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G. Bryan Salzman

HYDROPOWER LICENSING AND FERC: THE CALL FOR LEGISLATIVE REFORM

G. BRYAN SALZMANN, ESQUIRE*

I. INTRODUCTION

The challenge to achieve the proper balance of power between federal and state government has created a seemingly endless struggle dating back to the inception of the United States of America. This delicate balance is especially at issue where the need for regulatory authority exists. The interplay between federal and state government regulators is extremely sensitive whenever the environment is concerned. This article is limited to the specific discussion of environmental regulations involving the licensing process of a hydropower dam. Hydropower licensing encompasses the competing interests of the Federal Energy Regulatory Commission ("FERC") in developing alternative sources of energy often standing in conflict with environmental policies pursued by state government.

The licensing of a hydropower dam falls within the authority of FERC. However, FERC's licensing procedures have left in their wake a regulatory scheme riddled with inconsistencies. This article will attempt to provide the reader with a cursory understanding of this field of law highlighting the extreme friction caused by FERC's policy toward the development of energy. This goal will be accomplished by analyzing three areas: an overview of the statutory authority of FERC; the tendency of the Commission to assert preemption; and the judiciary's interpretation of FERC's power. In addition, an alternative solution to this perplexing problem will be offered.

II. THE STATUTORY AUTHORITY OF FERC: AN OVERVIEW

In 1920, Congress passed the Federal Water Power Act ("FWPA")[1] which was later incorporated into Part I of the Federal Power Act ("FPA") instituted in 1935.[2] The FWPA created the Federal Power Commission ("FPC") to oversee the development of hydropower as an alternative source of energy in America. In 1977, the FPC was renamed the Federal Energy Regulatory Commission ("FERC") pursuant

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*G. Bryan Salzmann is an environmental attorney practicing with the Law Offices of Eugene E. Dice in Harrisburg, Pennsylvania. The Law Offices of Eugene E. Dice are engaged in a statewide practice of environmental law and related issues.

1. 16 U.S.C. §§ 791-826 (1982).

2. 16 U.S.C. §§ 791a-828 (1988 & Supp. II 1990 & Supp. III 1991).

to the Department of Energy Reorganization Act.[3]

The FWPA was instrumental in establishing federal rights in state water systems. Prior to the FWPA of 1920, courts found the state to be the supreme body in the control of waters within its boundaries. In *Martin v. Waddell's Lessee*,[4] the United States Supreme Court stated:

> For when the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the Constitution to the General Government.[5]

Although the Supreme Court's language in *Martin* appears to conclude that a state has a sovereign interest in its watercourses, the Court notes that this right is subject to the shared interest of the federal government. One source of shared interest by the federal government is found under the Supremacy Clause of the United States Constitution.[6] In order to invoke this power, a proper exercise of a constitutional right must occur. The constitutional right that is relevant to hydropower is the federal government's ability to regulate interstate commerce.[7]

The federal commerce power is undoubtedly one of the broadest constitutional powers. The power to regulate commerce has been inextricably linked to navigation. In *Gibbons v. Ogden*,[8] the Supreme Court ruled:

> All America understands, and has uniformly understood, the word "commerce" to comprehend navigation . . . . The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."[9]

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3. 42 U.S.C. §§ 7101-7352 (1988 & Supp. II 1990).

4. 41 U.S. (16 PET.) 365 (1842).

5. *Id.* at 410. *See also* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

6. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ").

7. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To regulate Commerce . . . among the several states . . . .").

8. 22 U.S. (9 Wheat.) 1 (1824).

9. *Id.* at 190.

The federal government interest in navigation has come to be known as the "navigational servitude."[10] This servitude is a result of the need to protect the navigability of the waterways for the public.[11] At times, the navigational servitude can even be used to "take" private property without compensation in the attempt to aid navigation.[12] However, this servitude is limited to waters that are defined as navigable.[13] Therefore, the federal government may regulate when aiding navigation for the purpose of interstate commerce.

Common sense would instruct that damming activity directly affects the use of water for navigation. As a result, Congress has enacted various acts which bestow upon the federal government decision-making authority when an obstruction such as a dam would interfere with a navigable waterway. The first of these acts was the Rivers and Harbors Act in 1890.[14] This Act required a dam builder to receive consent from Congress before construction began.[15] Although the Rivers and Harbors Act of 1890 required Congressional consent, the Act did not address the feasibility of the project. Thus, a dam did not necessarily have to serve a public purpose. This void was later filled with the enactment of the Dam Act in 1906.[16] The Dam Act required a developer to submit proposed construction plans with specifications to the Chief of Engineers for a feasibility determination. Therefore, the Dam Act required social utility and proper construction before any interference to navigability could occur.

