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Notes and Comments

The Conflict Over the New River, and the Test Case for the Wild and Scenic Rivers Act: *North Carolina v. FPC*¹

The New River is clearly misnamed. Geologists estimate the river channel to be 500 million years old, an age which makes it the oldest river in the western hemisphere and second oldest river in the world, second only to the Nile.² Despite the river's venerability, it is unlikely that the river has witnessed as threatening an upheaval as the recent one, at least not since the last Ice Age.³ For in licensing a hydroelectric dam, the Federal Power Commission⁴ generated a complex political and legal controversy which involved twelve years of administrative deliberations,⁵ a Circuit Court appeal,⁶ legislation by Congress,⁷ and a decision by the Supreme Court.⁸

This article will first trace the evolution of the controversy surrounding the New River, and then examine the long awaited test case for the Wild and Scenic Rivers Act,⁹ *North Carolina v. FPC*. It will be suggested that the Circuit Court's interpretation of this Act unjustifiably limits the ability of individual states to safeguard unique rivers, fails to impose statutorily mandated burdens on the FPC, and frustrates Congressional intent to create an autonomous statutory mechanism of environmental protection by necessitating *ad hoc* protective legislation. It will also be suggested that the Circuit Court's interpretation resulted from a failure to consider the interrelationship of the statutory provisions of the Wild and Scenic Rivers Act,¹⁰ The National Environmen-

1. 533 F.2d 702 (D.C. Cir. 1976), *cert. granted, judgment vacated and remanded*, 429 U.S. 891 (1976).

2. HASKELL, DESIGNATING A SEGMENT OF THE NEW RIVER, NORTH CAROLINA, AS A COMPONENT OF THE NATIONAL WILD AND SCENIC RIVERS SYSTEM, S. REP. NO. 952, 94th Cong., 2d Sess. 4 (1976).

3. *Id.* at 4. In prehistoric times, the New River formed the headwaters of a gigantic river called the Teays. The last Ice Age radically altered the face of the continent, leaving only the New River portion of the Teays.

4. Hereinafter referred to as the FPC.

5. *Re Appalachian Power Co.*, 51 F.P.C. 1906, 5 PUR 4th 334 (1974), [hereinafter cited to PUR].

6. 533 F.2d 702 (D.C. Cir. 1976).

7. Act of Sept. 10, 1976, Pub. L. No. 94-407, §§1, 2, 90 Stat. 1238.

8. 429 U.S. 891 (1976).

9. 16 U.S.C. §1271 (1970). Described as a "law in search of a test case", observers felt that the Circuit Court's decision would determine whether the Wild and Scenic Rivers Act would afford a potentially powerful environmental safeguard or would become "a glorious might have been for natural river advocates." Comment, *Kleppe Conditionally Declares New River a Scenic River*, 6 ENVIR. L. REP. 10,077, 10,080 (1976).

10. 16 U.S.C. §1271 (1970).

tal Policy Act,¹¹ and the Federal Power Act.¹² This interrelationship will be examined in light of the New River Case, and a statutory framework of *accommodation*¹³ will be proposed.

I. BACKGROUND OF THE NEW RIVER CONTROVERSY

Tracing the developments in this protracted controversy is not a simple matter as not only have a multitude of parties been involved, but many of these parties changed positions during the course of proceedings.¹⁴ In 1962, the Appalachian Power Company¹⁵ applied for a preliminary permit to study the possibility of constructing a hydroelectric dam on the New-Kanawha River.¹⁶ This permit was issued in 1963.¹⁷ In 1965, Appalachian applied for a license¹⁸ to build the Blue Ridge Project on part of the New River located in North Carolina and Virginia.¹⁹

Hearings on the application began on May of 1967 before an Administrative Law Judge (ALJ), and continued for two years. As originally planned, the project involved a lower reservoir of 2,850 acres and an upper reservoir of 16,000 acres,²⁰ but subsequent interveners created pressure for modifications. The Secretary of the Interior argued for larger storage capacity reservoirs for water quality control purposes,²¹

11. 42 U.S.C. § 4321 (1970).

12. 16 U.S.C. § 791(a) (1970).

13. Accommodation of statutes to achieve a unified national policy is a mode of judicial construction which most clearly evolved in the area of labor law. *See, e.g.*, *Boys Markets, Inc. v. Retail Clerks' Local 770*, 398 U.S. 235 (1970); *United States v. Hutcheson*, 312 U.S. 219 (1940). As Congress passed a series of acts governing labor, *e.g.*, the Clayton Act, 15 U.S.C. §12 (1970); the Norris-Laguardia Act, 29 U.S.C. §§101-15 (1970); the Wagner, Taft-Hartley, Landrum-Griffin Acts, 29 U.S.C. §§ 151-69 (1970); and the Labor Management Relations Act, 29 U.S.C. §§147-97 (1970), the Supreme Court was forced to develop statutory interpretations which harmonized the policy considerations of each with previously existing law.

Environmental law, which has seen a proliferation of legislative enactments, is in great need of such an accommodating process. The New River case alone involves four separate acts; the Wild and Scenic Rivers Act, 16 U.S.C. §1271 (1970); the National Environmental Policy Act, 42 U.S.C. §4321 (1970); the Federal Power Act, 16 U.S.C. §791(a) (1970); and the Federal Water Pollution Control Act, 33 U.S.C. §11 (1970).

14. For an impressive list of 26 interveners, *see* *Re Appalachian Power Co.*, 5 PUR 4th at 334. Parties who have altered positions at least once include North Carolina, the Department of the Interior, Sprague Electric Co., the Washington Mills Co., and the state of West Virginia. *Id.*

15. The Appalachian Power Company is a wholly owned subsidiary of the American Electric Power Company, which is an investor owned public utility holding company. *Id.* at 346.

