

PUBLIC AGENCIES AS LOBBYISTS

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I. INTRODUCTION

Though Congress often delegates many tasks to public agencies, each agency can usually claim to have a primary mandate, which is reflected in its organic or enabling legislation. So, for example, one could fairly say that the National Highway Transportation and Safety Administration's primary mandate is "highway safety," the Department of Transportation's is "infrastructure development," and the Food and Drug Administration's is "public health protection." Frequently, however, Congress imposes additional or secondary mandates on an implementing agency. Secondary mandates can be substantive or procedural: they may limit the discretion of the lead agency, or impose obligations to consider additional factors, perform a particular analysis, or consult with specific players. Frequently, Congress imposes these mandates indirectly, by passing entirely separate statutes unrelated to the agency's original enabling act.¹ Thus, for example, Congress might create the Federal Power Commission (FPC) in 1920 and charge it with the authority to license hydropower production,² and at a later time pass a series of environmental statutes with which the agency (now the Federal Energy Regulatory Commission),³ in theory, must also comply. In this sense, Congress can create the potential for

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¹ Many statutes do not impose a mandate on a particular agency, but rather impose burdens on all agencies equally, providing they engage in a "triggering" activity. *See e.g.*, the National Environmental Policy Act, 1969 which, per § 102(2)(C), requires all federal agencies to produce environmental impact statements for major federal projects with a significant impact on the environment and the Endangered Species Act, 1973, which, per §7, requires all federal agencies to "consult" with the Department of Interior (or for marine species the Department of Commerce) to ensure that federal agency action is not likely to jeopardize the survival of a listed species.

² Prior to the passage of the FPA, the Secretaries of War, Agriculture and Interior each had authority to issue licenses for hydroelectric projects on lands under their respective jurisdiction, an approach that led to confusion and inefficiency. The Act centralized authority in a single agency by creating a commission consisting of the three Secretaries. The Commission was reorganized in 1930 to consist of five persons independent of the three Secretaries. *See Act of June 23, 1930 ch. 572, 46 Stat. 797.*

³ The FPC was reorganized by Congress into the Federal Energy Regulatory Commission (FERC) in 1977. *See 42 U.S.C. §7171 (1977).*

inter-statutory conflicts, meaning that Congress creates a situation in which the agency must balance multiple and potentially competing obligations arising from different statutes usually passed at different times by different enacting majorities.

Agencies frequently resolve such inter-statutory conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside. Consider the historical reluctance of licensing and development agencies to comply with environmental mandates in the early years of environmental legislation. Federal agencies such as the Atomic Energy Commission, the Army Corps of Engineers, the Department of Transportation and the FERC famously resisted complying with the National Environmental Policy Act (NEPA),⁴ the Clean Water Act (CWA),⁵ the Endangered Species Act,⁶ and a host of other environmental laws when they were first passed in the late sixties and seventies.⁷ This resistance is problematic, of course: it results in under-implementation of some congressional goals in favor of others. And while it arises frequently in the environmental context, we imagine that it occurs in other settings as well.

In this article, we explore this problem of agency reluctance in the face of multiple mandates. Specifically, we explain how and why agencies might resist secondary mandates, which typically—though not always—come in the form of obligations imposed in separate statutes passed after Congress delegates the agency’s primary mission in its enabling law.⁸ Relying on an illustrative study of FERC’s resistance to environmental legislation, we explain the political and economic forces that operate to encourage agency reluctance: congressional committees that reward an agency’s pursuit of its primary mission to the exclusion of its obligations under other statutes; executive oversight that fails to force agency compliance with multiple and potentially conflicting obligations arising in different statutes; interest group pressure that supports the agency’s primary mission but not its secondary ones; and aspects of agency culture and organization that create obstacles to full compliance with all mandates.

But our story, at bottom, is one of agency reluctance overcome. We argue that agencies can be prompted to take their secondary missions more seriously when Congress enhances the power of *other* agencies, with relevant expertise and interests derived from their own statutory mandates, to lobby them.⁹ In our example, Congress does this in a particular way, namely by

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⁷ See DANIEL A. MAZMANIAN & JEANNE NIENABER, CAN ORGANIZATIONS CHANGE? (1979) (documenting the Army Corps of Engineers’ resistance to modifying its historical mission of building large water-resource development projects in light of the environmental imperatives of NEPA); SERGE TAYLOR, MAKING BEAURACRACIES THINK (1984) (providing a case study of how NEPA was implemented and resisted in the Forest Service and Army Corps of Engineers); JEANNE NIENABER CLARKE & DANIEL C. MCCOOL, STAKING OUT THE TERRAIN, (2D ED. 1996) (explaining that agency’s may not easily integrate the functions and purposes of new legislation even when it accords with their own original mission).

⁸ Congress can create *intra*-statutory conflicts by giving an agency conflicting duties at the outset, and then expecting the agency to make difficult trade-offs. Indeed, one can argue that the Federal Power Act of 1920 originally charged FERC with responsibility to license hydropower and to protect non-power values. Still, our study emphasizes the secondary mandates that came later in the form of environmental laws.

⁹ We use this term purposely, to convey the idea that agencies might seek to influence each other in order to achieve a desired outcome, much the same as private lobbyists might try to pressure legislators and bureaucrats to achieve

amending the agency's enabling law. In so doing, Congress transforms an *inter*-statute conflict that the agency can ignore, into an *intra*-statute one that it cannot.¹⁰

We base our argument on an empirical study of FERC's licensing decisions from 1983-1998. The period covers the years immediately prior to, and following, the passage in 1986 of the Electrical Consumer's Protection Act (ECPA). What difference did this legislation make? It specifically strengthened the ability of resource management agencies to influence FERC in the hydropower licensing process. ECPA solidified and enhanced the leverage of these agencies, which served as a mechanism for forcing FERC to pay attention to the environmental concerns it had long ignored.

Indeed, ECPA requires FERC to do many of the things that it was in theory already obligated to do under both the Federal Power Act (FPA) and existing environmental laws, but didn't. For example, ECPA explicitly requires that FERC consult federal and state fish and wildlife agencies in order to assess, and then mitigate, the adverse environmental impact of proposed dams.¹¹ FERC was already obligated to do this pursuant to the Fish and Wildlife Coordination Act (FWCA), yet did so rather half-heartedly at best.¹² To take another example, ECPA explicitly requires FERC to give "equal consideration" in its licensing decisions to non-power values, such as the protection of fish and wildlife resources. Though ECPA made this requirement explicit, FERC was at least arguably bound to do this already, under the FPA as it

their desired legislative or administrative ends. Of course the two are different. Yet, while sister agencies may not use all of the same means of exerting influence as private lobbyists (e.g., campaign contributions), they certainly use *some* of the same means (e.g., providing useful information; threatening litigation; threatening to go over the head of the agency to members of Congress or higher ups in the White House). In response to some readers who have flinched at our use of the term to describe government activity, we should clarify that we do not mean to suggest that the activity is somehow perjorative. Nor do we mean to describe agencies as lobbyists before *Congress*. Rather, we focus on the role that agencies play in lobbying their sister agencies for particular outcomes.

¹⁰ We are quick to note that the form Congress uses to enhance inter-agency lobbying need not be the one we observe—that is, Congress could accomplish the same thing without amending the enabling law itself—yet, amending the agency's enabling statute may prove optimal for a variety of reasons. *See infra* note and accompanying text.

¹¹ All dams have a significant impact on the environment, by altering flow rates and water quality. Inadequate stream flow due to impounded water can destroy fish habitat and spawning areas, and can adversely affect upstream and downstream passage. For example, dams in the Pacific Northwest have had a devastating impact on anadromous fish runs (e.g., Chinook, coho and sockeye salmon) because these fish use the Columbia River and its tributaries to migrate to the Pacific Ocean, where they mature and then return upstream to spawn. Dams interfere with fish migration in both directions. Without fish ladders and other forms of assistance, adult fish may not survive the upstream migration. Similarly, juvenile fish migrating downstream may be killed when passing through turbines, or may abandon migration prematurely due to the challenges of passing around the dam or because of insufficient stream flow (due to impounded water). Dams also adversely affect habitat by increasing water temperatures, reducing oxygen levels, contributing to erosion and degrading water quality. *See* Sarah C. Richardson, Note, *The Changing Political Landscape of Hydropower Project Relicensing* 25 WM. & MARY ENVTL. L. & POL'Y REV. 499, 508 (2000); Melissa Powell, Note, *A Case Study for Stakeholders: An Alternative to Traditional Hydroelectric Relicensing* 18 ENERGY L. J. 405, 406 (1997). The environmental conditions imposed on dam licensees can help to ameliorate these effects. Conditions can include requirements for minimum stream flows, bank enhancements to control erosion, and limitations on effluent to maintain water quality.

¹² *See* 16 U.S.C. 661 *et seq.*

had been construed by courts¹³ and pursuant to the FWCA as it had been amended by Congress. Yet FERC had, for a variety of reasons, long resisted doing so.¹⁴

ECPA also reinforced the need for FERC to comply with a suite of environmental statutes passed half a century after the FPA, which FERC had either ignored or adhered to only minimally. These include the National Environmental Policy Act (NEPA), which requires federal agencies to produce environmental impact statements for proposed major actions that would significantly affect the environment, and the Endangered Species Act (ESA), which requires federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service to ensure dams will not jeopardize endangered species.¹⁵ At least until the mid-

¹³ Section 10(a) of the FPA of 1920 requires FERC to grant licenses on the determination that the project will be “best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses including recreational purposes....” It seems unlikely, given the political context of the time that Congress intended, even with this broad “public interest” standard, that nonpower values would receive equal consideration along with development values.

¹⁴In 1934, Congress passed the Fish and Wildlife Coordination Act requiring in § 3(b) that the federal government consult the Bureau of Fisheries prior to the construction of any public or private dam, and to make “due and adequate provision, if economically practicable” for the mitigation of fish life to the upper waters of the dam via fish passage facilities such as fish ladders. *See* Fish and Wildlife coordination Act, March 10, 1934, Ch. 55, 48 Stat. 401, 16 U.S.C. §§661 to 666c (S.2529; P.L. 73-121). The Act was amended four times between 1934 and 1965. Each time Congress required the government to do more to consider the impact of hydropower on fish and wildlife, and each time Congress strengthened the hand of other agencies in the dam licensing process. In 1948, Congress specifically required in §5(a) that in managing facilities on a particular stretch of the Mississippi River, federal government agencies are “hereby directed to give full consideration and recognition to the needs of fish and other wildlife resources.” *See* June 19, 1948, Ch. 528, 62 Stat. 497, 16 U.S.C. §665a (H.R. 2721; P.L. 80-697). And in 1958 Congress explicitly amended the Act for the purpose of ensuring that, “wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development.” *See* § 2. Congress required that permitting agencies consult with state and federal wildlife agencies “with a view to the conservation of wildlife resources by preventing loss of and damages to them” in connection with water development. *See* §2a, August 12, 1958, P.L. 85-624, 72 Stat.563, 16 U.S.C. §661 to 664 (H.R.13138). In addition, the Pacific Northwest Power Planning and Conservation Act applies specifically to the Columbia River system and imposes substantive rather than procedural obligations. It requires federal agencies responsible for managing hydropower projects on the Columbia system to, among other things, “adequately protect, mitigate, and enhance fish and wildlife...in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed...” 16 U.S.C. §839b(h)(11)(A)(i).

¹⁵ *See e.g.*, The Wild and Scenic Rivers Act, 1968, § 7(a) which applies specifically to FERC, limiting the agency’s authority to license or grant an exemption to any project that is on or directly affects a river designated or proposed as part of the national system, as determined the Secretaries of Interior or Agriculture. WSRA currently protects over 11,000 miles of 158 rivers. WSRA “study rivers” are designated by the Secretary of Interior or Agriculture as under consideration for inclusion in the national system. FERC is barred from issuing hydropower licenses for 3-years after a river is designated “study river,” and for additional 3-years after completion of Presidential reports required by study program. Rivers may ultimately become part of the national system by one of two routes: through an act of Congress (federally funded), or by State designation (State funded). A proposed project need not adversely affect a designated river or study river to fall under the WSRA § 7(a) license prohibition; it need only be found to “directly affect” a designated or proposed river within the national system. WSRA § 7(a) does not, however, “preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish [its] scenic, recreational, and fish and wildlife values.” *See also*, the Clean Water Act (1972) § 401, which, unlike WSRA generally applies to all federal agencies. Under §401, projects that require a federal permit or license must first receive state certification *See also*, The National Historic Preservation Act of 1966, § 106 also generally applies to all federal agencies,

1980s, FERC largely disregarded these laws, along with the FWCA, the CWA, the Wild and Scenic Rivers Act (WSRA), and the National Historic Preservation Act (NHPA), prioritizing instead its original pro-power and, therefore, pro-licensing mission.¹⁶ By reinforcing these mandates, ECPA sought to halt FERC's systematic bias against environmental values.

ECPA not only reiterated FERC's obligations, however, it added to them.¹⁷ For example, to the extent that FERC did consider non-power values in licensing decisions, it had always required license applicants themselves to consult with state and federal resource agencies before submitting their applications to FERC. ECPA altered this, subtly but importantly, by placing the burden of such consultation directly on the FERC.¹⁸ Second, ECPA required, for the first time, that FERC establish a dispute resolution process to mediate its disagreements with other agencies.¹⁹ Third, the statute demanded that FERC provide an explanation whenever it chose not to implement the recommendations of other agencies, something it had not been directly obligated to do before.²⁰ And finally, ECPA forced FERC to engage in monitoring to ensure that dam operators complied with any environmental conditions, something that had been done only rather ineffectively in the past.²¹ While all of these impositions might be viewed as procedural, they were clearly intended to have a substantive effect.²²

including FERC. Prior to licensing any project, the federal agency must assess the effects of its licensing on historic properties and provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment. The Advisory Council's regulations implementing § 106 provide for agreements among federal agencies, State Historic Preservation Officers, and the Advisory Council as a means of assessing effects on historic properties and affording the Advisory Council its opportunity to comment. If the proposed action involves a large or complex project, or includes a class of undertakings that would otherwise require numerous individual requests for comments, a Programmatic Agreement (PA) may be used. A PA that addresses the effects of a hydroelectric project on historic properties (sometimes also referred to as "cultural resources") is one means of providing that comment opportunity to the Advisory Council. Properties of traditional religious and cultural importance to an Indian tribe (traditional cultural properties) are considered historic properties if they meet the eligibility criteria for inclusion on the National Register of Historic Places, and agencies must consult with Indian tribes attaching religious or cultural significance to those properties when carrying out their § 106 responsibilities. There is scant mention of the NHPA in federal circuit court decisions addressing a party's appeal of a FERC licensing decision. There appears to be a very low threshold for satisfying NHPA requirements, and there is no mandate for FERC to ameliorate all potentially adverse effects that a proposed hydropower project may have on identified cultural resources. FERC has historically treated these provisions as having a limited reach and sees them as aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for, or otherwise control.

¹⁶ On FERC's record regarding fish and wildlife, see Bodi & Erdheim, *Swimming Upstream: FERC's Failure to Protect Anadromous Fish*, 13 *ECOLOGY L. Q.* 7 (1986). See also, Blumm, *A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing*, 10 *HARV. ENVTL. L. REV.* 1 (1986).

¹⁷ Among other things, ECPA did the following: 1) established new procedures for processing relicensing applications to increase opportunities for agencies, interested organizations, and the public to participate in the process; 2) required FERC to base its recommendations for mitigating adverse effects of a licensing/relicensing proposal on the recommendations of federal and state resource managing agencies and to negotiate with the agencies if disagreements occur; and 3) required FERC to give the same level of consideration to the environment, recreation, fish and wildlife, and other non-power values that are given to power and development objectives in making a licensing/relicensing decision.

¹⁸ Prior to ECPA's passage, FERC regulations required that license applicants consult with resource agencies prior to submitting their final application to FERC. For more on the process, see *infra*, note and accompanying text.

¹⁹ Section 10 (j).

²⁰ *Id.*

²¹ Section 12 of ECPA requires the agency to monitor and investigate compliance with each license and permit, and provides the Commission with the authority to revoke licenses and issue penalties for non-compliance. For a critique

We argue that these changes made a significant difference because, collectively, they facilitated and intensified inter-agency lobbying.²³ Taken together, the data tell us that agencies do lobby one another; that Congress can make a difference by intensifying that lobbying; and that additional lobbying alters agency outcomes.

We base this conclusion on six key findings. First, our data show that, on average, FERC imposed more than twice the environmental conditions in dam re-licensing proceedings after 1990, a date by which we can be certain that ECPA had been fully implemented.²⁴ Second, our data show that public resource agencies representing environmental concerns intervened in FERC re-licensing decisions more frequently than any other groups during the period we studied (both before and after ECPA was passed).²⁵ This tells us nothing in particular about the effect of ECPA, but it does tell us that agencies are active players in the decision making processes of sister agencies.

Third, by comparing public agency participation before and after ECPA, we show that public agency participation *increased* after the statute was passed, climbing steadily over time.

of FERC's monitoring and compliance investigations prior to ECPA, *see* John D. Echeverria, "The Electric Consumer's Protection Act of 1986" 8 Energy L. J. 61, 81-2(1987).

²² The difference between a substantive mandate and a procedural one can be less than clear. By substantive, commentators usually mean requirements that more directly affect agency outcomes, either by dictating them or constraining discretion to a greater extent. By procedural, they typically mean requirements that agencies must follow, but which, once followed, do not necessarily affect the outcome—like a box the agency has to check before doing what it wants to do anyway. For example, if a statute requires an agency to set safety standards within a given range, or without regard to cost, such burdens might fairly be considered substantive. In these two examples, respectively, if an agency sets a standard outside the specified range, or sets a lower standard because of cost considerations, the agency risks being overturned. The statute in these two cases seems to constrain the agency's actual choice. However, if a statute requires an agency merely to consult another agency before rendering a decision, commentators often consider this to be a procedural requirement. Now, if the agency skips the consultation it might still be overturned, but as long as it does take that step, the agency's ultimate decision remains in its discretion. Ultimately, the agency will prevail if it dots its procedural "i"s and crosses its procedural "t"s. However, procedural impositions of this kind can in practice affect substantive outcomes (e.g., a consultation could affect the agency's ultimate decision by providing it with new information, or the consultation might reveal information that gives a reviewing court reason to doubt the rationality of the agency's ultimate decision). And judges can make procedural obligations seem more substantive, just as they can neutralize seemingly substantive impositions by making them seem merely procedural (see e.g., *Vermont Yankee v. NRDC* holding that NEPA is a procedural statute despite cases suggesting otherwise). So while we invoke the two categories of procedural and substantive as if they are conceptually meaningful, in practice they can often amount to the same thing.

²³ We chose the 1990 date for purposes of comparing public agency intervention rates, and numbers of environmental conditions imposed, before and after ECPA because we believe that after 1990 we can be certain that ECPA was fully implemented. To some extent, ECPA must have influenced FERC even sooner. Indeed, some of our interviews suggest that the agency shifted course internally very quickly because it was already modifying its approach to licensing. And we are aware that regulations often lag behind internal change. Still, the regulations formally implementing ECPA took several years to produce, with the most important of them promulgated in 1988 and 1999. To be safe then, we assumed that ECPA was fully implemented only once those key rules were promulgated. Even if we had chosen an earlier date, however, our conclusion would be the same. The time trend shows a gradual increase in the effect of ECPA from 1986 on.

²⁴ The number of conditions jumped from an average of about five to an average of twelve conditions.

²⁵ Indeed, our data show that public agencies comprised 60% of all intervenors in FERC proceedings over this time.

After 1990, by which the statute can be assumed to be fully operational, the rates of participation jumped even more: the average participation of public intervenors in FERC licensing proceedings increased 300 per cent after this date, from an average of 3.2 public intervenors to an average of 10.5.²⁶ While participation rates for all intervenors increased post-ECPA, none spiked as much as the public agencies.²⁷

Fourth, when more agencies intervene, outcomes change. Over the period we studied, public intervenors had a significant impact on the number of environmental conditions imposed by FERC: for every additional federal agency that attended a relicensing hearing, FERC imposed an average of three-quarters of an additional environmental condition on the license; for every additional state agency, FERC imposed an average of approximately one third of an additional environmental condition. The average cumulative effect of federal and state agency participation in FERC licensing proceedings is approximately four extra environmental conditions.

Fifth, the data show that the *magnitude* of the influence each of these public agencies exerted on environmental conditions increased, almost doubling on average after ECPA was fully implemented. Finally, when the increase in agency intervention is considered together with the increase in the magnitude of their influence, we find that public agencies were associated with 60 percent of all environmental conditions following the full implementation ECPA, which is up from about 20 percent in the period prior to ECPA's full implementation.

In short, on the basis of these findings, we hypothesize that inter-agency lobbying occurs, that it affects outcomes, and that Congress can intervene to intensify it.

Our example illustrates how Congress can encourage an agency to internalize the secondary mandates it has long ignored by augmenting the influence of *other* agencies on decision making. In doing so, Congress can reinforce authority that the outside agencies may already, to some extent, possess, but which for a variety of reasons have failed to use effectively.

Now one might ask: why should the result we observe be surprising? After all, as an independent agency, FERC is a creature of Congress. By passing ECPA, Congress finally ordered FERC to care about the environment, effectively saying, "we really mean it this time." Surely it makes sense for the agency to change its ways. But what interests us is that Congress does this in a particular way—by reinforcing and invigorating outside agencies as lobbyists. And this succeeds where other attempts to influence the agency—via the imposition of separate environmental mandates in statutes like NEPA—have failed. Thus, inter-agency lobbying may be part of the solution to the problem of the reluctant agency.

To be clear, we do not claim that ECPA was solely responsible for overcoming FERC's reluctance to comply with its secondary environmental mandates. Indeed, the agency was already, in the early eighties, taking these obligations more seriously because of a combination of events, including significant losses in the courts. As one FERC insider put it, "we were getting

²⁶ This represents the biggest absolute increase of any types of intervenors in FERC's licensing decisions.

²⁷ The participation by all intervenors rose from an average of about five to an average of almost sixteen--a tripling in participation.

whacked, repeatedly.” Indeed, the number of environmental conditions per license had already begun to rise when ECPA was passed.²⁸ Still, we argue, passing ECPA made a difference. The statute clearly intensified the underlying inter-agency dynamic, encouraging agencies to be even more aggressive than they might otherwise have been, and locking in their influence in perpetuity. Our data show that the boost ECPA gave to fish and wildlife agencies had a meaningful effect, independent of the other influences that also encouraged FERC to change.

