1995 WL 17204829 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals,
District of Columbia Circuit.

BANGOR HYDRO-ELECTRIC COMPANY, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

No. 95-1083.
December 20, 1995.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

Brief for Respondent Federal Energy Regulatory Commission

Susan Tomasky, General Counsel, Jerome M. Feit, Solicitor, Joseph S. Davies, Deputy Solicitor, Edward S. Geldermann, Attorney, for Respondent Federal Energy Regulatory, Commission, Washington, D.C. 20426.

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**IV GLOSSARY*

Anadromous	--	Various species of fish that are hatched in fresh water, migrate downstream to salt water bodies, and then return as adults upstream to freshwater locations for spawning purposes.
Bangor	--	Bangor Hydro-Electric Company
Denil Fishway	--	Fishway consisting of a steep flume or trough with vanes installed on the sides or bottom. The vanes dissipate the energy of the water flowing down the flume by causing part of the flow to turn back on itself, and the resulting reduced velocity enables fish to ascend.
DMR	--	Maine Department of Marine Resources
Fishway	--	Physical structures, facilities, and devices and related project operations needed to provide for safe and timely fish passage upstream and downstream of hydroelectric projects necessary to maintain all life stages of such fish.
FWS	--	U.S. Fish and Wildlife Service, an arm of the U.S. Department of the Interior.
Ellsworth Project	--	FERC-licensed hydropower project located on Union River in Ellsworth, Maine, operated by Bangor.
Salmon Commission	--	Maine Atlantic Sea Run Salmon Commission

Secretary	--	Secretary of the U.S. Department of the Interior
Steeppass	--	A type of Denil fishway that is generally less costly than standard Denil fishways because it is constructed out of aluminum sheets, allowing it to be prefabricated and transported in sectional pieces to remote sites.
Trap-and-Truck	--	A method (alternative to fishways) of facilitating migration of anadromous fish by capturing them and transporting by tank truck around dams located within a hydropower project and re-depositing them in the river upstream or downstream of the project's dams.

***1** *STATEMENT OF THE ISSUE*

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") correctly determined that Section 18 of the Federal Power Act, 16 U.S.C. § 811, requires it to include, without exception, fishways in hydropower licenses as prescribed by the Secretary of the Interior ("DOI" or "Interior").

STATUTES AND REGULATIONS

The applicable statutes pertinent to this case are contained in an Addendum to this brief.

STATEMENT OF THE CASE

I. *Nature of the Case, Course of Proceedings, and Disposition Below*

In this case, the Commission's Director of the Division of Project Compliance and Administration of FERC's Office of Hydropower Licensing included a condition in a license issued to petitioner, Bangor Hydro-Electric Co. ("petitioner" or "Bangor"), ***2** requiring Bangor to construct a fishway [1] prescribed by an official of the U.S. Fish and Wildlife Service ("FWS"), an arm of the Department of the Interior. *Bangor Hydro-Electric Co.*, "Order Approving And Modifying Fish Passage Plan," 66 FERC ¶ 62,079 (Feb. 16, 1994) (J.A. 1-7). In an order denying rehearing, the Commission affirmed Bangor's obligation to build the fishway and declined to entertain Bangor's claims that Interior's fishway prescription was procedurally invalid and unsupported by substantial evidence. The Commission explained that under Section 18 of the FPA, 16 U.S.C. § 811, it lacked jurisdiction to review Interior's prescription, and that Bangor's claims must be reviewed in the first instance by the courts of appeals. *Bangor Hydro-Electric Co.*, "Order Denying Rehearing," 70 FERC ¶ 61,078 (Jan. 26, 1995) (J.A. 8-14).

II. *STATEMENT OF FACTS*

A. *Statutory and Regulatory Background*

1. Part I of the FPA, originally enacted as the Federal Water Power Act of 1920, 41 Stat. 1063, constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). The FPA ***3** empowers the CLuumssion to regulate the development of hydroelectric projects on navigable waters and federal lands, or where the project will affect interstate commerce. FPA § 4(e), 16 U.S.C. § 797(e). Under Section 10(a) of the Act, 16 U.S.C. § 803 (a), the Commission must determine whether a project is "best adapted to a comprehensive plan for improving or developing a waterway" before it issues a license. in addition, Section 10

authorizes the Commission, in its discretion, to include conditions in hydropower licenses to protect navigation, fish, wildlife, recreation, and other resources. [2]

2. Other provisions of the FPA require the Commission to include conditions and prescriptions imposed by other federal agencies in hydropower licenses it issues. Section 4(e) of the FPA specifies that the Commission "shall *include"* (emphasis added) in a license for any hydropower project located within certain federal reservations "such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 772-79 (1984) ("Escondido"), the Supreme Court ruled that the plain language of Section 4(e) is mandatory and does not allow the Commission to ***4** "decide when the Secretary's conditions exceed the permissible limits." 466 U.S. at 777. According to the Supreme Court, the Commission must include in any license it issues the conditions the Secretary deems necessary, and tnat "[i]t is then up to the court of appeals to determine whether the conditions are valid." *Id.* There, the Supreme Court went on to explain, *id.:*

It may well be that the conditions imposed by the Secretary are inconsistent with the FPA and that they are therefore invalid ..., but that issue is not for the Commission to decide in the first instance *but is reserved for the court of appeals* .... (Emphasis added.]