16. In the order issuing a preliminary permit, the project was found to affect a navigable water of the United States. *Appalachian Power Co.*, Project No. 2317, 29 F.P.C. 445 (1963).

17. *Id.*

18. 5 PUR 4th at 337. Appalachian sought a license under 16 U.S.C. §797(e) (1970).

19. The project was located in Ashe and Allegheny counties in northwestern North Carolina and Grayson County in southwestern Virginia. 5 PUR 4th 336, 343.

20. S. REP. NO. 952, 94th Cong., 2d Sess. 9 (1976).

21. 5 PUR 4th at 338. The Federal Water Pollution Control Administration of the Interior Department had objected to the initial proposal on the grounds that the drawdown from the reservoirs would be insufficient to dilute downstream pollution. Comment, 6 ENVIR. L. REP. at 10,078.

while the states of North Carolina and Virginia objected to the diminished recreational and aesthetic benefits of the proposed plan as it required 30 foot drawdowns of the upper reservoir²² during the summer.²³

To meet these concerns, the FPC staff suggested a modified Blue Ridge Project in which the smaller reservoirs of the original plan were replaced by larger ones.²⁴ It was reasoned that the greatly expanded upper reservoir would augment stream flow for water quality control, and still allow a reduction in the necessary drawdown,²⁵ thereby improving recreational benefits. Appalachian applied for the modified project.²⁶ In October of 1969, the ALJ rendered a decision recommending the issuance of a license. Under this decision, the project was to include an upper reservoir of 26,000 acres and a lower reservoir of 12,390 acres, a 10 foot summer drawdown, and a lower downstream release rate.²⁷

North Carolina and Virginia generally supported the project, but objected to the non-summer drawdown of 12 feet,²⁸ but unlike Virginia, North Carolina had other objections as well. One objection concerned the release rate of downstream water for pollution dilution.²⁹ The primary objection, however, focused on the additional water storage capacity for pollution control, as under the modified plan the upper reservoir extended seventy river miles into North Carolina, a state not directly served by Appalachian.³⁰

Further hearings were ordered in response to these objections. In 1971 a "Supplemental Initial Decision" was issued by the ALJ which limited drawdowns to 10 feet at all times after 1985 and further reduced the downstream release rate.³¹ Virginia maintained its objection to the drawdown level and North Carolina continued to object to the additional water storage for pollution control.³²

To complicate matters further, *Greene County Planning Board v. Fed-*

22. The upper reservoir was to be the primary recreation area. Steep slopes and a lack of shoreline made the lower reservoir less attractive as a recreational site. 5 PUR 4th at 347-49.

23. The non-summer drawdown level was to be 40 feet. *Id.* at 339.

24. *Id.* at 338.

25. S. REP. NO. 952, 94th Cong., 2d Sess. 9 (1976).

26. Before the Circuit Court, North Carolina argued that since Appalachian's real purpose in expanding the Blue Ridge Project was to augment streamflow for pollution dilution, and since the EPA disapproved of such an action (Federal Power Commission, Final Environmental Impact Statement (FEIS), Modified Blue Ridge Project No. 2317, North Carolina/Virginia 73-74, June 1973 at 335) the FPC license violated the later enacted prohibition of the Federal Water Pollution Control Act, 33 U.S.C. § 1152 (g)(6). Comment, 6 ENVIR. L. REP. at 10,080.

27. 5 PUR 4th at 339-40; 533 F.2d at 705; S. REP. NO. 952, 94th Cong., 2d Sess. 9 (1976).

28. 533 F.2d at 705.

29. *Id.*

30. S. REP. NO. 952, 94th Cong., 2d Sess. 9 (1976). See note 26, *supra*.

31. 533 F.2d at 705; 5 PUR 4th at 340-41.

32. *Id.*

eral Power Commission³³ was decided while additional hearings before the Commission were pending. Under this decision, the FPC was required to prepare an Environmental Impact Statement (EIS) prior to hearings, to allow full scrutiny of environmental studies during the course of proceedings.³⁴ To comply with *Greene*, the Blue Ridge proposal was remanded to the ALJ for further hearings.³⁵

Prior to these hearings, North Carolina withdrew its support of the Blue Ridge Project altogether, citing environmental damage to the river and severe social consequences to people in the effected area as justification.³⁶ In the additional supplemental decision which followed in January 1974, the ALJ recommended licensing the project, but placed a 10 foot limitation on drawdowns and reduced water quality control storage for regulation of stream flow, thus reducing the size of the lower reservoir.³⁷ The ALJ did not recommend reduction in the size of the upper reservoir, as the extra capacity was now found to be necessary for power and generating purposes.³⁸

While these results were acceptable to Virginia, North Carolina did not find any of these modifications sufficient to budge its opposition and undertook its own initiatives to protect the river. On February 7, 1974, the Governor and General Assembly of North Carolina supported a Senate bill to include the New River as a State-run component of the Wild and Scenic Rivers System.³⁹ At this time, the Secretary of the Interior joined North Carolina's action.⁴⁰ The Senate passed the bill seventeen days prior to the Commission's final opinion granting a license.⁴¹

Despite this legislative activity, the FPC authorized the license on

33. 455 F.2d 412 (2d Cir. 1972).

34. *Id.*

35. 5 PUR 4th at 341.