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10. *See* United States v. 412.715 Acres of Land, Contra Costa County, Cal., 53 F. Supp. 143 (N.D. Cal. 1943).

11. *Id.* at 148.

12. *See* Colberg, Inc. v. State, 432 P.2d 3 (Cal. 1967).

13. The "Daniel Ball" test for navigation states:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradiction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 483 (1871).

14. 26 Stat. 454 (1889-91).

15. *Id.*

16. 34 Stat. 386 (1905-07).

A great deal of argument has existed surrounding the intent of Congress in passing the FWPA. The issue is what powers Congress intended to grant the federal government in the Rivers and Harbors Act of 1899 and the Dam Act of 1906. The power given to FERC under the FWPA can be construed as necessary to aid interstate commerce by preventing the obstruction of navigable waters. This theory would be in harmony with the legislative intent of both the Rivers and Harbors Act and the Dam Act, which seeks to prevent unnecessary obstructions to commerce in navigable waterways. The acceptance of this theory would suggest that the FWPA was created with a goal of aiding commerce on the waterways. As a result, FERC, which receives its power from the FWPA, would also be geared to preventing unnecessary obstructions at the expense of commerce and social utility.

The notion that Congress intended the FWPA to exist in harmony with the Rivers and Harbors Act and the Dam Act has been plainly rejected. In *Sporhase v. Nebraska*,[17] the Supreme Court held that water is a commodity in and of itself. Therefore, water is interstate commerce which clearly falls under the regulatory authority of the federal government by way of the Commerce Clause.[18] This holding parallels a philosophy which construes the FWPA to allow the broad federal regulation of a hydropower facility because the water moving through a hydropower turbine constitutes interstate commerce. This understanding permits the use of the Commerce Clause to advocate federal preemption in the field of hydropower licensing.

III. FERC'S PREEMPTIVE TENDENCY: THE IMPLEMENTATION OF POLICY

"The only thing we have to fear, is FERC itself."[19]

President Roosevelt wisely noted that the broad-sweeping powers of FERC combined with its policy strategy caused many a state environmental agency to tremble. Although the regulatory authority of FERC encompasses a significant number of areas, this discussion will be limited to hydropower dams.

It has been an admitted fact that FERC construes its power in licensing and regulating a hydropower dam contained in the FWPA to allow total preemptive rights.[20] FERC has continuously asserted that hydropower is interstate commerce itself. Thus, FERC asserts that the Commerce Clause allows it to oversee all aspects of a hydropower dam including environmental assessment. The implications of such

17. 438 U.S. 941 (1982).

18. *See id.*

19. Charles A. Trabandt, *Preemptive Tendencies at the FERC --An Insider's View*, 122 PUB. UTIL. FORT. 9 (Sept. 29, 1989) (quoting President Franklin D. Roosevelt).

20. *Id.*

a perception can be harmful to the balance between the state environmental agency and the federal government.

It is not disputed that the development of an alternative source of energy is an extremely important pursuit that should be encouraged. This search for energy is especially necessary in light of the recent oil crisis caused by Iraq's invasion of Kuwait and an overdependence on foreign oil. However, given the varied topography of the states, it is unreasonable to assume that FERC has more expertise in assessing environmental impacts than a state agency. In fact, this concern has been previously raised by the states in hearings held by the House Subcommittee on Energy, Conservation, and Power in 1984.[21]

FERC is in the business of energy. As a result, FERC may not be properly equipped to evaluate the long-range environmental impacts of a hydropower dam on a watercourse and its tributaries. Arguably, FERC's licensing process can serve as a mere formality to an aggressive dam developer. Therefore, various state agencies have expressed their outrage over federal preemption by FERC when natural resources will be destroyed as a result of hydropower dam development.