3. Section 18 of the FPA, 16 U.S.C. § 811, similarly specifies that:

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 Interior or the Secretary of Commerce, as appropriate. [Emphasis added.]

In *Lynchburq Hvdro Assoc.,* 39 FERC 1 61,079, at p. 61,218 (1987), [3] the Commission determined that there was no way to distinguish the mandatory language of the requirement imposed by Section 18 on the Commission from the mandatory language in Section 4(e) and that it would therefore follow the same procedure under Section 18 that the Supreme Court had imposed under Section 4(e) in *Escondido, supri.*

***5** B. *The Proceedings Before the Commission*

1. On April 12, 1977, the Federal Power Commission ("FPC"), FERC's predecessor, issued Bangor an initial license for the "Ellsworth Project," a hydropower facility located on the Union River in Ellsworth, Maine. The project consists of Ellsworth Dam, its impoundment, Lake Leonard, and a powerhouse. It also includes Graham Dam and Graham Lake located four miles upstream. A fish trapping facility owned by the Maine Atlantic Sea Run Salmon Commission (Salmon Commission) is located immediately downstream of Ellsworth Dam. The Salmon Commission used this trapping facility as part of a salmon stocking operation that captured adult salmon and trucked them to FWS hatcheries.

Based on the recommendations of state and federal fisheries agencies, the FPC, in the original license it issued in 1977, required Bangor to install an upstream and downstream fishway at Graham Dam to allow alewives (an anadromous fish) to migrate upstream to Graham Lake for spawning. Shortly thereafter, the FPC, the Maine Department of Marine Resources ("DMR"), and FWS agreed that these fishway facilities were not needed. The FWS and the FPC therefore indefinitely deferred Bangor's obligation to construct them.

2. On December 28, 1987, the Commission issued Bangor a new license to continue operation of the project for a term of thirty years. *Banaor Hydro-Electric Co.,* 41 FERC ¶ 62,304 (1987). In an environmental assessment prepared at that time, the Commission found that the existing fish trapping facility could not be ***6** adapted to meet long-term plans for the restoration

of anadromous fisheries. *See* 41 FERC at 63,751; J.A. 68. Thus, Article 406 of the Commission's new license required Bangor to develop a plan for fish passage, consistent with any future prescription made by the Secretary of the Interior.

3. On January 3, 1989, Bangor filed a fish passage plan and schedule with the Commission pursuant to Article 406. R. 1809. The plan relied extensively on continued use of the existing trap facility and consisted of trucking salmon and alewives to locations upstream of Ellsworth Dam. Under the plan, Bangor would not be required to construct permanent fish passage facilities until the salmon population grew to a certain level -- 500 adults -- for three consecutive years.

4. In a March 7, 1989 letter, the FWS notified the Commission that it would not support any plan that relied on extensive use of trucking, and it stated that Bangor must construct permanent fish passage facilities at both dams immediately following a five-year trucking period contemplated by Article 406. *See* 66 FERC at p. 64,251, J.A. 2. FWS also stated that it would require Bangor to install a Denil-type fishway [4] or ***7** elevator at Graham Dam, instead of a steeppass fishway, [5] as Bangor had proposed.

5. By a June 7, 1991 letter, Bangor informed FERC that the Salmon Commission had discontinued its Union River salmon stocking program because of poor returns and lack of personnel and funds. *See* 66 FERC at p. 64,251; J.A. 2. In response, Commission staff, relying on the Commission's order in *Lynchburg, supra*, notified Bangor in a November 6, 1991 letter that, notwithstanding the discontinuance of its salmon program, Bangor was still required to revise its fish passage plan in accordance with FWS's prescriptions. R. 4185, J.A. 156. The letter also informed Bangor that it was entitled to request FWS to modify the prescription, and any such request for modification should be transmitted directly to Interior for its consideration. R. 4187, J.A. 158.

6. Subsequently, Bangor transmitted a letter requesting FWS to reconsider the need for permanent fish passage facilities because, according to Bangor, the expense could not be justified for the incremental gain which might be achieved solely for upstream passage of alewives. 66 FERC at p. 64,252; J.A. 3. ***8** In response, the Supervisor of FWS's New England regional field offices informed Bangor that the design of FWS's proposed permanent upstream fish passage facilities remained unaffected by the change in salmon management in the Union River. 66 FERC at p. 64,252; J.A. 3. The Supervisor also stated that the facilities were needed for alewives alone, and observed that they would also be useful for returning adult salmon, when and if salmon stocking resumed in Union River. *Id.* [6]

7. Despite FWS's denial of reconsideration, Bangor subiiited a revised fish passage plan to FERC on May 4, 1992, comparable to the one it had originally submitted in January 1989. [7] - J.A. 171-218. On August 14, 1992, FWS filed comments reaffirming its fishway requirements and requesting FERC to dismiss Bangor's revised plan because its proposed trap-and-truck operation would not produce the size of alewife runs that could be achieved by fishways. J.A. 267-270.

