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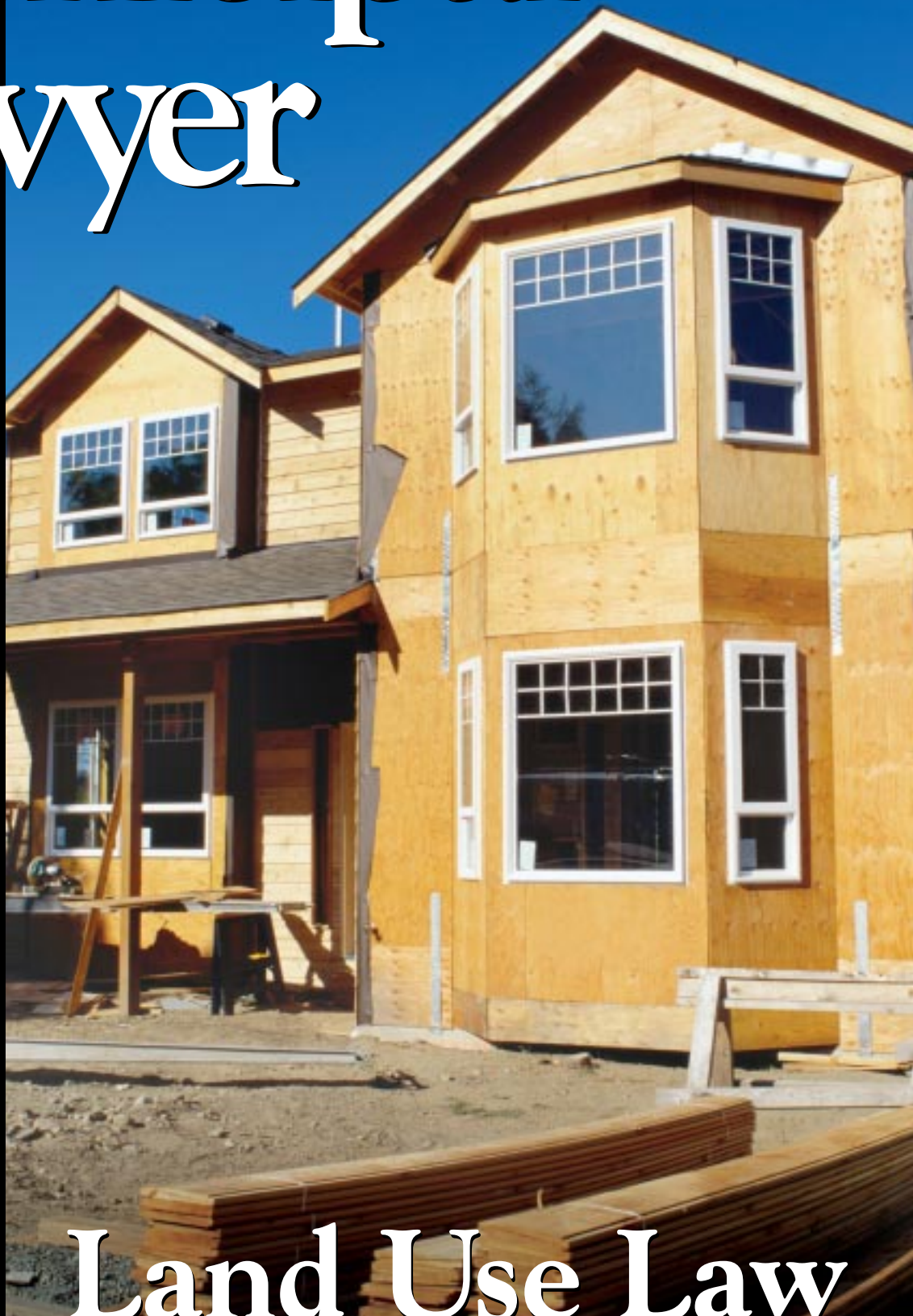
