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HONORING THE LIFE AND SPIRIT OF THE PACIFIC SALMON (2): Legal Systems to Protect Salmon in the United States and Japan

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A. Legal Obligation of the Administrative Agencies

1. Environmental Assessment

(1) The United States

The National Environmental Policy Act is one of the most important environmental statutes in the United States.[72] At the same time, it is well known as the world's first provision to require an environmental impact assessment. In the United States, the nation wide environmental movements developed in the 1960s as various environmental issues including pollution problems came to light. Congress regarded the environmental conservation issue as one of the problems of the nation and discussed many bills related to national environmental conservation policy.

The National Environmental Policy Act (NEPA) was enacted in 1969.[73] It consists of three main parts; (i) a declaration of the national environmental policy, (ii) requirements to prepare Environmental Impact Statements, and (iii) provisions to establish the Council on Environmental Quality.[74]

In the National Environment Policy Act, Congress declared that the continuing policy of the federal government is to use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[75]

The National Environmental Policy Act obligates the federal government to six main duties. The federal government has obligation to (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (b) ensure for all Americans safe, healthful, productive, and esthetically and culturally

pleasing surroundings; (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (d) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (e) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (f) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[76] The National Environmental Policy Act also provides responsibilities for each person.[77]

In order to fulfill those duties mentioned above, the National Environmental Policy Act prescribes many concrete measures forcing the federal government to consider environmental values. The most important measure is the environmental assessment system. The National Environmental Policy Act orders all federal government agencies to "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (a) the environmental impact of the proposed action, (b) any adverse environmental effects which cannot be avoided should the proposal be implemented, (c) alternatives to the proposed action, (d) the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity, and (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[78]

The National Environmental Policy Act's regulations, made by the Council on Environmental Quality in 1978, provided detailed provisions for Environmental Impact Statement (EIS) contents and processes.[79] At first, a federal agency must check the proposed federal action against a list of exceptions that do not need an Environmental Impact Statement.[80] If the proposed action is not on the list, the agency carries out an Environmental Assessment (EA)

and judges whether an Environmental Impact Statement should be prepared.[81] If the agency decides to prepare an Environmental Impact Statement, the agency announces it publicly in the official gazette — the Federal Register. An Environmental Impact Statement must be prepared in two stages: a Draft Environmental Impact Statement and a Final Environmental Impact Statement. The Draft Environmental Impact Statement is to be open to the public for forty-five days. A public hearing will be held and public opinion will be collected.[82] The Draft Environmental Impact Statement shall be made in ninety days after publication of the notice for it.[83] With amendments of the Draft Environmental Impact Statement, the agency prepares a Final Environmental Impact Statement after due consideration of those public opinions.[84] The Final Environmental Impact Statement is also to be open to the public for thirty days and public opinion will be collected during that time. The final decision of the Environmental Impact Statement is made at least thirty days after the publication of a Draft Environmental Impact Statement.[85] However, in the case the agency changes the proposed action significantly or new information that the proposed action will cause a serious environmental situation is released, the agency must prepare a Supplemental Environmental Impact Statement even though a Final Environmental Impact Statement may have already been issued.[86] The agency judges whether it should carry out the proposed action or not after due consideration in the Final Environmental Impact Statement. At the time of the agency's decision or its recommendation to Congress, each agency must prepare a concise public Record of Decision to explain how the agency considers the environmental impact of the action.[87]

The National Environmental Policy Act is a trail blazing statute because is requires the federal government to assess the environmental impacts of its development projects "before" any action is taken. These assessments, while they do not always accomplish their goals, have in many cases brought negative environmental effects to light and thus have prevented potential major mistakes.

Soon after the passage of the National Environmental Policy Act, some States began to create or pass state laws similar to the National Environmental Policy Act. Now the number of the States reaches approximately thirty.[88]

The California Environmental Quality Act of 1970 was the first state law after the National Environmental Policy Act.[89] The California Environmental Quality Act provides seven abstract basic purposes[90] and seven concrete policy purposes.[91] It is important that the California Environmental Quality Act requires that agencies shall mitigate or avoid the significant effects on the environment of projects when it is feasible to do so,[92] and that all agencies to consider long-term benefits and costs, in addition to short-term benefits and costs, and to consider alternatives to proposed actions affecting the environment.[93] Same as the National Environmental Policy Act, in order to accomplish those purposes, the California Environmental Quality Act requires to prepare an environmental impact report for proposed state and local projects that may have a significant effect on the environment.[94]

