

ORAL ARGUMENT IS SCHEDULED FOR MARCH 11, 2005

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1133

**RHINELANDER PAPER COMPANY
PETITIONER,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF THE RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT
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COMMISSION
WASHINGTON, D.C. 20426**

**NOVEMBER 19, 2004
FINAL BRIEF: JANUARY 10, 2005**

CIRCUIT RULE 28(a)(1) CERTIFICATE

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory

Commission hereby certifies as follows:

A. Parties

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief.

B. Rulings Under Review:

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *Rhineland Paper Company*, "Order Issuing New License," 104 FERC ¶ 62,134 (August 20, 2003), R. 82, J.A. 115-143 (Licensing Order); and
2. *Rhineland Paper Company*, "Order On Rehearing," 106 FERC ¶ 61,164 (February 18, 2004), R. 89, J.A. 163-172 (Rehearing Order).

C. Related Cases:

There are no related cases

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January 10, 2005

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GLOSSARY

Commission or FERC

Respondent Federal Energy Regulatory
Commission

Draft EA	Draft Environmental Assessment
Final EA	Final Environmental Assessment
FPA	Federal Power Act
FWS	The Fish and Wildlife Service
J.A.	joint appendix page
Licensing Order	<i>Rhineland Paper Company</i> , 104 FERC ¶ 62,134 (2003); R. 82
R.	record item
Rehearing Order	<i>Rhineland Paper Company</i> , 106 FERC ¶ 61,164 (2004); R. 89
Rhineland	Rhineland Paper Company
Wisconsin DNR	Wisconsin Department of Natural Resources

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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”), in issuing a new license to Rhineland Paper Company (“Rhineland”) to continue to operate and maintain a hydroelectric generating project on the Wisconsin River, reasonably decided that:

1. The historical boundary of the project should not be decreased until Rhineland has presented additional information as to project lands and uses;
and
2. Rhineland should file for Commission approval a plan to monitor the presence of invasive plant species at the project site.

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act (“FPA”), 16 U.S.C. § 796, *et seq.*, and the Commission’s regulations are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Rhinelanders operates a 2,120 kilowatt hydroelectric project on the upper Wisconsin River in Tomahawk, Newbold, Pine Lake, and Pelican townships, Oneida County, Wisconsin. (R. 82 at 1; J.A. 115). In 1998, pursuant to Section 4(e) of the FPA, 16 U.S.C. § 797(e), Rhinelanders filed an application for a new license to continue to operate the project. *Id.*

In the orders under review, the Commission issued a new license to Rhinelanders. *Rhinelanders Paper Company*, 104 FERC ¶ 62,134 (2003) (R. 82; J.A. 115-143), *order on rehearing*, 106 FERC ¶ 61,164 (2004) (R. 89; J.A. 163-172). Rhinelanders challenges two of the many rulings made by the Commission. First, it objects to the decision denying, for the time being, Rhinelanders’ proposal to remove from the project boundary nearly 90% of the non-reservoir lands. Second, Rhinelanders asserts that the Commission should not have required it, in license Article 406, to monitor certain invasive plant species.

II. STATEMENT OF FACTS

A. The Commission’s Licensing Authority

The FPA grants the Commission licensing authority over hydroelectric projects

under Section 4(e). Therein, the Commission can issue a license for any hydroelectric project that develops power “across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States. . . .” 16 U.S.C. § 797(e). The FPA, in Section 3(11), defines a hydroelectric “project” as a:

complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

16 U.S.C. § 796(11); *see, e.g., Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 357-59 (D.C. Cir. 2003) (examining the statutory framework); *Domtar Maine Corp., Inc. v. FERC*, 347 F.3d 304, 305-07 (D.C. Cir. 2003) (same). *See also, e.g.,* 18 C.F.R. § 4.41(h) (detailing project boundary information requirements).

FPA Section 10(j)(1) requires the Commission, when issuing a license, to include license conditions based on the recommendations of federal and state fish and wildlife agencies “to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation and management of the project” 16 U.S.C. § 803(j)(1). If the Commission believes any such recommendation may be inconsistent with the purposes and requirements of the FPA or other applicable law, then FPA Section 10(j)(2), 16

U.S.C. § 803(j)(2), requires the Commission and the agencies to attempt to resolve such inconsistencies. If the Commission still does not adopt a recommendation, it must establish that the license and attached conditions are, consistent with FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), “best adapted to a comprehensive plan for improving or developing a waterway” for a variety of “beneficial public uses.”

B. The Rhinelander Hydroelectric Project And The License Application

The Rhinelander Hydroelectric Project consists of a main dam; an 8.5-mile-long, 3,576 acre impoundment; a 965-foot-long power canal; a powerhouse with a total installed capacity of 2,120 kilowatts; and appurtenant facilities. (R. 82 at 2; J.A. 116). Power generated on site is used at Rhinelander’s paper mill, located adjacent to the hydroelectric project. (*Id.* at 9; J.A. 123, R. 3 at A-1; J.A. 28). In 1997, the average annual hydroelectric plant output of 10,692 megawatt hours accounted for about six percent of the electrical energy used by Rhinelander that year. *Id.*

The site is subject to Commission jurisdiction under FPA Section 4(e) because the Wisconsin River is a navigable waterway of the United States. *See Consolidated Water Power Company*, 17 FPC 108 (1957). The original license was issued April 11, 1955, effective January 1, 1938 to June 30, 1970. *Rhinelander Paper Company*, 14 FPC 653 (1955). A second license was issued January 23, 1981, effective until June 30, 2000. *Rhinelander Paper Company*, 14 FERC ¶ 62,064 (1981). On June 26, 1998, Rhinelander applied for a new license for the project. Since 2000, Rhinelander has operated the project under an annual license pending disposition of its application for a new license. (R. 82 at 1; J.A. 115).