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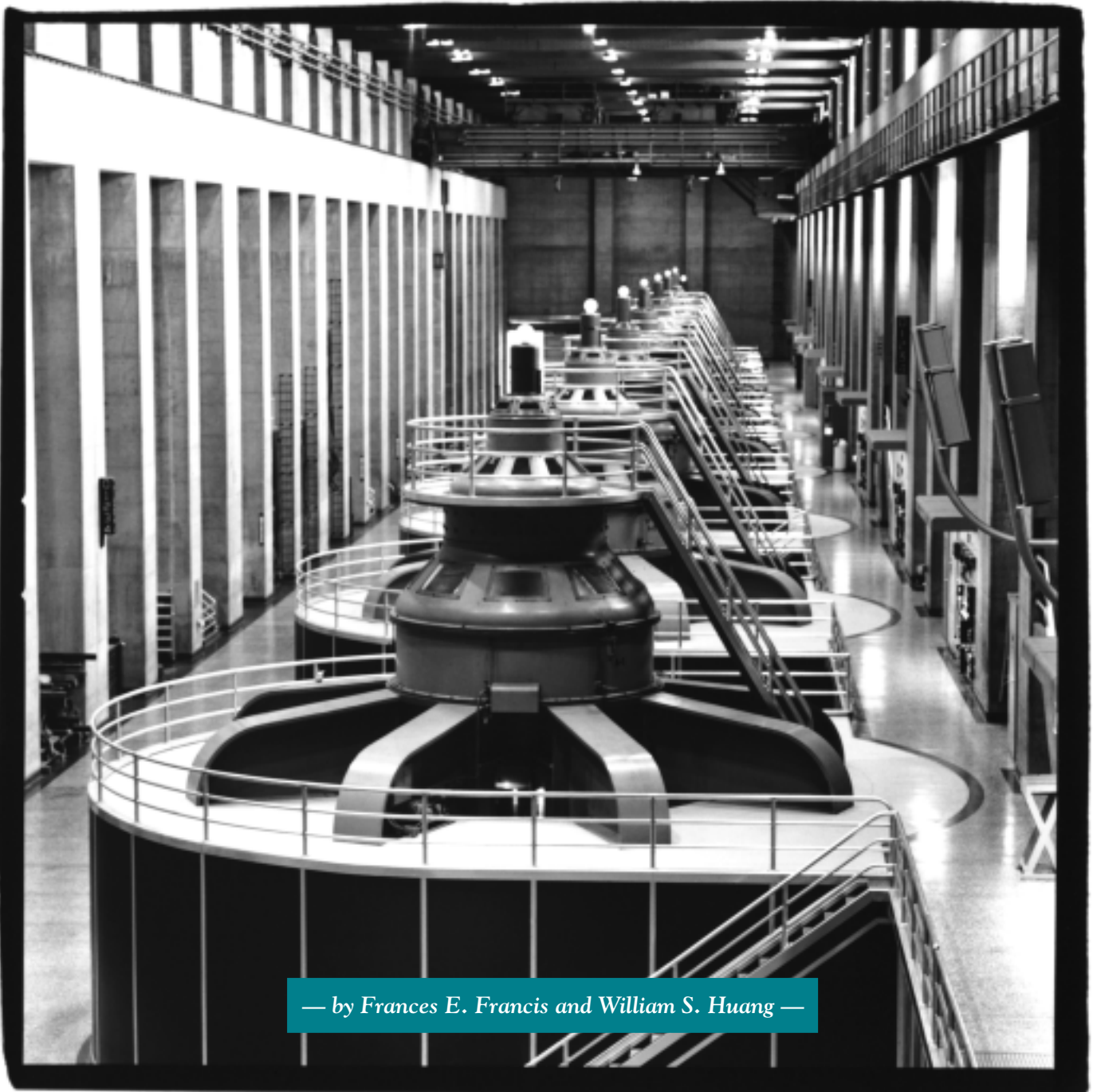
Shoreline Development

