

GAO

Report to the Chairman, Subcommittee on
Oversight and Investigations, Committee
on Energy and Commerce, House of
Representatives

July 1988

ENERGY
REGULATION

Allegations Concerning
the Development of
Fishways at
Hydropower Projects



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**Resources, Community, and
Economic Development Division**

B-230363

July 28, 1988

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your letter dated February 2, 1987, to the Secretary of the Interior and the Chairman, Federal Energy Regulatory Commission (FERC) regarding administration of the Federal Power Act, section 18, expressed concern that hydropower projects at Sewalls Falls, New Hampshire; Lockwood, Maine; and Scott's Mill, Virginia; may not have provided adequately for fishways facilities for anadromous fish (fish such as salmon which must migrate upstream to spawn). Section 18 states that FERC shall require the construction, maintenance, and operation of fishways by licensees at the various project sites as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

In your letter you stated that in the case of two of these projects it was alleged that the Department of the Interior's Assistant Secretary for Fish and Wildlife and Parks overruled the Fish and Wildlife Service regarding section 18 requirements and that, in the case of another project, he was allegedly planning to approve a hydropower project over Fish and Wildlife's objections.

You also expressed concern that FERC officials allegedly initiated an effort to question the authority of the Secretary of the Interior to prescribe fishways under section 18 and that FERC officials prepared one or more draft letters for the Department of the Interior's signature regarding the fishways issue, including the withdrawal of a motion to intervene in one case.

You asked Interior and FERC to provide your office with copies of all letters, memoranda, notes, and other documents regarding matters involving these projects relating directly or indirectly to actions taken or inactions under section 18. You also asked that copies of these documents be provided to us so that we could examine and report on these matters, including any applicable legal issues.

As you requested, we reviewed Interior's and FERC's documents regarding these three projects. We briefed your office earlier this year on our findings on each of the three projects, the actions taken by FERC and Interior, and their impact on section 18 fishways development at these projects. Your office requested that we provide a report on our findings and our analysis of FERC's position on the nature of section 18 authority.

Results in Brief

On the basis of our examination, we found that Interior had adequately provided for fishways at the three projects reviewed. Furthermore, we believe that FERC has acted within the scope of its authority with respect to the three projects and has correctly acknowledged that fishways properly prescribed by Interior under section 18 of the act must be imposed as license conditions by FERC. We found no indication that FERC's actions concerning these projects were intended to impede Fish and Wildlife Service efforts to carry out the Service's responsibilities. Our findings on the allegations relating to the three projects reviewed are discussed below.

Sewalls Falls Project

Allegation: That Interior's Assistant Secretary for Fish and Wildlife and Parks was planning to approve the project over the Fish and Wildlife Service's objections.

We found no substance to this allegation. On February 9, 1987, Interior's Assistant Secretary for Fish and Wildlife and Parks notified the Seaward Construction Company, the prospective licensee for the project, that he concurred with the Service's recommendation to FERC that the project not be licensed. Our review of FERC's project files on December 10, 1987, showed that the dam on which the hydroelectric project was planned had been breached and that the State of New Hampshire was negotiating with the company to buy back the development rights for the site. In an October 20, 1987, letter the legal representatives of the company informed FERC that it would withdraw its license application only after its interest in the site is purchased by the state and the balance of the property is transferred to the state Fish and Game Department.

Lockwood Project

Allegation: That Interior's Assistant Secretary for Fish and Wildlife and Parks overruled the Service regarding section 18 fishways prescriptions for the project. We found that the Assistant Secretary agreed to license conditions which included a requirement for fishways. The license did

not, however, allow the Service to retain control over the design of the fishways as it had wanted. Under the terms of the project licensing order, fishways are to be developed at the Lockwood project site. Under article 36 of FERC's September 30, 1985, order on Lockwood, the licensee is required to design, construct, and operate, upstream and downstream fish passage facilities at Lockwood as may be prescribed by the Maine Department of Marine Resources and the Maine Atlantic Sea Run Salmon Commission.¹ Also, the Service is to be consulted on the design of these facilities along with the Maine agencies. In a September 20, 1985, letter to FERC, the Acting Deputy Assistant Secretary for Fish and Wildlife and Parks explained that (1) fish passage facilities would be required by state fish restoration plans, (2) the state and the licensee were (and are) cooperating on plans for fish passage, and (3) early action on the license amendment application was necessary.