With our argument, we hope to enrich a number of debates. First, we contribute to the literature on political control of delegated discretion. We see inter-agency lobbying as a form of indirect or “lateral” legislative control over agencies, which supplements other forms of legislative control.²⁹ Our argument, therefore, builds on and extends the literature in political science regarding congressional control of delegated authority.³⁰ While scholars have studied both ex ante statutory constraints and ex post oversight as potential instruments of control, they have paid little attention to the prospect of relying on agencies. Scholars have argued that Congress uses a variety of tools to control agency policymaking: by limiting agency discretion through specific language; by structuring agencies in ways that favor particular outcomes; by adding administrative procedures that are meant to “stack the deck”³¹ in favor of certain interest groups; by structuring the agency in such a way that it automatically favors particular interests; by engaging in direct oversight by congressional committees; and by enabling interest groups to alert Congress to agency misbehavior by pulling “fire alarms.”³² Given this expansive literature,

²⁸ See Cornelius M. Kerwin, *Transforming Regulation: A Case Study of Hydropower Licensing*, Pub. Admin. Rev. 91, 95 (1990) (showing recommendations per license climbing from 4.5 in 1980 to a high of 9.4 in 1984 and back to 6.7 in 1986 for an average of 6.2 per license over a six year period). As Kerwin points out, this was likely a response to a number of influences, including successful litigation that limited the agency’s capacious reach and unmitigated focus on power benefits; successful lobbying by environmental interests; and, to some extent, anticipation of ECPA itself. See discussion at *infra* note, and accompanying text.

²⁹ For a study of congressional efforts at imposing “structure” and “process” controls on FERC ex ante, which similarly focuses on FERC licensing decisions see, David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies* 28 J. L. STUD. 413 (1999). Spence concludes that the effectiveness of such controls, including ECPA, varies: certain kinds of changes appear to influence agency decisions while others do not. See also, Jeffrey S. Hill and James Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J. L. ECON. & ORG. 373 (1991) (concluding that the Public Utilities Regulatory Policies Act did not on balance make FERC more responsive to environmental concerns).

³⁰ See, e.g., Matthew McCubbins & Talbot Page, “A Theory of Congressional Delegation,” in CONGRESS: STRUCTURE AND POLICY (McCubbins and Terry Sullivan, eds. 1987).

³¹ See generally, McCubbins et al., *Administrative Procedures as Instruments of Political Control*, *Journal of Law, Economics and Organization* (1987); Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law and Procedures: An Introduction*, *JOURNAL OF LAW, ECONOMICS AND ORGANIZATION* (1992); Barry Weingast & Mark Moran, *Bureaucratic Discretion or Congressional Control? Policy-Making by the FTC*, *JOURNAL OF POLITICAL ECONOMY* 91(1983); Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight*. Brookings Institution, 1990.

³² See Matthew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI 165 (1984) (hereinafter McCubbins and Schwartz, *Police Patrols*). It should be noted that claims about the extent to which such attempts are successful are hotly debated. Legal scholars in particular have resisted claims by political scientists that Congress can effectively manipulate structures and procedures in such ways. See e.g., Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J. L. Econ. & Org. 267 (1990) (arguing that procedures enable not only the “winning coalition” of interest groups to influence agencies but also open the agency to the influence of the losers);

the notion that Congress might seek to alter an agency's behavior by imposing an additional mandate is not new. What is new is the finding that effective legislative control can take the form of inter-agency lobbying.³³

We contribute, as well, to the literature on interest group theory, by drawing on the literature about political control described above. In forcing a reluctant agency to internalize secondary mandates by strengthening the hand of other agencies, Congress re-structures the interest group market. We show that public agencies are the most frequent participant in FERC proceedings, that their presence increased following ECPA, and that this caused a jump in environmental conditions. Our result about the impact of inter-agency lobbying is surprising given traditional interest group theory, which suggests that private interest groups, such as license applicants, are best situated to dominate agency outcomes. We show, by contrast, that public agencies not only participate in this market, but can effectively dominate it.

Political science already tells us that Congress can intervene to adjust the existing interest group market in which participants compete to influence agencies. Yet the focus of most of this work is private actors and non-profits; much of interest group theory seeks to explain why some of these groups have more influence than others. We add a missing ingredient to the mix by suggesting that public agencies may be effective participants in this market, and that Congress can intervene to embolden them, just as Congress might intervene to empower private organizations.³⁴

In addition, our argument builds a bridge between the two literatures just described—theories of legislative control and theories of interest group influence—by positing inter-agency lobbying as a potential mechanism for counter-balancing private influence over agencies, a phenomenon we call “unstacking the deck.” If public agencies are effective at influencing sister agencies, and if Congress can intervene to make them more so, perhaps these agencies will give voice to a set of interests that might balance or neutralize the influence of private (usually well-financed and industry dominated), groups. Traditional public choice theory would predict that private groups representing concentrated costs and benefits would prevail in this setting. Yet such predictions might need to be modified to account for the impact of public agencies.

Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J. L. Econ. & Org. 93 (1992).

³³ We are not the first to note the important role that federal and state agencies play in FERC licensing. *See* Kerwin, *Transforming Regulation*, *supra*, note _ (concluding that, among other forces, input from fish and wildlife agencies during the eighties led FERC to adopt more environmental conditions). Kerwin's data and argument are generally congruent with ours though his focus is not on the inter-agency process as an instrument of congressional control, and he provides no empirical test of ECPA's impact on this dynamic. Kerwin's argument focuses instead on how FERC used traditional regulatory tools, including rulemaking and negotiation, to enlist outside agencies in its licensing process, demonstrating both adaptiveness and responsiveness.

³⁴ Spence, *supra*, does not discuss inter-agency lobbying *per se*, but he does note that Congress may purposely choose to give power to one agency over another based on what Congress knows about agency policy preferences. He calls this form of structural control a “distribution of power” type of control. This line of thinking suggests that Congress should be able to anticipate how empowering one agency might serve to check the discretion of another.

We expect our argument to interest both political scientists and legal scholars. A great deal of inter-agency communication occurs in the administrative state, most of it informal and relatively invisible. Yet scholars know relatively little about it. For the most part, scholars complain about the *ad hoc* and inconsistent nature of inter-agency coordination, treating it as a problem for the executive branch to fix, presumably through better management. Usually this takes the form of calls for more inter-agency task forces or greater centralization through oversight by the Office of Management and Budget (OMB).³⁵ But our understanding of inter-agency lobbying as a form of lateral legislative control puts the “problem” of inter-agency “conflict” into a new light.

First, inter-agency conflict can be productive. Agencies with specialized expertise in one area can press their counterparts to modify decisions in another. Because agencies represent different constituencies, and adhere to different statutory mandates, the inter-agency process may serve as an important vehicle for interest mediation in the policy process. It may also function as a relatively transparent mechanism for coordinating activity across multiple agencies with conflicting interests.

Second, our account suggests that inter-agency coordination need not be a uniquely executive branch pre-occupation. Our study shows that Congress can strengthen inter-agency lobbying for congressional purposes. There are a number of reasons why Congress may do so, which we explain.³⁶

Surprisingly, there is a dearth of academic literature analyzing the extent to which inter-agency dynamics affect agency outcomes, and how those dynamics might be manipulated by both congressional and executive principals. Our study takes a small step in the direction of exploring this phenomenon. Among other things, it prompts us to ask, what are the implications of inter-agency lobbying for separation of powers concerns? In our example, Congress enhances the authority of some agencies to help it control the discretion of another agency. But this strategy may yield some degree of control over the inter-agency process to the president, who can intervene to determine how the lobbying process will play out.³⁷ The separation of powers implications may be especially significant in cases such as ours, where the lobbying agencies are executive, and the lobbied agencies independent, since the prospects for gains in executive over congressional power may be greater in these cases, assuming that Congress typically has greater leverage over independent agencies than it does over executive ones.³⁸

³⁵ Sometimes it results in structural changes within the executive branch to help the President coordinate policy e.g., President Clinton’s creation of a National Economic Council with representatives from Treasury, the Council of Economic Advisors, Labor, and others agencies to coordinate the administration’s economic policy.

³⁶ See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (hereinafter DeShazo and Freeman, *Congressional Competition*).

³⁷ Through a variety of tools—many informal—the president may encourage agencies to stand down when they might otherwise intervene to press their statutory interests, or persuade them to intervene more vigorously when they might otherwise see no need to do so.

³⁸ This assumption may be unfounded, however. As many commentators have noted, independents may, in practice behave very much like executive agencies even when not legally obligated to do so. For example, independents often try to comply with executive orders. There appears to be some variation among the independents over how

In addition, our point about inter-agency lobbying should interest scholars of administrative law and statutory interpretation for at least two reasons. As Mashaw, Strauss and other have pointed out, debates over statutory interpretation focus almost exclusively on judicial approaches to interpretation, ignoring the process of *agency* interpretation³⁹ By raising the problem of the “reluctant” agency faced with multiple mandates, we focus much needed attention on how agencies resolve potential conflicts and determine their statutory missions. While we do not undertake here to demonstrate how agencies interpret statutes in practice (something that would require its own empirical study),⁴⁰ or to recommend how they should do so (which would call for an elaborate normative argument), our study illustrates some of the difficulties agencies encounter as they wrestle with multiple tasks assigned to them over time, including the need to answer to multiple principals.⁴¹

Second, scholars of administrative law and statutory interpretation should be interested in inter-agency lobbying because it may offer a new rationale for judicial deference. The fact that multiple agencies have been meaningfully involved in the exercise of discretion could be seen as additional rationale for deferring to the lead agency’s decision. In cases of disagreement among agencies, however, there may be good reasons for the reviewing court to defer to the views of the external agencies, assuming they have been specifically empowered by Congress to play a consultative role in the lead agency’s decision making process.⁴²

The Article proceeds as follows. In Part II, we explain the factors that contribute to the problem of agency reluctance, using our FERC case study as an illustration. In Part III, we explain the range of tools that might force agencies to comply with secondary mandates imposed on them via separate statutes passed after their enabling legislation, but we note that in the FERC example, each of these tools proved limited. We then explain the events leading up to ECPA, and the difference the statute made, introducing our argument that it was effective because it facilitated inter-agency lobbying. In Part IV, we present our empirical data, which supports our argument about inter-agency lobbying. Finally, in Part V, we discuss the theoretical implications of our findings, including our contribution to the literatures on legislative control and interest group theory. We also speculate that inter-agency lobbying may have separation of powers implications, and that it might affect judicial review of agency decisionmaking.

truly independent they are in practice, and this depends on history, culture and personality as much as agency structure.

³⁹ See Jerry L. Mashaw, *Agency Statutory Interpretation*, ISSUES IN LEGAL SCHOLARSHIP, DYNAMIC STATUTORY INTERPRETATION, Article 9 (2002). Available at <http://www.bepress.com/ils/iss3/art9>.

⁴⁰ See Mashaw, *supra* at, suggesting different approaches one might use but simply does a survey of rulemakings at EPA and HHS to do a quick impressionistic study.

⁴¹ See Mashaw, *supra* note at, referring to the fact that agencies must respond to multiple principals as one among many examples of how agencies differ from courts in their interpretive approach. .

⁴² We thank Lois Schiffer, former Assistant Attorney General, Environment and Natural Resources Division of Department of Justice, for raising this possibility.

II. FERC AS A RELUCTANT AGENCY

In theory, all statutory mandates are created equal. That is, when Congress instructs an agency to do something (set health standards; allocate disability benefits; gather intelligence), and even when it tells an agency to do two conflicting things at once, the agency must comply. This is true regardless of when and how such mandates are passed; whether they are assigned to the agency in its organic statute or later on; and whether they come in the form of an amendment to the organic statute or in separate pieces of legislation.

So if Congress creates a Federal Power Commission in 1920 to license projects best adapted to “the most comprehensive plan designed to improve the waterway...,”⁴³ and then in the 1960s tells the agency to consult with federal and state agencies to ensure that dam licensing does not jeopardize endangered species or compromise state water quality standards, the agency must do it all. And in theory, congressional, executive and judicial oversight, are designed to ensure agency compliance. Potential sanctions for agency failure to fulfill statutory mandates include political embarrassment at congressional hearings, vulnerability to auditing and investigation, the threat of losing appropriations, and even elimination of the agency. The President can punish non-compliant agencies as well, through his appointment and removal powers, his budget proposals, and by resorting to informal political sanctions. And of course, interest groups can challenge, and courts can invalidate, unlawful agency action.

How then, did FERC come largely to ignore both the non-power concerns in the FPA (e.g., recreation), and the specifically environmental mandates that came along later in a variety of environmental laws? In this section, we explain the factors that we suspect operated to encourage FERC’s disregard for these additional mandates. In short, we find a systematic failure, across all principals, to force the agency to comply with its non-power mandates.

A. The Enabling Act

To a significant extent, the original statute itself determined FERC’s attitude toward licensing. The Federal Water Power Act was passed to centralize authority over licensing hydropower specifically in order to promote it. Prior to passage of the Act, the Secretaries of War, Agriculture and Interior each had authority to issue licenses for hydroelectric projects on lands under their respective jurisdiction, which led to confusion and inefficiency. The FPA centralized authority in a single agency, the Federal Power Commission, which was to consist of the three Secretaries. Ten years later Congress reorganized the agency to consist of five commissioners independent of the three Secretaries. Congress soon after passed the Federal Power Act of 1935, encompassing most of the FWPA.⁴⁴ In 1977 the agency’s powers were reassigned to the Federal Energy Regulatory Commission.⁴⁵

⁴³ See FPA §10(a), 16 U.S.C. § 803(a) (2003).

⁴⁴ 16 U.S.C. § 791a (1994).

⁴⁵ Department of Energy Organization Act, 1977.

The original statutory mission assigned to the FPC was unmistakably pro-power.⁴⁶ The Commission was given broad authority to grant licenses for fifty years to non-federal public and private entities for the construction and operation of hydroelectric facilities.⁴⁷ The purpose of the law was to facilitate power production. Prior to the FPA's enactment, Congress authorized hydropower licenses on a case by case basis. President Theodore Roosevelt sought to provide more determinate licensing, and to centralize control in the federal government. After he vetoed dam related legislation that did not meet these conditions, Congress finally acted in accordance with his wishes.⁴⁸

The FPA issued hundreds of licenses in these early years, the majority of the total licenses it would ultimately approve.⁴⁹ During this period, and through the Second World War, there was a strong national imperative to generate power with virtually no consideration of recreational or environmental consequences.⁵⁰ The 30s and 40s was known as the "Big Dam" era,⁵¹ during which the Commission was concerned solely with developing hydropower to meet the needs of a growing economy.⁵² Dams were identified with progress and American technological ingenuity.⁵³ At the time, relatively little was known about the harm dams could

⁴⁶ For an early history of the FPC and a description of its organization, see, Milton Conover, *The Federal Power Commission*, Brookings, 1923 at 1-2. The FPC's "function is to exercise general administrative control over all water-power sites...located on the navigable waters, on the public lands, and on the reservations of the United States...the commission is required to issue permits and licenses for the purpose of utilizing dams, reservoirs, power houses, water conduits, transmission lines, and kindred projects. It must regulate, under certain conditions, the financial operations of water power industries including the rates of service. It must make physical valuations of the properties of power enterprises, determine the character of their services, and control the operation of power projects. The significance of these functions is obviated by the almost inexhaustible immensity of the water-power resources of the United States, the growing practice of substituting water-power for steam power, and by the constant appearance of new inventions for the further utilization of water-power in industry....The seemingly unlimited uses of hydroelectric power in industry and in the rising standards of living indicates the undetermined volume of future water-power permits that must be granted by the Federal Power Commission, and the vast amount of industrial regulation that they may have to exercise."

⁴⁷ "Licenses are issued to citizens and municipalities for the purpose of constructing and maintaining water-power plants, and all of the necessary accessories thereto. They are also issued for the construction of project works that may aid in the improvement of navigation....Practically all of the preliminary work that is required on the applications for permits, licenses...is performed through the Engineering Division and the engineering forces of the Departments of War, Interior, and Agriculture." Conover, *supra* note, at 69-70.

⁴⁸ "The primary emphasis in 1920 was hydropower development..." See H.R. Rep. 99-507, 1986 U.S.C.C.A.N. 2498. "Congress generally embodied President Roosevelt's views..." *Id.* at 2499. Roosevelt insisted that the public retain control of the waterways and that license terms be limited to fifty years. "Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at the time." See H.R. Rep. No. 99-507, at 11(1986), reprinted in 1986 U.S. C.C.A.N. 2496, 2498, as quoted in

⁴⁹ See Kerwin, *supra* note at

⁵⁰ See Charles S. Sensiba, *Who's In Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing* 70 U. COLO. L. REV. 603, 619 (1999). See Richardson, *supra* note at 502.

⁵¹ Richardson, *supra* note at 500.

⁵² See Sensiba, *supra* note. Hydropower licensing did slow somewhat in the late forties when, as Kerwin points out, more efficient forms of energy became commercially feasible. See Kerwin, *supra* at 92. But licensing would pick up again during the energy crisis of the seventies. See *infra* note and accompanying text.

⁵³ *Id.*

cause to aquatic resources and habitat.⁵⁴ Environmental values had yet to take hold in the public consciousness, let alone in legislation.

In section 10(a) of the FWPA, Congress gave the FPC fairly unbounded discretion to grant hydropower licenses. The only limitation on that discretion comes in the form of an instruction to prefer projects “best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses including recreational purposes....” Conceivably, this broad language might encompass environmental values (in both recreational purposes and in the larger category of beneficial public uses), and eventually courts held that it did. Still, both the legislative history and political context of the time make clear that recreational or environmental values were not meant to compete with the overriding need for licensing dams to help satisfy the nation’s energy needs.

It is not, therefore, surprising that FERC resisted considering recreational and other beneficial public uses referred to in § 10(a). At its inception, the FPC seems to have viewed the question of whether to consider non-power values under the FPA as entirely within its discretion.⁵⁵ The agency viewed itself as the sole authority over hydropower, having been delegated extremely broad discretion by Congress.

This attitude would take root in FERC and shape its culture for the next fifty years. And although the hydropower industry originally resisted Congress’ attempt to centralize licensing authority (because it feared that the free-wheeling laissez faire state attitude toward resource exploitation might be curbed by the federal government), it came around to support FERC.⁵⁶ Though power had been centralized and the terms of licenses limited to fifty years, FERC adopted a pro-exploitation attitude, bestowing licenses upon virtually all applicants. A statute that gave the agency broad discretion and that enfranchised a clientele of powerful licensees would contribute to the agency’s later reluctance in the face of environmental mandates.

B. Culture and Expertise

As they interpret their statutory mandates, agencies tend to internalize a particular mission, develop an agency culture, and cultivate a unique expertise. FERC is certainly not the first agency to adopt a sense of mission that endures over time; many agencies develop strong identities in their early years that prove resilient to change.⁵⁷ In our example, FERC clearly

⁵⁴ See *supra* note 11 on the harms dams can cause.

⁵⁵ “The statutory delegation of authority to the FERC to determine how a public resource will be used drew intellectual support from a progressive-era faith in expertise and rational scientific management....As an independent commission, the FERC would determine what the public interest was in dam licensing decisions and could do so based on sound technical studies and insulated from political pressure.” Stephenson, *supra*, note at 484.

⁵⁶ Richardson, *supra* note at 504.

⁵⁷ See Mazmanian and Nienabauer, *Organizations, supra*, note 7 (documenting the Army Corps of Engineers’ resistance to modifying its historical mission of building large water-resource development projects in light of the environmental imperatives of NEPA. Note also contemporary accounts of FBI “cops” and CIA “spooks” in descriptions of the different cultures of the two law enforcement agencies. See MARK RIEBLING, WEDGE: FROM

developed a pro-power culture. This was reflected in, and reinforced by, its internal organizational structure and its dependence on professional engineers. The agency's early organization consisted of three sparsely populated divisions—operations, legal and accounting—along with a more substantial Engineering Division of sixteen men, plus a number of field personnel who were all engineers from other federal departments. The agency contained no division devoted to fisheries or recreational interests.⁵⁸ Not surprisingly, the engineers' priority was dam safety, not the conservation of fish and wildlife or the protection of recreational and aesthetic values. From the start, engineers were to play a key role in the licensing process, and their dominance persisted until the mid-eighties.⁵⁹

Because of its deeply rooted pro-power identity, and the role played internally by engineers, FERC never developed the expertise necessary to competently analyze the non-power effects of its licensing program. Yet while hydropower was, and still is, considered an inexpensive and relatively clean source of energy⁶⁰ dams have a significant adverse impact on the environment, by altering flow rates and water quality. Inadequate stream flow due to impounded water can destroy fish habitat and spawning areas, and can adversely affect upstream and downstream fish passage.⁶¹ At this time, however, there were no wildlife or fish biologists in the agency to introduce the possibility of mitigating the adverse effects of dams; no one to counter the views of the engineers; and no one to communicate effectively with their professional counterparts in the resource agencies.

In particular, FERC had no familiarity with the kind of comprehensive and longer term planning necessary to properly protect environmental resources. Indeed, the agency had never conducted a general planning process for its licensing program. As with many New Deal agencies, it proceeded to make policy on a case by case—license to license. This incremental approach would prove especially damaging to riverine resources in cases where multiple dams were licensed in the same river basin.⁶² FERC simply avoided confronting the cumulative effect of its hydropower projects. Developing this expertise would have been culturally wrenching for the agency, and also enormously costly.

PEARL HARBOR TO 9/11--HOW THE SECRET WAR BETWEEN THE FBI AND CIA HAS ENDANGERED NATIONAL SECURITY (2002).

⁵⁸ See Conover, *supra* note at 75-82

⁵⁹ Early annual reports from the FPC contain descriptions of the agency's structure, and later reports contain organization charts, all of which indicate that even as the Commission grew larger and increasingly complex over the years, its original structure remained basically the same, with law, engineering and administration/accounting at the center. In an annual report from 1937, the Commission is divided into a Bureau of Administration, a Bureau of Law and a Bureau of Engineering and a Bureau of Finance and Accounts. See Seventeenth Annual Report of the Federal Power Commission, 1937. On an organization chart from the 1963 annual report one sees an Office of Economics, an Office of Accounting and Finance, a Bureau of Power and a Bureau of Natural Gas. See Forty-Third Annual Report of the Federal Power Commission, 1964.

⁶⁰ See Kurt Stephenson, *Taking Nature Into Account: Observations About the Changing Role of Analysis and Negotiation in Hydropower Relicensing* 25 Wm. & Mary Env'tl. L. & Pol'y Rev. 473, 474 (2000). Hydropower is a relatively cheap, renewable form of energy, and it does not produce the emissions associated with fossil fuels (such as particulates, ozone precursors and greenhouse gases).

⁶¹ See *supra* note at.

⁶² See Kerwin, *supra* note at.