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Land Use Law

A Changing Landscape



— by Frances E. Francis and William S. Huang —

A Growing Problem

**Local Land Use Planning and Federal
Control of Shoreline Development Around
Federally Licensed Hydroelectric Projects**

There are over one thousand federally licensed hydroelectric projects in the United States, located in both urban and rural areas. In many instances, reservoirs at hydroelectric projects have become development magnets, attracting recreational users, vacation homes, and retirement communities. In other instances, they are located in revitalized city centers or lie in the path of suburban growth. The ability to shape development in and around these hydro projects is of increasing value to communities, but it is not solely a local issue. The federal government, through the Federal Energy Regulatory Commission (FERC), regulates land use within the boundaries of hydroelectric projects across the country, and FERC restrictions on land uses within project boundaries may conflict with the implementation of plans developed by local agencies. FERC's relative indifference to land planning policies and coordination of its jurisdiction with local land planning agencies and policies is likely to lead to increasing conflicts. This article describes the circumstances and makes some suggestions.

Conflicts Between Federal and Local Regulation

Under the Federal Power Act,¹ FERC has authority to control land uses within the boundaries of federally licensed hydroelectric projects. FERC is responsible for issuing licenses for the construction, operation, and maintenance of hydro projects.² FERC issues such licenses subject to conditions, and FERC's standard license conditions, in conjunction with its regulations, require licensees to obtain agency approval before making alterations or additions to federally licensed projects,³ or transferring easements or other property rights to prospective shoreline developers or residents.⁴

FERC land use decisions are often treated as an overlay on top of other land use restrictions, whether locally imposed or due to federal ownership. In this framework, just as a developer may be required to obtain both local zoning approvals and EPA permits, waterfront development within the boundaries of a hydro project would be required to satisfy both (1) land use regulations imposed by local ordinances and plans or, in the case of federally-owned lands, by the federal agency supervising the federal lands (for example, the Bureau of Land Management or the Forest Service); and (2) any conditions or restrictions placed on development by FERC.⁵ Moreover, the primary direction of FERC's land use regulation is (1) non-interference with the project's hydropower

operations, and (2) assuring compliance with specific license conditions (*e.g.*, a requirement to build a park).

Because of the nature of most land use regulation—restrictions on land uses, as opposed to an affirmative obligation to build—FERC's regulation of land uses has produced relatively few direct conflicts between local and federal land use rules regarding non-hydropower uses of specific parcels. To the extent that local and federal restrictions do not match, applying the more restrictive regulations would satisfy both (*e.g.*, applying FERC restrictions on dock design within a project's boundaries, even if local zoning would allow greater flexibility).

Even in the absence of formal conflicts between FERC's federal and local land use *regulations*, however, conflicts are increasingly emerging with respect to the implementation of local development *plans*. Localities that seek to concentrate waterfront development in certain areas, for example, may be blocked by FERC rulings that restrict access to the project's water features in those locations. Municipalities that use zoning or growth management tools to shape the direction of new development in coordination with the extension of public infrastructure and urban services, may find that waterfront access to a FERC-licensed reservoir or impoundment is prohibited from parcels that local plans have slated for water-oriented development and growth. Localities that want to use a hydro project's water features as an amenity for local development or urban revitalization plans—like urban parks and greenways, waterfront promenades, or public recreational access points—may be precluded from doing so because of FERC land use decisions, including FERC's increasing use of delegation to the licensee to make the final decisions.

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Although formal federal preemption may not be involved in these situations, many of the conflicts can be just as disruptive for localities that seek to incorporate the benefits of a hydro project's water features into their plans. Communities located around hydro project perimeters develop their land use plans and zoning regulations at considerable cost and through legitimate, time-consuming public processes. Like all communities, they consider and balance a wide range of factors in an effort to craft a vision for their future development—public and private cost, housing affordability, aesthetics, avoidance of land use conflicts, environmental impacts, economic development, and coordination of infrastructure and land use development, to name only a few. Inconsistent or insensitive FERC land use decisions may effectively override these local government decisions, which were reached through public, often difficult, deliberations by the people who live at or near the hydro projects, and who must experience their impacts every day. To address what, if anything, local governments can do to solve these types of problems requires some understanding of the way FERC land use decisions are reached.

Federal Regulation of Land Use Within Hydro Projects

The Commission is obligated under Section 10(a) of the Federal Power Act to issue a hydro license only if the project adopted is one that shall be “best adapted to a comprehensive plan” for a waterway, as well as for the improvement and utilization of water development for not only fish and wildlife, but also for other beneficial public uses, including “water supply, and recreational and other purposes.”⁶ In meeting its task, FERC is not allowed to arbitrarily favor one objective to the exclusion of other legitimate purposes.⁷ The comprehensive development obligation is forward-looking and requires that FERC examine both conditions as they exist, and conditions that are projected to exist in the future.⁸

This basic framework reflects an effort to ensure that the public interest

is protected when FERC grants a licensee the valuable, exclusive right to use a public resource (the waters of the United States) for individual, and often private, gain for 30 to 50 years. Under the Federal Power Act, licensees also receive the right to use the federal power of eminent domain to assemble the land and property rights necessary to create their projects.⁹ This powerful right, normally reserved only to governmental bodies, is given to privately-owned hydroelectric licensees because a license can be issued only upon a finding that the public purpose underlying the planned development of the water resources of the United States is in the public interest.¹⁰

There are over one thousand federally licensed hydroelectric projects in the United States, located in both urban and rural areas. In many instances, reservoirs at hydroelectric projects have become development magnets, attracting recreational users, vacation homes, and retirement communities. The ability to shape development in and around these hydro projects is of increasing value to communities, but it is not solely a local issue.