36. 533 F.2d at 705. It is noteworthy that as of October 12, 1973, North Carolina was on record as in opposition to any hydroelectric dam on the New River, as it supported a proposed section of the Water Resources Development Act which would have afforded the New River protection as a river under study by the Army Corps of Engineers. 119 CONG. REC. 33882-83 (1973) (remarks of Rep. Mizell). This protection did not materialize as a subsequent amendment deleted the proposal from the final bill. *Id.* See also, Comment, 6 ENVIR. L. REP. at 10,079.

37. 5 PUR 4th at 342.

38. *Id.*

39. On September 10, 1973, Senator Helms of North Carolina introduced S. 2439, which designated the New River as a potential component of the Wild and Scenic Rivers Act. S. REP. NO. 952, 94th Cong., 2d Sess. 8 (1976). Subsequently, on February 7, 1974, the Governor of North Carolina, the Department of the Interior, the North Carolina General Assembly, the North Carolina Department of Natural and Economic Resources, and the Boards of Commissioners of Ashe and Allegheny counties, all came forward in support of the bill at subcommittee hearings. 120 CONG. REC. S14,960 (daily ed. Aug. 30, 1976) (remarks of Sen. Stone).

40. The precise moment that the interior withdrew support from the project is not clear. It is fair to approximate that it coincided with the introduction of S. 2439, given the Department's support of that bill. See note 39 *supra*.

41. S. REP. NO. 952, 94th Cong., 2d Sess. 9 (1976).

June 14, 1974.⁴² The FPC did take note that the project would result in the partial obstruction of a free flowing river, the inundation of 40,000 acres and the displacement of 2,700 people, but concluded that the power benefits and the increased recreational opportunities outweighed these factors.⁴³ Although the FPC concluded that the pending legislation did not remove its jurisdiction to issue a license, out of deference to Congressional action, it postponed the effective date of the license until January 2, 1975.⁴⁴ In response to a petition for reconsideration, the FPC reaffirmed the earlier rulings with only minor modifications.⁴⁵

When the bill died in the House Rules Committee,⁴⁶ North Carolina pressed several eleventh hour actions to forestall the project. The state made application to the Secretary of the Interior for the inclusion of the New River into the system pursuant to §1273 (a)(ii), marking the first utilization of the state-initiated protective mechanism of the Act.⁴⁷ The state then petitioned the FPC for a stay of the license pending action by the Secretary and the Court.⁴⁸ Thereupon, an appeal was made to the District of Columbia Circuit Court of Appeals.⁴⁹ While the stay was denied by the FPC,⁵⁰ the Circuit Court did grant interim relief.⁵¹ Eleven days prior to the Circuit Court's final decision, the Secretary gave initial approval for inclusion of the New River into the system,⁵² and final approval was given on April 13, 1976.⁵³ An EIS

42. 5 PUR 4th at 334.

43. *Id.* at 371-72.

44. *Id.* at 375.

45. 52 F.P.C. 1986 (1974).

46. S. REP. NO. 952, 94th Cong., 2d Sess. 8 (1976).

47. Comment, 6 ENVIR. L. REP. at 10,079.

48. 52 F.P.C. 1986 (1974).

49. 533 F.2d at 702. North Carolina also pursued a collateral action in a North Carolina Federal District Court. *North Carolina v. Federal Power Commission*, 393 F. Supp. 1116 (M.D. N.C. 1975). North Carolina attempted to avoid jurisdictional problems by claiming that it was not challenging the FPC license, a matter pending in the District of Columbia Circuit Court, but rather it was seeking to enforce a statutory duty imposed upon the FPC by §1278(b) of the Wild and Scenic Rivers Act. 16 U.S.C. §1271 (1970). Mandamus was sought pursuant to the Administrative Procedure Act. 5 U.S.C. §§701-706 (1970). The District Court held that it did not have jurisdiction to hear the case as there was no real distinction between the two actions. 393 F. Supp. at 1122-24. In this article a position similar to that advanced by North Carolina in the District Court will be taken, *i.e.*, that the FPC had a legal obligation to consider the provisions and policies of the Wild and Scenic Rivers Act. See text accompanying notes 98-127 *infra*.

50. 52 F.P.C. at 1990.

51. *North Carolina v. FPC*, No. 74-1941 (D.C. Cir. Jan. 31, 1975).

52. 6 ENVIR. REP. (BNA) 1951 (1976). As originally submitted, the North Carolina plan under N.C. GEN. STAT. §113A-35.1 (1975) only encompassed a 4.5 mile segment of the river. In its consideration of the management plan, the Interior Department delayed approval as it felt a 4.5 mile segment was too short for national designation. See Comment, 6 ENVIR. L. REP. at 10,079. North Carolina amended its statute by adding an additional 22 miles to the plan. N.C. GEN. STAT. §113A-35.1, as amended by H.B. 789, eff. May 22, 1975. The approval given on March 12, 1976 was for the expanded segment of 26.5 miles.

53. 41 Fed. Reg. 16,941 (1976).

was filed by the Secretary as required by §102 of NEPA on July 23, 1976.⁵⁴

This approval did not forestall the Circuit Court from upholding the licensing decision of the FPC in *North Carolina v. FPC*.⁵⁵ Deferring to the judgement of the Commission, the Circuit Court held that there was no failure to comply with environmental requirements of NEPA, and that the New River was not a protected river under the Wild and Scenic Rivers Act.⁵⁶ As a concession to the archeological importance of the area, the court ordered the FPC to modify the license and require Appalachian to provide the necessary time and funding for complete research, excavation and storage.⁵⁷

The decision of the Circuit Court ignited Congressional rescue legislation. Fearing the actions of North Carolina and the Secretary would not be deemed sufficient,⁵⁸ Congress amended the Wild and Scenic Rivers Act on September 10, 1976.⁵⁹ These amendments added a 26.5 mile segment of the New River to the protected system, and restricted the FPC's licensing power on the river, to effectively revoke Appalachian's license.⁶⁰

On October 19, 1976, the Supreme Court granted certiorari and at the same time made a summary disposition of the case.⁶¹ The Court vacated the judgement of the Circuit Court and remanded the case for determination under the new amendments.⁶² While the Congressional

54. 41 Fed. Reg. 32,280 (1976).