In response to FWS's comments, Bangor reiterated that its proposed trap-and-track operation should be deemed adequate until the fishery agencies' salmon restoration program achieved greater ***9** success. *See* 66 FERC at pp. 64,253-54, J.A. 4-5. Bangor also challenged the validity of the fishway prescription on the grounds that the FWS field personnel who prescribed it acted without any express delegation from the Secretary of the Interior and that FWS had not justified the need for the fish passage facilities in relation to cost. 66 FERC at p. 64,254, J.A. 5.

C. *The Commission's Orders Under Review*

1. On February 16, 1994, the Director of the Division of Project Compliance and Administration of FERC's Office of Hydropower Licensing (“Director”) issued an order modifying the drawings and construction schedule of Bangor's proposed

fish passage plan to conform to the FWS's fishway prescription. *Banqor Hydro-Electric Co.*, 66 FERC ¶ 62,079 (Feb. 16, 1994). The Director declined to address Bangor's claim that FWS field personnel lacked authority to submit an FPA § 18 fishway prescription, finding that FERC should not "dispute the effectiveness of Interior's delegation practices." 66 FERC at p. 64,254, J.A. 5.

The Director likewise rejected Bangor's evidentiary challenges to the FWS fishway prescription as beyond the scope of FERC's responsibilities. The Director noted that "the Commission has not required Interior to prove a need for the fishways that it prescribes or to provide cost estimates," and that the Commission "has no authority to reject or modify fishways that Interior properly prescribes." 66 FERC at 64,255, J.A. 6. He further found that "[a]ny appeal of a fishway prescription under ***10** a substantial evidence or arbitrary and capricious test is for a court of appeals to review." *Id.*

2. Bangor then filed a rehearing request with the Commission repeating its challenges to delegation of fishway prescription authority to FWS personnel and to the evidentiary support for the need for the fish passageway. In addition, Bangor claimed that FERC was required to review the procedural aspects of the fishway prescription because Bangor had no opportunity for an administrative appeal of the prescription at Interior. J.A. 424-430.

On January 25, 1995, the Commission issued an order denying Bangor's rehearing request. *Banaor Hydro-Electric Co.*, 70 FERC ¶ 61,078 (Jan. 25, 1995), J.A. 8-14. The Commission observed that the Supreme Court in *Escondido, supra,* and the Ninth Circuit in *California Save our Streams v. Yeutter,* 887 F.2d 908, 912 (9th Cir. 1989), had held that parties challenging Section 4(e) conditions imposed by the Secretary must seek initial review of the conditions in a court of appeals. Citing its decision in *Lynchburg,* sgupra, concluding that the same procedure applies under Section 18 of the FPA, the Commission rejected Bangor's claims that the absence of any published DOI procedures or an appeal process within Interior concerning the formulation of fishway prescriptions required the Commission to review Bangor's challenges fishway such prescriptions of the Secretary:

Whether Interior's method of formulating fishway prescriptions violates principles of administrative law and fairness is beyond the scope of the Commission's authority under ***11** section 18. Rather, it is a matter for a reviewing court to determine. Since a licensee would have to seek court review to challenge the substance of a fishway prescription that the Commission required, the licensee could, at that time, also seek review of the procedural aspects of the prescription.

70 FERC at 61,214; J.A. 13.

The Commission also refused to reach Bangor's claim that the fishway requirements were invalid because they had not been imposed by the Secretary of the Interior himself. The Commission explained that in determining whether fishways are prescribed "by the Secret/ry" its sole concern was whether the prescription represents the position of Interior. 70 FERC at p. 61,214, J.A. 13. It proceeded to observe that there was nothing in the record to indicate that the Secretary disagreed with the prescription submitted to FERC and that "it is not uncommon for FWS field personnel to submit fishway prescriptions, and it is apparent that this practice is sanctioned within Interior." 70 FERC at p. 61,214, J.A. 13.

3. On February 2, 1995, Bangor filed a request with the Commission for a stay of the Director's order requiring Bangor to proceed with installation of fish passage facilities pending the completion of judicial review. In an order issued February 24, 1994, the Commission approved the stay, with the Chair of the Commission dissenting. *Bangor Hydro-Electric Co.*, 70 FERC 1 61,216 (1995). In its stay order, the Commission observed that it had concluded in its earlier orders that it lacked authority to consider "the legitimacy of the prescription, as measured by ***12** standards of administrative law and fairness on the substance of the prescription." 70 FERC at p. 61,678. Since "[a]dherence to the existing installation schedules would require Bangor to make expenditures and modifications to the project before receiving, in any forum, a review of the prescription that would determine whether Bangor is obligated to take these actions," the Commission deemed it appropriate to grant the stay. *Id.* The Chair dissented on the ground that she did not believe it was "appropriate for ... [the] Commission to prevent the very decision it found beyond its authority to second guess from going into effect." *Id.* in her view, it was for the Court, not the Commission, to determine whether Interior's prescription should be stayed. *Id.*

D. *Bangor's Appeal And Interiores Motion To Supplement The Record On ADDeal*

On February 2, 1995, Bangor filed the instant petition for review of the Commission's orders with this Court. On August 11, 1995, Interior, as intervenor in support of the Commission, filed a motion in this Court for leave to file a "Certified Index To Its Administrative Record with the Court." Bangor opposed this motion on the ground that Interior's record contained "at least two dozen documents which DOI failed to file with FERC, most of which have never been provided to Bangor." (Bangor Opposition at 2.) in an August 29 reply, Interior acknowledged that:

documents included in the Secretary [of Interior's] certified index which were not included in FERC's index (and which were not part of FERC's record at the time the Secretary submitted its prescriptions), are ***13** the Department's consultative process with Bangor and other parties in developing the fishway prescriptions.

