

The next legislative-agency subsidy to these projects is the Energy Tax Credit. While that credit expired in 1985 for most technologies, it was extended for hydro through 1988. Thus, developers are planning to recapture a major portion of their equity as a tax credit in the year following construction. This will increase the federal deficit and pass the subsidy to future generations.

The next subsidy to the projects is artificially low land use rates set by FERC. As an example, we have valued the land at Lewis Fork as a value of $30,000/year. The developer will pay less than $400 annually, this being the land use rate set by FERC. This is why virtually all of the hydro projects are located on federal land, even though they conflict with other public uses of that land.

Save Our Streams calls these three major subsidies "triple-dipping":

1) Standard Offer No. 4;
2) Energy Tax Credit; and
3) Virtually free use of public lands.

A major discrepancy exists in California Water Code Section 106.7 granting preference to "environmentally compatible" projects smaller than 30 MW. There are enormous differences of opinion regarding what is "environmentally compatible". Save Our Streams has endorsed only three such projects. But each developer contends that their project is "environmentally compatible" since its effects will be less profound than Chernobyl, for example.

A major scientific problem is lack of a data base to measure subtle long-term effects of a project on stream and riparian ecosystems. Save Our Streams has proposed that the Iowa Canyon Project be developed as an experiment with pre- and post-project monitoring by U.C. Davis and funded by the developer. The State Water Resources Control Board has not ruled on this proposal. Impacts come down to a conflict of the developers' best case scenario versus opponents' worst case scenario.

I have developed this background to your requested testimony to establish the importance of the Sayles Flat case.

The Federal Energy Regulatory Commission is a loose cannon in the California environment. Save Our Streams has a petition for mandate pending in the Ninth Circuit that FERC adopt regulations consistent with the Council on Environmental Quality (CEQ). FERC contends that it is exempt from the CEQ, and FERC's practices and procedures violate CEQ in many regards, one of which is coordination with state agencies.

The two most important California agencies relating to private hydroelectric projects are the State Water Resources Control board ("Water Board") and the Department of Fish and Game ("DFG").

While Save Our Streams has had and will have disputes with the Water Board, the Water Board is two orders of magnitude better than FERC on environmental oversight. The Water Board's procedures provide some opportunity for a grassroots organization such as Save Our Streams to participate. In contrast, it requires a minimum of $50,000 to mount a meaningful FERC protest, which Harriett La Flamme, a school teacher, did not have. The institutional nature of FERC insures that no environmentalist will ever be a Commissioner.

Maintaining Water Board control of California streams is absolutely vital to their protection. The First Iowa 1/ case is totally inconsistent with the "New Federalism" which has evolved over the last 20 years with bipartisan backing. If there is a judicial loss of Sayles Flat, it should and must be legislatively overridden to retain California control of California resources.

Turning to the Department of Fish and Game, we perceive both opportunities and problems in the evolution of hydro regulation. While the Department's written procedures look good, its practices fall short of the mark. The Department perceives that it has limited political ammunition which must be reserved for the absolute top priority streams such as the McCloud River. As to streams of less "importance", DFG has compromised scientific scrutiny by sloth, inertia, and budget restrictions.

The California Sportfishing Alliance has identified hundreds of violations of DFG bypass flow requirements which had escaped the attention of the Department. DFG has no formal monitoring program and has admitted that it largely relies on citizen reports of bypass violations.

The Department's review of hydroelectric proposals is conducted in private, without public review until a civil agreement is signed and released.

In particular, we urge that developers be required to pay the Department's cost of reviewing their proposed projects. Present practice provides yet another subsidy to the developers by using limited public funds for this purpose.

1/ First Iowa Hydro-Electric Cooperative v. FPC 328 U.S. 152 (1946)

You have asked our reactions to (a) recent federal amendments and (b) the Sayles Flat litigation. The federal legislation is tokenism. It will do little to alter the practices of an agency with a 60 year history of "power at any price". In the pungent phrase of "Network", "we're made as hell" about Sayles Flat. We are proud to belong to Protect Our Outdoor Resources, the coalition of citizen intervenors in the case.

Your letter asked for our suggestions on budgetary and legislative action. Frankly, we would like to see a complete moratorium on non-retrofit hydro until there exists a data base from an experiment like Iowa Canyon and until we have a need for the power which cannot be met by a preferable source. At present, retrofit hydro is not being developed, in part, because of the priority of high head hydro projects on the waiting list, which we feel is bizarre.

PURPA, which was enacted to encourage retrofit hydro, has been subverted to discourage retrofit hydro.

Adequate funds and insulation from political pressure must be provided the Department of Fish and Game.