55. 533 F.2d 702 (D.C. Cir. 1976).

56. *Id.* at 707-09.

57. *Id.* at 709, 710.

58. S. REP. NO. 952, 94th Cong., 2d Sess. 6 (1976).

59. Pub. L. No. 94-407, §§1,2, 90 Stat. 1238.

60. The effect of the amendments would be to prohibit the impoundment of water, thereby eliminating any feasible hydroelectric facility. S. REP. NO. 952, 94th Cong., 2d Sess. 12 (1976); 120 Cong. Rec. S14930 (daily ed.) (remarks of Sen. Haskell). During committee hearings, Appalachian argued against the amendments on the grounds that the restrictions contained therein amounted to a taking requiring compensation under the fifth amendment. See S. REP. NO. 952, 94th Cong., 2d Sess. 12 (1976). Appalachian claimed that in this case "just compensation" would be 500 million dollars, *i.e.*, the difference between the cost of the Blue Ridge Project and an alternate coal-fired plant. *Id.* It is clear that the just compensation clause, U.S. CONST. amend. V, only applies to the taking of private property. *United States v. Tennessee Valley Authority*, 319 U.S. 266 (1943). Despite the abandonment of the right-privilege distinction and the emergence of an expanded property concept which evolved to extend procedural due process, see generally *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelley*, 397 U.S. 254 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Reich, *The New Property*, 73 YALE L. J. 733 (1964), it is equally clear that a federal license, such as the one involved here, is not compensable property. See, *e.g.*, *Acton v. United States*, 401 F.2d 896, 899 (9th Cir. 1968); *Alabama Power Co. v. FPC*, 128 F.2d 280 (D.C. Cir. 1942). See generally *United States v. Chandler-Dunbar Water Co.*, 229 U.S. 53 (1913); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963); Comment, *President Signs Bill Protecting New River*, 6 ENVIR. L. REP. 10,219 (1976).

61. 429 U.S. 891 (1976).

62. *Id.*

rescue saved the New River, it caused the Supreme Court to summarily decide the case thereby leaving the Circuit Court's statutory analysis intact. That analysis which necessitated Congressional intervention holds negative implications for locally initiated protection of environmentally valuable rivers in the future.⁶³

II. STATUTORY INTERPRETATION OF THE WILD AND SCENIC RIVERS ACT: FPC RESTRICTIONS AND OBLIGATIONS

Arguing the case before the Circuit Court, North Carolina raised the following issues:

- (1) whether the FPC failed to consider the alternatives of energy conservation;
- (2) whether the FPC had authorized inclusion in the project of water storage capacity for pollution dilution;
- (3) whether the FPC failed to analyze adequately certain costs of the Project;
- (4) whether the FPC failed to consider as an alternative to the Project the possibility that the river should be made a component of the National Wild and Scenic Rivers System.⁶⁴

In raising these issues,⁶⁵ North Carolina was contending that the FPC had not met the cost-benefit analysis requirements of §102(2) of NEPA,⁶⁶ in that on balance the detrimental environmental effects far outweighed any potential benefits.⁶⁷

The court, however, would only entertain two issues relating to NEPA requirements as it found under *Federal Power Commission v.*

63. The proposed Dickey-Lincoln hydroelectric dam on the wilderness stretch of the St. John's River in northern Maine may raise issues similar to the New River case in the near future. See *The N. Y. Times*, Dec. 9, 1977, at 18, col. 6. Because of the profound alteration on the free flowing river that would be occasioned by impounding its waters into an 88,000 acre flat water reservoir, the EPA has expressed its opposition to the project. *Id.*

64. 533 F.2d at 706.

65. 533 F.2d at 706-08. With the exception of issue (2), all the the issues question the net benefit of the Blue Ridge Project.

66. 42 U.S.C. § 4332(2) (1970).

67. Several factors weighed against the Blue Ridge Project. First, the project's primary purpose was to meet peak load demand, but it had been suggested that peak load pricing would perhaps have been a better alternative. Comment, 6 ENVIR. L. REP. at 10,220. Second, pumped storage facilities are net energy wasters, in that they require four units of energy for every three returned. *Id.* at 10,078. And third, it has been suggested that 22 other locations in the area had better physical characteristics for a pumped storage facility. *Id.* at 10,220. Thus it may well be that a substantive review would result in the reversal of the FPC's decision. However, considerable controversy exists over the question of whether NEPA affords any substantive protection from agency decisions. Duetsch, *The National Environmental Policy Act's First Five Years*, 4 ENV'TL AFF. 3, 58-63 (1975); Note, *The Relationship Between Substantive and Procedural Review Under NEPA: A Case Study of SCRAP v. U.S.*, 4 ENV'TL AFF. 157 (1975). The conservative view, accepted here, would be that §102(2) of NEPA only offers procedural safeguards against arbitrary administrative actions. Yet accepting this view does not injure the position taken in this article that the Wild and Scenic Rivers alternative must be accommodated, for this position imposes only procedural considerations.