The FWPA requires FERC to formulate comprehensive planning when a need for energy is determined to exist.[22] This comprehensive planning has been largely ignored.[23] Additionally, although the National Environmental Policy Act ("NEPA")[24] is applicable to FERC, it has been argued that FERC is not always required to prepare an environmental impact statement as required by NEPA.[25] Thus, FERC's licensing depends upon the feasibility of a project and whether proper financing has been secured. However, there has been judicial support for the proposition that FERC must consider the public trust implications over the feasibility of the project.[26]

A common fear of the state agency is that a dam developer in a navigable waterway will disguise a project aimed at recreation under the cloak of a hydropower dam. The addition of hydropower turbines engages the FERC licensing process and, to some extent, can avoid the regulatory arm of the state. In sum, if the FERC process is invoked, perhaps a more lenient review of a dam's effects might be secured.

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21. *Small Hydro Program: Hearings Before the Subcomm. on Energy, Conservation, and Power of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. (1984) [hereinafter *Hearings*].

22. 16 U.S.C. § 803(a).

23. *Hearings*, *supra* note 21

24. 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

25. *See Hearings*, *supra* note 21, at 411-12. An Environmental Impact Statement can be required for relicensing of a project. Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2358 (1985).

26. Shokal v. Dunn, 707 P.2d 441 (Idaho 1985).

The debate mentioned earlier is central to a current case under litigation in Pennsylvania. In *City of Harrisburg v. Commonwealth of Pennsylvania, Department of Environmental Resources*,[27] the City of Harrisburg (the "City"), brought suit against the Pennsylvania Department of Environmental Resources ("DER"), when it was denied a § 401 water quality certification as required by the Clean Water Act.[28] The granting or waiver of a § 401 water quality certification is required by FERC before a hydropower license will be issued.[29] DER's denial of water quality certification effectively prevented FERC from completing its review and stalled construction of the hydropower dam project.[30]

The City has proposed the construction of a 17-foot high dam close to the south end of City Island, in the Susquehanna River, approximately at the site of an existing railroad bridge. The City claims the project would create jobs, energy, and recreation for the people of Harrisburg in the river.

The Susquehanna River is a navigable waterway.[31] Some experts have estimated that the proposed dam would create an 8-mile pool above the dam. The City has proposed that two turbines be placed on each end of the dam. DER studies determined that during the summer flow, a 150-200 acre area of riverbed below the dam would be exposed due to a lack of water over the breast of the dam. DER also determined that the dam would create adverse effects on the water quality of the Susquehanna River. In fact, in an April 16, 1991 press conference, American Rivers, the nation's leading river conservation organization, ranked the Susquehanna River

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27. EHB Docket No. 88-120-F.

28. *See* 33 U.S.C. § 1341 (1988).

29. In support of the argument that the City must first obtain a § 401 certification, DER cites the following:

> An applicant for a license or exemption from licensing must consult with each appropriate Federal and state agency before submitting its application to the Commission. The agencies to be consulted must include the appropriate certifying agency under section 401 of the Federal Water Pollution and Control Act (Clean Water Act), 33 U.S.C. [§] 1341 . . . .

18 C.F.R. § 4.38(a) (1991). DER also argues that the City must obtain a § 404 dredge and fill permit, 33 U.S.C. § 1344, from the Army Corps of Engineers for the proposed project under this same regulation. A § 401 certification from the state is required prior to consideration for a § 404 permit. *See* 18 C.F.R. § 4.38 (1991).

30. The author of this article was a certified legal intern with DER and worked exclusively on the Dock Street Dam case. The statements made are solely of his opinion and do not necessarily reflect the views of DER.

31. In *Pennsylvania Water and Power Co. v. FPC*, 123 F.2d 155 (D.C. Circ. 1941), *cert. denied*, 315 U.S. 806 (1942), the court ruled that the Susquehanna River was navigable because it had been used by vessels in interstate commerce and was susceptible of being made navigable again if Congress appropriated money for the work.

fifth on its list of most endangered rivers in light of this project.

The City of Harrisburg has argued that FERC has the authority to consider environmental concerns surrounding the project. Thus, the City contends that DER has abused its authority in evaluating the impact that their proposed dam would have on the environment. DER has disputed this view by asserting that the construction of a hydropower dam will result in an adverse impact to water quality in the Susquehanna River. DER argues that they can evaluate and regulate water quality impacts under § 401 of the Clean Water Act.

In sum, the issue of federal preemption is being challenged by the DER. If FERC is found to preempt the field, the environmental concerns of the state will inevitably be left unsettled. However, many prior judiciary interpretations of FERC's power have left the State of Pennsylvania with much to fear.