Fish passage facilities at the Lockwood project site are to be provided no later than 1 year after construction of such facilities at the downstream Edwards Dam are completed. The Lockwood project is the second impassable barrier to the upstream migration of anadromous fish in the mainstream of the Kennebec River in Maine. The lack of fish passage facilities at the Edwards Dam currently precludes upstream migration of fish on the river.

Service officials told us that they regarded their consultative, as opposed to prescriptive, role concerning the future design of fish passage facilities at Lockwood as a limitation of their authority under section 18. Nevertheless, the Assistant Secretary for Fish and Wildlife and Parks denies that the Service was overruled, since fish passage facilities will be required by the state. Furthermore, the Service acknowledged that involvement by the State of Maine authorities in developing the Lockwood project should result in timely and adequate provision of fishways facilities at the site.

Scott's Mill Project

Allegations: (1) That FERC has questioned the section 18 authority of the Secretary of the Interior; (2) that FERC prepared one or more draft letters regarding fishways, for Interior's signature, including the withdrawal of an Interior motion to intervene in the case; and (3) that, as with the Lockwood project, Interior's Assistant Secretary for Fish and

¹FERC subsequently substituted the Maine Department of Inland Fisheries and Wildlife for the Maine Department of Marine Resources. (33 FERC para. 61,329)(1985)

Wildlife and Parks overruled the Service regarding section 18 fishways requirements.

With regard to the first allegation, as far as we could determine, FERC never questioned the authority of the Secretary of the Interior under section 18, although, as discussed in appendix I, FERC questioned the scope of Interior's use of its authority with regard to the Scott's Mill project. Concerning the second allegation, FERC drafted a proposed letter for the Interior Assistant Secretary's signature, in which he would have concluded it was no longer necessary to invoke the Secretary's section 18 authority, in this particular case. However, the draft did not restrict Interior's authority because the licensee had agreed that needed fishways would be installed when prescribed. Nevertheless, the language in the draft letter was not acceptable to Interior, and the draft was revised to provide Interior with intervenor status. The letter was never formally sent.

We found that the third allegation concerning this project had no substance. The FERC order issued to Lynchburg Hydro Associates on April 29, 1987, to construct, operate, and maintain a hydroelectric project on the James River in Virginia, at Scott's Mill provides for the eventual development of fish passage facilities at the Scott's Mill Dam. Currently, on the James River in Virginia, five dams block the spawning migration of anadromous fish below Scott's Mill. Construction of fish passage facilities to restore fish runs in the river will necessarily proceed in a downstream to upstream order, beginning at the most downstream dam location.

Lynchburg Hydro Associates has agreed to install fish passage facilities at the Scott's Mill Dam upon notification of the need. All parties involved with the hydroelectric project proposed at this location acknowledged that fish passage facilities at Scott's Mill are not needed at the present time.

In an August 24, 1984, letter to FERC, Interior prescribed that fishways should be provided pursuant to section 18, and enumerated various measures for protecting fish and wildlife resources at Scott's Mill. In its November 6, 1984, motion to intervene, Interior submitted mandatory fishways prescriptions subject to the Service's notification and approval. After extensive discussion in the April 29, 1987, order regarding Interior's authority under section 18 of the act, FERC concluded that section 18 is mandatory and that FERC must therefore require the licensee to construct, operate, and maintain fishways that the Secretary of

Interior prescribed. FERC also stated that it had no discretionary authority with regard to section 18 and that fishways must be required when prescribed by the Secretary.

The April 29, 1987, order also acknowledges that no anadromous fish currently exist in the project area. It states that it is not clear whether, and to what extent, fish restoration efforts will be successful on the James River and that design of appropriate fishways for the Scott's Mill project would not be feasible at this early stage. The FERC order states that when it is not feasible to prescribe fishways at the time of issuance of the license, it is appropriate, and in the public interest, to include in the license a condition that reserves Interior's authority to prescribe fishways, if and when they are needed in the future. Accordingly, article 406 was included in the license to reserve Interior's section 18 authority to prescribe fishways. The order also provides that FERC, at the appropriate time, shall require the licensee to construct, operate, and maintain the prescribed facilities.