Rhinelanders raised and the Commission addressed, often in response to the concerns of federal and state resource agencies, many issues concerning continued operation of the Rhinelanders Project. Only two issues are relevant to the instant appeal. First, in its relicensing application, Rhinelanders sought to reduce the land encompassed within its project boundary by about 90%. The Commission denied that request, ruling that it needed additional information concerning the varied uses of the project property, which would be generated when Rhinelanders later submits its Land Management Plan under license Article 410. Second, the Commission approved, over Rhinelanders' objections, a license condition requested by the Fish and Wildlife Service ("FWS") of the Department of the Interior, requiring the monitoring of invasive plant species.

C. The Commission's Initial Review Of The Project Boundary

The original license for the Rhinelanders Project included a project boundary encompassing an estimated 6,347 acres of land. (R. 54 at 74; J.A. 194). At normal pool level, the reservoir surface is 3,576 acres, leaving an estimated 2,771 acres of dry land. *Id.* The majority of this land is privately owned, with about 1,225 acres in residential use. *Id.* Rhinelanders proposed to remove about 2,478 acres of land, leaving 292.5 acres within the revised boundary, which would consist of 4.5 acres of land associated with the powerhouse, 146 acres of island land in the reservoir and 142 acres of land owned by Rhinelanders. *Id.*

During the solicitation period for comments from affected state and federal agencies, the FWS recommended that the boundary change proposal undergo further review before final Commission action. (R. 35 at 14; J.A. 49). It stressed that the

licensee needed to prepare a land management study to address wildlife management, forest harvest, and the protection of habitat for federal and state-listed threatened and endangered species. *Id.* The FWS, therefore, recommended that the existing boundary remain unchanged until all Rhinelander-owned land proposed for removal was clearly identified to enable the FWS to make an informed decision. *Id.* at 15; J.A. 50. The FWS stressed that the Rhinelander project is home to “a diverse fish community,” “[e]xtensive areas of generally high quality wetlands,” as well as “both nesting and staging habitat for waterfowl, staging habitat for waterbirds, and high quality habitat for water dependent mammals such as muskrat, beaver and otter.” *Id.* at 1-2; J.A. 36-37.

The Commission issued a Draft Environmental Assessment (“Draft EA”) in December 2001 (R. 54; J.A. 173-202). The Draft EA stated, *inter alia*, that the proposed boundary modification would have no adverse effects on the hydroelectric project resources. (R. 54 at 75; J.A. 195.) The Final Environmental Assessment (“Final EA”), issued in March 2003, recommended that Rhinelander be allowed to remove lands from the project boundary. (R. 78 at 90; J.A. 235).

D. The Commission’s Initial Review Of Exotic And Nuisance Plant Species

During the same period set aside for comments from federal and state agencies, the FWS also recommended that the Commission, pursuant to FPA Section 10(j), 16 U.S.C. § 803(j), require Rhinelander to cooperate with the Wisconsin Department of Natural Resources (“Wisconsin DNR”) and other agencies to identify and control the spread of purple loosestrife (*Lythrum salicaria*) and Eurasian water-milfoil (*Myriophyllum spicatum*), as well as other exotic and nuisance plant species, at the

project site. *Id.* at 12-13. According to the FWS, these exotic (non-native) invasive species, if allowed to grow, can out-compete valuable wetland plants that exist at the project site and “can dominate the species composition of a wetland or aquatic macrophyte bed in a few years.” (R. 35 at 12-13; J.A. 47-48). The FWS stated that the purple loosestrife can infest valuable wetlands and cause extreme harm to wildlife and habitat. *Id.* at 13. Similarly, it concluded that the Eurasian water-milfoil “can rapidly cause aquatic weed problems and alter fish communities by providing too much refugia for prey species, leading to overpopulation and stunting problems in the flowage.” *Id.*

The FWS stated that there was no indication that any of these plants currently existed in the Rhinelander Flowage. (R. 35 at 13; J.A. 48). But it submitted that infestation by these plants could become a serious problem over the decades-long term of the new license. *Id.* Accordingly, the FWS recommended that the license be conditioned to require Rhinelander to cooperate with relevant agencies in the monitoring and control of these invasive species. *Id.*

In response, Rhinelander admitted that the “Purple Loosestrife and Eurasian Watermilfoil infestations are problems at many lakes and reservoirs in Wisconsin.” (R. 37 at 14; J.A. 67). But it asserted that this nuisance vegetation was not caused by the operation of its hydroelectric project and argued that the implementation of any control measures would constitute a state or federal resource agency obligation. *Id.* Rhinelander, therefore, proposed no programs to either monitor or control this exotic vegetation, but agreed to “cooperate with the agencies and implementation of control programs funded by others.” *Id.*