In the absence of strong signals to change, FERC understandably stuck with its pro-power orientation. In the first sixty years of its existence, it denied a proposed license only once.⁶³ The agency became known as a friend of the hydro-power industry and was derided for “never having met a dam it didn’t like.”⁶⁴ Its attitude toward environmental concerns was, if not openly hostile, then consistently obstructionist. It appears to have viewed resource agencies with management responsibilities for fish and wildlife primarily as irritants.⁶⁵ The agency simply believed that it was substituting for Congress in determining the conditions under which to issue licenses. Although specific sections of the FPA appeared to grant resource agencies the power to impose mandatory conditions on certain licenses (on Indian Reservations, for example),⁶⁶ FERC read these provisions of the Act as if they were merely advisory. “Talk about adopting a cultural bias when reading the law,” remarks one insider, “FERC thought it was clearly in charge.”⁶⁷ In short, the original pro-power statutory mandate, and the political environment in which the agency was created powerfully shaped the agency’s sense of mission.

C. Oversight

1. Congressional Oversight

Of course, a statute as drafted by the enacting majority does not by itself determine agency behavior. Statutory language is subject to interpretation, and agencies interpret their statutory mandates in light of congressional, executive and judicial oversight.⁶⁸ The three principals frequently send agencies mixed messages, and these messages can shift over time. Agencies must be attentive as new administrations take office; as control of Congress changes hands; as membership of congressional committees shifts; and as judicial thinking evolves. A failure of agency responsiveness can lead to repeated interventions by one or more of these principals, an erosion of support for the agency, and, ultimately, the imposition of constraints that limit the agency’s jurisdiction and discretion.

It would have been risky, therefore, for FERC to have ignored or minimized non-power concerns for recreation and fisheries if congressional oversight had not consistently signaled the agency that power mattered most. In our example, FERC clearly received a pro-power message from its congressional overseers in its first few decades of very active licensing, through the post war period, and into the late seventies.

⁶³ See Richardson, *supra* note at 509.

⁶⁴ Interview with Ralph Cavanagh, Senior Attorney, NRDC, March 9, 2005, on file with author.

⁶⁵ FERC did occasionally take environmental values into account, but as Spence points out, this was rare. The agency invalidated the Namekagon Hydro Company’s license application in 1953 on environmental grounds, because the project would be located on a scenic river. See Spence, *supra* note at n.39 and accompanying text.

⁶⁶ See § 4 (e) which requires in part that licenses, “shall be subject to and contain 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 resource...” 16 U.S.C. §787(e) (1994).

⁶⁷ Interview with Mark Robinson, Director, Office of Energy Projects, FERC, March 11, 2005, on file with author.

⁶⁸ See Mashaw, *supra*, note 41, on the subject of statutory interpretation by agencies and how it is likely to differ from statutory interpretation by courts.

Even as the environmental movement took shape and Congress began passing environmental legislation in the early seventies, oversight over FERC did not suddenly shift. Congress may have been sending the country a pro-environmental message by passing NEPA in 1970, the modern CAA in 1970, the modern CWA in 1972, and the ESA in 1973, but the oversight committees were continuing to sending FERC a pro-power one.⁶⁹ Indeed, right on the heels of passing the most significant federal environmental legislation in history, Congress passed a spate of energy related legislation between 1978 and 1980 that sought to respond to the energy crisis by reducing the nation's dependence on foreign oil. In 1978, Congress passed the Public Utilities Regulatory Policy Act (PURPA), which created incentives for small private firms to undertake hydropower projects.⁷⁰ The Act guaranteed to these applicants very favorable rates of return, offered attractive depreciation rates for tax purposes, and granted exemptions from time-consuming licensing procedures for smaller projects.⁷¹ Congress also amended other statutes such as the Energy Security Act⁷² and the Crude Oil Windfall Profits Act, to include additional incentives.⁷³

A biologist working at FERC at the time described the package of incentives as a “license to print money” for hydropower.⁷⁴ So profitable did Congress make it for operators to build hydropower projects, and so eagerly did the applicants descend upon FERC for new licenses, that the period would become known as the “hydro power gold rush.”⁷⁵ Notably, the legislation had opened licensing to a new class of smaller, private applicants that were largely unfamiliar with the licensing process. These applicants had no experience consulting with fish and wildlife agencies, and were not inclined to look favorably on the imposition of expensive environmental conditions that would cut into their anticipated profits.⁷⁶

Thus, after a period of relative quiet, when virtually all of the original fifty year licenses were still in effect, and only the occasional new application came across the agency's desk, the energy legislation of the late seventies spurred a boom in licensing activity at FERC; the agency received thousands of hydropower preliminary permit and development applications. The pace of licensing was intense, and the agency all but ignored environmental concerns.⁷⁷ Legislative oversight was sending FERC a clear pro-power message.

⁶⁹ Our data suggests that even as late as 1986, and after ECPA was passed, members of the Senate Committee on Energy and Natural Resources maintained their pro-power orientation. The effect of each additional member on the oversight committee who is from the jurisdiction of license applicant, reduces the number of environmental conditions imposed on licenses.

⁷⁰Public Utilities Regulatory Policy Act of 1978, Pub. L. No. 95-617.

⁷¹ See George C. O'Connor, *Will the Hydropower Program Revive in the 90s?* 14 Energy L. J. 127, 129-132 (1993) (describing the terms of PURPA, and its effects).

16 U.S.C. § 824a-3 (1982). See also regulations in 18 C.F.R. §292.101 (1986).

⁷² 42 U.S.C. § 737 (1988).

26 U.S.C. § 4994 (1982) (incorporating 10 C.F.R. § 212.54(c) (1979)) (repealed 1988).

⁷⁴ Robinson interview, *supra* notenote.

⁷⁵ See Echeverria, *supra*, note at 76, quoting Representative Wyden in 123 CONG. REC. H8962.

⁷⁶ Cavanaugh interview, *supra* note.

⁷⁷ O'Connor, *supra*, note at 130, claiming that 1471 exemption applications were filed between 1980 and 1985 and that the Commission issued 775 exemptions during that time. “During that same period there were approximately 5, 609 preliminary permits and 439 licenses issued by the Commission.”

2. Executive Oversight

The role played by executive oversight in the story of the reluctant agency is equally complicated. In theory, executive oversight should work to force agency compliance with all applicable statutory mandates, at least for executive agencies. In practice, however, just as we have seen with legislative oversight, executive oversight may instead encourage agencies to comply with their primary mandate alone, or confuse them with mixed messages.

And the situation is more complicated still when it comes to presidential oversight of independent agencies like FERC. The President's power over the independent commissions is constrained. For example, the president has limited appointment and removal power over board members or commissioners, though typically he has the power to select the Chair.⁷⁸ Still, the White House can exert informal political pressure on members of independent agencies and the president can influence such agencies indirectly by threatening to veto legislation moving through Congress.

To the extent that executive oversight has made an impact on FERC, the signaling has been consistently pro-power. It was a president, Teddy Roosevelt, who initially championed the centralization of authority over hydropower in a federal agency in order to harness a cheap and plentiful source of energy and subsequent presidents have followed suit.⁷⁹ Through the Progressive era and the Second World War, successive presidents seemed to be in lock step with Congress: the nation needed power, and the domestic economic benefits of licensing public and private dams were substantial. In the ensuing years, as hydro-power became a relatively less important source of energy, FERC's hydro power program slipped under the radar,⁸⁰ but administrations seemed largely to leave FERC alone. Without providing a comprehensive history of the period, it seems fair to say that no White House through the Nixon administration sought to pressure FERC, directly or indirectly, to address fisheries and other non-power effects of hydropower licensing.

One might have expected this to change in the seventies, as environmental values took hold in legislation. President Nixon created the EPA in 1970 and marketed himself to voters as the environmental President. In the early and middle part of the decade, Congress passed—and succeeding presidents signed—a raft of federal environmental legislation.⁸¹ However, the late seventies also brought the energy crisis, which renewed interest in domestic energy production and in developing alternatives to oil. The Carter administration supported congressional efforts to expand the market for hydropower by encouraging licensing of smaller private applicants.

⁷⁸ This is perhaps more significant for FERC than other agencies; among other things, the large staff works exclusively for the Chair.

⁷⁹ See Connor, *supra* note

⁸⁰ Interview with Bill Massey, former FERC Commissioner, March 13, 2005, on file with author, noting that hydropower plays a relatively small role compared to natural gas and electricity regulation in FERC's portfolio and that he was surprised at the intensity of interest in hydropower among members of the Senate Committee on Energy and Natural Resources during his confirmation hearings.

⁸¹ CAA in 1970; CWA in 1972; ESA in 1973; RCRA in 1976; CAA amendments in 1977.

President Carter signed PURPA and the related legislation that ushered in the hydro gold rush. The administration clearly supported the revitalization of FERC's licensing process.

Yet, even though there are no signs of high level pressure on FERC to accommodate environmental concerns during this period, line staff in executive branch agencies like the U.S. Fish and Wildlife Service (USFS), the National Marine Fisheries Service (NMFS) and the Forest Service (USFS) tried, in a less visible way, to force FERC to take its environmental obligations seriously. The fish and wildlife agencies intervened in FERC's licensing process and joined lawsuits challenging several specific licenses. This suggests either that the Carter administration was sending mixed messages to FERC while trying to balance energy and environmental concerns, or that these resource agencies were able to act somewhat independently of direct White House control.

Even during the Reagan administration, which was notoriously anti-environmental,⁸² the staff of the federal fish and wildlife agencies continued to pressure FERC. Kerwin speculates that because the administration was so clearly de-regulatory and pro-power, the agencies did this rather quietly, preferring to negotiate with FERC so as not to arouse the ire of the White House.⁸³ Yet the agencies quite visibly continued to intervene in licensing proceedings and they participated in (although did not lead) lawsuits challenging the agency in court.⁸⁴ Why would the Reagan administration, which had cut the budgets of these agencies and taken such public anti-environmental stances, tolerate this inter-agency pressure? Perhaps they were unaware of it, as Kerwin suggests. Perhaps perfect control over these employees simply eluded the administration because of high transaction and opportunity costs. Perhaps career agency staff defied instructions out of frustration with the administration's agenda. Whatever the reason, it does seem that in this case agency staff maintained some decisional independence from the political appointees at the top.

Despite the activity of the fish and wildlife agencies, however, executive pressure on FERC was never public, consistent or vigorous enough to counteract FERC's strong pro-power

⁸² The Reagan administration took office with an anti-regulatory agenda and promptly sought to weaken environmental regulations. See Marc K. Landy, Marc J. Roberts & Stephen R. Thomas, *THE ENVIRONMENTAL PROTECTION AGENCY*, 1994 at 245-279. The administration appointed Ann Gorsuch, an outspoken critic of environmental regulation, as the EPA administrator. Upon accepting the appointment, Ms. Gorsuch said "I took the job because I wanted to bring a politically conservative approach to solving the management problems of environmental protection." On Gorsuch's watch, EPA personnel were reduced by 23 percent and referrals to the Justice Department dropped by half. She fired the head of the Superfund and RCRA programs and refused to comply with Congress's demand that she turn over internal Agency documents dealing with Superfund enforcement. She soon after resigned in controversy in 1983. See Richard J. Lazarus, *THE MAKING OF ENVIRONMENTAL LAW*, 2005 at 99-106. Many commentators who were at EPA or working in environmental organizations during this period have referred to it as "a dark time at the agency." See e.g., interview with Peter Wyckoff, former Assistant GC at EPA; Bill Pederson, former Assistant General Counsel at EPA; David Doniger, Senior attorney, Natural Resources Defense Council.

⁸³ Kerwin, *supra* note.

⁸⁴ Kerwin argues that the agencies preferred quiet negotiation during this period to direct opposition to energy on the theory that this would escape the scrutiny of the White House. Yet it is hard to believe that the Reagan administration wouldn't be aware of even this softer negotiation strategy, and wouldn't be inclined to put a stop to it if it could. See Kerwin, *supra* note at 97.

disposition. Of course, as an independent agency, FERC might have ignored White House signals had they been sent, but the Commissioners would have at least paid a political price for doing so. And if the issue were salient enough, the White House might have gone over the heads of both the Commission and Congress to the public. This never happened, however. FERC was, as a result, left to pursue its pro-power agenda well into the eighties, while giving its environmental mandates relatively short shrift.

3. *Judicial Oversight*

Judicial review might also help to force reluctant agencies to take their secondary mandates seriously. As with other forms of oversight, however, judicial review has its limitations. In our example, FERC was able to remain a reluctant agency for a long time, despite mounting pressure from the federal courts.

First, judicial review emerged as a potential limitation on FERC only in the late sixties. There are at least three reasons why. First, until then, the environmental movement had not developed sufficiently to create organized interest groups capable of maintaining litigation campaigns. Second, there were few opportunities or incentives for plaintiffs to sue FERC for failure to comply with environmental mandates given the relative dearth of environmental laws that provided them with causes of action. And finally, those entities with the most relevant expertise and the greatest chance of influencing FERC were federal fish and wildlife agencies, which preferred not to sue other federal agencies.⁸⁵

Things began to change in 1965 with the landmark *Scenic Hudson* case, in which a federal circuit court invalidated FERC's issuance of a license and held, for the first time, at the behest of environmental groups, that "recreational purposes" in § 10(a) of the FPA encompassed "conservation of natural resources, maintenance of natural beauty and the preservation of historic sites."⁸⁶ The Court held that FERC was obligated to consider the environmental issues raised by the intervenors, including fish and wildlife agencies and tribes, *prior* to issuing the license rather than monitoring effects afterwards, which was the agency's practice.

After *Scenic Hudson*, a variety of plaintiffs including tribes, environmental groups and federal and state wildlife agencies, brought lawsuits challenging virtually every aspect of FERC's licensing process. Only two years later, in *Udall vs. Federal Power Commission*,⁸⁷ the Supreme Court made clear that section 10 of the FPA obligated FERC to consider and protect fish and wildlife in its licensing decisions. FERC was admonished for failing to consider all "relevant factors" beyond the need for power, including recreation, fish and wildlife, flood

⁸⁵ While such suits are technically lawful, they tend to be frowned upon, especially among executive agencies. The Department of Justice has a policy of declining referrals of cases in which one executive agency seeks to sue another. The rationale usually offered for this is the theory of the Unitary Executive embodied in Article II of the Constitution, which is thought to prohibit such internecine litigation. The situation between executive agencies and independents is more complicated, however. These lawsuits do occur, but they are still uncommon. In most of the lawsuits challenging FERC's licensing, federal fish and wildlife agencies are intervenors.

⁸⁶ See *Scenic Hudson v. FPC*, 354 F.2d 608 (2d Cir. 1965) at 614.

⁸⁷ 387 US 428 (1967).

control, and irrigation. The Court held that FERC was obligated to do this earlier, more explicitly and more carefully.

One would think that such high profile lawsuits would have prompted FERC to modify its behavior, even if Congress and the executive branch had remained largely pro-power in their oversight. But FERC initially acted as if *Scenic Hudson* had never happened. And it continued to drag its feet throughout the seventies as the losses mounted. Indeed, FERC refused even to issue regulations regarding how the agency would implement NEPA. The Council on Environmental Quality (CEQ) had required all federal agencies to develop a compliance plan, but FERC took the position that as an independent agency, it was not subject to the CEQ guidelines.⁸⁸

This is neither unique nor surprising; such behavior is characteristic of the reluctant agency. Judicial oversight may, over time, affect agency behavior, but not many single cases—and not even many handfuls of cases—can be relied upon to dramatically alter agency behavior; certainly not quickly. This is because agencies can engage in a strategy of trench warfare in which they simply defy the court's latest holding until another plaintiff seeks judicial review of another decision.⁸⁹ Where agencies issue one license at a time, in separate proceedings, plaintiffs must be prepared to challenge each one in turn, a time consuming and expensive prospect. By contrast, a successful challenge to an agency rule can have more far-reaching effects.

Perhaps more importantly, most agency decisions, most of the time, go unchallenged. And of those that are the subject of a lawsuit, most settle. High profile cases in which a federal appellate court, or the United States Supreme Court, invalidates federal agency action are, relatively speaking (and despite the impression one gets from casebooks in law school) few and far between. Beyond this, under the most plaintiff friendly circumstances, legal challenges take years, cost money, and can be dragged out, all of which buys the agency time to continue its non-compliance.

In the case of FERC, the agency very likely resisted judicial oversight for a combination of related and reinforcing reasons. Agency officials who had internalized the pro-power culture and adopted the original pro-power mandate seem genuinely to have believed that environmental obligations were some other agency's responsibility. Engineers, in particular, may have resisted and resented the expertise of the differently trained staff from other agencies; their own internal environmental staff remained embarrassingly small through the seventies. FERC was likely also responding to interest group pressure from licensees and applicants who felt that taking account of the environmental effects of hydropower licensing would slow the licensing process and raise the costs of hydro-power generation, something the country could ill afford. And of course, any impetus in the direction of change would have been nipped in the bud by the energy crisis, and the ensuing legislation encouraging licensing.

⁸⁸ Robinson interview, *supra*; Interview with Dinah Bear, Chief Counsel for the CEQ, October, 2003, on file with author.

⁸⁹ In these cases, the courts are invalidating a single license and not an agency rule, so they only apply to the instant case. While it is true that a reviewing court can, in so doing, indicate what is legally required of the agency the next time around, until the next license is challenged it remains valid.

4. *Reluctant Principals?*

To a significant extent then, the reluctant agency is the logical result of reluctant principals. That is, until ECPA passed, neither Congress nor the executive seemed terribly interested in forcing FERC to comply with its secondary mandates, and this might have emboldened FERC to shrug off the only principal pressing for compliance—the courts.⁹⁰

Sometimes, however, principals are not reluctant so much as they are unclear or inconsistent. For example, it can be hard to discern precisely what Congress wants of agencies; Congress is hardly crystal clear in its legislative pronouncements and it is not a monolith when it comes to overseeing delegated power. As we have argued elsewhere, an agency that in theory answers to “Congress” really answers to multiple principals within Congress, including the original enacting majority (which expresses its wishes via statutory language and legislative history); later oversight committees (which may, acting as a group, have their own priorities); individual members of oversight committees (whose influence can be separated out from committee averages); and members-at-large (who may also exert influence).⁹¹ Matters become even more complicated in the case of multiple statutes passed over time by different enacting majorities, overseen by a variety of committees whose membership changes.

A Congress this fractured is beset by problems of coordination. It may, as a result, send agencies mixed messages.⁹² For example, members of oversight committees may not seek to enforce the terms of a statute passed by an earlier enacting majority. Instead the committee may advance its own interpretation. But even committee oversight is not stable—average committee preferences have been shown to change over time.⁹³ Moreover, *average* committee preferences tell only part of the story. Individual committee members may pressure agencies to arrive at outcomes that further their own electoral interests. And of course, members-at-large can intervene in agency processes as well.⁹⁴

When one considers the temporal dimension of the legislative process (which forces agencies to keep pace with changes in both legislation and committee oversight over time), with the complexities of a fractured Congress (which forces agencies to respond to multiple messages from competing committees and members-at-large), it would not be surprising to discover that an agency receives mixed messages. Inevitably, some statutory mandates will be overseen with

⁹⁰ Congress was, of course, sending mixed messages during this period, which undoubtedly reflected competing views among members and committees with divergent interests and priorities. On the one hand, Congress continued to pass environmental legislation aimed at cleaning up the nation’s air, water and land, and at protecting endangered species. In almost all of these statutes, Congress included citizen suits to enable private interest groups access to the federal court. On the other hand, congressional oversight of FERC specifically seemed to be pro-energy.

⁹¹ See DeShazo and Freeman, *Congressional Competition*, *supra* note 36.

⁹²*Id.*

⁹³ See Weingast and Moran, *supra* note 31.

⁹⁴ One might think that congressional minorities are brought under control by either the floor or by parties. Of course this occurs to some extent but there are obstacles to perfect control. Compare Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990) (discussing theory of perfect control) and DeShazo and Freeman, *Congressional Competition*, *supra* note 36 at note 168 and accompanying text (critiquing theory of imperfect control).

greater vigor than others. Agencies may feel that the safest course, when faced with new mandates and conflicting messages, is to stick with its original mission. At least one can imagine an agency doing so until instructed—decisively—to change.

Executive branch oversight can be equally complicated. In theory, a president's job is to execute all the laws equally. In practice, of course, this is impossible. For reasons of ideology and practicality, administrations always choose among competing priorities. This necessarily results in under-implementation of some statutory mandates compared to others. And, to the extent legally permissible, administrations will interpret statutes in line with their political agendas. There is nothing unusual or untoward about this. One administration may favor vigorous enforcement of environmental laws even if it slows energy production, or uphold civil rights even at the expense of national security concerns, while another may do the opposite. An administration may intentionally allow an agency to ignore some of its obligations if doing so furthers more important priorities. Conceivably, in some cases, an administration will simply do nothing in the face of such conflicts. It may prefer not to resolve conflicts between competing statutory mandates because of the transaction and opportunity costs of doing so. In such instances, the agency will be left to sort out how to address competing priorities; political appointees might step in only to resolve the most politically salient matters.

What if an administration were not a reluctant principal, however? Suppose the President wanted to hold an agency to account for some long ignored mandates. Wouldn't it be relatively easy to do so? The answer is yes, presumably, at least for executive agencies, if the issue were at the top of the President's agenda. But with less salient matters (and this includes the overwhelming majority of the federal government's day to day implementation of statutes) executive control over executive agencies, like congressional control over delegated power, is imperfect, and there are opportunity costs to focusing on any one problem over another.

In theory, the President could simply direct an executive agency to comply with all of its legal obligations.⁹⁵ But even if the White House could bring to heel the political appointees at the top of the agency, career staff with longer and greater experience, access to more information and support from both congressional allies and the press, could frustrate their objectives.⁹⁶ Moreover, the analysis above applies to executive branch agencies where the President ostensibly exerts significant top-down control. Attempting to influence independent commissions like FERC would prove even more challenging.

For different reasons, judicial review is also an imperfect oversight tool. Unlike Congress and the executive branch, courts deal only reactively and episodically with agency behavior. Unlike Congress, they cannot oversee agency decision-making on a continuous basis and must wait for litigants to bring cases to them.⁹⁷ Whereas the executive and legislative branches can

⁹⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

⁹⁶ Why would an agency resist executive efforts at control? For the reasons suggested above—because of the agency's entrenched sense of mission, or because the agency is under-resourced and/or overtasked already—or perhaps because congressional oversight and interest group pressure is pushing the agency in the opposite direction.

⁹⁷ Note exception of structural injunction used in class actions involving civil rights but not available in standard administrative review cases.

signal both executive and independent agencies in myriad ways, the only tool of oversight at the disposal of courts is invalidation or remand of agency action, both rather blunt instruments.⁹⁸ And agencies can simply treat a ruling in one federal Circuit as inapplicable in others, unless and until the Supreme Court rules on the matter.