(DOI Reply at 2.)

On August 31, 1995, this Court granted Interior's motion to file the certified index to its administrative record "with the proviso that the Court reserves the right to strike, in whole or in part, the Department of Interior's ... record once the court has reviewed the merits of this case." The Court's August 31 order went on to direct the parties "to include in their briefs any arguments concerning the admissibility of the Department of the Interior's certified index to its administrative record."

***14** SUMMARY OP ARGUMENT I.

A. The Commission properly directed Bangor to construct fish passage facilities because Section 18 of the Federal Power Act required it to do so.

1. The Commission's inclusion of Interior's fishway prescription in Bangor's hydropower license was mandatory under the Supreme Court's decision in *Escondido.* in *Escondido,* the Court declared that "Congress' apparent desire [in Section 4(e) of the FPA] that the Secretary's condition 'shall' be included in the license must ... be given effect unless there are clear expressions of legislative intent to the contrary." 466 U.S. at 772. There, the Court found no such contrary congressional intent, and thus concluded that the Commission "does not" have the authority "to decide when the Secretary's conditions exceed the permissible limits." *Id.* at 777.

In *Lvnchburr,* 39 FERC ¶ 61,079 (1987), the Commission decided that FPA § 18 must be construed in light of *Escondido,* and therefore its responsibility to include a Secretary's fishway prescription in a license is likewise mandatory. This view was upheld by the Seventh Circuit in *Wisconsin PSC v. FERC,* 32 F.3d 1165, 1167-68 (1994), which observed that, in enacting the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), Congress had explicitly considered and rejected an amendment that would have authorized the FERC to consider and balance Interior's recommendations for fishways against other values.

***15** 2. In these circumstances, the Commission had no authority to adjudicate petitioner's evidentiary and procedural challenges to the fishway prescription at issue here. Nothing in Section 18 of the FPA empowers the Commission to review the substantive criteria or the procedures employed by Interior in developing a fishway prescription.

While the Commission possesses certain threshold authority to determine whether a submission it has received from the Department of the Interior is not in fact a "fishway prescription," Petitioner has never asserted such a claim here. Moreover, Petitioner has failed to present any evidence that the fishway prescription submitted by FWS does not represent the position of the Secretary of the Interior.

B. Petitioner's claims to the contrary lack merit.

1. There is no substance to Petitioner's claim that FERC must review Petitioner's evidentiary and procedural challenges to fishway prescriptions. in fact, just the contrary is true, as demonstrated by *Escondido's* recognition that fishway prescriptions must be reviewed in the first instance by the courts of appeals. Indeed, the Ninth Circuit explained in *California Save Our Streams Council* that in *Escondido:* "the Supreme Court clearly envisioned that the courts of appeals would be able to review all aspects of the licensing procedure." The Commission interpreted this view of the court of appeals' authority to review "all aspects of the licensing procedure" as sufficiently broad to encompass review of a claim that ***16** prescriptions were submitted by officials lacking authority or were formulated in the absence of proper procedures.

2. Petitioner's claim that FERC's failure to hold a hearing in this case violated a "hearing requirement" recognized by the Seventh Circuit in *Wisconsin PSC,* 32 F.3d 1165 (7th Cir. 1994) is equally unfounded. The Seventh Circuit's opinion does not suggest that the Commission is required to hold a trial-type evidentiary hearing in order to determine the validity of a fishway prescription. Instead, the relevant Commission order in *Wisconsin PSC,* which the Seventh Circuit upheld, stated only that if and when Interior submits a fishway prescription pursuant to its reserved "reopener" authority, the Commission will at that time issue public notice and afford interested persons the opportunity to intervene and file comments. This procedure was duly observed in this case.

3. Petitioner's claim that the Commission erred in declining to review its challenge to the delegation of fishway prescription authority also lacks substance. A presumption of regularity fully supports the Commission's acceptance of the fishway prescription in this case.

4. Also meritless is Bangor's separate claim that the Second Circuit's decision in *Scenic Hudson Preservation Conference v. FERC,* 354 F.2d 608 (2d Cir. 1965), and this Court's decision in *NAACP v. FPC,* 520 F.2d 432 (D.C. Cir. 1975), imposes upon FERC a duty to adjudicate challenges to fishway prescriptions, arising from FERC's obligation to protect the ***17** "public interest." Petitioner's reliance on *Scenic Hudson* and *NAACP* is misplaced because neither case involved Section 18 of the FPA, much less held that FERC must engage in a public interest balancing analysis when confronted with a mandatory condition or prescription formulated by Interior.