The Draft EA (R. 54; J.A. 173-202) recognized that neither purple loosestrife nor Eurasian water-milfoil is currently a problem at the project site. (R. 54 at 64; J.A. 193). Nevertheless, it agreed with the FWS that measures should be taken “to control the potential spread of these invasive species,” especially since the project contains wetlands “providing habitat for fish and wildlife.” *Id.* Accordingly, it recommended that Rhinelander, in consultation with the FWS and the Wisconsin DNR, develop a plan for Commission approval, to monitor the presence of purple loosestrife and Eurasian water-milfoil at the project site. *Id.* That plan was to include: “(1) a description of monitoring methods; (2) a monitoring schedule; (3) a schedule for providing the monitoring results to the FWS and the DNR; and (4) public information.” *Id.*

In response, Rhinelander stated that since over 250 homes are located around the perimeter of the reservoir, the implementation of a program controlling the purple loosestrife or Eurasian water-milfoil would require it to obtain access to a large number of private properties. (R. 57 at 5; J.A. 104). It agreed only to “implement the plan for control of these exotics on property that it owns.” *Id.* Accordingly, it requested that the Commission modify the proposed condition to only “reflect Rhinelander’s responsibility on project lands that are owned by Rhinelander.” *Id.*

The Final EA reiterated the view expressed in the Draft EA, that Rhinelander, in consultation with the FWS and Wisconsin DNR, should develop a plan for Commission approval, to monitor the purple loosestrife and Eurasian water-milfoil on project property. (R. 78 at 78-79; J.A. 229-230). The Final EA stated that should either the FWS or the Wisconsin DNR significantly demonstrate that either of these species is affecting

the fish and wildlife populations at the project, Rhinelanders should cooperate with those agencies in taking reasonable measures to control or eliminate these plants from project properties. *Id.* at 79; J.A. 230.

E. The Commission's Order Issuing A New License To Rhinelanders

On August 20, 2003, the Commission, acting pursuant to authority delegated to the Director of its Office of Energy Projects issued a new license to Rhinelanders. (*Rhinelanders Paper Company*, 104 FERC ¶ 62,134 (2003)) ("Licensing Order"; R. 82; J.A. 115-143). As here relevant, the Commission held that Rhinelanders's proposal to remove almost 2,500 acres from the project boundary was not adequately supported. *Id.* at ¶ 17; J.A. 119. The Commission noted that while some 1,225 acres have apparently been designated for residential use, Rhinelanders had not identified the proposed use of the remaining acreage, nor had it identified the location of the land proposed for removal. *Id.* at ¶ 19; J.A. 119-120. The Commission concluded that the record did not contain sufficient information to allow an informed decision with respect to the proposal to significantly reduce the amount of land within the project boundary. *Id.* at ¶ 22; J.A. 120.

The Commission explained that Rhinelanders's effort to show that the lands in question were not needed for project purposes was insufficient. (Licensing Order, R. 82 at ¶ 22; J.A. 120). The Commission suggested that possible uses for the land included a shoreline buffer zone, public recreational access, or the preservation of habitat necessary for fish and wildlife, including threatened or endangered species. *Id.* The Commission noted that once Rhinelanders files its Land Management Plan in compliance with license

Article 410,¹ and after the Commission has approved that plan, Rhinelander can seek to amend its license to remove the lands in question. But Rhinelander bears the burden of presenting the requisite evidence to support any such request. *Id.*

Moreover, in license Article 406, the Commission required Rhinelander, within one year of the issuance date of the license, after consultation with the FWS and the Wisconsin DNR, to file for Commission approval a plan to monitor invasive species, such as the purple loosestrife and the Eurasian water-milfoil. (Licensing Order, R. 82 at 19; J.A. 133). The monitoring plan is to include: (1) a description of the monitoring method; (2) the frequency of monitoring; (3) documentation of the monitoring results provided to the FWS and the Wisconsin DNR; and (4) a description of, and implementation schedule for providing public information about, the species. *Id.*

F. The Commission's Order On Rehearing

On September 22, 2003, Rhinelander sought rehearing. (R. 84; J.A. 145-162). It asserted that the Commission erred in finding that insufficient information existed to support its proposal to remove approximately 2,500 acres from the project boundary. *Id.*

¹ Under Article 410, Rhinelander is required, within one year of the issuance date of the license, in consultation with state and federal fish and wildlife and land management agencies, to develop and file for Commission approval a final Land Management Plan. (R. 82 at 22-23; J.A. 136-137). That plan is to: (1) include the establishment of appropriate buffer zones; (2) include a detailed map clearly identifying the project, its boundary, Federal lands, lands designated for residential use, undesignated lands, and areas of special concern; (3) describe the environmental and recreational effects of removing 28.5 acres of federal land from the project boundary; (4) describe the existing or future use of all the proposed land to be removed from the project boundary; (5) describe the timber management practices to benefit wildlife and other resources; (6) identify designated public access for recreational use of project lands; and (7) provide an implementation schedule.

at 7; J.A. 152). Rhineland argued that it had already presented sufficient information to justify approval of its proposed project boundary change.