The ambiguity of the so-called "environmentally compatible" hydro should be abolished. The small number of benign projects does not justify the enormous efforts in opposing projects such as El Portal, Sayles Flat and Lewis Fork, to name but a few.

In a broader view, we must plan the best possible energy future for the state, moving from energy abundance to energy sufficiency in a prompt but orderly manner by 1997. Conservation and efficiency improvements can achieve this goal more prudently than "hydromania". Hydromania reduces diversity of supply and impedes projects which could increase diversity, particularly wind and biomass.

You have asked about the status of our complaint before the PUC against PG & E asking termination of 63 hydro contracts. A thumbnail answer is that the PUC appears to have filed and forgotten it. Assemblyman Bill Jones, at our request, inquired last year about problems with the Qualifying Facility Milestone Procedure (QFMP). Chairman Vial responded that there were no problems, in essence.

We disagree. The QFMP was designed to impose time limits on projects with contracts and to "bump" projects which did not comply with their self-selected development schedule. The two most important milestones are beginning construction (11) and operation (12). A notable exception to the QFMP allows the developer, with the utility's consent, to extend these dates. It is our understanding that developers would contact individual Public Utilities Commissioners, ex parte, who would informally ask PG & E to extend dates. This practice apparently evolved to extension by request as a matter of course.

The effect of these extensions is that ratepayers will pay for contracts which PG & E could have declared in default. Another effect is that projects lower on the waiting list are not getting "bumping" benefits of the QFMP. We are alleging that this amounts to an unlawful discrimination by PG & E in favor of the hydro developers that do not comply with their development schedules.

PG & E moved to dismiss our complaint several months ago, but as far as we can tell, that motion was also filed and forgotten.

Contrary to what Chairman Vial wrote Assemblyman Jones, problems with the QFMP do exist. Worse, they appear to be written in stone, since review was terminated and our complaint is being ignored.

Thank you for the invitation to testify.

Glenn M. Kottcamp

State Headquarters
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Sacramento, CA 95831

California Sportfishing Protection Alliance

**Testimony to the California Assembly Natural Resources Committee
by the California Sportfishing Protection Alliance**

**Monday, February 9, 1987
State Capitol, Sacramento**

Mr. Chairman and members of the Committee, my name is Jim Crenshaw and I am the President of the California Sportfishing Protection Alliance (CSPA). My associate's name is Bob Baiocchi and he is a consultant for the CSPA. The CSPA is a state-wide organization made up of sportsmen groups and individual members who are concerned about the protection and maintenance of the state's fishery resources in conjunction with the development and operation of all hydroelectric projects in the state.

Since commencement of small hydropower development in California we have played a major role in attempting to have both small and major hydroelectric projects adequately mitigated with respect to the protection of the state's fishery resources. We have filed over 200 formal protests with the State Water Resources Control Board (State Board) and also filed numerous petitions of interventions and formal protests with the Federal Energy Regulatory Commission (FERC) on hydroelectric development in the State. We have found some improvements in the manner in which fishery protection measures are now conditioned into water rights permits by the State Board for hydroelectric uses. We are presently working closely with the staffs of the Division of Water Rights and State Board in developing a comprehensive environmental document concerning initial environmental information on all new applications for water rights.

However, we have also found a small improvement in the manner in which the FERC develops environmental information pertaining to fisheries when licensing hydroelectric projects. One problem with the FERC staff is that they work in an "closed" office environment in Washington, D.C. without having first hand on-site knowledge of the waterway which will be affected by the project, and in many cases overrules the specific recommendations of the Department of Fish and Game pertaining to major hydroelectric project being considered for relicensing. Hopefully the recommendations of the Department of Fish and Game will be conditioned into FERC licenses in the future because of the provisions of the Electric Consumers Protection Act of 1986. We will all have to watch their actions very closely in complying to the requirements of the Act.

One of the major problems we have experienced in the past is that the FERC was not monitoring or enforcing mandatory license requirements such as minimum streamflow requirements for fish even though the USGS gauging records showed non-compliance of the requirements. To further compound this problem we also found both the Department of Fish and Game, and the State Board were also not monitoring or enforcing the minimum streamflow requirements. Sometime ago we filed formal complaints with the State Board and the FERC against several licensees operating major hydroelectric projects in California for alleged violations of the minimum streamflow requirements. Even though some of our complaints have been pending before the FERC for nearly three years, the FERC has not taken any formal actions against the licensees. It should be noted that in June, 1985 the FERC staff did fly to California and meet with our organization and the licensees involved in four complaints on alleged minimum streamflow violations. It also should be noted that because we alleged that minimum streamflow compliance was a state-wide problem the FERC did require five years of gauging records from all licensees in the state. However the FERC has still not taken any formal action. Fortunately, the State Board took appropriate actions with some of our complaints and the end result was that four licensees were required to submit Plans of Compliance to the State Board, subject to the State Board's approval. However, it should be noted that we

have several additional complaints before the State Board, but because of a staffing problem the staff of the Division of Water Rights has not taken any actions to date. We also have additional compliants we want to file with the State Board, however we are holding back filing the complaints because of the staffing problem. It is our understanding they have a tremendous backlog of complaints and have not yet been able to install any type of statewide monitoring or enforcement program.