There are, in addition, many obstacles to litigation that limit its availability as an effective oversight tool. As in private law, the transaction costs of public law litigation are sufficiently high that many meritorious cases may never be brought; litigation is slow and cumbersome so it can take many years for a lawsuit to have any impact on an agency's practices; and many victories in the arena of administrative law are procedural, and therefore somewhat limited, in the sense that the agency can fairly easily fix its mistake and still achieve its original desired end. And, as we noted earlier, agencies sometimes simply defy judicial decisions. This is not to say that courts are entirely, or even mostly, ineffective in overseeing agency behavior, or that "procedural" victories are not meaningful. The point is simply that judicial review, like legislative and executive oversight, is an imperfect source of control over the reluctant agency.

In the case of FERC's licensing program, all of these limitations were in evidence. The triggers for judicial review were limited until the passage of environmental legislation obligating FERC to observe numerous procedures and enabling citizen groups to access federal courts more readily. Moreover, even when environmental groups, tribes and agencies began to aggressively file suit, the total number of cases was still relatively few.⁹⁹ Of those that succeeded, the reviewing courts generally held that FERC had committed procedural blunders rather than substantive errors that would have made the granting of a license arbitrary or capricious on the merits. Though FERC's exclusive authority over licensing was eroding, the full impact of this prospect would take awhile to settle on the Commission.

In light of this history, what explains the reluctant agency? There are, it seems, a number of reasons why agencies may stay wed to a primary mandate while ignoring secondary ones. These include the original statutory mandate, which elevates some goals and enfranchises some interest groups over others; the agency's sense of mission, its culture, and the professional orientation and expertise of agency staff (all of which flow from the original mandate but can take on a life of their own); the obstacles to coordination and fractured committee structure within Congress that prevent perfect oversight as mandates multiply; the obstacles to direct control by an administration over executive but especially independent agencies, which prevent perfect oversight as mandates multiply; and the inherent limitations of reactive, episodic and largely procedural judicial review. Presumably, both legislative and executive principals could overcome some of their control and coordination problems, but only at the expense of high transaction and opportunity costs. Courts are even more limited in overcoming the limitations of judicial review. While we cannot say definitively which of these influences has the greatest effect, it seems that their combination helps to explain how reluctant agencies remain reluctant over time.

⁹⁸ Of course, rules may be reviewed prior to enforcement. *See Heckler v. Chaney*, 470 U.S. 821 (1985) (pre-enforcement review available when matter ripe and waiting until enforcement would cause hardship).

⁹⁹ Cite collected data on lawsuits.

III. RELUCTANCE OVERCOME

FERC's reluctance to comply with its secondary mandates did begin to erode in 1984-85, just prior to when ECPA was passed. And though we will later argue that passing ECPA made a significant difference to FERC's licensing practices, it would be an overstatement to suggest that ECPA, alone and suddenly, caused FERC to change course. It appears that FERC was "softened up" for ECPA and already moving in the direction of taking its secondary mandates more seriously. Why?

The answer lies in the partial victories and accretive progress in the story told above: all of the determinants of agency behavior began to shift at least somewhat toward pressing FERC to attend to its environmental mandates, even if no single principal acted forcefully or decisively on its own. First, as noted earlier, Congress had passed, in the late sixties and early seventies, a spate of new or significantly amended environmental statutes. Some of these laws imposed environmentally related obligations specifically on FERC (e.g., the WSRA) while others generally applied to all federal agencies including FERC (e.g., NEPA). Some of the new statutory mandates were "procedural" (e.g., to consult with the Fish and Wildlife Service over endangered species or file environmental impact statements) while some were "substantive" in that they had more potential to restrict FERC's decision making power (e.g., FERC could not issue licenses without state certification under the CWA). In at least one statute (the amended Fish and Wildlife Coordination Act),¹⁰⁰ Congress specifically tried to boost inter-agency coordination by requiring FERC to consult with fish and wildlife agencies prior to issuing licenses, and by demanding that non-developmental values be given "equal consideration" with power concerns.¹⁰¹

These statutes opened the door to inter-agency lobbying. Even before ECPA was passed, the resource agencies attempted to influence license applicants in the informal consulting process, and in many instances formally intervened to try to influence FERC. Most of these laws also contained citizen suit provisions that enabled environmental groups to access the federal

¹⁰⁰ 16 U.S.C. §§ 661-666c (1988). The FWCA requires all federal agencies involved with management of natural resources to consult with federal and state wildlife agencies before authorizing projects and to give "equal consideration" to wildlife conservation in water development projects.

¹⁰¹ See *supra* note. The conference report accompanying the legislation emphasizes that "equal consideration" is necessary so that FERC will give non-developmental concerns "the same level of reflection as it does to power and other developmental objectives....equal consideration must be viewed as a standard, both procedural and substantive, that cannot be satisfied by mere consultation or by deferring consideration and imposition of environmental conditions until after licensing. Protection, mitigation, and enhancement of fish and wildlife, energy conservation, and the protection of recreational opportunities are a potential cost of doing business for hydropower projects." See Joint Explanatory Statement of the Committee of Conference, 132 Cong. Rec. H 8776 (Sept. 30, 1986). FERC's most recent handbook on hydropower licensing says that environmental values include, "fish and wildlife resources, including their spawning grounds and habitat, visual resources, cultural resources, recreational opportunities, and other aspects of environmental quality" and developmental values include, "power generation, irrigation, flood control, and water supply." See Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing, FERC, April, 2004 at 1-2.

courts more readily.¹⁰² FERC itself may have ignored or resisted these mandates initially, but in passing them Congress equipped third parties to hold FERC to account.

In addition, Congress had laid the groundwork for weakening FERC's exclusive jurisdiction over the licensing process¹⁰³ by carving out a right for federal and state resource agencies to impose mandatory conditions on FERC licenses under certain circumstances. Section 4(e) of the FPA authorized the Secretary of Interior to condition licenses on Indian reservations;¹⁰⁴ section 18 afforded resource agencies the power to require fish passages.¹⁰⁵ The courts ultimately interpreted these powers fairly broadly, cutting back FERC's exclusive authority.

Third, the intense pace of licensing and the apparent disregard for environmental concerns during the "hydro gold rush" led to a backlash. The agency's behavior was in part a result of being overwhelmed by applications: its staff and budget were too small to handle the onslaught.¹⁰⁶ In order to manage, the Commission took steps to shorten review times and issue licenses quickly.¹⁰⁷ This, the Commission thought, was what Congress wanted. But in its effort to deliver results, FERC was careless: exemptions were widely granted in perpetuity with no restrictions; too many projects were licensed too quickly; the agency engaged in precious little monitoring; and there was widespread non-compliance with the few conditions that were imposed.¹⁰⁸

Simply put, the agency made some "stupid decisions that enraged a lot of people."¹⁰⁹ For example, FERC declared that concrete structures less than ten feet in height were simply not dams, which had the practical effect of exempting many projects from the licensing process altogether.¹¹⁰ The agency also determined that fish only swim in one direction, an interpretive move that had the effect of limiting the ability of resource agencies to require dam operators to install fish passages.¹¹¹ Both of these decisions would ultimately land FERC in the federal courts, where it would lose resoundingly.

¹⁰² Of course even without citizen suit provisions, litigants could avail themselves of the Administrative Procedure Act section 10 in order to get standing. This was the route for bringing challenges under NEPA, which contained no citizen suit provision.

¹⁰³ FERC believed it had this power because the FPA required it to engage in a comprehensive balancing process, and because Supreme Court precedent supported FERC's primacy. *See* *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946) (holding that the FPA preempts state imposed conditions on licensing).

¹⁰⁴ *See* 16 U.S.C. §787(e) 1994. Licenses "shall be subject to and contain such conditions shall deem necessary for the adequate protection and utilization of such resource..."

¹⁰⁵ *See* 16 U.S.C. §

¹⁰⁶ "We were used to getting about 5 applications per year, and we were happy to have something to work on! All of a sudden there were hundreds of applications to deal with, and the staff was teeny. There were about ten environmental people." Robinson interview, *supra* note.

¹⁰⁷ O'Connor, *supra* note at 132.

¹⁰⁸ O'Connor, *supra* note at 131.

¹⁰⁹ Robinson interview, *supra* note.

¹¹⁰ *See* O'Connor, "*supra* note at 130 (1993).

¹¹¹ Need cite.

It is hard to overstate the effect of this overzealous response.¹¹² The agency's pell mell approach to licensing drew the attention of environmental organizations across the country, most of which had never before looked closely, or comprehensively, at FERC's licensing practices.¹¹³ Up to this point, the Commission's self-understanding was, as described earlier, rather imperious, and it had stirred up opposition only episodically and locally. The agency carried this attitude into the hydro rush period with disastrous consequences. No longer was FERC asserting absolute power in one isolated instance after another; now it was doing so in the context of a national program affecting many rivers simultaneously across the country. "People began to sit up and take notice, and they asked, 'Who do you think you are?'"¹¹⁴ The hydro rush had finally brought FERC's licensing program to national attention.

Suddenly, public interest groups like American Rivers¹¹⁵ and Trout Unlimited¹¹⁶ were scrutinizing the agency. Up to this point, no organized environmental interest groups had been committed to monitoring FERC's hydropower program.¹¹⁷ "Public interest groups had engaged FERC in episodic siting fights but then they would go away. As a result, FERC Commissioners never had systematic contact with the groups. The groups that had organized around particular conflicts had no interest in FERC as an institution. And it was difficult to interest funders in monitoring FERC. There was no intervenor compensation."¹¹⁸

In the mid-eighties, everything coalesced: three of the most important cases that FERC lost, *Tulalip Tribes of Wasington v. FERC*,¹¹⁹ *Yakima Tribes v. FERC*¹²⁰ and *Escondido v. La Jolla*,¹²¹ were decided in 1984; in that same year and again in 1985, the Senate Energy and Natural Resources Committee held hearings on FERC's licensing process; and following the hearings, Congress required that GAO monitor the licensing program.¹²² Not surprisingly, the developments in one arena seemed to influence and reinforce developments in another. Successful lawsuits lent support to the wildlife agencies in their dealings with FERC, and provided ammunition for interest groups pressing Congress to act. Of course, all of this provided momentum for the passage of ECPA in 1986.¹²³

The most important of the judicial decisions mentioned above, *Escondido*, interpreted the mandatory conditioning power in section 4(e) of the FPA to cut back FERC's asserted authority

¹¹² Robinson Interview, *supra* note.

¹¹³ Cavanaugh interview, *supra* note; Robinson interview, *supra* note.

¹¹⁴ Robinson Interview, *supra* note.

¹¹⁵ See <http://www. www.americanrivers.org>.

¹¹⁶ See <http://www.tu.org>.

¹¹⁷ Robinson interview, *supra* note

¹¹⁸ Cavanaugh interview, *supra* note.

¹¹⁹ 732 F.2d 1451 (9th Cir. 1984).

¹²⁰ 746 F.2d 466 (9th Cir.1984) (holding that FERC is obligated under §10(a) to consider "all beneficial public uses" of waterways and required that consideration to occur *prior to* issuing a license).

¹²¹ 467 U.S. 1267 (1984)

¹²² This history is recounted in Kerwin, *supra* note at 94

¹²³ See H.R. REP. 99-507 at 2507-8 noting that, even after a raft of major court decisions "coming down on all phases of the Commission's hydropower program...for giving inadequate treatment to environmental values....Just last month, again the Commission was reversed by the courts...for failure to give adequate consideration to fisheries and failure to prepare an environmental assessment or impact statement."

over licensing. The Supreme Court required FERC to accept modification conditions deemed necessary by the Secretary of Interior on public lands and reservations. The Court held that FERC had no discretion to determine the reasonableness of these modifications: “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.”¹²⁴ This dealt a stunning blow to the agency’s position that it alone had licensing discretion. It forced the agency to recognize that the mandatory conditioning power accorded other agencies in the Act would not be read as “advisory.”¹²⁵

The cumulative effect of this and the other cases in the federal courts was beginning to take a toll. Robinson recalls that the lawyers in the agency came to the program staff responsible for licensing and told them, “You’re killing us.”¹²⁶ A tipping point had been reached. And the agency began to change.

By 1983, the Commission had already begun to develop a basin-wide approach to licensing, in which it would consider the cumulative effects of multiple projects, something it had long resisted.¹²⁷ In 1984, it issued a Directive to Staff to prepare a plan for this new methodology, which became known as the “Cluster Impact Assessment Procedure” (CIAP).¹²⁸ FERC also began to make greater efforts to encourage applicants to consult early in the licensing process with fish and wildlife agencies, as well as tribes and states, in order to integrate environmental and recreational considerations on the front end.¹²⁹ The agency also began to develop a new policy with regard to NEPA compliance (after years of saying it was not bound by CEQ policy) though it was not finalized until 1988.¹³⁰

¹²⁴ Escondido, *supra* note at 777.

¹²⁵ Robinson interview, *supra* note “We realized, we were no longer in charge.”

¹²⁶ Robinson interview, *supra* note.

¹²⁷ See O’Connor, *supra* note at 133-4; Robinson interview, *supra* note.

¹²⁸ *Id.*

¹²⁹ Kerwin notes that as early as 1982, the agency had issued detailed regulations and guidance documents advising applicants to consult with fish and wildlife agencies prior to filing an application. Though the agency still left the consultation burden to applicants, the agency had begun, as Kerwin puts it, to emphasize negotiation and consensus to a greater extent in the licensing process. See 47 Fed. Reg. 38506. The consultation requirements were elaborate. For example, applicants first had to contact all appropriate agencies and provide them with detailed maps, designs and environmental analyses along with streamflow information. At the second stage, the applicant had to perform a variety of studies in order to determine the impact of the project. The third stage required ongoing service and consultation with resource agencies regarding exemptions or modifications. The purpose of the rules was to encourage consultation with a wide variety of agencies early and throughout the licensing process. See s.4.38. Kerwin suggests that as ECPA was passed, the licensing process had already come to “rely on a strategy of negotiation between agencies and applicants.” See also Notice of Proposed Rulemaking 49 Fed. Reg. 8009 (Mar. 5, 1984) at 8015, emphasizing that process of applicant consultation with fish and wildlife agencies must be more than opportunities to simply provide the agencies information. “An effort should be made to determine the types of studies agencies consider necessary, the information they have in hand, their concerns about the environmental consequences of the proposed project and their ideas about mitigation of adverse impacts or enhancement of resources. Areas of disagreement between applicants and agencies should be isolated, and an attempt to resolve conflicts should be made. Applicants should be aware that if they and the agencies cannot resolve their conflicts, the Commission will give weight to the agencies expertise....”

¹³⁰ See O’Connor, *supra* note at 134.

Finally, and perhaps most importantly, the agency restructured itself. It created a licensing office headed by the former Director of the Environmental Division, and an Office of Environmental Compliance headed by environmental experts rather than civil engineers.¹³¹ These internal changes represented a “cultural tsunami” says Robinson, a limnologist on the tiny environmental staff at the time, and now Director of the Office of Energy Projects. “We were plucked into management of the hydro program and told we were in charge. Hirings of wildlife biologists, fish biologists and other environmental staff went way up. Before this, we couldn’t even use terms like ‘instream flow’ and we couldn’t talk about NEPA because the Commission’s position was that it didn’t apply! In 83-84 there was a tectonic shift.”¹³²

At the same time, Congress had swung into action. The initial impetus for ECPA was not the environmental aspects of the licensing process, it should be noted, but other features of the FPA, most importantly the preference for public over private license applicants in the license renewal process.¹³³ Many licenses were set to expire in the late 1980s and 1990s, and private utility operators were concerned that the legislative preference for municipalities in the original licensing process might apply as well to re-licensing. ECPA clarified that municipalities would retain their preference in original licensing proceedings only.¹³⁴ However, federal and state resource agencies, and environmental organizations took advantage of the opportunity to appear at hearings and criticize FERC’s disappointing record on fish and wildlife considerations.¹³⁵

Recall that, until just before ECPA was passed, the relevant House and Senate oversight committees pressed FERC to pursue its historical pro-power orientation, signaling the agency that it could ignore its environmental obligations with few consequences. Indeed, it fell to other committees in Congress, namely those with responsibility over environmental statutes (and indeed to one especially powerful member of the House, John Dingell who had Chaired the Fisheries and Wildlife subcommittee of the Merchant Marine and Fisheries Committee) to press for the statutory amendments in the bargaining over ECPA. This suggests that an inter-committee struggle between pro-environmental committees in Congress and pro-energy committees was occurring in the background of the statutory drafting.

The House Committee Report accompanying ECPA notes that consideration of non-power values under both the FPA and applicable environmental laws had historically been “less than satisfactory;” that environmental considerations had “generally given less weight than power production;”¹³⁶ and that the FPA had been implemented with “little regard for the economically and socially important fishery resources of the nation.”¹³⁷

¹³¹ The agency also added environmental advisors to each regional offices and created a staff unit for public outreach. *See* Robinson interview, *supra* note.

¹³² Robinson interview, *supra* note.

¹³³ ECPA clarified that a municipality is not entitled to a preference at relicensing; enumerated the factors the Commission must consider in acting on relicense applications; and specified the standard the Commission must use in choosing among competing applications. *See* Echeverria, *supra* note.

¹³⁴ *See* H.R. REPA. 99-507.

¹³⁵ *See* Grimm, *supra* note at 940.

¹³⁶ H.R. REP. 99-507 *supra* at 2504. In his statement in support of the bill, Congressman Dingell said that, “While I Chaired the Fisheries and Wildlife subcommittee of the Merchant Marine and Fisheries Committee, the Federal

The Report goes on to note that “despite landmark environmental laws passed in the intervening years,” the FPA itself had remained largely unchanged. “[A]s presently written, the Federal Power Act itself does not specifically ensure that hydroelectric development and operation proceeds in a manner consistent with fish and wildlife values, although other laws, such as [NEPA, ESA and the FWCA] have supplemented the Federal Power Act to require FERC to provide greater recognition of these values.”

And though it acknowledged changes at FERC, the Committee clearly felt the agency was not making sufficient progress. “While recent Commission actions under Chairman O’Connor demonstrate improvement, the Commission has not always displayed sufficient concern for the non-power aspects of hydropower development. Moreover, as Commission members change so too does FERC’s attitude toward these aspects.”¹³⁸

The Committee seemed intent on integrating the requirements from other statutes directly into the FPA to eliminate any doubt that these mandates were in fact FERC’s.¹³⁹

Most importantly, the legislative history evidences a specific congressional intent to facilitate and strengthen inter-agency lobbying. Even though FERC was diversifying and promoting its own environmental staff at the time, Congress chose to strengthen the hand of the resource agencies that it could fairly predict—because of their own statutory missions, cultures, and track records—would reliably pressure FERC to pursue environmental protection and wildlife conservation.

Power Commission would devise, with apparent relish, schemes to circumvent or render ineffective the Fish and Wildlife Coordination Act.” 133 Cong. Rec H 1996, Monday, April 21, 1986.

¹³⁷ *Id.* at 2506.

¹³⁸ *Id.* at 2504.

¹³⁹ See 132 cong rec H 1996. Comments of Rep. Dingell: “Mr. Speaker, I rise in strong support of H.R. 44 which amends the Federal Power Act to resolve a very thorny and contentious issue concerning the relicensing of hydroelectric power facilities. It is a fair bill. It is a reasonable bill. It is proconsumer. It is pro-environment. Just as important, it retains the expressed statutory preference for states and municipalities in original licensing, while making it inapplicable in proceedings following expiration of an existing license...I particularly want to stress the environmental features of the bill worked out cooperatively with all my colleagues on the committee, but particularly the bill’s chief sponsor, Mr. Shelby, the subcommittee Chairman, Mr. Markey, and the ranking minority member, Mr. Moorhead....The fish and wildlife and related environmental provisions of this bill are long overdue. To me, they are the backbone of the bill. As the electric utility industry knows, they are one of the principal reasons for my supporting the bill with great enthusiasm. For too many years, the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, treated these important natural resources, including the pristine waterways to which they depend, with disdain and indifference. These resources have been relegated to a mere nuisance, rather than treated as a valuable and irreplaceable national treasure. Too often, while I chaired the Fisheries and Wildlife Subcommittee of the Merchant Marine and Fisheries Committee, the Federal Power Commission would devise, with apparent relish, schemes to circumvent or render ineffective the fish and wildlife coordination act. Recently, under former chairman O’connor, FERC showed some indication that this attitude might be on the wane. But he is gone and now some of the new commissioners seem ready to revert back to the “good old days.” This must not happen. I believe that this bill, along with some vigilant oversight by the Energy and Commerce Committee’s Subcommittee on Oversight and Investigations, which I chair, will help to assure that it does not.”

The Conference Committee Report specifically adverts to this goal, describing ECPA as “clearly and unmistakably upgrading the status of recommendations made to FERC by fish and wildlife agencies such as the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and the State fish and wildlife agencies made pursuant to the Fish and Wildlife Coordination Act.” ECPA is intended, says the Report, to underscore the need for both FERC and license applicants to work with these other agencies.¹⁴⁰

One way to view ECPA, then, is that it merely clarified and reinforced obligations that FERC was already required to meet.¹⁴¹ Yet this is not quite right. ECPA created new burdens. For example, “equal consideration” of power and non-power values *per se* was not required under the FPA; the language in section 10(a) merely required the agency, when choosing among competing applicants, to select the proposal that presented the most “comprehensive plan” for the waterway. The agency was to consider not only power benefits but also recreation. It took, however, until the 1960s for courts to be construing section 10(a) to require FERC to explicitly consider recreational and environmental values on a par with power concerns. And while the FWCA had required since 1934 that FERC consult with wildlife agencies, Congress only added the “equal consideration” language to that statute in 1958. So, while one could say that FERC had always formally been obligated to consider equally non-power and power values, and had just ignored that obligation, the more persuasive claim is that this imposition on FERC was of more recent vintage. ECPA cemented a relatively recent expansion of FERC’s obligations, one that had occurred thanks to the federal courts.¹⁴²

Setting aside whether the “equal consideration” feature was in fact new, other changes created by ECPA were inarguably new: ECPA required that FERC itself, and not just the license applicants, consult with specific resource agencies; that FERC develop a dispute resolution process to resolve its disagreements with other agencies; and that the Commission give reasons for not adhering to their recommendations. As Spence puts it, ECPA raised the transaction costs

¹⁴⁰ See Joint Explanatory Statement of the Committee of Conference, 132 Cong. Rec. H 87666, Tuesday, September 30, 1986. “Under section 10(j), the fish and wildlife conditions FERC imposes for each project must be based, as required under present law, on recommendations made by these fish and wildlife agencies. To address concerns that the input from these agencies could be ignored, watered down, or undervalued, the Commission may only reject, in part or whole, a recommendation of any of these agencies concerning any specific project after attempting to resolve the difference with the agencies and after publishing a finding (and reasons therefor) that such recommendation is inconsistent with the purposes and requirements of the Federal Power Act and that the conditions selected by FERC meet the statutory standard in section 10(j)(1).” Such findings would be subject to judicial challenge under arbitrary or capricious review. *Id.* Still, the Report reinforces that the recommendations are not mandatory requirements and do not dictate a particular result. The amendments are intended to ensure that FERC does not ignore them as it has so often done in the past.