The State of Washington enacted the State Environmental Policy Act in 1971, the year after the California Environmental Quality Act was passed.[95] Although most provisions of the Washington State Environmental Policy Act are similar to those of the National Environmental Policy Act, the Washington State Environmental Policy Act is characterized by two remarkable provisions. First, the Washington State Environmental Policy Act clearly provides that "the legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[96] Second, the Washington State Environmental Policy Act confers upon agencies the substantive authority to condition or deny agency actions in order to mitigate specific adverse environmental impacts.[97]

Other States' Environmental Policy Acts all require the same form of environmental assessment and generally use approaches

similar to the National Environmental Policy Act.

(2) Japan

In 1972, the Cabinet Consent decided to introduce the environmental impact assessment system in Japan. In 1981, a bill for the Environmental Impact Assessment Act was introduced to the Diet. It was dropped in 1982, however, after meeting with fierce opposition from the Ministry of International Trade and Industry and many private developers.

The passage of the Basic Environment Act of 1993 was the next chance for the Diet to re-examine the environmental impact assessment system. The Basic Environment Act of 1993 is now located at the top of Japanese domestic environmental laws and has superior efficacy to other individual domestic environmental laws.[98] According to the Basic Environment Act, the Nation "is responsible for formulating and implementing fundamental and comprehensive policies with regard to environmental conservation, pursuant to the basic principles of environmental conservation."[99] The Act provides that, in the case corporations are engaged in alteration of land shape, construction of new structures and other similar activities, the Nation must "take necessary measures to ensure that they will conduct in advance, surveys, forecasts, or evaluations of the environmental conservation based on the result of them."[100]

Subsequently the Environmental Impact Assessment Act (EIAA) was enacted in 1997 to achieve the responsibilities the Basic Environment Act provides, through the environmental impact assessment system.[101] The Environmental Impact Assessment Act provides that the national government, local governments, proponents, and citizens must endeavor from their respective positions to ensure that such an environmental impact assessment is conducted properly and smoothly in order to avoid or to reduce as much as possible the environmental burdens resulting from the planned project, and in order to assist in giving proper consideration to the protection of the environment in

regard to the implementation of the planned project.[102]

Like the National Environmental Policy Act in the United States, the Japanese Environmental Impact Assessment Act is not applicable to every project. Its application is limited to the projects with licenses, concessions, and permission from the national government; or subsidized by the national government, special corporations projects, and the national government's projects. The Act provides for twelve specific projects to which the Environmental Impact Assessment is applicable.[103] Furthermore, the Act's application is limited to large-scale projects that are designated by government ordinance as likely to have a serious impact on the environment. The Act divides these applicable projects mentioned above into two groups by the scale of land area to be altered and the size of any structure(s) to be built. The first project group (Class-One Project) needs an Environmental Impact Assessment, and the second project group (Class-Two Project) needs screening by the agency concerned to determine whether the project needs an Environmental Impact Assessment.[104]

Importantly, unlike the United States' system where the administrative agency prepares the Environmental Impact Statement (EIA), in Japan the proponent of the project is responsible for execution of an Environmental Impact Assessment. The Japanese Environmental Impact Assessment procedure can be divided into four steps. First, the proponent of a project must prepare and publish a scoping document that presents information regarding the scope of the Environmental Impact Assessment of the project.[105] Taking comments on the scoping document from prefectural governor(s); the mayors of the cities, towns, and villages having jurisdiction over the area deemed likely to be environmentally impacted by the project, and the opinion from the general public into consideration, the proponent decides the method for each project's Environmental Impact Assessment.[106] Second, the proponent of the project compiles the results of the Environmental Impact Assessment into a Draft Environmental Impact Statement,[107] submits the statement and

a document summarizing it to the prefectural governor(s) and to the mayors of the cities, towns, and villages having jurisdiction over the related area, and holds a public hearing.[108] Anyone who has comments regarding protecting the environment can submit his or her comment to the proponent of the project within two weeks after the last day of the public review of the Draft Environmental Impact Statement.[109] Third, the proponent of the project prepares an Environmental Impact Statement, taking the comments on the Draft Environmental Impact Statement from prefectural governor(s) and the general public into consideration.[110] Not only the competent authority but also the Minister of Environment may express his or her opinions, from the standing point of protecting environment, regarding the Environmental Impact Statement.[111] The proponent of the project completes and opens the Environmental Impact Statement to the general public for one month after amendment.[112] Fourth, before issuing a license or other required approval to the proponent of the project, the competent authority examines whether he or she is sure to consider environmental conservation carefully. It is possible for the competent authority to refuse to issue a license or other required approval to the proponent if there are worries about serious affects of the planned project upon the environment.[113]