II.

Finally, the Commission submits that the record, but not the case, should be remanded to the Commission to permit the parties to supplement the Commission's record. *Escondido* and *California Save Our Streams* both recognize that the evidence on which the Secretary relies must be "presented to the Commission" to ensure that the administrative record is complete for judicial review when the licensee challenges a prescription on appeal. Interior failed to follow that procedure in this case and, as a result, Bangor did not have any opportunity to comment on Interior's additional evidence at the administrative level. The Commission therefore believes that Interior cannot present its record evidence for the first time on appeal. Accordingly, the Commission is filing a motion with this brief in order to afford the Court the opportunity to remand the record in this case before proceeding with judicial review on the present incomplete record.

***18 ARGUMENT**

I. THE COMMISSION PROPERLY REQUIRED THE CONSTRUCTION OF FISH PASSAGE FACILITIES

A. *Section 18 of the FPA Requires The Commission To Impose the Fishway Prescription by the Secretary of the Interior*

As the Commission held, this case falls squarely within the Supreme Court's decision in *Escondido* and the Commission's decision in *Lynchburg* applying *Escondido* to Section 18 of the FPA.

1. *Escondido* involved Section 4(e) of the FPA, 16 U.S.C. § 797(e), which provides that the Commission "shall include," in a hydroelectric license it issues for a project located on a federal reservation, the conditions which the Secretary, under whose

supervision the reservation falls, deems "necessary for the adequate protection and utilization of such reservation." in that case, the Commission argued that since Section 10 of the FPA, 16 U.S.C. 803, authorizes the Commission to issue licenses that "in the judgment of the Commission will be best adapted to a comprehensive plan" for developing a waterway and for other beneficial public uses, and since Section 313 of the FPA, 16 U.S.C. § 8251, authorizes judicial review of Commission decisions on which applications for rehearing have been made to the Commission, the Commission must likewise have the authority to review and, if necessary, reject or modify conditions proposed by a Secretary.

***19** The Supreme Court, however, rejected that position. in its view, "Congress' apparent desire [in Section 4(e)] that the Secretary's condition 'shall' be included in the license must ... be given effect unless there are clear expressions of legislative intent to the contrary."466 U.S. at 772. Finding no legislative intent to the contrary, the Court concluded that the Commission "does not" have the authority "to decide when the Secretary's conditions exceed the permissible limits." *Id.* at 777. According to the Supreme Court (id. at 778-779):

> If the Secretary concludes that the conditions are necessary to protect the reservation, the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal, otherwise consistent with the FPA, and supported by substantial evidence. The fact that in reality it is the Secretary's, and not the Commission's, judgment to which the court is giving deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation. There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to secondguess the Secretary on this matter.

The Supreme Court noted that if the Commission chooses, it "is free to express its disagreement" with the Secretary's conditions, not only in connection with the issuance of the license but on judicial review and that the Commission could refuse to issue a license as conditioned. *Id.* at n.20. The Court proceeded to observe that, in either event, the license applicant can seek judicial review of the Secretary's conditions ***20** and the court of appeals "is to sustain the conditions if they are consistent with the law and supported by the evidence presented to the Commission, either by the Secretary or the interested parties." *Id.* [8]

In *Lynchburg, supra,* 39 FERC ¶ 61,079, the Commission decided that since Section 18 of the FPA likewise provides that the Commission "shall require" the construction of fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, and since the legislative history of Section 18 did not "support a conclusion that Congress intended a meaning other than the plain language of the statute," Section 18 is properly construed in the same manner as the *Escondido* Court construed Section 4(e). 39 FERC at p. 61,218. As the Commission explained:

> 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 have no discretionary authority in this regard; fishways must be required when properly prescribed by the Secretaries.

Lvnchburq, 39 FERC at p. 61,218 (1987).

***21** In *Wisconsin PSC3l. FERC,* 32 F.3d 11F5 (7th Cir. 1994), the Seventh Circuit upheld a Commission order issued under this interpretation of Section 18. In that case, the Commission included a "reopener" clause in the license it issued allowing it to require the licensee to construct such fishways as might be prescribed by the Secretary of the Interior in the future. There, the Seventh Circuit noted that when Congress passed the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), it had explicitly considered and rejected an amendment to Section 18 that would have limited Interior's authority to prescribe fishways. 32 F.3d at 1168. The Court observed that the Commission had asked for authority to consider and balance Interior's recommendations for fishways and other values but that Congress had rejected that approach. *Id., citing National Energy Strategy: Hearings on H.R. 1301 et al. Before the Subcomm. on Energy & Power of the House Comm. on Energy &*

Commerce, 102nd Cong., 1st Sess. pt. 6 at 516-17 (1991). The Court therefore concluded in *Wisconsin PSC* that Congress had obviously vested the Secretary with the authority to prescribe fishways "in the belief that he would give the values in question a stronger priority" and thus that "the need for fishways ... under Section 18 ... [is] a matter delegated to the Secretary of the Interior by the Congress." *Id.* at 1169.