Rhineland also asserted that license Article 406 -- requiring it to develop a program to monitor the presence of purple loosestrife and Eurasian water-milfoil within the project -- should be removed. (R. 84 at 11; J.A. 156). It claimed that neither noxious species of plant was “affected” by the development, operation and management of the hydroelectric project and thus Article 406 was an improper condition under FPA Section 10(j). *Id.* at 12; J.A. 157. Alternatively, Rhineland contended that if the condition fits within Section 10(j), the Commission should still reject it as inconsistent with the public interest and not supported by substantial evidence. *Id.* at 14-15; J.A. 159-160.

On February 18, 2004, the Commission issued its order on rehearing. (*Rhineland Paper Company*, 106 FERC ¶ 61,164 (2004)) (“Rehearing Order”, R. 89; J.A. 163-172). With respect to the project boundary issue, the Commission stated that FPA Section 10(a)(1) required it to make sure that the licensee undertook “appropriate measures on behalf of both developmental and non-developmental public interest uses of the waterway, including fish wildlife and recreation.” *Id.* at ¶ 9; J.A. 165. The Commission termed these requirements the “project purposes.” *Id.*

The Commission stressed that Section 4.41(h) of its regulations, 18 C.F.R. § 4.41(h), requires that license applications include a project boundary which encompasses “all works, facilities, and interests in lands necessary to enable the licensee to carry out project purposes.” (Rehearing Order, R. 89 at ¶ 10; J.A. 165). The Commission stated that if a licensee wishes to delete land from the project license, it must demonstrate that

the land is not needed for project purposes. *Id.* at ¶ 12; J.A. 166.

Here, the Commission found that Rhinelanders' map showed that the existing project boundary encompassed "the entire reservoir and all of its shoreline, together with land extending back from the water's edge for varying distances all around the reservoir." (Rehearing Order, R. 89 at ¶ 13; J.A. 166). It recognized that, according to Rhinelanders, about 75% of the shoreline around the reservoir had apparently been residentially developed, but that a patchwork of undeveloped project lands, including some small wetlands, were scattered around that shoreline. *Id.* at ¶ 14; J.A. 167. The Commission also noted that the land proposed by the licensee to remain within the boundary consisted of "scattered, noncontiguous parcels containing only a tiny fraction of the shoreline above the reservoir's edge." *Id.* at ¶ 15; J.A. 167.

The Commission acknowledged its general policy of removing from project boundaries lands occupied by residential structures. (Rehearing Order, R. 89 at ¶ 16; J.A. 167). But it stated that a request for removal implicates other Commission policies, "involving protection of shoreline resources and public recreation, about which we must have adequate information to ensure that our policies are as much as possible harmonized." *Id.* The Commission stressed that it seeks to include and retain within project boundaries a buffer zone around project reservoirs, "which serve[s] to control the type and extent of private and public use of reservoir shorelines, for the benefit of recreation, wildlife resources, water quality, and aesthetics." *Id.*; J.A. 167-168 (footnotes omitted).

The Commission found that there was "sufficient evidence in the record . . . to find

that there is neither current nor foreseeable need to retain in the project boundary any of the lands at issue for purposes of public recreational facilities and access.” (Rehearing Order, R. 89 at ¶ 17; J.A. 168). But it charged Rhinelander with demonstrating, in its Land Management Plan required by license Article 410, that an appropriate buffer zone around the reservoir will still exist if the lands in question are removed from the project boundary. *Id.* at ¶ 18; J.A. 169. The Commission explained that it needed to know exactly where residential development had occurred along the reservoir shoreline, so it could draw a new project boundary that best served the public interest. *Id.*

Turning to the plant species issue, the Commission concluded that FPA Section 10(j) requires it to include in each license conditions “to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) based on recommendations from federal and state resource agencies.” (Rehearing Order, R. 89 at ¶ 22; J.A. 171). It agreed with the FWS that the purple loosestrife “can out-compete valuable native wetland plants,” and that the Eurasian water-milfoil “can cause aquatic weed problems and alter fish communities by providing too much refuge for prey species.” *Id.* Accordingly, the Commission concluded that the FWS’ recommendation was an appropriate proposal under Section 10(j). *Id.* Finally, it estimated that the annual cost of the monitoring plan it required was \$9,270.²

² The Commission also had limited the term of Rhinelander’s new license to 30 years. (Licensing Order, R. 82 at ¶¶ 45-46; J.A. 127). Rhinelander sought rehearing of that ruling. (R. 84 at 9-11; J.A. 154-156). The Commission on rehearing agreed with Rhinelander and extended the term of the license to 40 years. (Rehearing Order, R. 89 at ¶¶ 23-24; J.A. 171-172).

SUMMARY OF ARGUMENT

The Commission here granted Rhinelander a new 40-year license to maintain and operate its hydroelectric project on the Wisconsin River. In issuing the license, the Commission imposed numerous conditions, many of which were designed to protect and enhance the fish communities, the abundant wildlife, and the valuable wetlands at the project site. Only two of these conditions are the subject of this appeal.

First, the Commission reasonably held that it could not, at this time, grant Rhinelander's request to remove 90% of the historically included lands from the project boundary. The Commission explained that the information contained in the record could not assure it that an adequate shoreline buffer zone would remain after the removal of these lands from the boundary. Nevertheless, the Commission afforded Rhinelander an opportunity to revisit the issue by requiring it to address the shoreline buffer zone question in the forthcoming Land Management Plan required by license Article 410.