¹⁴¹ The House Committee Report on ECPA noted that “...the bill does not amend or change the Fish and Wildlife Coordination Act, NEPA or other environmental laws. It addresses and clarifies FERC’s procedures and decision-making to ensure that those laws are fully met.” See *supra* note

¹⁴² If Congress had merely done this, we might be able to claim that the *form* of Congress’ intervention was determinative i.e., that amending the enabling law, as opposed to expressing congressional preferences in independent environmental statutes. But this comparison is not available to us. We conducted here an “event” study, which focuses on ECPA and the difference it made, controlling for other possible explanations of FERC’s behavior. We did not set out to compare alternative methods of congressional attempts to alter FERC’s behavior. Still, we speculate about this in the hopes that it becomes a fruitful area of research. See *infra*, note and accompanying text.

of ignoring the other agencies.¹⁴³ And ECPA put all of these obligations, new and old, in one place, front and center in the agency's own statute, the FPA.

To be clear, prior to ECPA, agencies concerned about non-power values already participated in FERC's licensing process through consultation with license applicants and through intervention in licensing proceedings. Yet, their efforts were routinely thwarted by FERC. Inter-agency lobbying had accelerated somewhat in the early eighties, but our data show that ECPA had an important booster effect. The data show that ECPA nevertheless made a difference to the number of environmental conditions imposed on licenses specifically because it intensified inter-agency lobbying. We explain our findings below.

IV. EMPIRICAL DATA

A. Summary

Against this history of FERC as a "reluctant agency" we set out to study whether ECPA made any difference to FERC's licensing process. Our empirical strategy was to explain the number of environmental conditions as a function of a variety of influences: interest groups, legislative oversight,¹⁴⁴ and local conditions such as the characteristics of the dam, the local power market and the local stock of natural resources, which might affect the propensity to impose environmental conditions.¹⁴⁵ Controlling for these and other influences, we wondered what might explain the rate at which FERC imposes more or fewer environmental conditions per license. We discovered, to our surprise, that the most likely explanation for the rise in environmental conditions we observed was inter-agency lobbying.

¹⁴³ Spence, *supra* note at.

¹⁴⁴ These principals include a congressional statutory majority that altered FERC's legislative mandate, the members on FERC's oversight committees, and at-large members representing jurisdictions in which FERC is relicensing a dam.

¹⁴⁵ Local conditions can affect the costs and benefits of imposing environmental requirements on dam owners, and thus should affect the willingness of intervenors and legislative overseers to exert effort to block them, thereby reducing the chance that the agency will impose them. We focus on factors that affect 1) the social opportunity costs of the conditions, including the cost of finding alternative power; 2) the profits to dam owners; and 3) the costs of retrofitting dams. We hypothesize that where the price of replacing power lost due to the imposed conditions is high, FERC will impose fewer conditions. Similarly, where the price of foregone profits (due to imposed conditions) is high, FERC will impose fewer conditions. Finally, where the relative cost of retrofitting the dam is higher as a result of the conditions (e.g., when an older dam must be retrofitted to control flow, in order to protect fish life), FERC will impose fewer conditions. On the other hand, FERC can be expected to issue relatively more conditions for dams with physical aspects or modes of operation whose modification will provide larger benefits (i.e., larger and taller dams with greater storage capacity are likely to negatively impact the local environment relatively more, so modifications to these dams will have greater environmental benefits than modifications to shorter dams with smaller storage capacities). Dams operated in a "run-of river" mode (which provides consistent flow to fish stocks), rather than a "peak" storage mode (which allows dam owners to charge high prices during peak demand but which can "starve" fish stocks of minimum flows), are already environmentally friendly and will be associated with fewer conditions. Conversely, the greater the value of the environmental resources that would be protected by the conditions (i.e., where the dam is located on an "endangered river" or on a river containing endangered species), the greater the number of conditions FERC will issue.

Our study tracks the number of environmental conditions FERC imposed on the 222 dams the agency relicensed between 1983 and 1998.¹⁴⁶ We focus on relicensing because this was FERC's primary activity at the time (indeed it will continue to be the agency's major focus in the hydropower area for the foreseeable future.¹⁴⁷ Approximately 116 projects underwent relicensing between 2001 and 2005, and another 69 will do so between 2006 and 2010.¹⁴⁸) The relicensing process is especially important when it comes to mitigating environmental harm because older dams built between the 1930s and 1950s typically included minimal conditions to mitigate environmental harms; they were licensed before most of the environmental legislation applicable today was passed and at a time when FERC was focused, as we have pointed out, exclusively on production values.¹⁴⁹ Relicensing these dams without applying environmental conditions would be enormously destructive for fish and wildlife.¹⁵⁰

Our data reveal that the number of environmental conditions rose strikingly following ECPA's implementation and the results point to inter agency lobbying as the explanation.

We base this conclusion on six key findings. First, our data show that, on average, FERC imposed more than twice the environmental conditions in dam re-licensing proceedings after 1990, a date by which we can be certain that ECPA had been fully implemented. (jumping from an average of about five to an average of twelve conditions.) Second, our data show that public resource agencies representing environmental concerns intervened in FERC re-licensing decisions more frequently than any other groups during the period we studied (both before and

¹⁴⁶ These data come from four primary sources: the hydroelectric relicense itself, the hydroelectric relicense docket sheet, an internal FERC database, the 1990 U.S. Census, and various governmental records on political and river basin characteristics. The data consist of 222 observations of hydroelectric dam relicenses issued by FERC over the fifteen-year period.

¹⁴⁷ Over our period of study, 1983 to 1998, FERC issued over 2,400 environmental requirements for 222 dams. Over the next 15 years FERC will issue environmental conditions for over 1,500 dams, locking in a portfolio of power and non-power benefits for the 30- to 50-year lifetimes of each license. Notably, both the initial licensing and the relicensing process follow the same procedures, so there should be no difference between the two in terms of how FERC considers environmental effects. The Supreme Court has held that a relicensing application should be given the same scrutiny by FERC as an initial license application, with all the attendant requirements and regulation. The court held that "relicensing...is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo. Simply because the same resources had been committed in the past does not make relicensing a phase in a continuous activity. Relicensing involves a new commitment of the resource, which in this case lasts for a forty-year period." See *Yakima Indian Nation vs. Federal Energy Regulatory Commission* 746 F. 2d. 466.

¹⁴⁸ See Sensiba, *supra* note at n.7 citing American Rivers, Facts About Hydropower and Dams (<http://www.amrivers.org/facts.html>).

¹⁴⁹ See Lydia T. Grimm, Comment, *Fishery Protection and FERC Hydropower Relicensing under ECPA: Maintaining a Deadly Status Quo*, 20 ENVTL. L. 929 (1990) AT 931.

¹⁵⁰ The environmental conditions imposed on dam licensees can help to ameliorate adverse environmental impacts caused by dams by requiring sufficient in-stream flows for fish migration; limiting the fluctuation of flows that results from storage and release at peak demand; requiring operators to build fish passage devices and to mitigate dam impacts on water quality and soil erosion. Conditions might also require operators to provide on-site recreation or to preserve historical and archaeological resources. However, because retrofitting older dams can be expensive, and because mitigation measures for environmental and resource protection can interfere with the production value of these dams, the imposition of environmental conditions remains highly contentious.

after ECPA was passed).¹⁵¹ This tells us nothing in particular about the effect of ECPA, but it does tell us that agencies are active players in the decision making processes of sister agencies.

Third, by comparing public agency participation before and after ECPA, we show that public agency participation *increased* after the statute was passed, climbing steadily over time. And after 1990 (again, a date by which the statute can be assumed to be fully operational), the rates of participation jump even more: the average participation of public intervenors in FERC licensing proceedings jumped post 1990 by 300 per cent, from an average of 3.2 public intervenors to an average of 10.5.¹⁵² While participation rates for all intervenors increased post-ECPA, none spiked as much as the public agencies.¹⁵³

Fourth, this public agency intervention matters. Over the period we studied, public intervenors had a significant impact on the number of environmental conditions imposed by FERC: for every additional federal agency that attended a relicensing hearing, FERC imposed an average of three-quarters of an additional environmental condition on the license; for every additional state agency, FERC imposed an average of approximately one third of an additional environmental condition. Fifth, the data show that the *magnitude* of the influence each of these public agencies exerted on environmental conditions increased, almost doubling on average after ECPA was fully implemented. Finally, when the increase in agency intervention is put together with the increase in the magnitude of their influence, we find that public agencies were associated with 60 percent of all environmental conditions following the full implementation ECPA, that is up from about 20 percent in the period prior to ECPA's full implementation the majority of the increase in environmental conditions that followed the passage of ECPA.

Our analysis also offers two secondary insights. Controlling for the impact of public and private intervenors as well as for a wide variety of other possible influences,¹⁵⁴ the data also show that ECPA itself, independent of its impact on inter-agency lobbying, and independent of any other factor, caused a jump of about three environmental conditions on average. In addition, our data show that legislative oversight involves several competing principals, some of whom are associated with significant decreases in environmental conditions, while others cause an increase in these conditions.

While it is true, as Kerwin points out, that FERC was already increasing the number of conditions per license in the early eighties, the post-ECPA jump is nevertheless striking. It is hard not to conclude from the evidence that ECPA made a difference; that it intensified the underlying inter-agency dynamic. Again, to be clear, our study separates the impact of ECPA (meaning all the procedural and substantive changes that ECPA represents) from the impact of

¹⁵¹ Indeed, our data show that public agencies comprised 60% of all intervenors in FERC proceedings over this time.

¹⁵² This represents the biggest absolute increase of any types of intervenors in FERC's licensing decisions.

¹⁵³ The participation by all intervenors rose from an average of about five to an average of almost sixteen--a tripling in participation.

¹⁵⁴ Our regression controls for a variety of other potential influences on the number of environmental conditions such as oversight by members of Congress from the district in which the dam is located; oversight by congressional committees; type and location of dam; and unique features of the river on which the dam is located. Our expectations about how these factors would affect the number of environmental conditions were largely borne out. For example, as we expected, dams located on scenic rivers are more likely to receive more conditions.

public agency intervenors. Both are associated with a jump in environmental conditions. However, since the ECPA's reforms primarily strengthen the influence of public agencies, we believe the primary explanation for the increase in environmental conditions is inter-agency lobbying.¹⁵⁵

Our empirical results highlight a surprisingly important role for inter-agency lobbying in the agency decision making process. Federal and state agencies not only participated in relatively large numbers in FERC's relicensing hearings, but also had the largest empirical impact on FERC's decision-making of all the factors we considered. And ECPA appears to have intensified this impact.

For theories of legislative control, inter-agency lobbying appears to be an important but overlooked form of control, beyond the traditional *ex ante* statutory and *ex post* oversight instruments. For theories of interest group influence, the effectiveness of lobbying by public agencies appears to turn conventional wisdom on its head. Normally, we would expect local firms and market-oriented groups, who bear concentrated costs, to mobilize more effectively than other groups, such as consumers, who enjoy only diffuse benefits. However, our results reveal that public agencies, which are more akin to groups representing diffuse interests, are the most effective intervenors of all.

Below, we explain our methodology and findings in more detail. We conclude by discussing the way in which the methodological limits of an event study affect the strength of our inferences from these data and the robustness of our argument.¹⁵⁶

B. Public Participation in Relicensing

Before it was reformed significantly in the wake of ECPA,¹⁵⁷ the traditional FERC relicensing process was lengthy, reactive and adversarial. The process typically began three to five years prior to the license expiration.¹⁵⁸ FERC did not mediate between license applicants

¹⁵⁵ To be clear, prior to ECPA, agencies concerned about non-power values already participated in FERC's licensing process through consultation with license applicants, and through intervention in licensing proceedings (which enabled them to challenge licenses in federal court). And prior to ECPA, courts had already (and repeatedly) admonished the agency to take non-power values more seriously. Finally, prior to ECPA, public support for environmental values had already been building for nearly two decades, and Congress had responded to that public sentiment by passing environmental legislation. Indeed, this provided the statutory basis for the judicial admonishment referred to above. ECPA built on, and intensified, these trends.

¹⁵⁶ This discussion will address omitted variable bias, simultaneity/endogeneity bias, and the definition of the "event" in this analysis as well as other issues.

¹⁵⁷ It should be noted that, in recent years, the traditional sequential licensing process (through which applicants first consult with relevant resource agencies without FERC's involvement and then file applications with the agency) has been supplanted by a new, more negotiated process that integrates environmental considerations early. *See infra* note, and accompanying text.

¹⁵⁸ The FPA authorizes FERC to choose among five options upon application for renewal: the federal government can take over the project (which has never happened); FERC can issue a new license to the incumbent licensee; FERC can issue a new license to a new licensee (this has never happened where the incumbent licensee has applied for renewal); FERC can issue a temporary nonpower license which transfers the project lands to the federal, state or

and resource agencies, but required that they consult with each other prior to submission of an application.¹⁵⁹ After consultation, the applicants would prepare studies and submit the application to FERC. Only upon receiving it did FERC staff review the studies that were proposed by the applicant, and process the application. Finally, the Commission would issue the license with relevant conditions.¹⁶⁰

By the early 1980s FERC adopted a liberal intervenor policy,¹⁶¹ allowing any interested party to file comments and participate in the relicensing process, providing that its interests were not already represented. As a result, during the period we studied, a wide range of interest groups participated in FERC's licensing process.¹⁶² These include the dam owner, local utility, local water-dependent businesses, Indian tribes, recreational and environmental non-profits and numerous state and federal resource agencies. Table 1 provides examples of the different types of intervenors.

municipal government (this has never happened); or FERC can accept surrender of the license (which is rare). *See* Powell, *supra* note at 511.

¹⁵⁹ “The applicant prepares the proposals, then the agencies, Tribes, and public react....” Powell, *supra*, note at 414.

¹⁶⁰ The process proceeded in seven stages and typically took 3-5 years, but sometimes much longer. At step one, the dam owner files an application with FERC and FERC provides public notice of the relicense application in the federal register and specific notice to appropriate resource agencies; at step two, the applicant and agencies engage in a first-stage consultation; at step three, the applicant prepares studies and a draft application; at step four, the applicant and resource agencies engage in a second-stage consultation; at step five, the applicant files the application with FERC; at step six, FERC processes the application and complies with NEPA requirements; finally, FERC issues the license with terms and conditions. *See* Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook*, April 1990. The process is also detailed in 18 C.F.R. §16.8.

¹⁶¹ FERC promulgated regulations to revise its intervenor rules. *See* 18 C.F.R. pt.4 (Regulation 214 in 1982).

¹⁶² *See* Moore et al. There is a between an “official” and an “unofficial” intervenor which we do not recognize in our dataset. Only official intervenors are entitled to file a lawsuit in the Court of Appeals challenging a final FERC decision, while unofficial intervenors can (and do) comment, receive information upon request, and participate in the negotiations. Still, unofficial intervenors have no legal authority to challenge the final outcome of the relicensing decision. *See* 18 C.F.R. § 385.214 (a)(3).

Table 1: Intervenor Descriptions and Examples

	<u>Sports fishing</u> <u>Water Supply</u>	<u>Boating</u> <u>Recreation</u>	<u>Historic/Archaeology</u>	<u>Endangered Species</u>	<u>Power</u>
<u>Geographic</u>					
<u>Range</u>					
Federal	Atlantic American Salmon Canal Federation Society	American Appalachian Canoe Mountain Assn. Club	Advisory Council on Historic Preservation	American Rivers	UNITIL Power Corp.
State	California ID Dept. of Trout Water Resources	Georgia Adirondack Canoeing Mountain Assn. Club	Alabama Historical Commission	WA Dept. of Wildlife	WI River Power Co.
Local	Puget Sound Tuolumne Gillnetters Water Assn. District	Shasta Camp Paddlers Grady Spruce	OR Dept. of Planning & Development	Covelo Indian Community	Loup River Public Power
<u>Market</u>					
<u>Orientation</u>					
Public	Pacific CO Div. of Fishery Mgt. Water Council Resources	CA Boat- NY Parks ing & & Recreation Waterways	AL Historical Commission	VA Game Dept.	WI Public Service Dept.
Private	Bumble Bee Diamond Seafoods Fruit Growers	Southeastern Little River Expeditions Camping Resort		Chippewa & Flambeau Improvement Co.	Niagara Mohawk Power
NGO	Federation Deerskin of Fly Lake Fishers Assn.	Six Rivers Paddling Club	Fernbank Museum of Natural History	UT Wilderness Assn.	UT Muni. Power Agency

C. Environmental Conditions

Because FERC has only declined to relicense one project out of 222 from 1983-1998, the primary focus of the relicensing proceedings studied here is the environmental requirements that FERC imposed in relicensing proceedings. These environmental requirements may be subdivided into six broad purposes: erosion control; water quality; historical and archaeological; recreational and aesthetic; resource; and flow. Table 2 provides a sample of various types of requirements.¹⁶³

Conditions can be both costly and inconvenient for licensees. Examples range from less expensive and largely procedural requirements (e.g., that licensees monitor water quality) to onerous ones that restrict owner decisions in ways that will cut into profits (e.g., the maintenance of minimum stream flows to support fish populations).

We treat the number of environmental conditions as a measure of FERC’s attentiveness to its secondary environmental mandates. While we recognize that this is an imperfect measure—because a greater number of conditions may not always translate into greater environmental protection—it is nevertheless the best proxy available for measuring FERC’s willingness to take environmental concerns seriously.¹⁶⁴

Table 2
Sample Requirements By Type

Erosion Control Requirements

License	Description
P-298	File an erosion protection and remediation plan
P-2397	Licensee shall file with Commission recent geotechnical analysis of shoreline conditions, for purposes of determining need for remediation of erosion
P-2360	Licensee shall file a dust and erosion control plan
P-2535	Maintain a shoreline buffer of trees
P-1267	Conduct a five-year channel monitoring study
P-2421	Plan to establish and maintain a shoreline buffer zone

Flow Requirements

P-2512	Operate project in run-of-river mode
P-2512	Install a streamflow gage to monitor minimum flow releases
P-2512	Develop a plan to set limits on the maximum rate of change in river flow
P-1957	Licensee shall act to minimize fluctuations of reservoir surface elevations
P-1773	Maintain and utilize a guaranteed priority stream flow device to automatically release minimum flows
P-2360	Licensee shall release bottom water from the diversion dam whenever possible

¹⁶³ Department of Energy, 1991, 1994, 1996.

¹⁶⁴ See Table A1 of the Appendix for a description of the all of the variables we use in the foregoing analysis.

Water Quality Requirements

P-96	Licensee shall file a plan to minimize the quantity of sediments or other pollutants resulting from construction, that might enter project waters
P-487	Licensee shall conduct a water quality monitoring program
P-271	Licensee shall study measures to alleviate coldwater discharges from the dam
P-405	Licensee shall develop a study plan to look at dissolved oxygen and temperature levels in project reservoir
P-405	Licensee shall conduct a study for disposition of river-borne debris
P-459	Licensee shall take necessary measures for control of vectors at the project

Resource Requirements

P-120	Licensee shall survey lands for presence of any endangered species
P-503	Develop a plan to ensure protection of raptors from electrocution
P-2520	Install upstream fish passage facilities
P-2520	Install downstream fish passage facilities
P-18	File a plan to monitor the golden eagle nest near the project site
P-663	Monitor habitat aquatic species populations in bypassed reach
P-2468	Licensee shall provide annual monetary contributions for fish losses due to turbine entrainment mortality
P-2580	File a plan to monitor existing wetland habitat
P-460	File an Estuarine Enhancement Plan

Historical & Archaeological Requirements

P-1413	Consult and cooperate with the State Historic Preservation Officer
P-2428	File a cultural resources studies and management plan
P-1267	Manage historic properties
P-1889	Consult with the SHPO to determine any necessary historic or archaeological mitigation measures

Recreational & Aesthetic Requirements

License	Description
P-96	Licensee shall submit a plan to minimize any disturbances to the natural, scenic, historical, and recreational values of the project
p-1889	Licensee shall consult with agencies in the development of park areas to provide for optimum public utilization and recreation needs of project area
P-935	Licensee shall provide recreational facilities
P-935	Licensee shall provide boat access and launching facilities
P-1235	Licensee shall construct a small boat launch/take out facility and a paved canoe portage path; consideration shall be given to handicapped in the recreation facilities
P-6032	Bury a transmission line, for visual and recreational reasons
P-1394	Licensee shall fund two access trails
P-2486	Implement a telephone hotline on daily flows

D. Findings

1. FERC imposed more than twice the environmental conditions in dam re-licensing proceedings after ECPA had been fully implemented.

Table 3 presents the average number of environmental conditions included in licenses each year. We see that before ECPA’s implementation a FERC license had an average of 4.8 conditions, while after ECPA’s implementation this number increased to 12 conditions.¹⁶⁵ There may be many reasons for this increase. There may have been changes over time in the characteristics of both the rivers and the dams up for relicensing. The implementation of ECPA may have changed the preferences of FERC. There may also have been changes in the types and numbers of interest groups that participated in relicensing and changes in the legislative oversight of FERC.

Table 3
Environmental Conditions per License by Year

Pre-ECPA (1982-1990)	4.8
Post-ECPA (1991-1998)	12.0
1982	2.2
1983	4.8
1984	2.3
1985	4.3
1986	6.0
1987	8.0
1988	5.3
1989	4.3
1990	3.7
1991	11.3
1992	9.4
1993	8.8
1994	11.1
1995	13.2
1996	13.4
1997	14.1
1998	15.2

2. Public agencies represented the largest number of intervenors.

In Table 5 we present the propensity of organizational types to participate as intervenors. Perhaps most surprising is the distribution of intervenors across organizational types (see the far

¹⁶⁵ Even if one assumes that ECPA was immediately implemented following passage, the upward trend in environmental conditions is still clearly observable and our results would not change significantly.

right column of Table 3). The highlighted figure indicates that FERC will face far more public sector intervenors (60% of the total) than private sector (19%) or non-profit (21%) intervenors. In fact, the average number of state agencies (3.0) and federal agencies (3.4) participating as intervenors outnumbered private sector (2.5) and non-profit (2.7) intervenors put together.

Table 5
Interveners by Geographic Scope and Type of Organization^a

	Local	State	National	Total
	Avg. (row %)	Avg. (row %.)	Avg. (row %)	Avg. (column %)
Private Sector	1.6 (64%)*	0.5 (20%)	0.4 (16%)	2.5 (19%)
Non-profit Sector	0.8 (30%)	0.7 (26%)	1.2 (44%)	2.7 (21%)
Public Sector	1.5 (19%)	3.0 (38%)	3.3 (42%)	7.8 (60%)
Total	3.9 (30%)	4.2 (32%)	4.9 (38%)	13 (100%)

- a. Based on the 222 licenses issued between 1983 and 1998 with an average of 12 intervenors per license.
*Includes dam owner as an intervenor.