Complaints for alleged minimum streamflow violations were filed by the CSPA against the Placer County Water Agency, Yuba County Water Agency, Nevada Irrigation District, SMUD, Modesto Irrigation District, Turlock Irrigation District and the Pacific Gas and Electric Company. At one FERC licensed project, there were 10,214 days of alleged violations of the minimum streamflow requirements over a period of 20 years. Some of the rivers and streams included in our complaints are the South Fork American, Middle Fork American River, Rubicon River, North Fork Yuba River, Middle Yuba River, Tuolumne River, Pit River, McCloud River,Bear River, Silver Creek, South Fork Silver Creek, Duncan Creek, Canyon Creek, Bucks Creek, Grizzly Creek, tributaries to Butte Creek, and recently tributaries to the North Fork Mokelumne River.

Also we have communicated with the House of Representative's Subcommittee on Energy, Conservation and Power during the development of the specific provisions of the Electric Consumers Protection Act. We provided the staff of the subcommitte with copies of our FERC complaints and exhibits on alleged minimum streamflow violations. We have also had environmental organizations in Washington, D.C. lobby for penalties when minimum streamflow requirements were violated. Because of this, the provisions of the Electric Consumers Protection Act contains civil penalties of $10,000 per day for each day of violation. Also, under the terms and conditions of the Act the FERC is required to monitor and enforce all license requirements. To date we have not seen any initiation of these enforcement procedures by the FERC.

With respect to the Department of Fish and Game (Department), as stated beforehand the Department is not monitoring or enforcing the minimum stream flow requirements even though the Department has written fish and wildlife agreements with the licensees. The Department has indicated due to staffing problems they also cannot monitor and enforce terms and conditions of the fish and wildlife agreements. We believe when a written fish and wildlife agreement between a licensee and the State of California is breached, the Department should take appropriate actions though the Attorney General's Office and notify the FERC and/or the State Board, requiring compliance of the minimum requirements, and in some cases penalties. Because the streamflow requirements are minimums, the state's fishery resources are dependent upon full compliance of the requirements.

We recommend and urge the Committee to investigate our testimony and take the necessary actions which will provide staffing for the State Water Resources Control Board to monitor and enforce the provisions of all water rights permits and licenses in the state. We have been working closely with the staffs of the State Board and the Division of Water Rights, and even though there is a significant staffing problem, they have been working with us in attempting to set up a state monitoring system on all water rights permits and licenses which have minimum streamflow requirements for fish. We sincerely appreciate the help of State Board Member Darlene Ruiz and Deputy Director Walt Pettit in this matter, and also the cooperation of the staffs of the Division of Water Rights and State Board.

With regards to the development of new hydroelectric projects, we feel all proposed projects should be judged on a case by case basis, with an emphasis on adequate protection measures for the fisheries, provided there is a need for energy in the State. Our observations, based on extensive research, indicates that many of the existing hydroelectric projects in the state were not adequately mitigated because many of the minimum streamflow requirements and other fishery protection measures were not

developed by state-of-the-arts fishery studies, but simply were negotiated administratively. The State of California acting through the Department of Fish and Game now has the opportunity to remitigate inadequate fishery protection measures through the FERC relicensing process or by filing complaints with the FERC and/or the State Board. We believe there should be a directive from the California Legislature which requires such adequate fishery mitigation measures based on state-of-the-arts studies on all existing major hydroelectric projects. Since fish are the property of the people of the state of California and are a public trust resource, this would be reasonable and in the public interest.