Colorado Interstate Gas Co.,⁶⁸ that the other issues were not raised with the necessary specificity in the petition for a rehearing.⁶⁹ The court then narrowed reviewable issues to the question of energy conservation alternatives, and the alleged failure of the FPC to give adequate consideration to the relocation of the people displaced by the project.⁷⁰

Considering the requirements of §102(2)(E) of NEPA in relation to the issue of energy conservation, the court concluded the matter had been adequately addressed by the FPC.⁷¹ Citing *Natural Resources Defense Council v. Morton*,⁷² the court noted NEPA did not require a "crystal ball" inquiry of reasonable alternatives but rather required a reasonable assessment.⁷³ In regard to the second narrowed issue, the relocation of persons, the court similarly noted that "the question . . . was not whether the FPC may require guarantees of replacement housing, rather the question is whether the FPC adequately considered the projected social cost."⁷⁴ Again, using a "good faith" standard of procedural compliance,⁷⁵ the court found the latter issue was adequately addressed in both the EIS and the license to Appalachian.⁷⁶

The concern here is not with the court's treatment of the first issues. It is possible that North Carolina's petition was inadequate and justified the court's limitations. Similarly, to the extent the NEPA standards were employed the results reached are not questioned, for the FPC likely gave reasonable attention to the issues as posed by the court.⁷⁷ The critical concern is with the court's analysis of the Wild and Scenic Rivers alternative.

While the court initially indicated that it would not consider the Wild and Scenic Rivers alternatives because of the procedural bar noted in *Colorado Interstate Gas*,⁷⁸ it did in fact consider the alternative, but not in relation to NEPA. The court's ensuing interpretation of the Wild and Scenic Rivers Act warrants critical focus for two reasons. First, the court's narrow reading of §1278(b),⁷⁹ the water power resources restriction, limits the ability of individual states to protect rivers being studied for inclusion in the Wild and Scenic Rivers system.

68. 348 U.S. 492 (1955).

69. 533 F.2d at 706.

70. *Id.* at 706-07.

71. *Id.* at 707.

72. 458 F.2d 827 (D.C. Cir. 1972).

73. *Id.* at 836-37.

74. 533 F.2d at 707.

75. *Id.* For a discussion of the "good faith" standard of compliance under NEPA, see *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297-300 (8th Cir. 1972); Duetsch, *supra* note 67, at 23; Note, *supra* note 67, at 162.

76. 533 F.2d at 708.

77. See note 68 *supra*.

78. 348 U.S. 492 (1955).

79. 16 U.S.C. § 1278(b) (1970).

Second, the result the court reaches can be attributed to its failure to consider the Act in relation to NEPA and the Federal Power Act.

A. Restrictions on Water Resources Projects

Acting as a river safeguard during the time lag between proposed inclusion and inclusion, § 1278(b) precludes the construction of power projects on rivers being considered for inclusion in the Wild and Scenic Rivers System.⁸⁰ North Carolina made the argument that since its Governor and the state legislature had recommended that the New River be included as a state-run component of the System pursuant to §1273 (a)(ii),⁸¹ the FPC was prohibited from licensing a power project because of §1278(b). The court, however, was not receptive to this statutory construction.

Closely examining the complicated syntax of §1278(b), the court viewed the entire provision as affording protection only to those rivers explicitly designated for possible inclusion in §1276(a).⁸² The court also found that this syntactical construction reflected legislative in-

80. 16 U.S.C. § 1278(b) provides:

The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is listed in section 1276(a) of this title, and no department or agency of the United States shall assist by loan, grant, license or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval—

(i) during the five year period following October 2, 1960, unless, prior to the expiration of said period, the Secretary of the Interior and where national forest lands are involved, the Secretary of Agriculture, on the basis of study, conclude that such river should not be included in the national wild and scenic rivers system and publish notice to that effect in the Federal Register, and (ii) during such additional period thereafter as in the case of which is recommended to the President and the Congress for inclusion in the national wild and scenic rivers system, is necessary for congressional consideration thereof or, in the case of any river recommended to the Secretary of the Interior for inclusion in the national wild and scenic rivers system under section 1273(a)(ii) of this title, is necessary for the Secretary's consideration thereof, which additional period, however, shall not exceed three years in the first case and one year in the second.

81. 16 U.S.C. § 1273(a) provides in pertinent part:

(a) The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned without expense to the United States, that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system . . .

82. 533 F.2d at 708, 709. In the aftermath of the New River controversy, President Carter has proposed that several rivers be elevated from "study" rivers to component rivers, and has also proposed that an additional twenty rivers be designated as study rivers for potential inclusion. *The Environment—the President's Message to Congress*, 7 ENVIR. L. REP. 50,057, 50,065 (1977).

tent.⁸³ Thereupon, the court concluded that since the New River was not already a part of the System under §1274, and since it was not specifically listed for potential inclusion under §1276(a), there was no restriction against a FPC license.⁸⁴

Despite the seeming neatness of this analysis a closer syntactical analysis of the provision supports the North Carolina construction. The first independent clause of §1278(b) does refer exclusively to rivers listed in §1276(a).⁸⁵ A fair paraphrase of the clause would be that the FPC is prohibited from licensing projects specifically designated for study.⁸⁶ But the second clause, beginning after the conjunction "and", is broader in scope.⁸⁷ It provides that no federal agency or department can assist the construction of any project that would interfere with any river that might be designated for inclusion in the System after study by the Secretary.⁸⁸ Since the Secretary must study proposals submitted by individual states, the second clause of §1278(b) is certainly broad enough to protect state proposals under §1273(a)(ii).⁸⁹ Yet the court's analysis ignored the second clause.

The court's construction can also be weakened by an argument of "symmetry."⁹⁰ If there are two ways to nominate additional rivers to the System, by acts of Congress under §1273(a)(i) and by acts of states under §1273(a)(ii), then logically there should be two corresponding

83. 533 F.2d at 709 n.2.