IV. THE JUDICIARY'S INTERPRETATION OF FERC'S REGULATORY AUTHORITY

The preemptive authority of FERC over a hydro-electric project has been a cornerstone for debate. The seminal case involving this debate is *First Iowa Hydro-electric Cooperative v. Federal Power Commission*.[32] In *First Iowa*, the Supreme Court considered whether an applicant for a FERC license was first required to obtain a state permit for dam construction from the State of Iowa.[33] First Iowa Hydro-electric Cooperative was denied a license without prejudice by the FPC because it failed to show compliance with state law pursuant to § 9(b) of the Federal Power Act.[34] The Court ruled that § 9(b) of the Act did not mandate that an applicant first obtain a state permit. The *First Iowa* Court reasoned that "[w]here the Federal Government supersedes the State Government, there is no suggestion that the two agencies both shall have final authority. . . . A dual final authority, with a duplicate system of state permits and Federal Licenses required for each Project, would be unworkable."[35] The Supreme Court feared that duplicative authority would vest a veto power in the state agency.[36]

The rationale of *First Iowa* has been utilized by the federal courts of appeal. In *State of Washington, Department of Game v. Federal Power Commission*,[37] the 9th Circuit Court of Appeals held that "state laws cannot prevent the Federal Power

32. 328 U.S. 152 (1946).

33. *Id.* at 161.

34. 16 U.S.C. § 802(b).

35. 328 U.S. at 168.

36. *Id.* at 164.

37. 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States."[38]

The *State of Washington* court clearly implemented a federal water domain theory[39] in the context of the development of hydro-electric facilities. Thus, the 9th Circuit Court expanded *First Iowa* to create almost total preemptive authority in FERC.

Likewise, district courts have utilized the *First Iowa* decision. In *Town of Springfield, Vermont v. State of Vermont Environmental Board*,[40] the United State District Court for the District of Vermont considered whether an applicant for a FERC license must obtain a land use permit from the state. The District Court in *Town of Springfield* ruled that:

> [t]he result is the same whether the state permit is required as a condition precedent to obtaining a Federal license or as an independent exercise of the state regulatory power. In either event, the power to withhold a state permit is the power to thwart a federal project. This is prohibited."[41]

Therefore, the federal district court in *Town of Springfield* found the federal authority of FERC exclusive and deemed that a state's imposition of a land use permit was wholly contradictory.

State courts have also adopted the notion of federal preemption in hydropower licensing and operations. In *deRham v. Diamond*,[42] the New York Court of Appeals confronted the issue of whether a state's approval of a § 401 water quality certification should be upheld.[43] The approval of the certification was contested by various conservation groups.[44] The *deRham* court upheld the certification approval stating:

> Congress, by the Federal Power Act, has vested the Federal Power Commission with broad responsibility for the development of national policies in the area of electric power, granting it sweeping

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38. *Id.* at 396.

39. *See* U.S. v. Rands, 389 U.S. 121 (1967).

40. 521 F.Supp. 243 Dist. VT. (1981).

41. *Id.* at 249.

42. 333 N.Y.S.2d 771 (1972).

43. *Id.*

44. *Id.* at 773.

> powers in a specific planning responsibility with respect to the regulation and licensing of hydro-electric facilities affecting the navigable waters of the United States. The Commission's jurisdiction with respect to such projects preempts all state licensing and permit functions.[45]

It should be noted, however, that subsequent updates to § 401 of the Clean Water Act have shown that § 401 is to be preempted. The issue now in dispute is the scope of § 401.

The State of Oregon has also recognized the preemptive authority of FERC. In *Arnold Irrigation District v. Department of Environmental Quality*,[46] the Oregon Court of Appeals considered the limits of a state environmental agency in issuing a § 401 water quality certification.[47] *Arnold Irrigation* challenged the agency's denial of certification on the grounds that the agency viewed environmental impacts outside the scope of water quality. The *Arnold* court ruled that environmental concerns not involving water quality were in the sole purview of the federal government, not a state agency.[48]

Although FERC's power has been construed broadly by the judicial system, limited support of FERC's lack of preemptive authority does exist. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*,[49] the Supreme Court encountered the question of FERC's obligation to adhere to conditions set forth by other federal agencies. The Court ruled that FERC's licensing authority was subject to the conditions of the Secretary of the Interior, even if FERC disagreed with those conditions.[50] In support of its ruling, the *Escondido* Court stated:

> It is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions.[51]

Similarly, overlapping jurisdiction in hydropower dam development has been

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45. *Id.*

46. 717 P.2d 1274 (Or. Ct. App. 1986).