Local private sector intervenors (comprising 64% of private sector intervenors) are significantly more prevalent than state and national private sector intervenors (comprising 20% and 16 % of all private sector intervenors, respectively). State and national public sector intervenors are significantly more prevalent (at 38% and 42% of the total public sector intervenors, respectively) than are local public agencies (comprising only 19% of the public sector intervenors). We find non-profit intervenors at all three geographical levels; local (30%), state (26%) and national (44%).

3. ECPA is associated with an increase in the total number of intervenors but the increase in absolute numbers is, by far, the greatest for public agencies.

Table 5 shows that the average number of intervenors per licensing increased substantially after ECPA was implemented in 1990. Moreover, the greatest absolute effect was for public intervenors. Even though there was an upward trend in the data before ECPA was passed, the post-ECPA jump is quite striking: a 300 percent increase in public agency participation (from an average of 3.2 to an average of 10.5 participating agencies).

Table 5
Types of Interveners per License by Year

	Total	Public Agencies	Non-Profits	Private Sector
Pre-ECPA 1982-1990	4.9	3.2	0.5	1.2
Post-ECPA 1991-1998	15.6	10.5	3.3	1.9
Year				
1982	2.0	1.7	0.0	0.3
1983	16.4	7.2	1.8	7.4
1984	1.7	1.3	0.3	0.0
1985	2.8	1.8	0.8	0.3

1986	4.3	3.8	0.2	0.3
1987	3.8	3.4	0.4	0.0
1988	4.4	3.7	0.1	0.6
1989	6.0	3.9	0.6	1.5
1990	2.3	2.3	0.0	0.3
1991	10.7	9.3	0.3	1.7
1992	33.2	22.1	5.1	6.1
1993	6.5	5.3	0.8	0.5
1994	11.2	8.1	3.0	0.3
1995	11.5	8.5	2.5	0.5
1996	20.3	9.7	6.5	4.2
1997	14.1	9.5	3.2	1.4
1998	17.4	11.1	5.1	1.8

4. Federal and state agencies have the largest overall influence on FERC’s propensity to issue environmental conditions. The influence of public agencies on environmental conditions appears to have doubled with the passage of ECPA.

In Table 6, we seek to explain changes in the number of conditions per license as a function of several factors including dam and river characteristics, intervenor characteristics, legislative oversight and other regional factors. Model 1 reveals the *relative* influence of the different intervenors over the entire study period. Note that, as highlighted in Model 1, FEDERAL PUBLIC has the largest estimated coefficient (0.78). This means that the presence of an additional federal agency intervenor is associated with three-quarters of an additional environmental condition on average. STATE NONPROFIT appear to be the second most influential intervenor with an estimated coefficient of 0.64, followed by STATE PUBLIC with a estimated coefficient of 0.37.¹⁶⁶ These results are consistent with our expectations that federal and state agencies support environmental conditions. Federal and state resource agencies have been the most influential types of intervenors, with federal agencies being about twice as influential as state agencies.¹⁶⁷

Combined with the results in Table 4, we can calculate the combined effect of federal and state agencies on FERC’s propensity to attach environmental conditions to relicenses. To calculate the total influence of each type of public agency, we consider the average number of participants (presented in Table 4) in conjunction with their marginal effect (presented in Table 6). This is captured in the simple calculation below.

¹⁶⁶ Not surprisingly, LOCAL PRIVATE and LOCAL NONPROFIT are (-0.54) and (-0.45), respectively. The presence of an additional intervenor of either of these types is associated with one-half fewer requirements on average.

¹⁶⁷ STATE NONPROFIT and LOCAL NONPROFIT are both statistically significant; yet STATE NONPROFIT is positively correlated with requirements, while COUNTY NONPROFIT is negatively correlated. This is consistent with county level non-profit intervenors representing the interests of local communities that bear the cost of higher energy costs, while state level intervenors represent those consumers who enjoy the upstream, downstream, and the pure public goods provided by the environmental requirements. Finally, COUNTY_PRIVATE is significant and negative as expected.

On average, 3.3 federal agencies and 3 state agencies attend a relicensing hearing (see Table 4). Thus, the average total effect of federal agencies per license is (3.3 federal agencies \times .78 of a condition) 2.54 additional environmental conditions. The average total effect of state agencies per license is (3 state agencies \times .33 of a condition) 1.11 additional environmental conditions. The average total effect of federal and state inter-agency lobbying is (2.54 + 1.11) 3.65 environmental conditions over the entire time period.¹⁶⁸

While this analysis shows that federal and state agencies were the most influential types of intervenors over our entire study period, for our argument the larger question remains: did the implementation of ECPA substantially increase their influence relative to other intervenor groups? To explore answers to this question, we examine Model 2 in Table 6. Model 2 enables us to measure the influence of the major intervenor groups (i.e., public, private and non-profit) before and after ECPA's implementation.

Within Model 2, the coefficient on PUBLIC AGENCIES measures the influence of each agency before the implementation of ECPA. Before ECPA's implementation, the involvement of each agency increased the number of conditions by one-third (0.301). This reveals that even before ECPA's implementation, public agencies had the largest possible influence on FERC's propensity to issue environmental conditions. The variable ECPA*PUBLIC measures the additional incremental impact of passing and implementing ECPA on the influence of each agency. The coefficient's sign (which is positive) and size (which is 0.396) indicate that ECPA's implementation meant that each agency exerted additional influence associated with over one-third of a condition. Therefore the total influence of each agency after the implementation of ECPA was (0.306+0.394=0.700), almost three quarters of a condition. This represents a doubling of public agencies' influence as a result of ECPA. No other intervenor group had as much influence before ECPA was passed and implemented. Nor did any other intervenor group gain as much influence as did public agencies as result of ECPA.

As mentioned earlier, the addition of more environmental conditions will not necessarily lead to greater environmental protection; this depends in part on how well the conditions are designed, and the extent to which they are implemented and enforced. In theory though, conditions are designed to mitigate the adverse environmental impacts of dams, which is why we used them as a proxy for FERC's attention to environmental mandates.¹⁶⁹

It is possible, of course, that FERC is simply increasing the number of relatively cheap, easily performed requirements, while decreasing more costly and environmentally protective

¹⁶⁸ For the other intervenors with significant coefficients, their average total group influence is STATE NONPROFITS (0.70 \times 0.64=) 0.45, LOCAL PRIVATE (1.57 \times -0.54=) -0.85, and LOCAL NONPROFIT (0.83 \times -0.45=) -0.37.

¹⁶⁹ Some conditions may be badly designed; some might be well designed but poorly implemented. Our study does not measure the effectiveness of the measures adopted but assumes that the number of environmental conditions imposed on licenses is an appropriate dependent variable if one is concerned about how seriously FERC takes its environmental obligations. Generally speaking, we think it reasonable to assume that adopting more environmental mitigation measures will be better for the environment than adopting fewer such conditions.

ones. For example, minimum flow requirements are among the most expensive because they deprive dam owners of the ability to store water for sale in periods of peak demand.¹⁷⁰ The data show when flow requirements increase, such as those forcing owners to operate dams in what is called “Run of River” mode, the number of other conditions fall by more than one.¹⁷¹ Perhaps in some instances, FERC is doing the reverse: substituting fewer, more costly requirements for a greater number of inexpensive ones.¹⁷² The data do show, however, that *both* expensive and inexpensive requirements increase after ECPA’s passage and implementation. Moreover, even if ECPA did result in a greater number of inexpensive restrictions at the expense of fewer costly ones, it would not undermine our claim that the imposition of more conditions is a sign of effective inter-agency lobbying. Nor would it undermine our claim that the lobbying and resulting conditions can be a means of legislative control over FERC; even inexpensive conditions provide the basis for agencies and interest groups to oversee and challenge FERC’s implementation as well as dam owner compliance, if necessary.

5. The incremental influence of public agencies increased after the passage of ECPA.

To appreciate the overall influence of public agencies before and after the implementation of ECPA we consider the increases in both their participation and their influence. Before ECPA was implemented an average of 3.2 public agencies participated (Table 5), each having an average influence of 0.301 conditions (Table 6, Model 1). These public agencies are associated with a total effect of 0.96 conditions out of an average of 4.8 total conditions (Table 3), or about 20 percent of all conditions. After ECPA’s implementation, an average of 10.3 public agencies participated (Table 4) with an average influence of 0.700 conditions (Table 6, Model 1). These public agencies were associated with 7.3 conditions out of a post-ECPA average of 12.0 conditions in total (Table 3), or about 60 percent of all conditions.

This pre- and post-ECPA comparison requires careful interpretation. Our analysis clearly suggests that the increase in public agency *influence* is associated with ECPA (Table 6, Model 1); however, we cannot attribute the significant increase in public agencies’ *participation* (Table 5) solely to the ECPA. Still, even if only one half, or even one quarter, of the increase in participation is due to ECPA, it would have had a substantial influence by facilitating inter-agency lobbying.

E. Secondary Findings

5. The passage and implementation of ECPA itself, independent of any other factor, caused a jump in environmental conditions.

¹⁷⁰ A dam operated in “peak mode” releases water in response to demand for irrigation or power. Such draw-downs can lead to dramatic fluctuation in water levels. Minimum stream flows limit the harm done to downstream fish as a result of this method of operation.

¹⁷¹ That is, the marginal coefficient is both negative and significant.

¹⁷² It makes sense that the imposition of some expensive requirements obviates the need to undertake others (i.e., flow requirements that enable fish to swim upstream make other requirements less necessary).

As reflected in Table 6, ECPA's passage did have an impact on the number of environmental conditions. We included in our model a dummy variable, ECPAD, which indicates whether a project was relicensed after January 1, 1990.¹⁷³ This variable is positive and highly significant. The coefficient ranges from 2 to 3, indicating an average increase in requirements.

To be clear, this result is independent of the effect ECPA had on inter-agency lobbying. ECPA's mere passage and implementation causes this jump. We cannot say, however, which feature of ECPA is responsible for it. As we noted above, the statute included a number of reforms including: requiring FERC to consult directly with environmental agencies; requiring FERC to give reasons for not following those agencies' recommendations regarding conditions; and specifying that power and non-power values were to receive "equal consideration." We can say only that, collectively, these changes caused an increase in environmental conditions. To put a fine point on it, even if no public agency intervened in a FERC relicensing, ECPA would have this effect. Moreover, because of our controls, we can say that ECPA would have this effect even in the absence of legislative oversight.

2. To fully explain FERC's decision making, we need to track both legislative oversight and the effect of intervenors.

a. Statutory preferences: ECPA increased the total number of environmental requirements by an average of 3.0 to 3.5. We discussed this variable above.

b. Oversight committee preference decreased the number of environmental requirements

In the Senate, the Committee on Energy and Natural Resources oversees FERC. Members who self-select onto this committee tend to have a policy interest in energy development (coal, oil and natural gas) and the regulation or deregulation of energy markets.

¹⁷³ While the Act was passed in 1986, we choose 1990 to represent a date by which we could be certain that the Act's effects would be fully incorporated into a license. We made this decision based on a number of considerations. First, the relicensing process typically begins three to five years prior to FERC's approval of the license. Thus, when ECPA was passed, a number of relicensing applications would have been in the pipeline. In an interview, Mark Robinson, who personally negotiated the first post-ECPA license application, reports that the agency complied with ECPA virtually instantaneously because FERC was, in response to the barrage of lawsuits in 1983-4, already moving in the direction of greater and earlier consultation with fish and wildlife agencies. Yet, it is hard to imagine that all of the pending licenses could have been immediately adapted to conform to ECPA's new requirements in such a short time. Other commentators have suggested to us that the transition from the pre-ECPA process to the post-ECPA process took some time. The Notice of Proposed Rulemaking in 1984, requiring license applicants to consult directly with the resource agencies, was somewhat slow to take effect. Moreover, FERC did not even issue its own regulations implementing ECPA until 1998 and 1989. *See* Hydroelectric Relicensing Regulations Under the Federal Power Act, 54 Fed. Reg. 23756 (May 17, 1989); Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 23108 (May 8, 1991). While we recognize that rule promulgation may lag behind internal agency behavior and that some of these regulations confirmed and clarified practices already adopted by the agency, we are hesitant to suggest that the statute was fully operational before these rules were promulgated. So, to remove any doubt, we selected 1990. However, regardless of the year one selects, the trend toward increased environmental conditions post-1986 is consistently positive.

They also tend to come from coal and oil producing states that are often not supportive of environmental regulation. As a result, we would expect these members to be, on average, pro-energy and anti-environmental protection. Even if that weren't their orientation, recall that environmental conditions impose concentrated costs on dam owners, while providing only diffuse benefits. This by itself may explain why, on average, a committee member would oppose them.

Consistent with our expectations, our data show that oversight is negatively correlated with environmental conditions. We use `SENATE_COMMITTEE`, as a dummy variable indicating whether at least one of the senators, at the time of relicensing, was a member of the oversight committee. The coefficient on this variable is negative and significant.¹⁷⁴ In Table 6, models 1 and 2, the estimated coefficients range in size from -1.9 to -2.2, suggesting that oversight committee influence reduces environmental conditions by 18% to 21% on average.¹⁷⁵

c. Non-committee member oversight of FERC varied with the extent of their environmental preferences as measured by LCV scores.

We also isolated the effect of members of Congress who were not on the oversight committee. These members-at-large can influence FERC through direct or indirect pressure. They may be compelled to influence FERC when the agency relicenses a dam within their jurisdiction. In order to measure their influence, and see whether it varied with their environmental commitments, we needed some indication of member preferences for environmental protection. As a proxy for how “pro-environment” a member is we used the League of Conservation Voters (LCV) score.¹⁷⁶

As we see in Table 6, the coefficient on this variable is positive and highly significant. Across models 1 and 2, the size of the estimated coefficient (when significant) ranged from 2.9 to 3.4. Shifting the Senators' average LCV score from its lowest possible level (0) to its highest level (1.0) increased the number of environmental conditions by 27% to 32%.¹⁷⁷ This suggests that individual members of Congress do intervene to influence FERC decision making, that their intervention has an impact, and that the effect of their intervention varies with their commitment to environmental protection. This result is not surprising. As with the findings on legislative oversight, this result does help to show that our study controlled for a range of influences on FERC and that the effect of these influences (e.g., legislative oversight associated with fewer environmental conditions; member oversight associated with more or fewer conditions depending on LCV score) conforms to our intuitive expectations.

¹⁷⁴ It is significant at the 5% to 10% levels and jointly significant at the 1% level.

¹⁷⁵ This is based on the average number of conditions over the entire study period of 10.4. *See* Table A1.

¹⁷⁶ The League of Conservation Voters score is a rating between 0 and 1 for environmental sensitivity (0 being none, 1 implying extreme environmental sensitivity). Republicans have had lower League of Conservation Voters scores than Democrats, and Eastern states have had much higher scores than Western states. For the Year 2000 scorecard, Republicans in the Senate averaged a score of 0.12, while Democrats averaged 0.79. To construct the `LCV_SCORE` variable, we averaged the League of Conservation Voters score for the two senators in Congress from the state within which a project is located in the year that the project was up for relicensing.

¹⁷⁷ *See supra* note

Table 6:
Ordinary Least Squares Model
Explaining the Total Number of Environmental Requirements

Variable	Model 1	Model 2
Constant	5.644*** (1.865)	4.039*** (0.9663)
<i>Interest Groups</i>		
Private Owner	0.474 (0.609)	0.8992 (0.6197)
Multiple Owner	-0.734 (0.690)	-0.8376 (0.6774)
Federal Public	0.782*** ^(E) (0.141)	
State Public	0.368*** ^(E) (0.139)	
Local Public	0.095 ^(E) (0.060)	
Federal Non-Profit	-0.026 ^(E) (0.250)	
State Non-Profit	0.642** ^(E) (0.267)	
Local Non-Profit	-0.454* ^(E) (0.251)	
Federal Private	0.234 ^(E) (0.389)	
State Private	0.137 ^(E) (0.340)	
Local Private	0.548* ^(E) (0.291)	
Public Agencies		0.306** (0.0933)
ECPA* Public		0.394** (0.0843)
Non Profit		-0.0211** (0.113)
ECPA*Non Profit		0.0310*** (0.132)
Private		-0.125 (0.135)
ECPA*Private		-0.623 (0.2623)

Legislative

<i>Principals</i>			
	ECPAD	3.444*** ^(F) (0.723)	2.2503* (1.024)
	LCV Score	3.426** ^(F) (1.452)	2.942** (1.587)
	Senate Committee	-2.237*** ^(F) (0.740)	-1.9246** (0.792)
<i>Local</i>			
<i>Conditions</i>			
	Dam Height	0.015*** ^(G) (0.006)	0.0186*** (0.005)
	kW/10 ³	-0.044*** ^(G) (0.013)	-0.005*** (0.002)
	Electricity Price	0.630*** ^(G) (0.238)	-0.780*** (0.268)
	kW*Elec. Price/10 ⁶	13.8*** ^(G) (4.46)	14.34*** (3.32)
	Concrete	1.008* ^(G) (0.559)	1.507* (0.659)
	Dam Year	-0.013 ^(G) (0.012)	-0.012 (0.011)
	Run-of-River	-1.11* ^(G) (0.578)	-1.71* (0.660)
	NERC-West	1.510 ^(G) (1.003)	1.980 (1.256)
	NERC-East	-0.933 ^(G) (0.740)	-0.833 (0.631)
<i>River</i>			
<i>Characteristics</i>			
	Endangered River	2.312*** (0.685)	2.614*** (0.735)

<u>Adj R²</u>	<u>0.618</u>	<u>0.538</u>
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(E) Joint significance test: F(9, 197)=9.62, Prob>F=0.0000***

(F) Joint significance test: F(3, 197)=17.63, Prob>F=0.0000***

(G) Joint significance test: F(9, 197)=6.22, Prob>F=0.0000***

In summary, our study measures a variety of influences on FERC’s licensing decisions, including legislative oversight and intervention by interest groups. We make further refinements within each category. For example, we break the oversight variable into statutory directives, committee oversight and member-at-large influence. And within the category of intervenors, we isolate the influence of public agencies versus private interest groups so that we are able to compare the two. (Indeed, we go still further within the public agency category, to separate the *relative* influence of federal versus state agencies.) Of the studies we have found of FERC’s licensing process,¹⁷⁸ our study is unique in this regard.¹⁷⁹ Our methodology helps to make clear

¹⁷⁸ See e.g., Spence, *supra* note 29 and Kerwin, *supra* note 28.

that the only way to fully explain FERC's propensity to add environmental conditions in a relicensing hearing is to consider all of these influences together.

F. Study Design

Among research methods, our analysis is an event study. We compare agency influence before and after an event in order to infer the effects that ECPA had on the ability of collateral agencies to affect the environmental conditions prescribed by FERC. There are several issues that may attenuate our ability to infer ECPA's impact on the influence of collateral agencies. We discuss these below.

1. Missing factors that explain environmental conditions.

Table 6 reflects that we controlled for a variety of factors that might influence the number of environmental conditions imposed per license. These controls include a host of "local conditions" that would make the addition of environmental restrictions more or less likely. These include, among other things, the price of purchasing alternative electricity; the value of foregone profits to dam owners; the age and physical characteristics of the dam; its location; and the value of the natural resources it affects. The results confirm most of our expectations with regard to these influences, and further bolster our confidence in our findings about the influence of public agencies.¹⁸⁰ In addition, we controlled for presidential party over the period studied; whether the administration is Republican or Democrat makes little difference.

Nevertheless, while we developed as comprehensive a model as possible, there remains a chance that unobservable factors explain the rise in the number of environmental conditions. Perhaps a background trend in rising preferences for environmental protection caught the public agencies and FERC up in its sweep. Our concern is that this omitted factor is positively correlated with the number or influence of intervening public agencies over time. If so, then our models' measurements of the influence of public agencies could be biased upward.

Ideally, we would answer this objection in one of two ways. First, we could include this omitted variable. Second, we could compare FERC's decision making with that of another agency with obligations like FERC's (i.e., to impose environmental conditions under certain circumstances) but which was not affected by ECPA.¹⁸¹ We would track the comparison agency's decision making pre- and post-1990, as we did with FERC, and see if it too experienced an increase in pro-environment decisions. If not, we would have even greater confidence that ECPA was responsible for the rise in environmental conditions.

Though we did not formally construct a comparison case, there does not appear to be a dramatic and consistent trend, either in Congress or among federal agencies during the period we

¹⁷⁹ Cf. Spence, *supra* note 29, and Kerwin, *supra* note 28.

¹⁸⁰ See note 89 *supra*.

¹⁸¹ This statistical approach is called a "difference in difference" approach. It measures the difference in the policy making between two agencies and then measures over time the difference in that "between-agency difference" caused by some event.

studied, that would explain the rise in environmental conditions beginning in 1990. Congress did not generally demonstrate a “pro-environment” bias during the period we studied. While Congress did pass some statutes enhancing environmental protection (including toughening the requirements for land deposition of hazardous waste),¹⁸² it weakened other statutes. For example, the 1986 amendments to CERCLA softened the burden of liability for hazardous waste cleanups by adding an innocent purchaser defense; and the 1987 amendments to the ESA generally weakened protection of endangered species.¹⁸³

In 1990, the most significant environmental legislation passed consisted of major amendments to the Clean Air Act. But these contained a mix of measures, some good for the environment and some less so (e.g., tightening pollution control requirements in the dirtiest areas of the country, but also extending deadlines for compliance) along with some measures that were new experiments (e.g., the acid rain trading program). On the face of it, this legislation would have been more likely to lead to a drop in EPA enforcement actions rather than a jump, because states in violation of the old deadlines for compliance would now have a reprieve.¹⁸⁴ So while it is true that the total amount of environmentally protective legislation and regulation has risen dramatically over the last forty years, during the period we studied there was no dramatic increase. Instead there were periods of advancement and retrenchment. Thus, FERC’s changed behavior after 1990 does not seem to follow from a clear and consistent signaling by Congress that environmental protection mattered.

Similarly, there seems not to be a general, powerful trend among environmental agencies during this period to more vigorously enforce environmental regulations. Indeed, as noted earlier, throughout the 1980s, the Reagan administration cut the budgets of the environmental and natural resource agencies. And the appointment of Ann Gorsuch as EPA Administrator in President Reagan’s first administration resulted in systematic de-regulation and a retrenchment in enforcement efforts. Indeed, under her tenure, referrals from the EPA to the Department of Justice dropped by half.¹⁸⁵ In 1990, under President George H.W. Bush, the budgets of the resource agencies did not dramatically increase.¹⁸⁶

To be clear, there may be a measurable upward trend in “pro-environment” attitudes among the public over the last forty years.¹⁸⁷ Surely a growing environmental awareness

¹⁸² See, e.g., Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, codified at 42 U.S.C. §§ 6991-6991(i).