Interior's Future Prescriptive Role on Fishways Requirements at Hydropower Projects

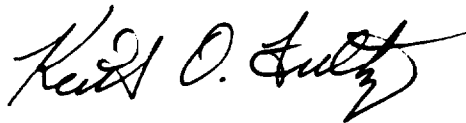
Fish and Wildlife Service officials have told us that Interior's role with regard to fishways requirements is prescriptive. As such, FERC must require licensees to implement those requirements at projects as prescribed by Interior. The Service officials stated that FERC has issued more recent licenses which reaffirm Interior's prescriptive role on fishways requirements. FERC also agrees on the prescriptive role of Interior with regard to those requirements. Our review of several of the more recent licenses indicated that FERC never questioned the basic authority of the Secretary of the Interior under section 18, although, in some cases, FERC did question the scope of Interior's use of such authority. Appendix I contains our legal analysis of FERC's position on the nature of section 18 authority under the Federal Power Act.

In addition to reviewing relevant documents concerning the three projects, we interviewed Fish and Wildlife Service and FERC officials responsible for the activities discussed in this report. We discussed our findings with agency program officials and included their comments where appropriate. However, as agreed with your office, we did not request official agency comments on a draft of this report. We performed our review in accordance with generally accepted government auditing standards.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to the Chairman, FERC, the Secretary of the Interior, and other interested parties.

This report closes out our work on section 18 fishways requirements at hydropower projects. Our analysis of FERC's position on the nature of section 18 fishways requirements authority is shown in appendix I. Major contributors to this report are listed in appendix II.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Keith O. Fultz". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Keith O. Fultz
Senior Associate Director

Contents

Letter		1
Appendix I		10
GAO Analysis of FERC's Position on the Nature of Federal Power Act, Section 18 Authority on Fishways Requirements		
Appendix II		13
Major Contributors to This Report	Resources, Community, and Economic Development Division, Washington, D.C.	13
	Office of General Counsel, Washington, D.C.	13

Abbreviations

ECPA	Electric Consumers Protection Act
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act

GAO Analysis of FERC's Position on the Nature of Federal Power Act, Section 18 Authority on Fishways Requirements

The Federal Power Act, section 18, states as follows:

"The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate" (16 U.S.C. Sec. 811).

In a recent decision involving the Scott's Mill project, FERC discusses whether fishway prescriptions submitted by the Departments of Interior or Commerce pursuant to section 18 are binding on FERC. Lynchburg Hydro Associates, Project No. 7163-001, 39 FERC para. 61,079 (1987). In Lynchburg, Interior prescribed that fishways be provided by the licensee and had enumerated several conditions the licensee should meet pertaining to fishways before it was granted a license to build a hydropower project at the Scott's Mill Dam.

FERC first noted that the use of the word "shall" in a statute (including section 18) usually indicated a mandatory intent unless a convincing argument to the contrary could be made. FERC cited its own interpretations of the various forms of section 18 through the years to support the conclusion that

" . . . Section 18 is mandatory and . . . we must therefore require the licensee to construct, operate, and maintain fishways that the Secretary of the Interior or the Secretary of Commerce may prescribe."

We see no reason to question FERC's conclusion. The language of section 18 certainly supports it. Moreover, the interpretation of a statute by the agency charged with its administration is entitled to deference. Udall v. Tallman, 380 U.S. 1, 16 (1964). This deference is particularly due when the interpretation involves a contemporaneous construction of a statute by the agency. *Id.* Furthermore, FERC's analysis of section 18 (and its predecessors) has been consistent since the passage of the FPA in 1920 (see Lynchburg, at p. 61, 217-18).