In Japan, it is natural that an Environmental Impact Statement concludes that the proposed project has no serious affect upon the environment because the Environmental Impact Statement is prepared by the proponent of the project. Moreover, unlike the National Environmental Policy Act of the United States, the Japanese Environmental Impact Assessment Act does not require the proponent of the project to (i) declare any adverse environmental effects which can not be avoided, (ii) evaluate alternatives to the proposed action, or (iii) identify any irreversible and irretrievable commitments of resources, in an Environmental Impact Statement. The Japanese Environmental Impact Assessment Act is quite advantageous to the proponents of the projects and does little to prevent negative affects to the environment.

Local governments accepted the environmental impact assessment system more than twenty years earlier than the national government. The city of Kawasaki (Kanagawa Prefecture) established the first Environmental Impact Assessment Ordinance in Japan in 1976. By 2000, all of the forty-seven urban and rural prefectures and twelve ordinance-designated cities came to have their own Environmental Impact Assessment Ordinances.

Environmental Impact Assessment Ordinances (EIAOs) are characterized by four factors. First, as compared with the Environmental Impact Assessment Act, the objectives of the Environmental Impact Assessment Ordinances are broad. It includes small scale projects, river works, high-rise buildings, cemeteries, earth and sand digging, and drainage facilities, although these projects are out of the scope of the Environmental Impact Assessment Act. Second, as compared with the Environmental Impact Assessment Act, the items covered by the Environmental Impact Assessment Ordinances are of rich contents. An Environmental Impact Statement under the Environmental Impact Assessment Act principally includes only seven typical environmental pollution items (air pollution, water pollution, noise, vibration, odors, soil contamination, and ground subsidence) and natural environment items (geographical features, geology, plant, animal, and ecosystem). On the other hand, an Environmental Impact Statement under the Environmental Impact Assessment Ordinances also includes life environment (electric wave, sunshine, waste, etc) and social environment (cultural properties, regional communities, recreation, countermeasures against calamities, etc). Third, some Environmental Impact Assessment Ordinances obligate the proponent to open the project plan to the general public at an early stage and to prepare a Pre-Environmental Impact Statement for the planned project. Fourth, the Environmental Impact Assessment Ordinances usually have more opportunities for public participation than the Environmental Impact Assessment Act. The Environmental Impact Assessment Ordinances require the proponent to hold hearings and to accept comments from the general public on the

Environmental Impact Statement, and on the environmental investigation after the project.

The Environmental Impact Assessment Act also encourages local assemblies to establish and execute Environmental Impact Assessment Ordinances progressively.[114] For example, the Act clearly provides that Environmental Impact Assessment Ordinances could order the proponent to prepare an Environmental Impact Statement even if the planned project is not included in the scope of an Environmental Impact Statement under the Act, or if the scale of the planned project is smaller than the second project group's standard (Class-two Project) of the Act, or the planned project is in the second group and it is decided that there is no need to prepare an Environmental Impact Statement according to the Act.

(3) Summary

Unfortunately, the environmental impact assessment system in Japan has many problems. First, Draft Environmental Impact Statements are generally very poor since there is no established method for preparing them. In almost all cases, it simply concludes that the planned project will have no negative impact on the environment because it is poorly investigated. The River public does not know the reasonable ground for its conclusion because basic data and materials for the Draft Environmental Impact Statement are not opened to the public. Second, an Environmental Impact Statement is untimely prepared. Usually an Environmental Impact Statement is prepared after the proponent gets sites for a planned project and arranges most needed procedures with the competent authority. So it is too late for the proponent of the project to modify the project plan substantially. Third, the object of an Environmental Impact Statement is limited to the affect of the planned project upon the environment. Necessity of the project, scale, and social and economical effects are not questioned, although they are the center of public attention in most cases. Fourth, and this may be the biggest prob-

lem, the Environmental Impact Assessment Act does not oblige the proponent to make and examine alternative plans for the planned project.[115] Therefore, it is impossible for everyone to evaluate whether the proponent of the project fully assessed the potential affect of the project upon the environment, whether the proposed project plan is the best, or whether there are alternative plans for the project.[116]

2. Regulation of Dams

In both the United States and Japan, dams are the largest cause of salmon habitat destruction. The next section shows what efforts legislatures of both countries make to mitigate the negative effects of dams on salmon and indicates the differences between them.