2. In these circumstances, the Commission correctly determined (70 FERC at p. 61,214, J.A. 13) that it had no authority to adjudicate petitioner's evidentiary and procedural ***22** challenges to the fishway prescription at issue here. As the Commission stressed, nothing in Section 18 of the FPA empowers the Commission "to review the criteria and procedures, or lack thereof, of Interior." *Ibid.*

To be sure, the Commission has stated that it possesses certain threshold authority to determine whether a submission it has received from the Department of the Interior is in fact a "fishway prescription." Thus, in the orders under review, the Commission agreed with Bangor that "whether a 'fishway' has been presd bedl] [is] a matter within our discretion, since Section 18 obligates us to require only the construction and operation of fishways." 70 FERC at p. 61,214, J.A. 13; *see also Lynchburg Hydro Assocs.*, 39 FERC at p. 61,218 ("it will be a matter for determination in each individual case where the scope of Section 18 is appropriately drawn"). Likewise, the Commission has acknowledged "Section 18 ... obligates us to require only those fishways 'prescribed by the *Secretary.*' " *Id.* (Emphasis added); *Escondido*, 466 U.S. at 781 ("[Section 4(e)] imposes no obligation on the Commission or power on the Secretary with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works").

Here, however, petitioner has never claimed that the facilities ordered by FWS are not "fishway prescriptions." Moreover, petitioner has not produced any evidence to show that the fishway prescription submitted by FWS does not represent the position of the Secretary of the Interior. In these ***23** circumstances, the Commission properly concluded that it was required to include without change, the prescription within Bangor's license as submitted by Interior, and that, as in *Escondido*, petitioner had to raise any challenge to the prescription in this Court in the first instance. *Escondido, supra*, 466 U.S. at 778-79.

B. *Petitioner's Claims Challenging The Fishway Prescription Are Without Merit*

In its brief, petitioner raises a number of arguments challenging the Commission's decision. As we now explain, none has merit.

1. Petitioner fails to sustain its claim (Br. 33-37) that FERC must review petitioner's evidentiary and procedural challenges to fishway prescriptions. Petitioner's claim is foreclosed by the decision of the Supreme Court in *Escondido*. As the Court explained:
[T]he Commission "shall" include in the license the conditions the Secretary deems necessary. It is then up to the courts of appeals to determine whether the conditions are valid.

Petitioner contends that such a scheme of review is inconsistent with traditional principles of review of administrative action. If the Commission is required to include the conditions in the license even though it does not agree with them ... the courts of appeals will not be in a position to grant deference to [FERC's] findings and conclusions *because those findings and conclusions will not be included in the license.* However, that is apparently exactly what Congress intended ... *There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.* ***24** U.S. at 778-79. (Emphasis added.)

Nor, as the Commission concluded, is there anything in Section 18 of the FPA suggesting that Congress authorized FERC to review a licensee's procedural challenges to Interior's formulation of a fishway prescription. As the Commission pointed out, 70 FERC ¶ 61,078 at 61,214, J.A. 13, "section 18 does not refer to criteria or procedures," and thus creates no administrative review scheme requiring the Commission to make findings and conclusions concerning the validity of the procedures followed

by Interior in formulating a fishway prescription. The Commission further observed (70 FERC at p. 61,214, J.A. 13) that in *California Save Our Streams Council.* Inc., *supra,* 887 F.2d at 912 (emphasis added), the Ninth Circuit had stated that:
[i]n *Escondido,* the Supreme Court clearly envisioned that the courts of appeals would be able to review all aspects of the licensing procedure. 'The license applicant can seek review of the conditions in the court of appeals, but the court is to sustain the conditions if they are *consistent with law* ...

The Commission interpreted the Ninth Circuit's "consistent with law" standard as sufficiently broad "to encompass review of a claim that conditions or prescriptions were submitted by officials lacking authority *or were formulated in the absence of proper procedures."* 70 FERC at p. 61,214, J.A. 13. (Emphasis added.)

Accordingly, petitioner's claim that FERC must review challenges to Interior's procedures must be rejected because it ***25** seeks to impose requirements on the Commission that are contrary to the procedures required by the FPA as construed by the Supreme Court.

2. Petitioner next argues (Br. 33-34) that FERC's failure to hold a hearing in this case violated the "hearing requirement" recognized by the Seventh Circuit in *Wisconsin PSC,* 32 F.3d 1165 (7th Cir. 1994). This claim is likewise unfounded.

As previously explained, *see* p. 21, *supra,* in *Wisconsin PSC,* the Seventh Circuit approved the Commission's use of a "reopener clause," authorizing the Secretary of the Interior at some future date to impose a fishway prescription on a license the Commission was issuing in that case. The licensee objected to the reopener clause complaining about the alleged unfairness of requiring a licensee to decide whether to proceed with its project without knowing in advance what its costs would be and whether its project would be commercially viable. In this factual context, the Seventh Circuit dismissed these objections as premature because "the Commission has committed itself to conduct hearings at such future time as fishways may have to be ordered." *Wisconsin PSC,* 32 F.3d at 1170.