Having conceded the mandatory nature of fishway prescriptions under section 18, FERC points out that, in contrast to the broader authority in section 4(e) of the FPA, 16 U.S.C. 797(e), section 18 power is limited to fishways. Under a part of section 4(e) which applies to hydropower projects on federal reservations, the Secretary of the Department which supervises the reservation may impose conditions which he deems "necessary for the adequate protection and utilization" of the reservation. In contrast,

Appendix I
GAO Analysis of FERC's Position on the
Nature of Federal Power Act, Section 18
Authority on Fishways Requirements

“... Section 18 in our view empowers the Secretary to prescribe fishways at a licensed project, but not to impose, for the protection, mitigation of damages to, and enhancement of fish resources, more far-reaching conditions with respect to the design and operation of the proposed project.”

FERC nevertheless concedes that the purpose of fishways is to protect, mitigate damages to, and enhance fish resources. Accordingly, FERC concludes that “it will be a matter for determination in each individual case where the scope of section 18 is appropriately drawn.” In each case,

“... the guiding principles ... are, first, that [FERC] has the ultimate responsibility and authority to balance the various public interest uses of a waterway, and, second, that the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA), Public Law No. 99-495, has a separate mechanism for fish and wildlife agencies to submit recommended license conditions for the protection, mitigation of damages to, and enhancement of fish resources. Section 10(j) of the FPA, as amended by ECPA, requires [FERC] to include license conditions based on recommendations of federal and state fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife resources, unless the recommendations are inconsistent with the purposes and requirements of applicable law.”

Under these principles, FERC considered several of Interior's section 18 prescriptions, in Lynchburg, as recommendations made pursuant to section 10(j). In addition, while FERC agreed to Interior's section 18 prescription requiring the installation of fish screens, it questioned whether a fish screen requirement should always be considered a section 18 prescription. It drew a distinction between fish screens whose sole purpose was to protect fish from project-induced injury or mortality and which, therefore, according to FERC, come under section 10(j), and fish screens which were measures for upstream and downstream passage and therefore, according to FERC, a proper section 18 prescription.

In subsequent cases, FERC, while often including conditions in a license, at the request of the Departments of Interior and Commerce, relating to constructing and maintaining fishways, has questioned whether those conditions were covered under section 18. For example, in City of Aberdeen, Washington and City of Tacoma, Washington (Project No. 6842-001, 40 FERC para. 62,316 (1987)), FERC included in the license a requirement for a period of turbo shutdown to ensure fish passage as well as a requirement for the monitoring of downstream anadromous fish movements. FERC questioned, however, whether the shutdown and monitoring were within the confines of section 18, as both the Departments of Interior and Commerce maintained.

Appendix I
GAO Analysis of FERC's Position on the
Nature of Federal Power Act, Section 18
Authority on Fishways Requirements

In Commonwealth Hydroelectric, Inc. (Project No. 7490-001, 41 FERC para. 62,309 (1987)), FERC, although agreeing to require the installation of fish screens, again drew a distinction, as it had in Lynchburg, between screens designed solely to protect fish from injury and those that helped guide fish upstream or downstream. In Greenwood Ironworks (Project No. 8535-000, 41 FERC para. 62,023 (1987)), FERC agreed to require the licensee to maintain existing flow conditions through the project reach and maintain adequate conditions through a breach in a canal wall at the site of the hydropower project to facilitate upstream fish passage. Here, too, however, FERC questioned whether such requirements were properly considered a "fishway" as referenced in section 18, as both the Departments of Interior and Commerce maintained.

While FERC's interpretation of the scope of section 18 is narrow, we cannot conclude that the analysis supporting its interpretation is unreasonable. At the same time, as the above examples make clear, more than one reasonable interpretation of what constitutes a "fishway prescription" pursuant to section 18 is possible. We agree with FERC that the confines of section 18 must be established on a case-by-case basis.

Major Contributors to This Report

Resources,
Community, and
Economic
Development Division,
Washington, D.C.

John W. Sprague, Associate Director (202) 376-9715
Gerald H. Elsken, Group Director
Frank J. Polkowski, Assignment Manager
Nicholas C. D'Amico, Evaluator
Gloria M. Sutton, Writer-Editor
Delores Hemsley, Typist

Office of General
Counsel, Washington,
D.C.

Barry R. Bedrick, Senior Attorney
John T. McGrail, Attorney

United States
General Accounting Office
Washington, D.C. 20548

Official Business
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