¹⁸³ In 1978, Congress added language to §4 of the ESA (the “No Jeopardy” provision), making it harder to meet the test for determining that an agency-supported project would jeopardize the continued existence of a species (which the Act prohibits). Congress also amended the statute to create a committee of high level government appointees with the authority to exempt certain projects from the section 7 “no jeopardy” prohibition if the actions meet certain criteria. In 1986, Congress passed SARA to amend CERCLA and make a third party defense available to innocent purchasers of contaminated property if they meet certain criteria. See §107(b)(3) and §101(35)(b).

¹⁸⁴ Moreover, the more stringent permit requirements imposed in non-attainment zones would take some time to implement, and then some time to violate, so any spike in enforcement actions related to these would not be expected to occur for some time to come.

¹⁸⁵ See *supra* note at.

¹⁸⁶ See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT (1990).

¹⁸⁷ See, e.g., Riley E. Dunlap, *Trends in Public Opinion Toward Environmental Issues: 1965-1990*, in AMERICAN ENVIRONMENTALISM (Dunlap and Angela G. Mertig, eds., 1992).

prompted new environmental legislation. Still, we are dubious about the claim that such a general and incremental trend fully explains the post-1990 jump in FERC's willingness to impose environmental conditions on hydropower licenses.

2. *An outside process simultaneously affects the influence of public agency participation and conditions issued by FERC.*

Another, somewhat technical, concern is what is called simultaneity or endogeneity bias.¹⁸⁸ Conceptually, the concern is that some causal process simultaneously affects both the influence of intervenors and the number of environmental conditions that FERC issues. If this is true, our estimates of the influence of intervenors may be biased in Table 6. We address this concern by directly testing for the exogeneity (or conversely the endogeneity) of the intervenor variable. See Tables A2 and A3 in the Appendix for details. We can reject the hypothesis that the intervenor variable is endogenous. Nonetheless we acknowledge that this is still a valid concern largely because tests of exogeneity/endogeneity are relatively weak. Still, even if it partially affects our results, we it should not undermine our ultimate claim that ECPA intensified inter-agency lobbying.

3. *An expansive definition of the event.*

We concede that ECPA does capture what might be described as a background trend in the direction of greater environmental protection. Without a growing demand for environmental protection, it is hard to imagine Representative Dingell or any other member of Congress pressing for ECPA in the first place; the electoral rewards would have been too few. As described above, momentum for this legislation built over time, in response to growing frustration with FERC's disregard for its secondary mandates, a frustration that would not have arisen in the absence of a growing demand for environmental protection. And as we recounted, this momentum was reflected in judicial decisions, legislation, and pressure from both environmental interest groups and environmental agencies.

Yet, as we have already argued, ECPA was more than epiphenomenal. It made FERC more vulnerable to the influence of collateral agencies by, among other things, requiring an explanation from FERC for departing from other agencies' recommendations. The post-ECPA jump in environmental conditions is too striking, and the post-ECPA role of intervenors too powerful, to conclude otherwise. So even if ECPA depends upon, and in part reflects, background trends, this does not detract from our finding that ECPA made a difference. In particular, it does not undermine either of our two key claims: that inter-agency lobbying can be a mechanism of legislative control and, relatedly, that Congress can encourage this lobbying by altering the interest group market.

¹⁸⁸ In the models of Table 6, this is the concern the intervenor variable is correlated with the error term of the model, leading to inconsistent (e.g., biased) estimates of the influence of intervenors on environmental conditions.

V. IMPLICATIONS

A. Lateral Legislative Control

Conceptually, our analysis extends both legislative control and interest group theories by broadening the purview of each, and highlighting their overlapping influences. First, we explain our contribution to the literature on legislative control, which explores Congress' ability to control the discretion it delegates to administrative agencies. Traditionally, this literature focuses on ex ante statutory requirements that limit agency discretion, and ex post oversight that can correct the agency when it deviates from congressional preferences.¹⁸⁹ Into this mix we offer a new source of control: collateral agencies. Our case study suggests that Congress specifically amended the FPA to strengthen the role of public agencies in FERC's decision making process, and that this was an effective strategy for altering FERC's behavior.

Certainly, it is not new to suggest that Congress may try to control agency discretion with a combination of structural and procedural legislative requirements. McCubbins, Noll and Weingast¹⁹⁰ originated this thesis some time ago, and others have since refined it.¹⁹¹ Indeed, Spence has applied this approach specifically to FERC, evaluating the effectiveness of congressional efforts to control FERC's licensing decisions via procedural requirements in environmental statutes.¹⁹² And beyond ex ante mechanisms such as these, scholars have already proposed that Congress might enlist third parties in ex post oversight of agency discretion. The most famous example is McCubbins and Schwartz' theory that Congress can equip interest groups to pull "fire alarms" to alert Congress to agency misbehavior.¹⁹³ Yet to our knowledge, scholars have not explored the prospect that Congress might rely specifically on inter-agency lobbying as a mechanism of control.

¹⁸⁹ See McCubbins and Schwartz, *Police Patrols*, *supra* note 32; Bendor et. al., 1985; McCubbins et. al., *supra* note 31; Aberbach, 1990 *supra* note 31.

¹⁹⁰ See Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) (hereafter *Administrative Procedures*); Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. Rev. 431 (1989).

¹⁹¹ See e.g., Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992); John A. Ferejohn, *The Structure of Agency Decision Processes*, in CONGRESS: STRUCTURE AND POLICY (Matthew McCubbins & Terry Sullivan, ed., 1987). McNollgast originally proposed that Congress can structure agency decision making to lock in deals made in legislative bargaining. See McNollgast, *Administrative Procedures*, *supra* note. Other scholars have contested this account, noting that procedures afford even members of the losing coalition opportunities to challenge implementation at the administrative stage. See e.g., Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development*, 6 J. L. & ORG. 267 (1990). See also Jerry L. Mashaw, *GREED CHAOS AND GOVERNANCE* (1997).

¹⁹² See e.g., Spence, *supra* note. Spence's study covers licensing decisions between 1960 and 1990. He argues that environmental statutes such as WSRA, the CWA and NEPA, along with PURPA and ECPA, exemplify efforts at procedural control. Based on his own empirical study, Spence concludes that FERC is somewhat resistant to political control. Our study, by contrast, makes the specific point that Congress may try to control agency decision making by strengthening other agencies to intervene in its process. Spence's conclusions about ECPA's effectiveness are not ideal for analyzing the effect of ECPA because the study ends in 1990, the year that we use as a baseline for the statute's full implementation.

¹⁹³ See McCubbins and Schwartz, *Police Patrols*, *supra* note 32.

Why would Congress rely on lateral legislative control? In theory, this should not be necessary because secondary mandates ought to bind the agency. But as we have shown, a failure of all relevant principals to enforce these secondary mandates led the agency to ignore them. Congress has some alternatives to relying on collateral agencies, however. It could, for example, take the task upon itself. Congress could determine the environmental conditions that ought to be imposed on dams of a particular age, with particular characteristics, sited in particular locations, without relying on collateral agencies at all. Yet, deputizing collateral agencies allows Congress to avoid making such time-intensive and potentially controversial determinations. And presumably this strategy has an added benefit: it gives members of oversight and appropriations committees considerable leeway to influence the inter-agency process during implementation, enabling members, down the road, to intervene on behalf of local constituents in particular instances.¹⁹⁴

Collateral agencies are attractive instruments of control because they have unique expertise that both Congress and the lead agency may lack. Generalist members of Congress cannot be expected to fully appreciate the environmental impacts of hydropower projects, and to develop mitigation strategies. Taking this level of detail upon themselves would be very costly in terms of both staff and member time. Yet forcing the reluctant agency to develop that expertise internally could also be costly, and duplicative of expertise that lies elsewhere in the government.

The best strategy for internalizing fish and wildlife considerations into the agency's licensing process under these circumstances, then, is to rely on outside agencies, like USFWS, USFS, and USNMFS, whose statutory mandates already require them to be environmental experts, and whose success in some measure depends upon their ability to prevent *other* agencies from frustrating their regulatory and management efforts. For example, the USFWS could not hope to protect endangered species as required by the ESA, if FERC continued to license hydropower with little concern for the devastating impact on anadromous fish runs. Neither could the Army Corps of Engineers enforce the WSRA without ensuring that FERC did not license a dam on an especially scenic river. Similarly, state environmental agencies could not ensure their own compliance with water quality standards under the CWA, without the authority to decline certification for hydropower licenses that would result in additional pollutants entering state waters. These agencies are already motivated to act on behalf of the interests that Congress wishes to strengthen. They are the natural candidates to enlist in lateral oversight.

Moreover, and perhaps more importantly, relying on the lead agency itself to change could be risky. In our example, FERC had an internal culture that was resistant to environmental concerns, and a relative lack of professional expertise in the area. Even if Congress and the courts demanded it, change might be slow and difficult. Relying on collateral agencies provides something of an insurance policy to Congress in such circumstances. While FERC had, as we noted, hired additional environmental staff beginning in the late 1970s, and while existing environmental staff were moving into powerful management positions in the agency, there was reason to doubt whether the changes would take root.

¹⁹⁴ See DeShazo and Freeman, *Congressional Competition*, *supra* note 36.

Collateral agencies that have consistently pressed for environmental concerns might also help to reinforce these developments at FERC. Indeed, there might be profitable synergies to be had among the professional staff in the different agencies. For example, FERC biologists tend to see fish and wildlife protection through a hydropower prism; they have heightened expertise about how to mitigate the impact of dams. The biologists in wildlife agencies may lack specialized expertise about hydropower, but their general knowledge about species and habitat might exceed that of the FERC experts.¹⁹⁵ Combining the different expertise distributed among the agencies could lead to more effective strategies for mitigation. Presumably, moreover, developing working relationships with professionals in other agencies, especially those with similar disciplinary training, could help to reinforce FERC's culture shift.

One might argue, however, that in deputizing collateral agencies, Congress is merely enfranchising the interest groups that tend to lobby those agencies (e.g., the environmental groups that lobby USFWS). This is certainly possible. Yet the extent to which one believes this depends on the extent to which one believes that agencies are so dominated by the interests that lobby them that they are effectively "captured"—and this remains a contentious issue in political science. Moreover, presumably Congress could enfranchise these private interest groups directly if it were so inclined. We think it more likely that Congress chooses collateral agencies because of their expertise, and their predictable preferences. Congress can rely on these agencies to press for their historical interests, which in our case was environmental protection. Moreover, their own oversight committees can ensure that they do.

This adds another reason why Congress might choose to rely on collateral agencies: it helps to empower their oversight committees *vis a vis* the oversight committees with power to oversee FERC. Why is this relevant? The struggle over how much attention FERC should pay to environmental concerns can be viewed as an inter-committee struggle in Congress, as we mentioned earlier. Members serving on committees that oversee the environmental and resource management agencies are likely to have different preferences than those who serve on the committees with oversight over energy. When Congress gives a larger role in FERC decisionmaking to the environmental agencies, it is readjusting power within Congress itself.

B. The Mode of Congressional Intervention

Our study made us wonder whether the *form* of congressional intervention matters when it comes to the reluctant agency. In this case, Congress elected to strengthen collateral agencies, and to do so specifically by amending the FPA itself. In doing so, Congress transformed an

¹⁹⁵ "There are two levels of expertise when dealing with energy infrastructure: the local biologists and the FERC people. The local biologists know where the trout are. They know their damn trout! But the expertise of the wildlife biologist that works at FERC is different because everything they do goes through prism of hydropower project. So the FERC biologist knows the best mitigation for inundating these kinds of lands or what have you—they integrate the wildlife concern with the engineering issues. The local guys are focused on their species and the many things that affect the health of their species. FERC staff are focused on the engineering and ecological aspects of hydropower. The ESA guy is worried about the bull trout, but it's being affected by 500 different actions, like the new car wash, the new road, and irrigation. But FERC knows hydropower mitigation." Robertson Interview, *supra* note .

inter-statute conflict between FERC's competing mandates (i.e., its mandate to license power pursuant to the FPA and its mandate to protect the environment pursuant to a host of environmental statutes) into an *intra*-statute one, by amending the agency's enabling law. At least in some circumstances, such a strategy might be optimal.

Our data do not speak directly to this issue, but we flag it as an interesting question for future research. We expect that most political scientists would say that form should not matter; what matters is whether Congress intends to make FERC change. Yet, as we pointed out, the legislative history of ECPA reveals how important it was for members to amend the FPA itself.¹⁹⁶ Our thoughts on this are necessarily preliminary, and secondary to our main point about the potential power of lateral legislative control but we think it worth asking: is it possible that statutes of general application may, for one reason or another, be taken less seriously than specific amendments to the agency's own enabling law? Quite apart from oversight, is it easier as a cultural matter for agency officials to ignore obligations that they believe to not be their responsibility?¹⁹⁷ It seems plausible that political appointees, agency lawyers and career staff might no longer be able to ignore mandates when they are unavoidably built into the statute they interpret and implement every day. Yet without extensive interviewing of agency officials, or an empirical test, we cannot answer this.

In our example, one might argue that Congress could have accomplished the same result by simply shifting its oversight priorities. Once the Senate Energy and Commerce Committee came to see the light about environmental considerations, it could have signaled FERC that the agency ought to be more sensitive to the suggestions of the resource agencies. Congress could, through aggressive oversight, have forced FERC to change its ways. Yet, amending the FPA, rather than relying on oversight alone, has its advantages. It locks in the new congressional preferences, and limits the flexibility that subsequent oversight committees and members-at-large to influence the agency subsequently. Should a future oversight committee direct the

¹⁹⁶ See House Report on ECPA (House Report No. 99-507, March 25, 1986, U.S.C.C.A.N. 2496) states that the bill "clarifies and improves the Commission's licensing process in assuring adequate environmental protections....Specific provisions of the Federal Power Act are amended to ensure that hydroelectric development, management and operation will only be carried out in a manner consistent with the protection, mitigation of damage to, and enhancement of fish and wildlife (as now generally required by the Act under sections 10, 18, and 30) by making them specifically *an integral part of the Commission's licensing, exemption, and permitting process*. These non-development purposes will be given 'equitable treatment' with the development purposes of the Act (at 2497 emphasis added)." This implies that the Commission already had these obligations but that Congress was now making them more central to the Commission's mission.

¹⁹⁷ Consider NEPA, which imposes on all federal agencies an obligation to file an environmental impact statement for major federal projects significantly affecting the environment; or the ESA, which requires all federal agencies to consult with DOI or DOC over whether projects they support will jeopardize the survival of endangered species. While these mandates apply to FERC as they do all other agencies, they arise in the context of statutes that are otherwise irrelevant to FERC and not viewed as part of its domain. NEPA is the responsibility of the Council on Environmental Quality (in the Executive Office of the President), which promulgates regulations governing the statute's implementation and the ESA is the shared responsibility of the DOI (for terrestrial species) and the DOC (for marine species). Can amending an agency's enabling law spur or accelerate a cultural shift in the agency? Does it help the agency to internalize a conflict that it had previously been able to externalize (e.g., the understanding that environmental mandates are the responsibility of environmental agencies, whereas the FPA's energy related mandate is FERC's responsibility)?

agency to act in a manner that runs directly counter to the now clear statutory mandate, that member runs the risk that the agency will (at the behest of its own political appointees and legal counsel) resist, or that even if the agency complies, the decision will be reversed upon judicial review. This is especially likely if the legislation enables third parties to sue to enforce the new mandates. Courts are reluctant to read congressional preferences into oversight behavior, because it is unreliable and not formalized into law but they *are* accustomed to reading statutes, and feel quite comfortable policing agency compliance with statutory mandates. Amending the FPA, therefore, indirectly empowered courts to oversee FERC's licensing process even more closely.¹⁹⁸

B. Interest Group Theory

The implications of our analysis for the literature on interest group competition are equally important. Interest group theory has focused primarily on explaining the reasons why some interest groups become more powerful than others in the legislative and administrative process. The classic analysis is that interest groups facing the prospect of concentrated benefits and diffuse costs will prevail over those that stand to gain only diffuse benefits; the latter groups have difficulties organizing because there are incentives to free-ride.¹⁹⁹ Yet our results show something unexpected: public agencies can be the most frequent and effective intervenors in an administrative process. And our analysis suggests that, just as Congress can intervene in the interest group market to enable private groups to pull fire alarms, Congress can intervene to augment the influence of public agencies.

Congress can do this with varying amounts of intensity. ECPA did not introduce collateral agencies into FERC's licensing process for the first time. Congress had already empowered these agencies to some extent through a variety of statutory mechanisms, including the longstanding "equal consideration" language in the FWCA; the general environmental impact statement requirement in NEPA; and the consultation requirements in WSRA, HCPA and ESA. The natural resource and management agencies did take advantage of these provisions as much as they could, intervening in FERC proceedings and joining lawsuits, as we described earlier. But for years, they were only marginally effective in convincing FERC to impose environmental conditions. Congress went much further in strengthening their hand when it passed ECPA. Beyond requiring "equal consideration" for non-power values in the FPA itself, the statute specifically named the resource agencies that were entitled to impose conditions, and it created a default presumption that their recommendations would be followed unless FERC could explain (presumably to a court's satisfaction) why not.²⁰⁰ ECPA also mandates a dispute

¹⁹⁸ Indeed, our data show that legislative oversight during the period studied, even after ECPA, was associated with a *drop* in environmental conditions. See coefficient in Table_. So there was certainly not unanimity in Congress over the need to enforce environmental mandates more vigorously. The key oversight committee remained, on average, pro-power. As noted above, the driving force behind the environmental mandates in ECPA was Representative Dingell, the Chair of the Subcommittee on Investigations and Oversight of the Senate Committee on Energy and Commerce (and notably, the former Chair of the Fisheries and Wildlife subcommittee of the Merchant Marine and Fisheries Committee). The price for his support of ECPA's other provisions was the adoption of the environmental amendments.

¹⁹⁹ MANCUR OLSEN, *THE LOGIC OF COLLECTIVE GOVERNANCE* (1965).

²⁰⁰ 16 U.S.C § 803(j)(2).

resolution process to replace the rather autocratic licensing process that FERC until that point had used.²⁰¹

It stands to reason that Congress can also intervene to *weaken* collateral agencies that it might have empowered at an earlier time. In fact, the energy bill currently pending in Congress contains a provision that would re-weight the balance in FERC proceedings toward greater FERC discretion.²⁰² Some in Congress apparently feel that the pendulum has swung too far in the direction of the fish and wildlife agencies.²⁰³

This is in part a response to the federal courts, which have helped to solidify, and even extend, the power of the resource agencies to condition FERC licenses. The most important case in this regard is *PUD No. 1 v. Washington*,²⁰⁴ in which the Supreme Court held that FERC licenses are subject to state certification for compliance with state water quality standards pursuant to §401 of the CWA. This section of the CWA requires states to provide water quality certification prior to a federal license being issued for any activity that may result in a discharge of pollutants into intrastate navigable waters.²⁰⁵ As a result of this conditioning power, a state may impose minimum flow requirements on license applicants. The *PUD* decision reinforces the *Escondido* case discussed earlier, in which the Court made clear that it would take the mandatory conditioning power of collateral agencies seriously.²⁰⁶ This shows that courts, and not just Congress, can strengthen inter-agency lobbying, though their ability to do so is much more limited; it depends on the existence of legislation (like the CWA in the *PUD* case; or section 18 of the FPA in *Escondido*) that gives collateral agencies a role in the first place.

Finally, we note that our finding the public agencies can dominate the interest group market represents a potential challenge to public choice theory. If public agencies are effective at influencing one another, and if Congress can intervene to make the lobbying agencies even more effective, perhaps these agencies will give voice to a set of interests that might balance or neutralize the influence of private (usually well-financed and industry dominated), groups. Traditional public choice theory would predict that private groups representing concentrated costs and benefits would prevail in settings like those we described. Yet such predictions might need to be modified to account for the impact of public agencies.

²⁰¹ *Id.*

²⁰² Cite as H.R.6, 10th Cong. (2005).

²⁰³ FERC's process has changed substantially over time. See 1990 Handbook on Hydropower Licensing and compare to 2004 handbook. There is much more consultation occurring much earlier now, involving many federal and state agencies. See 2004 Handbook at 2-6 for a list of agencies that applicants must consult, including NMFS, USFWS, NPS, USEPA, federal agencies administering any US lands used or occupied by the hydropower project; the state agency with responsibility over fish and wildlife; state historic preservation officer; and Indian tribes. The process has become multi-lateral and has evolved considerably from the original bilateral "applicant-FERC" relationship in which intervenors were viewed primarily as irritants. Ultimately, all of this consultation may result in fewer formal interventions because agencies may come to feel less of a need to formally participate in licensing hearings. At some point, we may see a rise in environmental conditions but a drop in agency intervention, which might be evidence that FERC has internalized a consultative and negotiated approach to licensing.

²⁰⁴ 511 U.S. 700 (1994)

²⁰⁵ See 33 U.S.C. § 1341 (2003).

²⁰⁶ See *Escondido*, *supra* note at.

D. Inter-Agency Lobbying as Policy Mediation

Our study sheds light on a dynamic that is widespread, but relatively invisible. Inter-agency lobbying pervades the regulatory process, yet much of it is necessarily informal. The extent of this lobbying, its quality and effectiveness, may be hard to measure. Whether on agency succeeds in influencing another likely depends as much on cultural patterns and practices across agencies, and on personal relationships among counterparts, as it does on formal policies that attempt to structure such disputes. Indeed a great deal of inter-agency process is likely ad hoc, uncoordinated and fairly low-level. Only a small subset of inter-agency conflicts will wind up with one agency formally intervening in another's licensing or rulemaking process.

Inter-agency conflict seems, on first glance, to be dominated by the executive rather than the legislative branch. Most conflicts among executive agencies, one expects, will be managed by the president and his staff, who can resolve them informally—by signaling to political appointees that they should overcome their disagreements—or more formally, by simply taking the relevant decisions out of their hands. Of course, most conflicts will never reach this level, and will be resolved instead by staff within the agencies, by the lawyers in their respective Counsel's offices,²⁰⁷ or by political appointees exercising discretion. (Conflicts between executive and independent agencies may be especially challenging for the president, since his ability to control the independent agencies is significantly less.)