In our view, this part of the Seventh Circuit's opinion does not suggest that the Commission is required to hold a trial-type evidentiary hearing in order to determine the validity of the Secretary's proposed conditions, as petitioner suggests (Br. 3334). Instead, the relevant Commission order in *Wisconsin PSC,* which the Seventh CircAit upheld, stated only that:

> ***26** The absence in Article 404 of a provision for notice and an opportunity for hearing is not prejudicial to Public Service. We have stated in our past orders that the inclusion of an express provision for notice and opportunity for hearing is not necessary, because these fundamental due process rights are inherent in all license articles for which there has been no final determination of an issue. *If during the license term Interior submits a fishway prescription pursuant to its reserved authority. the Commission will issue public notice and afford interested persons the opportunity to intervene and file comments.*

Wisconsin PSC, 62 FERC ¶ 61,095 at p. 61,686 (1993). (Emphasis added.)

The Commission provided exactly such an opportunity for a paper hearing in this instant case. Thus, in this proceeding, Bangor was provided timely notice of petitioner's obligation to comply with FWS's fishway prescription through the Director's November 6, 1991 letter, *see* p. 7, *supra,* as well as an opportunity to comment through its filings objecting to and seeking reconsideration of FWS's fishway prescription, *see* pp. 7-9, *supra.* Bangor therefore has received all the process that it was due from the Commission.

3. Petitioner also asserts that the Commission erred in declining to review its challenge to the Secretary's delegation of fishway prescription authority to the FWS. This claim, too, lacks substance.

Although the fishway prescription in this case was submitted by the Supervisor of FWS Region 5 (New England), and not the Secretary of the Interior himself, the Commission nonetheless ***27** reasonably declined to entertain Bangor's challenge to the validity of the Supervisor's authority to present the prescription. As the Supreme Court has observed, "[t]here is a well-established presumption to which administrative agencies are entitled -- that they act properly and according to law." *FCC v. Schreiber,* 381 U.S. 279, 296 (1965). Moreover, "a presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation. Inc.,* 272 U.S. 1, 14-15 (1926); to like effect, *see Wilson v. Hodel,* 758 F.2d 1369, 1374 (10th Cir. 1985); *FTC v. Owens-Corning Fiberglass Corp.,* 626 F.2d 966, 975 (D.C. Cir. 1980).

This presumption of regularity fully supports the Commission's acceptance of the fishway prescription in this case. As the Commission observed, 70 FERC at 61,214, J.A. 13, "it is not uncommon for FWS field personnel to submit fishway prescriptions, and it is apparent that this practice is sanctioned within Interior." Moreover, as the Commission explained, "[t]here is nothing in the record in this proceeding ... that would lead us to believe that the Secretary, or any appropriate official acting under the Secretary's authority, disagrees with the prescription submitted by the [FWS] Region 5 personnel."

In these circumstances, where Bangor has not introduced any evidence suggesting that the fishway prescription does not ***28** represent the "position of Interior," and where, as the Commission observed (70 FERC at p. 61,214, J.A. 13) Bangor has preserved its "delegated authority" challenge for review by this Court, the Commission reasonably treated the fishway prescription as presumptively valid for the purposes of issuing the license.

4. Next, Bangor (Pet. Br. 35) claims that the Second Circuit's decision in *Scenic Hudson Preservation Conference v. FERC,* 354 Fo2d 608 (2d Cir. 1965), and this Court's decision in *NAACP v. FPC,* 520 F.2d 432 (D.C. Cir. 1975) establish that FERC has a duty to adjudicate challenges to the validity of a fishway prescription which arises from FERC's general obligation to protect the "public interest."

Petitioner's reliance on *Scenic Hudson* and *NAACP* is misplaced because neither case involved Section 18 of the FPA, much less held that FERC must engage in a public interest balancing analysis when confronted a mandatory condition or prescription formulated by Interior. *Scenic Hudson* involved a challenge to the Commission's issuance of a license under Section 10(a) of the FPA, and *NAACP* involved whether the Commission's refusal to initiate a rulemaking regulating employment practices of power industries in order to prevent discrimination violated public interest criteria in Part I of the FPA. [9]

***29** In any event, petitioner's argument (Pet Br. 35-36) that the FERC must engage in "public interest" balancing of "need" in relation to "cost" is undermined by petitioner's own concessions in its rehearing request to the Commission that "mandatory prescriptions of fishways cannot be rejected by the Commission and must be included in any licenses it issues," J.A. 421-22 (emphasis omitted), and that *Escondido* "prohibit[s] the Commission from examining the reasonableness of a validly imposed § 4(e) condition." J.A. 418. Thus, petitioner's own view of the mandatory nature of Section 18 leaves no room for the Commission to engage in weighing public interest factors against fishway prescriptions.