Second, the Commission reasonably required Rhinelander, under FPA Section 10(j), to initiate an inexpensive program, recommended by the FWS, to monitor the presence of several invasive plant species that Rhinelander admits have become problems at many lakes and reservoirs in Wisconsin. The Commission took this preliminary step to ensure that these species do not harm valuable native wetland plants and alter the habitat for fish and wildlife. In taking this initial step, the Commission did not, contrary to Rhinelander's claim, mandate any substantive intervention at this time to eradicate these invasive plant species should they later be found at the project site.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of Commission orders proceeds under the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). In seeking to have a reviewing court find that an agency ruling is arbitrary and capricious, a petitioner “bears a heavy burden.” *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 461 (D.C. Cir. 2004). That standard requires the court to satisfy itself that the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., et al.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A reviewing court determines whether the agency “has met the minimum standards set forth in the statute,” and does not “substitute its own judgment for that of the [agency].” *United States Postal Service v. Gregory*, 534 U.S. 1, 11 (2001).

Findings of fact by the Commission, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 8251(b); *see, e.g., Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992). Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence, the possibility of drawing two different conclusions from the same evidence does not prevent one of those conclusions from being reasonable. *See, e.g., FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

II. THE COMMISSION REASONABLY DENIED, FOR NOW, RHINELANDER'S PROPOSAL TO REMOVE 90% OF THE LAND FROM THE PROJECT BOUNDARY, WITHOUT PREJUDICE TO RHINELANDER'S LATER SUBMISSION OF ADDITIONAL SUPPORTING INFORMATION

A. The Commission Reasonably Interpreted And Applied The Statute And Its Implementing Regulations

FPA Section 10(a)(1) directs the Commission, in issuing a license for a hydroelectric project, to determine whether the project “in the judgment of the Commission 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, for the adequate protection, mitigation, and enhancement of fish and wildlife . . . and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes. . . .” 16 U.S.C. § 803(a). In other words, in considering a license application, the Commission is obligated to consider a variety of developmental and non-developmental uses of a waterway, including those relating to the preservation of fish and wildlife and the promotion of recreation. The Commission considers these various uses as constituting the “project purposes.” (Rehearing Order, R. 89 at ¶ 9; J.A. 165).

Moreover, Commission regulations implementing FPA Section 10(a)(1) require hydroelectric projects to have a delineated project boundary encompassing all works, facilities, and interests in lands necessary to enable the licensee to carry out its project purposes, which include the protection of fish and wildlife. *See* 18 C.F.R. § 4.41(h). In particular, the licensee must submit, and the Commission must approve, a project

boundary map that delineates all lands necessary for shoreline control and the protection of environmental resources. *See* 18 C.F.R. § 4.41(h)(2); *see also* 18 C.F.R. §§ 4.51(h), 4.61(f).

In determining in the instant licensing proceeding that Rhinelander had not submitted sufficient information to justify the removal of 90% of the existing lands from its project boundary, the Commission faithfully followed its statute and its regulations. In FPA Section 10(a)(1), Congress explicitly left to “the judgment of the Commission” the determination as to what type of hydroelectric project will be “best adapted to a comprehensive plan for improving or developing a waterway.” In other words, Congress left to the Commission’s expertise and discretion how best to balance and carry out the project purposes of a licensed hydroelectric project. The Commission’s project boundary regulations, in turn, help the Commission to carry out that discretion by requiring the submission of certain types of data. The Commission’s interpretation and exercise of its discretionary authority, as long as it is reasonable, is entitled to judicial respect. *See Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

In the instant circumstance, the Commission’s exercise of its statutory and regulatory authority must be considered reasonable. Thus, while the Commission agreed with Rhinelander that the evidence in the record showed that the contested lands were not needed for public recreation in the foreseeable future (Rehearing Order, R. 89 at ¶ 17; J.A. 168), the Commission nevertheless held that it had a statutory obligation to protect shoreline and environmental resources. *Id.* at ¶ 16; J.A. 167-168. Accordingly, the

Commission ruled that it must ensure the presence of “an appropriate *buffer zone* around the reservoir, understanding exactly where residential development has occurred vis-à-vis the reservoir shoreline, and determining where to draw a new project boundary to best serve the public interest” *Id.* at ¶ 18; J.A. 169, (emphasis added).³ Here, neither the maps in Exhibit G of Rhinelander’s application (R. 3, Exhibit G; J.A. 33-35) nor the additional information it submitted in September 2001 (R. 50; J.A. 90-92) sufficiently addressed the Commission’s legitimate concern under FPA Sections 4(e) and 10(j) that, in determining whether to issue a license, it allocate sufficient consideration to the protection, mitigation of damage to, and enhancement of, fish and wildlife.

In reaching its decision, the Commission did not, as Rhinelander submits (Brief at 1, 13), “fail” or “refuse” to permit modification of the project boundary in contravention of its governing authority. Rather, the Commission simply chose not to modify the project boundary at this time. It did not bar Rhinelander in the future from seeking approval to remove the lands in question from the project boundary.

Specifically, the Commission reasonably chose the license condition (Article 410) that Rhinelander prepare a Land Management Plan as a vehicle in which the licensee later can present additional information with respect to the appropriate shoreline buffer zone.