84. *Id.* at 709. In reaching this conclusion the court adopted the same statutory construction found in the FPC Opinion 698A, 52 F.P.C. 1986, 1988-90.

85. 16 U.S.C. §1278(b) (1970). See note 80 *supra*.

86. *Id.*

87. *Id.*

88. *Id.*

89. 16 U.S.C. 1273(a) (1970). See note 81 *supra*. In its opinion of December 31, 1974, the FPC acknowledged that this construction of the Act was possible, but went on to construe the Act in a manner subsequently adopted by the Circuit Court. 52 F.P.C. at 1988-90. The FPC did hypothesize that even if the construction proposed were adopted, it would not help North Carolina as the January 2, 1975 licensing related back to the June 14, 1974 order. *Id.* The concept of "relating back" to avoid terming the licensing a subsequent agency action is strained, especially given the circumstances of the June order. Under the language of §1278 (b)(ii) it would appear that the FPC was precluded from any licensing action during Congressional study. Further under the precedent which requires the FPC to defer to considerations of public policy, *Udall v. FPC*, 387 U.S. 428 (1967), in this case actively being determined by Congress, the FPC should have postponed a decision on the merits. Instead, the FPC granted Appalachian a "springing" interest in a license by giving Congress a time limit in which to override its June decision, and by deeming ineffectual any other protective actions taken under the Act subsequent to its June decision. As the North Carolina action was taken during the protected period "granted" to Congress, it should not be deemed ineffectual, nor should the January licensing be regarded as a prior action. In any case the issue of chronology is not as significant as it would first appear, when viewed in terms of the FPC's failure to consider the scenic river alternative in its own deliberations. See notes 118-128 and accompanying text, *infra*.

90. In *Federal Power Commission v. Panhandle Eastern Pipe Co.*, 337 U.S. 498, 514 (1949), the Court, interpreting the Federal Power Act, stated that "all sections of the Act must be reconciled to produce a symmetrical whole."

protective restrictions for such rivers under §1278(b)(i) and (ii).⁹¹ The substance of the provisions of subsections (i) and (ii) of §1278(b) support this logical inference.⁹² Subsection (i) makes reference to the duration of study and protection rivers specifically designated by Congress are to receive, while subsection (ii) makes reference to the duration of study and protection rivers recommended by the states are to receive.⁹³ In addition, subsection (ii) of §1278(b) specifically refers to §1273(a)(ii) further weakening the court's position that only rivers under §1276(a) are protected.⁹⁴ The court's construction would render meaningless the mention of §1273(a)(ii).⁹⁵

Contrary to the opinion of the court, support for North Carolina's argument can also be found in the legislative history. The House Interior Committee report on the Wild and Scenic Rivers Act shows that it was the intention of the committee that the states should actively participate in the protection of free flowing rivers and that "such Federal agencies as the FPC . . . will not upset (the States) plans by taking adverse action without the full knowledge and consent of the Congress."⁹⁶

While legislative history alone cannot be regarded as conclusive, if it is fair to state that the policy behind the Wild and Scenic Rivers Act is to create a co-ordinated national system of protecting environmentally valuable rivers, then implicit in the Act is a full complement of local protective discretion. The court's analysis of the Act, if adopted, would hinder intergovernmental co-ordination and cooperation by allowing a federal agency the power to pre-empt the exercise of local discretion. In most situations such pre-emptive action would be well

91. See notes 80 and 81 *supra*.

92. See note 80 *supra*.

93. *Id.*

94. *Id.*

95. *Id.* To render the inclusion of §1273(a)(ii) in the language of §1278(b)(ii) meaningless, violates a basic rule of construction, *i.e.*, that effect must be given if possible to every word, clause and sentence of a statute, so that no part will be inoperative, superfluous, void or insignificant. See, *e.g.*, *United States v. Mechnasche*, 348 U.S. 528, 538-39 (1955); *Federal Communications Commission v. Kohn*, 154 F. Supp. 899, 910 (S.D. N.Y. 1957). See generally C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION*, vol. 2A, 56 (4th ed. 1972).

96. 120 CONG. REC. §14934 (daily ed. Aug. 30, 1976) (remarks of Sen. Bumpers). This legislative policy favoring non-interference pending protective action was reflected in the Tenth Circuit's opinion in *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971). In *Parker*, the court was faced with interpreting the provisions of §1132(b) of the Wilderness Act. 16 U.S.C. §1131 (1970). The court upheld the lower court's overturning of permission granted by the Forest Service for logging in primitive areas contiguous to wilderness areas. It was reasoned that the Service's power under the Multiple Use Sustained Yield Act, 16 U.S.C. §528 (1970), was limited by §1132(b), as to permit the destruction of a potential wilderness area would foreclose the presidential and congressional choice of formally including the area within the national wilderness system reserved by that section. The Circuit Court's statutory construction in the New River case foreclosed the exercise of choice by North Carolina and the Secretary of the Interior, as it eliminated North Carolina's ability to maintain the status quo under §1278(b)(ii).

within the delegated power of an agency like the FPC,⁹⁷ but in passing this Act, Congress is limiting such power and creating an exception to balance environmental values; values which often times can be assessed only from a local perspective.

B. The Interrelationship of the Wild and Scenic Rivers Act, NEPA, and the Federal Power Act

As the court did not seek to find an internally consistent relationship among the provisions of the Wild and Scenic Rivers Act, similarly the court did not seek or explore a consistent relationship among NEPA, the Wild and Scenic Rivers Act and the Federal Power Act.⁹⁸ Yet the problems raised in the New River case seem to require the construction of an analytical framework accommodating each of these acts.⁹⁹ The court's isolated, compartmentalized treatment of these statutes is analytically lacking.