III. TEE RECORD, BUT NOT THE CASE, SHOULD BE REMANDED

Finally, Bangor contends (Pet. Br. 48-49) that this Court should deny Interior's motion to supplement the record on appeal with additional documents that were never formally filed in the Commission's licensing proceeding and thus did not become part of FERC's official record in this case. The Commission, however, submits that another procedure is proper in the circumstances presented here. The Commission believes that this Court should remand the record, but not the case, to the Commission to allow Interior to supplement the FERC record with these materials and to afford Bangor an opportunity to comment on Interior's supplemental submissions. After this process is completed, the ***30** Commission will return the record to the Court for further disposition. [10]

Escondido explained that on judicial review a court of appeals would determine whether the Secretary's conditions are consistent with law and substantial evidence "supported by substantial evidence presented to the Commission." 466 U.S. 778, n.20. (Emphasis added.) Likewise, as the Commission observed in its rehearing order (70 FERC at 61,214, J.A. 13), the Ninth Circuit in *California Save Our Streams*, 887 F.2d at 912, expressed confidence that "a sufficient administrative record compiled in the Commission proceeding would be available to a court of appeals called upon to evaluate the appellant's claims ..." Accordingly, while neither *Escondido* nor *California Save Our Streams* suggests that the Commission is bound to evaluate such evidence once it is filed with FERC, both courts recognized that the evidence on which the Secretary relies must be "presented to the Commission" to ensure that the administrative record is complete for judicial review when the licensee challenges a prescription on appeal. [11] Since ***31** Interior failed to follow that procedure in this case, the Commission submits that Interior cannot therefore present its record evidence for the first time on appeal.

Interior had not filed in the Commission's proceeding all the documents on which it relied in prescribing ther fishway. Accordingly, the Commission was under a misunderstanding that Bangor had already been afforded an opportunity to comment on all of the material relevant to Interior's fishway prescription.

In these circumstances, where Interior failed to present to the Commission all of the evidence it relied upon in formulating its fishway prescription and Bangor was not afforded an opportunity to comment on that evidence in the record before the Commission, the Commission submits that the record in this case must be remanded to allow the Commission to afford the procedures contemplated by *Escondido* and the decisions which follow it. Accordingly, the Commission is filing a motion with this brief in order to afford the Court the opportunity to remand the record in this case before proceeding with judicial review on the present incomplete record.

32** ***CONCLUSION

For the foregoing reasons, the orders of the Commission should be affirmed.

Appendix not available.

Footnotes

* Authorities upon which we chiefly rely are marked with asterisks.

1 As indicated in the Energy Policy Act of 1992, the term "fishways" as used in Section 18 of the Federal Power Act, 16 U.S.C. § 811, is "limited to physical structures, facilities, and devices" and related project operations needed to provide for safe and timely fish passage upstream and downstream of hydroelectric projects "necessary to maintain all life stages of such fish." Energy Policy Act of 1992, § 1701(b), Pub. L. No. 102-486, 106 Stat. 2776, 3008.

2 Recent amendments to the Section 10 of the FPA likewise empower the Commission, in its discretion, to adopt recommendations of various federal agencies with jurisdiction over fish, wildlife, recreation, and other natural resources. *See* Section 3(c) of the Electric Consumers Protection Act of 1986 ("ECPA"), 100 Stat. 1243, 1244-45; 99th Cong. 2d Sess. (Oct. 16, 1986).

3 A copy of the Commission's opinion in *Lvnchburg* is attached to this brief.

4 According to the Commission:

[a] Denil type fishway consists of a steep flume or trough with vanes installed on the sides or bottom. The vanes dissipate the energy of the water flowing down the flume by causing part of the flow to turn back on itself, and the resulting reduced velocity enables fish to ascend.

70 FERC at p. 61,210 n.6, J.A. 9, n.6, *citing*, Clay, Charles H., Design of Fishways and Other Fish Facilities. 2nd ed., 1995 (pp. 3 and 35).

5 A steeppass fishway is a type of Denil fishway that is generally less costly than standard Denil fishways because it is constructed out of aluminum sheets, allowing it to be prefabricated and flown to remote sites.

6 As the Commission found (70 FERC at p. 61,211, J.A. 10), although salmon stocking was discontinued in 1991 by the Salmon Commission, the program had been resumed at least during 1993 in a cooperative effort involving the Union River Salmon Club, Bangor, and state and federal fishery agencies.

7 Like the January 1989 plan, Bangor's May 1992 revised plan relied significantly on the trap facility and the trucking of salmon to upstream areas until the adult salmon population reached 500 fish for three consecutive years, at which time Bangor would construct permanent fish passage facilities at both dams.

8 The Court noted that if no party to the proceeding seeks review, the conditions could go into effect notwithstanding the Commission's objection since the Commission cannot seek review of its own decisions. *Id.* The Court also observed if a party seeks judicial review, the validity of the Secretary's conditions is for the court to decide "in the first instance" with "the participation of the Commission if it is inclined to present its views." 466 U.S. at 778-779 n.21.

9 Likewise, *Udall v. FPC,* 387 U.S. 428, 450 (1967), cited by the Amicus (Br. 21), is inapposite because, there, the Supreme Court analyzed only the Commission's "public interest" responsibilities under FPA §§ 7(b) and 10(a), both discretionary provisions. *Udall*, like *Scenic Hudson* and *NAACP,* involved no issue arising under FPA § 18.

10 At that juncture, the Court may wish to modify the briefing schedule to permit Bangor and Interior to address any issues raised by the record, as supplemented.

11 At the time it issued the orders on review, the Commission was unaware that its record was not complete, or that

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