³ The Commission’s ruling in *Georgia Power Co.*, 76 FERC ¶ 61,281 (1996), supports its finding here. (Rehearing Order, R. 89 at ¶ 16 n.18; J.A. 168 n.18.) In *Georgia Power*, the Commission determined that a project boundary must include the licensee’s conservation buffer zone along a project reservoir shoreline, “to ensure that Georgia Power and the Commission can fulfill their respective statutory obligations to protect project shoreline and aquatic resources. . . .” *Id.* at 62,438.

(Rehearing Order, R. 89 at ¶ 18; J.A. 169). In preparing that plan, Rhinelander is required by license Article 410 to consult with the relevant expert federal and state agencies – the FWS, the Bureau of Land Management and the Wisconsin DNR. Moreover, that plan, to be completed within one year of the date of the issuance of a new license, specifically directs Rhinelander, *inter alia*, to propose the establishment of appropriate buffer zones and to submit “a detailed map that clearly identifies the Rhinelander project boundary.” Once this Land Management Plan is approved by the Commission, Rhinelander then can seek to amend its license to remove all or part of the lands in question from the project boundary, and the Commission then will possess the necessary information to make a reasoned determination on the substance of Rhinelander’s request.

In sum, the Commission simply lacked sufficient information to afford Rhinelander all the relief it sought (license renewal *and* a substantial project boundary redefinition) at this time. Accordingly, the Commission reasonably chose to proceed “one step at a time” rather than all at once. *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18, 35 (D.C. Cir. 2002).

B. The Commission Reasonably Concluded That It Needed Additional Information Before Evaluating Rhinelander’s Proposal To Delete 90% Of The Land Within The Project Boundary

According to Rhinelander (Brief at 13), it has already met the Commission’s standards for removal of the project lands in question and now faces “financial and resource-draining requirements” in developing a Land Management Plan that will encompass the historical boundary for the project, rather than the far narrower boundary

it now proposes. It admits (Brief at 14-15) that Section 4.41(h)(2) of the Commission's regulations includes "shoreline control" and the "protection of environmental resources" as issues that must be resolved with respect to lands within the project boundary. But Rhinelander nevertheless asserts, erroneously (Brief at 16), that "everyone, including the FERC, agrees" that the lands it seeks to remove from the project boundary are "not necessary for project purposes."

Rhinelander has not, however, demonstrated to the Commission's satisfaction -- at least not yet -- that the land proposed for removal is "not necessary for project purposes." To be sure, members of the Commission's environmental staff, in the Draft EA and Final EA, stated that the lands in question could be removed from the project boundary. But that staff recommendation was not accepted by the Commission, which reasonably determined that it needed additional information as to project purposes and uses. *See, e.g.,* Licensing Order, R. 82 at ¶ 22; J.A. 120 ("Rhinelander has not demonstrated that the lands at issue are not needed for project purposes, such as for a shoreline buffer zone"), Rehearing Order, R. 89 at ¶ 18; J.A. 169 ("Rhinelander's proposal for land removal must await further information and analysis, forthcoming in the Land Management Plan required by license Article 410, for purposes of establishing an appropriate buffer zone around the reservoir").

Significantly, Rhinelander never addresses the fact that the lands proposed for removal have historically been included within the boundary of its hydroelectric project. Thus, the Commission had twice previously determined, with Rhinelander's concurrence, that these lands were indeed "necessary for project purposes." In order to now remove

the lands in question from the project boundary, Rhinelanders must consult with and substantively address the legitimate concerns of the Commission and relevant federal and state agencies like the FWS and ultimately demonstrate why those lands are no longer necessary to protect fish and wildlife at the project site. It has not yet succeeded in that task, however.

Rhinelanders responds (Brief at 15) that it has provided “ample information” to support removal of the lands in question from the hydroelectric project. But, the only information it references other than the maps in Exhibit G of its application is a September 2001 submission. In that filing (R. 50; J.A. 90-92), Rhinelanders’s consultant admitted that both the total acreage within the current project boundary and the dry land within the current project boundary are estimates. *Id.* at 2; J.A. 91. Similarly, he stated that the land currently in residential use was estimated to be 1,225 acres, but that the amount of roadways “could not be accurately estimated.” *Id.* at 3; J.A. 92. Given the admitted lack of precision in Rhinelanders’s data, the Commission properly held that it needed additional information from the forthcoming Land Management Plan to understand “exactly where residential development has occurred vis-à-vis the reservoir shoreline.” (Rehearing Order, R. 89 at ¶ 18; J.A. 169).

Rhinelanders’s consultant further stated that the majority of the land within the project boundary is privately owned, but that “there are public facilities such as roads, bridges, and other state and publicly owned features within the current project boundary.” (R. 50 at 3; J.A. 92). But he again admitted that “[n]o reliable estimate of the exact amount of this acreage could be made.” *Id.* Rhinelanders’s admitted failure to

accurately depict the amount of land within the current project boundary, let alone its current use and suitability for shoreline control purposes, underscores the Commission's finding that it needed further information (including a "detailed map") and analysis in order to determine "where to draw a new project boundary to best serve the public interest" (Rehearing Order, R. 89 at ¶ 18; J.A. 169).⁴

Finally, Rhinelander's citation (Brief at 16) to the Commission's decision in *Southern California Edison Co.*, 107 FERC ¶ 61,067 (2004) does not present an irreconcilable conflict. In *Edison*, the licensee filed an application to amend its existing license to delete from the project boundary a switchyard and certain transmission lines and their access roads. *Id.* at 61,219. The Commission approved the deletion from the license of the switchyard and two transmission lines, but, with a few limited exceptions, denied the licensee's request to remove certain access roads from the project boundary. *Id.* at 61,219-21.