North Carolina originally raised the Wild and Scenic Rivers issue in the context of NEPA. The state was asserting that by failing to consider the Wild and Scenic Rivers alternative in the EIS, the FPC was in violation of §102(2)(E) of NEPA.¹⁰⁰ This section requires that all agencies of the federal government "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."¹⁰¹

The court's consideration of the FPC's compliance with NEPA requirements under §102 was limited to the narrow issues of energy conservation and the displacement of persons.¹⁰² Similarly, the court's consideration of the Wild and Scenic Rivers Act was limited to the issue of whether a license was prohibited under the water resources restriction of §1278(b).¹⁰³ There was no attempt by the court to interrelate the two acts. Perhaps this narrow approach can be justified by the court's earlier holding that under §825(1)(b) of the Federal Power Act, North Carolina had not raised the combined NEPA-Wild and Scenic Rivers objections with sufficient specificity in the petition for a

97. Under the commerce clause, U.S. CONST. art. I, § 8, cl.3, Congress has plenary power over navigable waters. See, e.g., *United States v. Chandler-Dunbar*, 229 U.S. 53 (1913); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). Through legislation such as the Federal Power Act, 16 U.S.C. § 791a (1970), Congress has delegated this power.

98. 42 U.S.C. § 4321 (1970); 16 U.S.C. § 1271 (1970); and 16 U.S.C. § 791a (1970).

99. See note 13 *supra*.

100. 533 F.2d at 707; 42 U.S.C. § 4332(2) (1970). The FPC's final impact statement devoted only two sentences to the potential benefits of scenic river designation, despite an EPA request for detailed analysis of such an alternative. Comment, 6 ENVIR. L. REP. at 10,080.

101. 42 U.S.C. § 4332(2)(E) (1970).

102. 533 F.2d at 706-08.

103. *Id.* at 708-09.

rehearing.¹⁰⁴ At the same time, the barring of this particular issue is not warranted.

As explained by the Supreme Court in *Colorado Interstate Gas*,¹⁰⁵ the procedural bar of §825(1)(b) was designed to make sure that the FPC had notice of objections and had an opportunity to correct them.¹⁰⁶ In this case, the FPC had actual notice of the consideration being given to the Wild and Scenic Rivers alternative by Congress, Secretary of the Interior, and the State of North Carolina.¹⁰⁷ Thus, there would seem to be no policy justification for barring the combined Wild and Scenic Rivers issue as posed by the state. Further, it is proposed here that apart from any responsibility of North Carolina to raise the issue specifically, the FPC had an affirmative statutory duty under both NEPA and the Federal Power Act to make a "good faith" consideration of the Wild and Scenic Rivers alternative.¹⁰⁸

At the hearing before the FPC, two intervening parties¹⁰⁹ challenged the license to Appalachian on the grounds that the Commission had not adequately addressed the alternative of a federal power project as required under §800(b) of the Federal Power Act, which provides:

Whenever in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates . . . as it may find necessary, and shall submit findings to Congress with such recommendations as it may find appropriate . . .¹¹⁰

The interveners supported their contention by citing the Supreme Court's opinion in *Udall v. Federal Power Commission*.¹¹¹ In *Udall*, the FPC had not given any consideration to the proposal of the Secretary of the Interior for a federal power project that would co-ordinate with existing federal projects and safeguard environmental concerns more readily than a private project.¹¹² In resolving the conflict, the Court interpreted §800(b) of the Federal Power Act as requiring the Commission to make an "informed judgment" which could only be determined "after an exploration of all issues relevant to the 'public interest', including future power demand and supply, alternate sources of power, the public interest in preserving wild rivers and wilderness

104. 16 U.S.C. § 825e(b) (1970).

105. 348 U.S. 492 (1955).

106. *Id.*

107. 5 PUR 4th at 374-75.

108. See note 75 *supra*.

109. The two parties were the Congress for Appalachian Development and the Appalachian Research and Defense Fund. 5 PUR 4th at 359.

110. 16 U.S.C. § 800(b) (1970).

111. 387 U.S. 428 (1967).

112. *Id.* at 432-33.

areas, the preservation of anadromous fish and the protection of wildlife."¹¹³

The FPC did consider the Court's interpretation of §800(b)¹¹⁴ but limited its obligation to a duty to consider federal power project alternatives in licensing determinations. *Opinion* 698 pointed out that unlike *Udall*, neither the Secretary nor the Congress had even suggested a public power facility.¹¹⁵ The opinion also indicated that a heavy burden of pursuing remote alternatives would unduly delay licensing of needed power projects, and would conflict with the FPC's primary obligation under the Federal Power Act, which is to assure "an abundant supply of electric energy throughout the United States."¹¹⁶

The failure of the FPC to give any study to North Carolina's alternative cannot be justified on the same grounds. In *Udall* the Court grafted environmental obligations onto §800(b) of the Federal Power Act, and made specific reference to the public interest alternative of "preserving wild rivers."¹¹⁷ Given this language, the FPC was somewhat nearsighted in failing to see its obligation to make findings on the Wild and Scenic Rivers alternative, where concrete proposals for just such an alternative had been made by the Congress, the Secretary, and the State of North Carolina.¹¹⁸ The FPC's narrow interpretation of *Udall* is especially mystifying as *Udall*, in essence, is only an approval of the earlier analysis of *Scenic Hudson Preservation Conference v. FPC*.¹¹⁹ In *Scenic Hudson I*, which also involved a pumped storage project, the court imposed a duty upon the FPC to go beyond consideration of energy, engineering and navigation, and to consider the totality of a project's long range effects, "including . . . conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites."¹²⁰ From this precedent it is clear that the FPC cannot interpret its §800(b) obligations narrowly, nor can it justify its failure to weigh the scenic river alternative in its licensing determination by citing its primary duty under the Federal Power Act. Perhaps more important in terms of future policy is *Udall's* indication that no matter what the scope and purpose behind Congressional passage of the original Federal Power Act, subsequent environmental acts concerning the same subject must be considered in relation to the earlier act.¹²¹

113. *Id.* at 450.