Notwithstanding this authority, FERC has given land use issues only passing attention. Part of the problem is institutional. FERC is most likely to address local government concerns at licensing and relicensing. That process occurs only once every 30 to 50 years, for most hydro projects. FERC also lacks a broad-based capacity to make informed land use decisions. Electric generation—and in more recent years, environmental issues—have been at the core of the Commission's interest and expertise regarding federally licensed hydro projects. FERC generally attempts to avoid complex land use decisions, because these involve areas in which the Commission has limited expertise, and because it has little detailed local knowledge of the multiple social, physical, and economic factors underlying specific development plans.

As waterfront development at licensed hydro projects becomes increasingly common and popular, and appli-

cations for development on project lands and waters have poured into FERC, the agency has responded by delegating increased authority to the licensee to act on “routine” shoreline matters without seeking separate FERC approval.¹¹ A Standard Land Use Article that appeared in a 1980 FERC case has been included in many project licenses:

the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval.¹²

FERC has also encouraged the expanded use of Shoreline Management Plans, or SMPs, being comprehensive plans developed by licensees to manage the multiple resources and uses of the project's shorelines. A licensee who develops a SMP, and has the plan approved by the Commission, can be granted even broader authority to take actions consistent with the plan without separate FERC approval.¹³

The result has been a withdrawal by FERC from decision-making in the land use area, a growing concentration of discretion in the licensee, and a land use decision-making process dominated by environmental and resource agency concerns that generally gives short shrift to social and community/economic development issues. The situation may be aggravated when the licensee also owns large amounts of land within or contiguous to the project that it seeks to develop for non-hydropower uses. Under these circumstances, the

licensee often has an incentive to favor its own development over development on lands owned by other entities; at a minimum, there will be a perception that it will do so.

Local governments have also discovered that they have limited access to the federal processes that provide oversight of a licensee's decisions. Although the SMP process is intended to involve the public and allow for agency consultation, review, and comment,¹⁴ FERC, in our opinion, has not consistently required licensees to conform their SMPs to local land use plans, or to address these differences meaningfully. Thus, FERC does not have a specific requirement that the licensee's SMP match local plans and zoning prior to filing the SMP for approval, nor does FERC require the licensee to specifically address the differences on an ongoing basis.¹⁵ Moreover, where separate FERC authorization is necessary to approve proposed waterfront development, FERC has allowed licensees to exercise broad discretion as to whether or not a development request is submitted to FERC for that approval, or simply denied by the licensee.¹⁶ Where a licensee delays acting on a request or denies an application for action, local governments or individual developers that are unhappy have little recourse but to file a complaint and engage in an expensive, time-consuming process at FERC.

As noted earlier, FERC's lack of familiarity with—and perhaps lack of resources to solve—these problems has led to a not unexpected bureaucratic reaction: Let the licensee develop a plan and save FERC from making these decisions affecting the use of land within the project boundary. By avoiding these issues, however, FERC is omitting an important licensing responsibility that Congress entrusted to it; namely, the responsibility to exercise its judgment to determine which licensing or relicensing proposal will best incorporate multiple objectives in the development of a waterway.¹⁷ Everyone agrees that water is precious, but it appears that land and the combined use of land and water are, increasingly, the more precious commodities that communities rely on for their well-being.

The federal government, through the Federal Energy Regulatory Commission (FERC), regulates land use within the boundaries of hydroelectric projects across the country; FERC restrictions on land uses within project boundaries may conflict with the implementation of plans developed by local agencies.

Strategies for Local Governments

FERC policy on land use issues needs to change. As currently structured, the deck is stacked against local governments that want social and community/economic development issues incorporated into FERC land use decisions. A locality has no assurance that its concerns will be addressed, even if it plays by FERC's and the licensee's rules, develops a detailed specific plan for land use around a hydro project, and actively participates in licensee land use processes and FERC proceedings. It is far too easy for licensees and FERC to ignore legitimate community concerns, or sacrifice them unilaterally in order to placate other interests that have more clearly defined roles in FERC's current decision-making. This is not the intent of the Federal Power Act's comprehensive development framework.

Absent a policy change at FERC, there are still things that localities can do now to help shape land use decisions at hydro projects.