47. *Id.*

48. *Id.* at 1275.

49. 416 U.S. 765 (1984).

50. *Id.*

51. *Id.* at 774.

deemed to exist in light of § 404 of the Clean Water Act.[52] In *Monongahela Power Co. v. Marsh*,[53] the District of Columbia Circuit Court of Appeals found that because the construction of a hydropower dam encompasses the discharge of dredged or fill material, the Army Corps of Engineers shares authority with FERC over the building process.[54] The court in *Monongahela* reasoned that:

> Congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the express requirements of the Water Pollution Control Act Amendments. We do not view this as a "repeal" of the FPC authority but as a reconciliation seen by Congress as necessary to ensure the protection of a vital national interest.[55]

Thus, the *Monongahela* court made clear that there is no preemption of one federal agency over another.

Court reasoning construing FERC's authority to be non-preemptive is in serious jeopardy in light of the recent Supreme Court decision in *California v. Federal Energy Regulatory Commission*.[56] In this case, the Court considered whether a state agency possessed the right to set the minimum stream flows through the federally licensed power plant.[57] The State of California argued that the protection of fish necessitated their ability to set the flow level at the project site.[58] In addition, California buttressed its argument by asserting that in the absence of clear intent by Congress, state law cannot be preempted.[59] These arguments were made in the context of the FERC license rather than under § 401. In response, the federal government argued that the FPA vested complete licensing authority for hydropower development in FERC.[60] Likewise, FERC contended that to allow California to set

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52. *See* 33 U.S.C. § 1344(a) (1988) (permitting discharge of dredged or fill materials in navigable waters).

53. 809 F.2d 41 (D.C. Cir. 1987).

54. *Id.* at 50.

55. *Id.* at 53 (footnotes omitted).

56. 110 S.Ct. 2024 (1990).

57. *Id.* at 2027.

58. *Id.*

59. *Id.* at 2028.

60. *Id.* at 2027.

the minimum flows would, in effect, allow the state to regulate the dam.[61]

The Supreme Court rejected the arguments presented by California. In delivering the opinion of the Court, Justice O'Connor relied on the rationale in *First Iowa*, stating that:

> FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."[62]

It is therefore a reasonable assumption that the Supreme Court has construed the FPA to vest broad regulatory powers in FERC. However, the Court also recognized that "[a]dherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and . . . 'unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.'"[63] Thus, the Supreme Court made it clear that the confusion surrounding FERC's regulatory authority can be remedied by legislative enactment.

V. CONCLUSION

FERC's broad authority to regulate a hydropower dam creates great concern for those committed to the protection of the environment. FERC was established to develop the alternative source of water power energy. Thus, FERC occupies itself with achieving that goal, which can be at the environment's expense. To allow the Commission to preempt the field causes an abhorration of the delicate balance of power between state and federal government.

There are two possible solutions to this dilemma. Both of these solutions require legislative intervention. First, the FPA could be amended to allow the state to define permissible water uses which would significantly impact the environment. This concept has been embraced in the Coastal Zone Management Act.[64] The second possible solution to the FERC preemptive authority puzzle would be an FPA amendment establishing regional councils to initiate comprehensive planning. This managerial concept has been utilized successfully in the Fishery Conservation and

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61. 110 S.Ct. at 2027.

62. *Id.* at 2034 (quoting California v. FERC, 877 F.2d 743, 749 (1989) (citing First Iowa Hydro-electric Cooperative v. FPC, 328 U.S. 152, 164-65 (1946))).

63. *Id.* at 2029 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

64. 16 U.S.C. § 1454(b)(2) (1988 & Supp. III 1991).

Management Act.[65] This alternative would substitute the current unsatisfactory FERC comment process with an organized body that could comprehend and implement state concerns.[66] The adoption of either of these legislative proposals would effectively amend the FPA to reach a compromise between the state agency and FERC. These amendments would instill a harmonious response to the needs of energy developers and environmentalists alike.

65. 16 U.S.C. §§ 1801-1882 (1988 & Supp. III 1991). For the provision of Regional Councils, see § 1821. For the membership of each council, see § 1852.

66. For a complete discussion of the state's role under the Fishery Conservation and Management Act, see Leslie M. MacRae, *The Fishery Conservation and Management Act: The State's Role in Domestic and International Fishery Management*, 88 DICK. L. REV. 306 (1984).