114. *Id.* The Court in *Udall* might have also attached public interest considerations to sections 797e and 803(a) of the Federal Power Act. 16 U.S.C. §§ 797e 803(a) (1970).

115. 5 PUR 4th at 359.

116. *Id.* at 346, 360.

117. 387 U.S. at 450.

118. See note 39 *supra*.

119. 354 F.2d 608 (2d Cir. 1965), 453 F.2d 463 (2d Cir. 1971), *cert. denied* 407 U.S. 926 (1972).

120. 354 F.2d at 614.

121. 387 U.S. at 438. The court uses the rule of construction that laws *in pari materia*, or on

Since subsequent environmental laws are by their nature limitations of power, *Udall* indicated that it is only logical to construe them as defining the scope of prior acts. Thus *Udall* can be seen as providing the basis for "accommodating" the broad range of legislation on energy and environment.¹²²

The Supreme Court's construction of the relationship between statutes and the Federal Power Act in *Udall* seems to have been codified in NEPA. Section 105 echoes *Udall* as it provides that "the policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of federal agencies."¹²³ Similarly, §103 requires federal agencies to review their original statutory authority and harmonize those provisions with environmental policies and procedures outlined in NEPA.¹²⁴ Where *Udall* attached environmental considerations to the Federal Power Act through §800(b), the Congress through NEPA has attached specific environmental requirements to all agency grants of authority.¹²⁵ This mechanism of statutory integration was recognized and described in *Iowa Citizens for Environmental Quality Inc. v. Volpe*,¹²⁶ where the court stated that "the policies of NEPA enunciated in §101 must be considered and implemented in the policies, regulations, and public laws of the United States to the fullest extent possible through the procedural requirements of §102(2)."¹²⁷

Returning to North Carolina's objection that the FPC failed to study the Wild and Scenic Rivers alternative as required by §102(2) of NEPA,¹²⁸ it becomes apparent that the Circuit Court inappropriately neglected the issue. The procedural bar and the question of notice to the Commission in this instance is irrelevant.¹²⁹ Under the statutory framework outlined above, the FPC has the affirmative duty to make such a study not simply because of specific requirements of §102(2), but rather because the total effect of NEPA is to make "environmental

the same subject, must be construed with reference to each other. *Id.* Such an approach can also be termed an accommodation of statutes. See note 13 *supra*.

122. See note 13 *supra*.

123. 42 U.S.C. § 4335 (1970).

124. 42 U.S.C. § 4333 (1970).

125. 16 U.S.C. § 800(b) (1970); 42 U.S.C. §§ 4333, 4335 (1970).

126. 487 F.2d 849, 851 (8th Cir. 1973). See also *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296-97 (8th Cir. 1972).

127. 487 F.2d at 851. Similarly, in *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. 584, 628 (D.C. Minn. 1973), aff'd 498 F.2d 1314 (8th Cir. 1974), the court noted that "NEPA cannot be construed in isolation but must be construed in conjunction with other statutes and regulations, and especially the Wilderness Act."

128. 42 U.S.C. § 4321 (1970).

129. For if the FPC has an independent legal obligation, which it did not take steps to satisfy, North Carolina's ability to raise the Wild and Scenic Rivers issue no longer depends on the specificity of its objections at the rehearing. Instead, North Carolina would have grounds to raise the issue in a mandamus action under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 (1970). See note 49 *supra*.

amendments" to the provisions of the Federal Power Act.¹³⁰ Here, where the FPC had taken none of the procedural steps mandated, the substantive result, apart from the recent amendments, should favor North Carolina, as the question is not of adequate, "good faith" compliance, but rather one of no compliance at all.¹³¹

III. CONCLUSION

For purposes of saving the New River, the above analysis is unnecessary. The critical segment of the New River is preserved in its free flowing state by the new amendments to the Wild and Scenic Rivers Act.

While the Circuit Court's result was pre-empted by the amendments, its statutory analysis, the first significant test of the Wild and Scenic Rivers Act, is left undisturbed. That analysis eliminated the effective utilization of the state initiated protective mechanism of the Act, and minimized the FPC's burden to independently consider such an alternative, as it failed to reach an accommodation of environmental and energy legislation.

Through NEPA, Congress intended to create an integrated, autonomous structure of environmental protection. The Circuit Court's decision undermines the integration of that structure by eliminating local discretion, and undermines the autonomy of that structure by necessitating *ad hoc* environmental determinations by Congress. Similarly, FPC actions served to undermine the objectives of NEPA, as the failure to adequately assess all environmental alternatives caused needless administrative and judicial delay, and perhaps more importantly, hurt the ability of concerned parties to make secure long range plans for energy and environmental needs.

Departure from the structured approach of NEPA subjects environmental planning and decision making to the happenstance of the political present. The New River controversy happened to reach a peak in the midst of a presidential primary in North Carolina, which may have substantially influenced the final outcome. However, in different circumstances, such as during an Arab oil embargo, events might have happened differently. Progress in resolving the problems of energy and environment, of which the New River case is but a microcosm, may ultimately depend on the degree of insulation from the politics of the day.

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130. 42 U.S.C. §§ 4333, 4335 (1970).

131. See note 67 *supra*.

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