Start Early, and Participate in FERC Proceedings. Proceedings for the issuance and amendment of FERC hydro licenses are local governments' best opportunity to define their role in project land use decisions, and to push for SMPs or amendments to existing SMPs that are consistent with local land use and infrastructure plans. Local governments interested in shaping development around federally licensed hydro projects must start early, and should be

prepared to participate in FERC proceedings, even if the timing of those proceedings does not coincide with the normal timeline for local land use planning. The broadest review of a project's license conditions occurs when the license is issued or renewed. As this happens very infrequently—typically once every 30-50 years—localities should be prepared to participate actively when the opportunity arises. A large number of hydro project licenses will be up for renewal in the next decade.¹⁸ The relicensing proceedings for these projects will establish rules that will govern the management of those hydro projects for the next generation or two. Localities cannot afford to sit these out.

Recognize Differences in Local Government and FERC/Licensee Planning Approaches. FERC's and licensees' approaches to SMPs may differ from the planning approach of affected local governments. Local government land use plans are often very general, and an affected locality may prefer to retain a relatively high level of flexibility to approve new development by, for example, zoning large areas for planned unit development and using the site plan review process to address the impacts on neighboring parcels, or by zoning large areas for relatively intensive development on the theory that market demand limits will prevent overbuilding. A local government may also prefer a rolling 20- to 25-year time horizon for its land use plans, with procedures allowing for plans to be updated or revised. In contrast, FERC and licensees may prefer shoreline classification systems that specifically identify areas for new development, while clearly restricting development on all other parcels, and preferably for the next 50 years.

A locality that wants to affect shoreline decisions for a particular hydro project will often need either: (1) to adjust its planning approach, so that it can provide meaningful input into the licensee's planning process; or (2) to press for procedural mechanisms as part of the official shoreline management process that will allow localities an active and ongoing voice in licensee decisions about land use. Localities that

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want to adopt the former strategy must plan ahead. The timing and deadlines for participating in FERC shoreline management proceedings will generally preclude the type of broad community participation process that many local governments use to develop and update their comprehensive plans. Communities, therefore, may need to incorporate shoreline development issues into their own general planning processes, so that they are prepared when FERC proceedings arise, or if the licensee initiates such action on its own.

Once a locality has developed its own shoreline development vision, there is no need to wait until the licensee or the Commission asks for community input. Local governments should approach licensees to discuss their plans, actively seek ways to coordinate community and licensee decision-making, and seek assistance in implementing local plans.

Engage the Licensee in Local Planning Processes. Local governments may benefit by providing mechanisms for licensees to participate in local government planning processes. There is no assurance that the licensee's decisions or preferences will conform with the community's vision of its future and, since hydro projects are increasingly owned by licensees headquartered in other regions (due to mergers and industry restructuring), the licensee may have relatively little interest in participating in local planning. Making efforts to engage the licensee in the community's planning process, however, can help identify common ground and clarify where and why disagreements may be likely.

Conclusion

Coordinating local and FERC land use development plans for federally licensed hydro projects is hard work for local governments. Unlike most other land use contexts, outcomes are uncertain because local governments share decision-making authority with another governmental body, one that also has an obligation to make decisions based on a comprehensive assessment of the

multiple resources and uses of the project's shorelines. In addition, absent federal legislation or a change in FERC policy, the ability of local government plans to influence FERC and licensee land use decisions is relatively undefined. The potential rewards, however—community and economic development, shoreline land uses consistent with community needs, and the integration of project water features into local development patterns—are considerable.

Notes

1. 16 U.S.C. §§ 791-828(c) (2003).
2. 16 U.S.C. § 797(e) (2003).
3. *See, e.g.*, Standard License Form L-3, Article 4; *Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act*, Docket No. RM76-9, Order No. 540, 54 F.P.C. 1792, 1818 (1975).
4. *See, e.g.*, Standard License Form L-3, Article 4; *Order No. 540*, 54 F.P.C. at 1818-19.
5. *See, e.g.*, Duke Energy Corp., 105 F.E.R.C. 62,027, at ¶ 64,103 (2003) ("Neither the classification maps nor the SMP are intended to replace or substitute for local planning and zoning efforts. The controls established by the project license, the proposed SMP and guidelines for allowable uses, local land use plans, zoning regulations, other local ordinances, and building permit requirements should help to collectively minimize environmental impacts from development"); South Carolina Electric & Gas Co., *Lake Murray Shoreline Management Program*, at 19 (1995) (noting that "[p]ermits or consents from local governments with jurisdiction over zoning or other land use laws may be required" in addition to licensee approvals) (follow "Shoreline Management Plan link from <http://connect.scana.com/SCEG/For+Living/Lake+Murray/Lake+Management.htm> (last viewed Apr. 25, 2005)); *Appalachian Power Co.*, Project No. 2210 090, *Smith Mountain Pumped Storage Project*, FERC No. 2210, *Shoreline Management Plan*, at 9 (filed on Sept. 2, 2003, and currently pending before the FERC).
6. 16 U.S.C. § 803(a) (2003).
7. *See, e.g.*, 16 U.S.C. § 797(e) (2003) ("In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, miti-

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gation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”)

8. See, e.g., 16 U.S.C. § 808(a)(2) (2003).

9. 16 U.S.C. § 814 (2003).