There is no appropriate comparison between the deletion of a few, specifically-defined facilities (a switchyard and two transmission lines) from a project boundary and the proposed deletion of 90% of the lands within a project boundary. If anything, *Edison* supports the Commission's approach in this case. Thus, the care with which the

⁴ As an example of the lack of concrete information that existed in the record, Rhinelander's consultant estimated (R. 50 at 3; J.A. 92) that about half of the acreage proposed for removal (1225 acres out of 2478.5 acres) was presently in residential use. However, Rhinelander stated (Brief at 14) that 75% of the shoreline around the reservoir was developed in a residential manner. While there may be a simple explanation for this apparent discrepancy as to residential use acreage, that explanation cannot readily be gleaned from the information submitted heretofore by Rhinelander.

Commission examined the location and purpose of each of the facilities in question in *Edison*, 107 FERC at 61,219-21, before determining whether to retain them within the project boundary, ably demonstrates the Commission's intent to carefully examine "the relevant data," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, to determine whether a proposed deletion fits within the "project's purposes." That same careful standard necessarily applies when the Commission is considering a request to remove 90% of the project lands from the boundary. *See B&J Oil and Gas v. FERC*, 353 F.3d 71, 77-78 (D.C. Cir. 2004) (finding substantial evidence justifying the Commission's selection of boundaries for a natural gas storage field).

III. THE COMMISSION REASONABLY DIRECTED RHINELANDER TO FILE A PLAN TO MONITOR INVASIVE PLANT SPECIES AT ITS HYDROELECTRIC PROJECT

A. The Commission Reasonably Adopted The FWS Invasive Species Monitoring Recommendation Under Section 10(j) of the FPA

Under FPA Section 10(j), the Commission is empowered to attach conditions to licenses to protect, mitigate and enhance fish and wildlife which are "affected by the development, operation, and management of the project." *See supra* p. 3. Here, the FWS recommended that the Commission include a condition in Rhinelander's license requiring it to "cooperate with the Wisconsin DNR and other agencies in future efforts to identify and control the spread of purple loosestrife . . . , Eurasian watermilfoil . . . , and other exotic and nuisance plant species." (R. 35 at 12; J.A. 47). The Draft EA and Final EA similarly recommended that Rhinelander, in consultation with the FWS and the Wisconsin DNR, present a plan to monitor the spread of purple loosestrife and Eurasian

water-milfoil. (R. 54 at 64; J.A. 193; R. 78 at 78; J.A. 229).

In its orders, the Commission, over the objections of Rhinelander, sustained those recommendations by including Article 406 in the new license. (Licensing Order, R. 82 at ¶ 13; J.A. 118; Rehearing Order, R. 89 at ¶ 22; J.A. 171). That license condition requires Rhinelander, within one year of the new license, to “file for Commission approval an exotic species control plan to monitor invasive species” such as the purple loosestrife and Eurasian water-milfoil. (Licensing Order, R. 82 at 19; J.A. 133). The estimated annual cost of the monitoring is \$9,270. (Rehearing Order, R. 89 at ¶ 22; J.A. 171).

Rhinelander contends (Brief at 16-20) that the inclusion of Article 406 in the license represents an improper exercise of the Commission’s authority under FPA Section 10(j). Focusing on the language of Section 10(j) that conditions may be imposed to protect, mitigate damages to, and enhance fish and wildlife “affected by the development, operation and management of the project,” Rhinelander asserts (Brief at 17) that noxious weeds are not “affected” by the continued operation of its project.”⁵

All that the Commission has done here is adopt, at the request of the FWS, a preliminary measure, *i.e.*, an inexpensive monitoring program, aimed at the protection of fish and wildlife communities and valuable wetlands within Rhinelander’s project. These

⁵ It is unclear why Rhinelander is making the argument that license Article 406 is not a proper exercise of the Commission’s Section 10(j) authority. It readily admits (Brief at 21) that even if the Commission cannot impose the monitoring condition under Section 10(j), it can impose the same condition under the broad public interest standard in FPA Section 10(a)(1). *See supra* p. 4. Indeed, in *Weyerhauser Co.*, 76 FERC ¶ 61,057 at 61,342-43 (1996), the Commission did not include a purple loosestrife condition as a Section 10(j) condition, but included the same condition in the license under Section 10(a)(1) since it would have beneficial effects.

valuable communities and wetlands may indeed be adversely “affected by the development, operation, and management of the project” if noxious weeds spread at the project site. Rhinelanders itself admits (Brief at 17) that the purple loosestrife and Eurasian water-milfoil species “are spread via many means and fairly easily.” But it makes the unjustified leap, *id.*, that the presence of its hydroelectric facility cannot possibly cause the spread of these noxious weeds and asserts (Brief at 20-21) that the Commission should have rejected the FWS’ recommendation.