The most important player in coordinating agency action across multiple executive agencies may be the Office of Information and Regulatory Affairs (OIRA) in OMB, which annually receives the regulatory agendas of the federal executive agencies²⁰⁸ and which often exerts pressure on them to adapt their plans to the Presidents' political priorities.²⁰⁹ For a subset of environmental and resource management issues that involve compliance with NEPA, the Council on Environmental Quality plays an important and statutorily prescribed role mediating inter-agency disputes.²¹⁰ A number of Executive Orders address inter-agency conflicts as well.²¹¹

The point here is that we know relatively little about inter-agency decision making because much of it is invisible. And what we do know assumes that it is mostly a problem of coordination that must be handled by the executive branch. But our argument suggests that the inter-agency process is more than a *problem* that generates conflicts for the executive branch to

²⁰⁷ John Leshy, former Solicitor at DoI in the Clinton administration, commented to us that he spent a great deal of his time mediating inter-agency conflicts. Comments made at Environmental Law Conference, Harvard Law School, November 2003.

²⁰⁸ OIRA compiles the regulatory agendas from all federal entities that have regulations under development or review into the semi-annual Unified Agenda as part of its implementation of Executive Order 12866. *See* Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993).

²⁰⁹ *See* comments of former OIRA official, The Future of Rulemaking, American University Center for Rulemaking, March 16, 2005.

²¹⁰ The CEQ has, in the past, issued reports on the need for greater inter-agency cooperation, especially for managing large-scale multiple-agency efforts to manage natural resources like watersheds but the report has been ignored. *See* CEQ Report.

²¹¹ Cite relevant EOs.

solve. It can, in our view, be a productive system of policy mediation, in which agencies introduce to other agencies a set of interests that they may otherwise ignore, or treat only lightly, even when those interests are intended by statute to be part of that agency's decision making process. Thus, we think of inter-agency lobbying not, as some might, in perjorative terms, but as a mechanism for broadening the scope of the agency decisionmaking process.

Consider the extent to which FERC's licensing process has been transformed. Some commentators reported to us that FERC no longer exercises final decision making power over licenses in any real sense; it has all but yielded its authority to the USFS, USFWS and state resource agencies, all of which now have mandatory conditioning power.²¹² The agency has significantly revised its approach to licensing, creating an "Integrated Licensing Process" in which license conditions are explicitly negotiated among agencies and stakeholders, and an "Alternative Licensing" option for speedier resolution of conflicts.²¹³ As Robinson put it, FERC no longer acts the part of the imperial agency. Instead, it runs a "distributed authority" licensing program. Indeed, on some projects, seven different entities have mandatory conditioning power.²¹⁴

Although there is a growing literature in political science on inter-branch lobbying (e.g., between the White House and Congress) we are not aware of significant academic commentary on agency-agency lobbying (whether between executive branch agencies or between them and independent agencies, as in our example). And while OMB's oversight of Executive Orders requiring cost benefit analysis in rulemaking has been studied and critiqued extensively, the topic of inter-agency coordination more generally strikes us as under-explored. Here we have argued that Congress can be a stimulant to inter-agency lobbying when it serves Congress' need for controlling agency discretion. This suggests that Congress may have a significant impact on inter-agency process, a possibility that may be underappreciated. Among other things, Congress' use of lateral legislative control may have important separation of powers implications, as discussed below.

E. Separation of Powers

Lateral legislative control may have implications for the separation of powers. When Congress relies on lateral legislative control, we have argued, it can strengthen the hand of some agencies *vis a vis* others. Congress may rely on this strategy as part of an effort to discipline a reluctant agency, as it did in our example. But in trying to exercise control in this way, Congress may also yield significant power to the president. On the one hand, this should not be surprising. All delegations of authority to executive agencies yield some control to the President, who oversees those agencies through political appointees. Where conflicts arise among agencies, or where they lobby each other, the president retains the power to step in and arbitrate disputes.

²¹² Interview with Mark Quern, November 2004, on file with author.

²¹³ In the "integrated licensing process" the applicant's pre-filing consultation process with resource agencies occurs concurrently with FERC's NEPA scoping analysis. In the integrated process, Commission staff involvement begins in the pre-filing stage. See 2004 Handbook, *supra*.

²¹⁴ Robinson Interview, *supra*.

Congress may not like the outcome in any particular case, but this is the risk Congress always takes when it delegates power.

Yet lateral legislative control may raise unique problems where the empowered collateral agencies are *executive* and the agency made vulnerable to their influence is *independent*. In this case, Congress may yield even greater power to the executive branch than it normally would. The president may be able to step in to arbitrate conflicts, and effectively determine outcomes, in the independent agencies, which are traditionally not under presidential control. In our example, the president can influence how the fish and wildlife agencies behave in the FERC licensing process. This suggests that there could be separation of powers implications to lateral legislative control that do not attend the other instruments of control that Congress uses to oversee agency decision making.

Of course, if Congress finds that it has ceded too much power to the executive branch to arbitrate disputes among executive and independent agencies, Congress can simply amend the statute and take the power back. Congress can, as we have pointed out, disempower collateral agencies just as easily as it empowers them. Perhaps not, however. Once the resource agencies become embedded in the FERC licensing process, and once cultural practices have changed (as Robinson suggested they have), it may be hard to shift the lead agency back. And though in our example, Congress gave every indication of acting intentionally (to make FERC's more vulnerable to executive branch agencies and state agencies), we are concerned that Congress may not fully realize the larger, systematic consequences of lateral legislative control. Congress may not intend to give the President the authority to arbitrate inter-agency disputes.

F. Statutory Interpretation

Our argument may suggest a new rationale for deference to agency decisionmaking: courts should be more inclined to defer when the lead agency has negotiated with other affected agencies and there is consensus among them. Alternatively, in cases of inter-agency conflict over statutory meaning, courts should defer to the agency that Congress has chosen as the expert *for purposes of that decisionmaking process*, even if it is a collateral agency and not the lead agency implementing the relevant statute. While both of these suggestions are controversial, they are certainly worth considering. Yet they only emerge as possibilities once one appreciates the dynamic of inter-agency lobbying.

Traditionally, when an agency like FERC is charged with multiple mandates (e.g., hydropower licensing *and* protection of fish and wildlife), and chooses to prioritize some over others, scholars and courts treat the agency's decision as a routine problem of statutory interpretation. The agency's resolution of any trade-offs would normally be reviewed under the *Chevron*²¹⁵ test for agency interpretations of law, or the arbitrary or capricious test for agency decisions based on policy or fact,²¹⁶ both of which are essentially reasonableness tests. If an agency ignores a clear statutory mandate, and the mandate is "procedural," the court simply

²¹⁵ *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984).

²¹⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

ensures that the implementing agency observed the appropriate procedures, regardless of its ultimate decision. If the mandate is substantive, however, the court must wrestle with the balance the agency struck between competing substantive concerns.²¹⁷ Regardless, from this perspective, the fact that the agency has multiple mandates is of no great consequence. It simply raises familiar questions about how courts should treat an agency's exercise of its discretion.

This traditional understanding of judicial review assumes that for most decisions most of the time, the only agency of concern is the lead agency charged with implementing a relevant statute. To the extent that agencies lobby each other, and to the extent that they negotiate outcomes, judicial review tends to ignore it. We think, however, that the inter-agency dynamic ought to affect judicial attitudes toward the decisions under review. Shouldn't it strengthen the case for deference that the ultimate agency decision is a product of consensus? Or is it possible that judges will look askance at such "deals" because they will think that agencies may have negotiated their way to a compromise that the statute does not authorize?

And what should happen, as often did with FERC, when collateral agencies disagree with the lead agency's decision? Shouldn't this affect the reviewing court's judgment about the reasonableness of the lead agency's action? And when push comes to shove, which agency is entitled to *Chevron* deference? On the few occasions when courts have encountered this problem, they have given deference to the lead agency charged with implementing the statute, which in our case would be FERC. But should they do so, if Congress has specifically intervened to strengthen the role of collateral agencies over at least some aspects of decisionmaking? While we cannot resolve these questions here, we flag them as interesting topics for future research.

VI. CONCLUSION

In this Article, we have identified a new form of control upon which Congress might rely to convince "reluctant" agencies to change their ways: lateral legislative control or, alternatively, inter-agency lobbying. Congress did not invent inter-agency lobbying; in fact it occurs all the time. But Congress can intervene to strengthen the hand of some agencies to affect the decisionmaking of others, and in so doing can ensure that the lead agency takes account of considerations that it might otherwise ignore.

In our example, we showed how FERC, an agency that had historically ignored a suite of environmental mandates, was brought to heel to a significant extent by collateral federal fish and wildlife agencies, and by state agencies willing to intervene in FERC's licensing process. The ability of these agencies to influence FERC was helped along over time by the federal courts, which effectively granted them "conditioning" power over FERC licenses, and, as we showed with our empirical data, by ECPA, which Congress passed in 1986 in part to intensify this inter-agency lobbying. The result, our data revealed, was more intervention by public agencies in FERC licensing, which resulted in many more environmental conditions imposed on the licenses

²¹⁷ For example, a reviewing court may have to resolve how OSHA should balance the need to ensure that workers suffer no "material impairment" from exposure to toxics in the workplace, with the tempering instruction that the agency do so "to the extent feasible." See *API v. OSHA* (The Benzene case).

FERC re-issued in the ensuing years, together with a much stronger, stable, and more structured role for collateral agencies in the licensing process. Hydropower licensing at FERC, it is fair to say, has now been transformed from a top-down process dominated by a single imperial agency, to a negotiated process in which other agencies have emerged as the most powerful players among all the stakeholders.

Once one peels back the skin of administrative decision making, one finds not lone agencies making isolated decisions in a cocoon of bureaucratic insularity, but collections of agencies intervening in each other's decisionmaking processes, sometimes formally and sometimes less so. This image of the administrative state is quite different—and much more dynamic—than the traditional view. It has implications not only for theories of legislative control, which we have emphasized here, but for our thinking about interest group theory, the separation of powers and statutory interpretation as well. This Article, merely scratches the surface of the complicated world of inter-agency process, which we hope becomes a focus of research in both political science and administrative law.

Appendix

Table 1A
Variable Definition

Dependent Variables

Total Requirements Number of environmental requirements issued per license

Interest Group Characteristics

Private Owner =1 if the ownership of the project is a private utility, = 0 if private non-utility, municipal ownership, industrial, or cooperative ownership

Multiple Owner = 1 if the owner of the project also owns other projects under relicensing, or whether they are simply a single project owner, = 0 otherwise

Intervenor Groups Total number of intervenor groups in a project relicense

Federal Public Number of federal public intervenor groups in a project relicense

State Public Number of state public intervenor groups in a project relicense

Local Public Number of local public intervenor groups in a project relicense

Federal Non-Profit Number of federal non-profit intervenor groups in a project relicense

State Non-Profit Number of state non-profit intervenor groups in a project relicense

Local Non-Profit Number of local non-profit intervenor groups in a project relicense

Federal Private Number of federal private intervenor groups in a project relicense

State Private Number of state private intervenor groups in a project relicense

Local Private Number of local private intervenor groups in a project relicense

Legislative Principals

ECPAD = 1 if a project applied for a relicense after the Electric Consumer Power Act Amendments went into effect (January 2, 1990) , = 0 otherwise

LCV Score The average LCV score for the two senators representing the state that the project is located in, in the year the project applied for a relicense

Senate Committee =1 if either senator of the state in which the project is located was on the congressional committee which oversees FERC, the year the project applied for a relicense, = 0 otherwise

Local Conditions

Dam Height Dam height in feet above the streambed of the tallest dam in the project

kW KW capacity generation of the project, divided by 10^3

Electricity Price Average annual price of industrial electricity in the state the project was relicensed, for the year the project applied for a relicense (CPI deflated, base year 1970)

Concrete = 1 if the dam(s) in the project were made of concrete, = 0 if earthfill, rockfill, timbercrib, or other

Dam Year Year (measured by the last two digits, so higher numbers imply younger dams) the oldest reservoir involved in the project was put into operation

Run-of-River =1 if the plant operation is run-of-river, =0 if storage, gravity diversion, or reservoir only

NERC-West = 1 if the project is located in a Western NERC region , = 0 otherwise

NERC-East = 1 if the project is located in an Eastern NERC region, = 0 otherwise

NY Office = 1 if the project is licensed in the New York FERC office, = 0 otherwise

CH Office = 1 if the project is licensed in the Chicago FERC office, = 0 otherwise

SF Office = 1 if the project is licensed in the San Francisco FERC office, = 0 otherwise

PO Office = 1 if the project is licensed in the Portland FERC office, = 0 otherwise

River Miles Total river miles of all the dams (creating their respective reservoirs)

Gross Storage/ 10^3 ^At-site maximum storage capacity in acre- feet divided by 10^3

Plant Factor % Percentage of time at which the plant is operating at optimal capacity

Recreation Use = 1 if the intended use of the project includes recreation, = 0 otherwise

River Characteristics

Endangered River =1 if the river of the project (within its state) is either an official Wild and Scenic River, or is listed on American Rivers' Most Endangered Rivers list, = 0 otherwise

Endangered Species A count variable for the number of federally listed endangered species for all counties in the project area

Sociodemographic Variables*

Population/10³ The total population of the county in which the project is located, divided by 10³

% Age 0-24 The percent of the total population of the county in which the project is located aged 0-24

% Age >75 The percent of the total population of the county in which the project is located over age 75

% Bach. Degree The percent of the total population of the county in which the project is located holding a bachelors degree

Median Income/10³ The median income of the county in which the project is located, divided by 10³

% Below Poverty The percent of the total population of the county in which the project is located below the poverty line

Housing Units The total number of housing units in the county in which the project is located

Labor Force/10³ The total civilian labor force of the county in which the project is located, divided by 10³

Unemployed/10³ The total number of unemployed in the civilian labor force of the county in which the project is located, divided by 10³

Total Farms The total number of agricultural farms in the county in which the project is located

Manf. Earnings Manufacturing earnings in the county in which the project is located, measured in billions of dollars

Gov. Revenue Local government revenue of the county in which the project is located, measured in millions of dollars

**information taken from the 1988 and 1994 County and City Data Books – 1988 used for project license applications before 1990 and 1994 used for those after, <http://fisher.lib.virginia.edu/ccdb/>*

Table A2
Variable Summary Statistics

<i>Dependent Variable</i>	Variable	Mean	Std. Dev.	Min.	Max.
	Total	10.468	5.712	0	28
<i>Interest Group Characteristics</i>	Private Owner	0.64	0.481	0	1
	Multiple Owner	0.77	0.421	0	1
	Intervenor Groups	12.041	18.649	0	227
	Federal Public	3.338	2.513	0	14
	State Public	2.982	2.451	0	14
	Local Public	1.536	9.129	0	134
	Federal Non-Profit	1.149	1.726	0	10
	State Non-Profit	0.707	1.525	0	11
	Local Non-Profit	0.829	2.55	0	29
	Federal Private	0.401	1.279	0	10
	State Private	0.527	1.371	0	11
	Local Private	0.572	2.201	0	18
<i>Legislative Principals</i>	ECPAD	0.653	0.477	0	1
	LCV Score	0.628	0.242	0	0.97
	Senate Committee	0.275	0.447	0	1
<i>Local Conditions</i>	Dam Height	50.171	66.156	0	661
	kW	21.629	66.519	0	650.25
	Electricity Price	5.172	1.515	2.0223	9.23
	Concrete	0.568	0.497	0	1
	Dam Year	24.698	22.325	0	99
	Run-of River	0.64	0.481	0	1
	NERC-West	0.189	0.393	0	1
	NERC-East	0.523	0.501	0	1
	NY Office	0.347	0.477	0	1
	CH Office	0.356	0.48	0	1
	SF Office	0.099	0.299	0	1
	PO Office	0.077	0.267	0	1
	River Miles	902.869	2001.965	0	19994
	Gross Storage/10 ³	92.162	418.596	0	4959
	Plant Factor %	54.527	26.069	0	308
	Recreation Use	0.55	0.499	0	1
	<i>River Characteristics</i>	Endangered River	0.18	0.385	0
Endangered Species		3.748	4.416	0	33
<i>Sociodemographic Variables</i>	Population/10 ³	142.185	569.275	4.887	8295
	% Age 0-24	34.622	9.185	0	56.5
	% Age >75	5.724	2.083	0	12.1
	% Bach. Degree	14.065	5.086	6.5	34
	Median Income/10 ³	25.031	8.387	10.973	51.716
	% Below Poverty	9.324	2.659	2.4	18
	Housing Units	54812	196485.3	1400	2855578
	Labor Force/10 ³	69.113	280.502	1.661	4095
	Unemployed/10 ³	4.594	18.684	94	273
	Total Farms	743.721	753.714	0	5911
	Manf. Earnings/10 ³	192.086	612.989	0.2	5035.309
	Gov. Revenue	89616.85	233052.9	4.2	1610700

Possible Endogeneity of Intervenor

Unobservable factors may affect both intervenor involvement and the requirements issued, leading to concerns about endogeneity. To mitigate this we develop as comprehensive an empirical model as possible. Nonetheless we explore the presence of endogeneity by instrumenting for the presence of intervenors and then test directly for the endogeneity. In Table A3, we present the first stage equation that predicts the presence of intervenors. Explanatory variables in this model include socio-demographic characteristics that should affect the behavior of local and state level intervenors as well as several characteristics of the dam and its surroundings. In Table A4, Model 1 presents the base specification, while Model 2 is the same specification except that we instrument for the intervenor variable. A MacKinnon-Wu-Hausman test finds that the endogeneity of intervenor participation is not significant at the 5% level, $F(1, 204)=3.06$ $Prob>F=0.0816$.

Table A3
First Stage Poisson Model

<i>Dep Var: Total Number of Intervenor Groups Per Project</i>		
Variable	Coefficient	Std. Error
Constant	2.343***	0.308
<i>Sociodemographic Variables^(A)</i>		
Population/10 ⁶	-4.960	3.170
% Age 0-24	0.012***	0.004
% Age >75	0.039**	0.019
% Bachelor's Degree	-0.029***	0.007
Median Income/10 ⁶	-4.040	9.250
% Below Poverty	-0.075***	0.015
Housing Units/10 ⁶	-8.660	5.640
Labor Force/10 ⁶	6.860	5.510
Unemployed/10 ³	0.140***	0.019
Total Farms/10 ³	-0.102**	0.045
Total Manufacturing Earnings/10 ⁶	0.397***	0.132
Total Local Government Revenue/10 ⁶	-0.547*	0.307

Local Conditions ^(B)

Dam Height/10 ²	0.220***	0.048
kW/10 ⁶	-6.220***	0.849
Electricity Price	-0.100***	0.026
kW*Electricity Price/10 ⁶	2.480***	0.275
Concrete	0.300***	0.054
Run-of-River	-0.211***	0.058
NY Office	0.717***	0.099
CH Office	-0.051	0.092
SF Office	0.032	0.144
PO Office	0.490***	0.120
River Miles/10 ³	0.041***	0.013
Gross Storage/10 ⁶	-0.275***	0.066
Plant Factor %	-0.004***	0.001
Recreation Use Dummy	0.180***	0.051
Endangered River	0.534***	0.058
Endangered Species	0.016*	0.009
Multiple Owner	0.177***	0.054
<u>ECPAD</u>	<u>0.695***</u>	<u>0.156</u>

(A) Joint significance test: $\chi^2(12)=131.73$, Prob> $\chi^2=0.0000$ ***

(B) Joint significance test: $\chi^2(18)=800.93$, Prob> $\chi^2=0.0000$ ***

Pseudo R²=0.3665

Table A4: OLS Models 1-3
Dependent Variable – Total Requirements

Variable	Model 1	Model 2-IV	Model 3
Constant	4.789** (1.984)	4.973** (1.996)	5.644*** (1.865)
<i>Interest Group Characteristics</i>			
Private Owner	0.958 (0.661)	1.231* (0.677)	0.474 (0.609)
Multiple Owner	-0.971 (0.749)	-1.141 (0.763)	-0.734 (0.690)
Intervenor Groups	0.047*** (0.165)	0.143** (0.056)	
Federal Public			0.782*** ^(E) (0.141)
State Public			0.368*** ^(E) (0.139)
Local Public			0.095 ^(E) (0.060)
Federal Non-Profit			-0.026 ^(E) (0.250)
State Non-Profit			0.642*** ^(E) (0.267)
Local Non-Profit			-0.454* ^(E) (0.251)
Federal Private			0.234 ^(E) (0.389)
State Private			0.137 ^(E) (0.340)
Local Private			-0.548* ^(E) (0.291)
<i>Legislative Principals</i>			
ECPAD	5.453*** ^(A) (0.666)	4.613*** ^(C) (0.796)	3.444*** ^(F) (0.723)
LCV Score	5.75*** ^(A) (1.626)	5.038*** ^(C) (1.645)	3.426*** ^(F) (1.452)
Senate Committee	-1.372* ^(A) (0.824)	-1.618*** ^(C) (0.82)	-2.237*** ^(F) (0.740)
<i>Local Conditions</i>			
Dam Height	0.014** ^(B) (0.07)	0.0128* ^(D) (0.007)	0.015*** ^(G) (0.006)
kW/10 ³	-0.05*** ^(B) (0.014)	-0.038*** ^(D) (0.015)	-0.044*** ^(G) (0.013)
Electricity Price	-0.683*** ^(B) (0.262)	-0.586*** ^(D) (0.262)	-0.630*** ^(G) (0.238)
kW*Elec. Price/10 ⁶	17*** ^(B) (4.65)	11.497*** ^(D) (5.432)	13.8*** ^(G) (4.46)
Concrete	1.823*** ^(B) (0.61)	1.503*** ^(D) (0.655)	1.008* ^(G) (0.559)
Dam Year	-0.014 ^(B) (0.013)	-0.012 ^(D) (0.013)	-0.013 ^(G) (0.012)
Run-of-River	-1.226* ^(B) (0.656)	-1.176* ^(D) (0.665)	-1.11* ^(G) (0.578)
NERC-West	2.134* ^(B)	1.981* ^(D)	1.510 ^(G)

		(1.112)	(1.120)	(1.003)
<i>River</i>	NERC-East	0.089 ^(B)	-0.370 ^(D)	-0.933 ^(G)
<i>Characteristics</i>	Endangered River	(0.816)	(0.834)	(0.740)
		2.787***	2.659***	2.312***
		(0.761)	(0.782)	(0.685)
	<u>Adj R²</u>	<u>0.491</u>	<u>0.487</u>	<u>0.618</u>
(A)	Joint significance test: F(3, 205)=34.06,	Prob>F=0.0000***		
(B)	Joint significance test: F(9, 205)=5.96,	Prob>F=0.0000***		
(C)	Joint significance test: F(3, 205)=18.88	Prob>F=0.0000***		
(D)	Joint significance test: F(9, 205)=3.56,	Prob>F=0.0004***		
(E)	Joint significance test: F(9, 197)=9.62,	Prob>F=0.0000***		
(F)	Joint significance test: F(3, 197)=17.63,	Prob>F=0.0000***		
(G)	Joint significance test: F(9, 197)=6.22,	Prob>F=0.0000***		