10. 16 U.S.C. § 797(e) (2003); Columbia Railway & Navigation Co., 1 F.P.C. 78 (1933) (condemnation authority is conferred in order to promote public purpose—development and sales of hydropower at lowest rates consistent with a fair return to attract capital—not private interests).

11. FERC: Office of Energy Projects, *Guidance for Shoreline Management Planning at Hydropower Projects*, at 1-1 to 1-3 (April 2001), available at <http://www.ferc.gov/industries/hydropower/enviro/smpbook.pdf> (last viewed Apr. 25, 2005).

12. Division of Hydropower Administration and Compliance, *Compliance Handbook*, App. H (March 2002). See also, Brazos River Authority, 11 F.E.R.C. ¶ 61,162, at 61,348 (1980).

13. See, e.g., Georgia Power Co., 98 F.E.R.C. ¶ 62,008 (2002) (granting licensee authority to permit certain activities without Commission approval, beyond that given as part of the standard land use article); cf. Duke Energy Corp., 92 F.E.R.C. ¶ 62,265 (2000) (granting licensee authority to permit certain excavation activities without separate Commission approval). Although still pending before the FERC, the proposed Shoreline Management Plan for the Smith Mountain Pumped Storage Project, Project No. 2210, requests expanded authority to approve development consistent with the SMP. *Appalachian Power Co.*, Project No. 2210 090, *Smith Mountain Pumped Storage Project*, FERC No. 2210, Shoreline Management Plan, at 1 (filed with the Federal Energy Regulatory Commission, Sept. 2, 2003). See also *Guidance for Shoreline Management Planning at Hydropower Projects*, at 4-1 (April 2001) (stating that “If there are inconsistencies with the project license, the [SMP] must be filed for Commission approval as an amendment to the license before being implemented. In most instances, an SMP does require Commission approval prior to implementation.”)

14. FERC: Office of Energy Projects, *Guidance*

for Shoreline Management Planning at Hydropower Projects, at ii.

15. For example, in *Appalachian Power Co.*, Project No. 2210 090, *Appalachian Power* proposed a working rule that in cases of conflict between the proposed SMP and local government land use controls, the more restrictive regulation would apply. *Appalachian Power Co.*, Project No. 2210 090, *Smith Mountain Pumped Storage Project*, FERC No. 2210, *Shoreline Management Plan*, at 9. However, this approach ducks specifics and may be counterproductive if it results in not achieving the rational objective of either the local plan or the SMP.

16. Since the licensee typically is the party to present the specific request to the Commission, the timing of a FERC submittal (if any) by the licensee, or whether the concerns of a third party seeking a permit are ever raised, are usually within the licensee’s discretion. See, e.g., FERC: Office of Energy Projects, *Guidance for Preparing Shoreline Development Applications* (stating in guidance to “developers, homeowners, and others on the contents of a non-project use application and the FERC’s review process,” that “[i]f a licensee finds that a proposed non-project use or facility is consistent with the license...it may file an application seeking FERC authorization.”), available at <http://www.ferc.gov/industries/hydropower/enviro/smpbrochure.pdf> (last viewed Apr. 25, 2005); FERC: Office of Energy Projects, *Guidance for Shoreline Management Planning at Hydropower Projects*, at 4-2 (noting that licensees may dismiss developmental proposals requiring Commission approval “by not forwarding them for Commission action”).

17. 16 U.S.C. § 803(a) (2003).

18. In the five-year period from 2005 through 2009, a total of 82 hydro project licenses will expire. The largest concentration, thirty, is in California and the Pacific Northwest (California-14, Washington-8, Oregon-6 and Idaho-2). The next largest concentration (24) is in the Southeast (North Carolina-11, South Carolina-2, Georgia-5 and Alabama-6). The third largest concentration (13) is in New York State and New England (NY-5, Vermont-3, New Hampshire-2, Massachusetts-2 and Maine-1). In the five-year period from 2010 through 2014, a total of 49 licenses will expire. **ML**

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