But Rhinelanders’ own speculation (Brief at 17-18) as to possible activities that could cause the spread of the purple loosestrife and Eurasian water-milfoil species actually supports the Commission’s adoption of Article 406. That speculation demonstrates that activities at the Rhinelanders project site could possibly spread these noxious weeds, thereby endangering fish and wildlife communities, valuable wetlands and other sensitive habitats. Thus, Rhinelanders suggests (Brief at 17) that the purple loosestrife and Eurasian water-milfoil species could arrive “as a hitchhiker on construction equipment, boats, vehicles, or the shoes of recreational visitors.” Applying this theory, these noxious weeds could arrive on construction equipment used at the project site, or on the vehicles or shoes of employees at the plant. Similarly, since wind can spread these species through the air, it is possible that the turbines at the project could also spread the species.

The key point is that, at this time, no one can know if the purple loosestrife and Eurasian water-milfoil species will actually become a problem at the project site at some time during the 40-year term of the new hydroelectric license. Rhinelanders itself

recognizes (R. 37 at 14; J.A. 67) that “the Purple Loosestrife and Eurasian Watermilfoil infestations are problems at many lakes and reservoirs in Wisconsin.” Moreover, the FWS explained, in recommending a monitoring condition, that the identified invasive species have “little food value for wildlife,” can “out-compete valuable native wetland plants,” can “cause aquatic weed problems,” and can “alter fish communities by providing too much refuge for prey species.” (Rehearing Order, R. 89 at ¶ 22; J.A. 171).

Accordingly, the Commission here understandably chose the inexpensive first step of monitoring the potential spread of these noxious species over the term of the license. In these circumstances, the Commission’s finding that the “nuisance plant recommendation is an appropriate fish and wildlife condition under Section 10(j),” *id.*, is a reasonable interpretation of the FPA that is entitled to deference. *See e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-44 (1984); *Intermountain Municipal Gas Agency v. FERC*, 326 F.3d 1281, 1284 (D.C. Cir. 2003).⁶

⁶ Rhinelanders argues (Brief at 18) that the inclusion of a noxious weeds condition in its license is contrary to Commission cases which held that agency-proposed monitoring and eradication recommendations were not proper Section 10(j) recommendations. However, neither of the cases it cites supports eliminating the condition. In *Weyerhaeuser*, *see supra* n. 5, 76 FERC at 61,342-43, the Commission held that a number of recommendations made by the Wisconsin DNR and the FWS, including one which would have required cooperation with “agencies on control of purple loosestrife,” were outside the scope of Section 10(j), in that they either “involve studies that could have been performed prior to licensing, or do not otherwise qualify as measures to protect, mitigate damages to, or enhance fish and wildlife.” However, the Commission did adopt the same condition under FPA Section 10(a)(1), stating that it would have beneficial effects.

Moreover, in *Northern States Power Company of Wisconsin*, 78 FERC ¶ 62,087 at 64,247-48 (1997), the Commission rejected a condition under Section 10(j) that Northern States cooperate with the FWS and the Wisconsin DNR in implementing a plan to control

B. The Commission Only Required Rhinelander To Monitor, Rather Than Eradicate, The Presence Of Purple Loosestrife and Eurasian Water-Milfoil

Rhinelander repeatedly – and erroneously – claims (Brief at 1-2, 11, 16, 20-21) that the Commission directed it both to monitor *and eradicate* the spread of invasive plant species at the project site. In fact, there is no present mandate in Article 406 that requires Rhinelander, either acting unilaterally or in concert with state and federal agencies, to actively attempt to eradicate any exotic species from the project site.

Instead, Article 406, after describing Rhinelander’s immediate monitoring responsibilities, expressly provides that:

If at any time during the term of the license, the Wisconsin DNR and FWS demonstrate the purple loosestrife or Eurasian water-milfoil is significantly affecting fish and wildlife populations at the project and that control measures are needed, and the Commission agrees with those determinations, the Commission may request the licensee to cooperate with the Wisconsin DNR and FWS to undertake reasonable measures to control or eliminate invasive species in project area. The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

(Licensing Order, R. 82 at 19-20; J.A. 133-134). In short, if the Commission determines in the future to require Rhinelander to perform any function other than monitoring the presence of invasive species, that ruling will be the subject of an administrative process,

the spread of purple loosestrife, finding that there was no evidence that this weed was found in the vicinity of the project. At the same time, the Commission adopted an alternative condition that the licensee monitor the project impoundment for the presence of purple loosestrife and then cooperate with the relevant agencies if the weed is detected in the vicinity in the future. That is precisely the same approach the Commission has initiated here.

supported by additional facts obtained from the monitoring process, in which the licensee can exercise its rights. At present, however, the Commission has only required the licensee to take a preliminary first step – to determine through a monitoring plan if any invasive species enters the project site during the term of the license.

Neither the Commission nor Rhinelanders knows if any invasive species will become a problem at the project site over the next 40 years. But Rhinelanders has conceded (Brief at 19) that the cost of implementing a monitoring plan is “relatively modest” and, at one time, even agreed to implement a plan to monitor the presence of these species on land it owns (R. 57 at 5; J.A. 104). Accordingly, the limited monitoring condition in license Article 406, relating to all project lands, which was proposed by the FWS and supported in the Draft EA and Final EA, is reasonable and supported by substantial evidence.

CONCLUSION

For the reasons stated herein, the orders of the Commission, denying the request to remove 90% of the lands from the project boundary until further information is gathered and requiring the monitoring of invasive plant species, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,761 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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