With respect to the Sayles Flat Associates v. U.S., et. al. on the ability of state regulatory agencies, particularly the State Water Resource Control Board, to separately regulate hydropower development, we have the following comments:

We are seriously concerned over this issue and the final decision by the courts. If the courts determine that a FERC license pre-empts state law, and consequently eliminates the state water rights process, the people of the state of California, and the property of the people (fish) are going to be potentially injuried. A good example of this was federal pre-emption of California Fish and Game Code 5937 in the development and construction of the Bureau of Reclamation's Friant Dam Project which destroyed the salmon runs in the San Joaquin River above the confluence of the Merced River. This was a multi million dollar loss to both the commerical and sportfishery. Since the FERC does not hold formal hearings in California, or in Washington, D.C. concerning the licensing of individual hydroelectric projects, how can the people who will be directly affected by the project be given the opportunity of due process of law? i.e. We are an interested party in the state water rights process for the Sayles Flat Project, and therefore we will be injuried and denied the opportunity of taking part in the process of determining adequate minimum streamflow requirements for fish, and other protection measures for the Sayles Flat Project through the state water rights process. Based on our experiences with the FERC, the FERC

has not been a responsible regulatory agency in requiring strict compliance of the mandatory license requirements which effects water, fish and wildlife, and private and public lands affected by existing projects. We believe if federal pre-emption of state water rights laws becomes a reality, the FERC will therefore become the trustee agency, and will hold in trust for the people of the State of California, the public trust resources of the State of California. We forsee a host of law suits against the FERC because of their dismal record.

The following are our recommendations to the Committee concerning the Sayles Flat issue:

1. The California Legislature should recommend emergency legislation to Congress which grandfathers the rights of the State of California to determine specific terms and conditions in water rights pertaining to hydropower uses.

2. The State Water Resources Control Board should immediately file petitions of interventions with the FERC on every new application for license for hydropower development in the state, including petitions of interventions on the relicensing of every hydroelectric project in the state. We believe it is unreasonable to allow any project to be build without first determining the fishery bypass flows as determined through the hearing process of the State Board. The FERC now routinely issues licenses to construct hydroelectric projects without first determining the final fishery bypass flows.

3. The California Legislature should direct the State Attorney General's Office to employ its best attorneys and resources, and take the Sayles Flat case to the U.S. Supreme Court, if need be. In cases where applicants for state water rights for hydroelectric uses ignore the state water rights process, the State Attorney General's Office should attempt to obtain restraining orders to prevent the diversion of said waters until the matter of the Sayles Flat case is resolved in the courts.

If deemed necessary by the members of the Committee, we would be most happy to work closely with the Committee's staff concerning the issues we have discussed today. Thank you for allowing the California Sportfishing Protection Alliance the opportunity to provide the members of the Committee with comments concerning the issues pertaining to the development and operation of hydroelectric projects in California.

Are there any further questions by any members of the Committee?

Mr. James Crenshaw, President
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Mr. Bob Baiocchi, Consultant
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January 13, 1987

Jim Crenshaw
5720 Roseville Road, Unit C
Sacramento, CA 95842

Subject: California Sportfishing Alliance

Dear Mr. Crenshaw:

On Tuesday, February 10, 1987 at 9 am the Assembly Natural Resources Committee will hold an information hearing on the impact of the "Electric Consumers Protection Act of 1986" (ECPA) and other recent developments affecting new small hydroelectric projects in California. The committee will review how this new legislation changes the Federal Energy Regulatory Commission's (FERC) licensing process. In addition, the hearing will focus on the ramifications of the Sayles Flat case (Sayles Hydro Associates v. U.S., et al) on the ability of state agencies, particularly the State Water Resources Control Board, to separately regulate hydro development.

The purpose of this letter is to invite you or representative of the California Sportfishing Alliance to present testimony at the hearing on any observations or concerns your organization has with regulation of hydro development and what problems will occur if the state loses the Sayles Flat lawsuit. In addition, we would appreciate responses the following questions:

1. Has your organization identified any problems with either state or federal regulation of hydro development, or the monitoring of such projects by government agencies?

2. What reaction, if any, does your organization have to (a) recent federal efforts to reform the FERC licensing process and (b) the litigation brought against the State of California by the developers of the Sayles Flat hydro project near Camp Sacramento on the So. Fork American River?

3. What suggestions, if any, would you make to the committee for either budgetary or legislative action affecting development of new hydroelectric projects in California? Should additional hydro development be encouraged or discouraged?

In addition, we are interested in learning about the status of the complaints your organization has filed with FERC and the State Water Resources Control Board against several major public water and power agencies regarding alleged violations of fishery bypass flow requirements. Specifically, what are these agencies doing to monitor or enforce such requirements?

Jim Crenshaw Page Two

These questions are intended to serve only as a general basis for your testimony. Please feel free to speak upon any other issues pertaining to the subject you believe the committee should be made aware. If you have any questions about the hearing, please contact Jeff Shellito, consultant to the committee at (916) 445-9367.

I look forward to seeing you on the 10th.

Sincerely,

BYRON D. SHER, Chairman
Assembly Natural Resources Committee

*hearing date may change if the regularly scheduled committee meeting time (currently Tuesday, 9 am) is changed in the new legislative session. In any event, the hearing will be held at the regularly scheduled committee meeting time and date during the week of February 9th.

cc: Michael Remy