(1) The United States

Before 1920, the regulatory authorities for hydroelectric power development were divided among some federal agencies such as the Department of Agriculture, the Department of the Interior, and the Department of the Army. Their activities were not coordinated well. Congress recognized that the lack of coordination would be the main obstacle to unified development of hydroelectric power resources. Then the Federal Power Act[117] was enacted in 1920 to set up intensive federal control over "navigable water courses," that is to say, the nation's larger rivers, and to establish a systematic, orderly process for promoting the comprehensive development, conservation, and use of navigation and water resources of the country.[118]

The Federal Power Act of 1920 created the Federal Power Commission. Its functions were transferred to the Federal Energy Regulatory Commission (FERC) in 1977.[119] The Federal Energy Regulatory Commission consists of five commissioners appointed by the President and has broad power over most of the nation's rivers.[120] One of the most important authorities of the Federal Energy

Regulatory Commission is to license hydropower development on navigable rivers and their tributaries.[121] However, the Federal Energy Regulatory Commission cannot license any facilities, including dams, on or directly affecting a component of the Wild and Scenic Rivers system,[122] National Parks,[123] or National Monuments.[124] All licenses must contain certain conditions[125] and be issued for a period not exceeding fifty years.[126] The licenses are conditionally available for transfer or renewal.[127] Licensees are liable for all damages occasioned to the property of others by the project works.[128]

The Federal Power Act has a special provision to protect the public interest including public uses of water resources. Before issuing licenses for constructing, operating, and maintaining a dam and its facilities, the original Federal Power Act required the Federal Power Commission to consider: (a) whether the applied development project is desirable and justifiable in consideration of the public interest,[129] and (b) whether the applied development project conforms to the comprehensive plan for expansion and development of watercourses for the purposes of using or being beneficial to both domestic and international commerce, (c) progressing and getting efficiency of hydraulic power resources development, and (d) whether it is benefiting public use including recreational use.

The requirements for environmental consideration in licensing were strengthened in the 1986 amendments of the Federal Power Act.[130] Similar to the Fish and Wildlife Coordination Act,[131] it requires the Federal Energy Regulatory Commission to give "equal consideration" to environmental concerns as well as irrigation and hydropower when it issues a new license. It specifically requires the Federal Energy Regulatory Commission to consider the effects on fish and wildlife.[132] The Act states:

> "in deciding whether to issue any license, ... the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to,

and enhancement of fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."[133]

Conditions requiring mitigation of effects to fish and wildlife also must be included in licenses.[134] Furthermore, the Federal Power Act specifies that the project must be best adopted to a comprehensive plan with such environmental consideration.[135] It is worth noting that the Act requires building fish ladders in projects where appropriate.[136] The Commission must also consider the States' and Indian tribal recommendations.[137]

Rivers are especially important natural resources and the Federal Power Act recognizes this by giving strong protection to the natural environment of rivers instead of economical values of rivers. Although the Federal Power Act has played a critical roll mitigating the negative impact of dams upon salmon, it is not perfect. As will be seen later, a more powerful statute to protect salmon from dams, the Pacific Northwest Electric Power Planning and Conservation Act of 1980, works together with the Federal Power Act.

(2) Japan

In Japan, rivers and dams are managed by administrative agencies under several statutes. There is no well-ordered, single statute to manage them. The following is an overview of the three main statutes. They are almost all lacking provisions relating to environmental conservation and public participation.

a. The River Act of 1964

The original River Act was enacted in 1896 to control floods. It was repealed and the present River Act was enacted in 1964 to control floods and water use. The River Act was considerably

amended in 1997 to add provisions for improvement and conservation of the river environment, protection of wooded zones along rivers, and public participation in river improvement planning procedures.

The River Act has four purposes: (a) prevention of disasters due to flood or high tide, (b) proper use of rivers and their water, (c) maintenance of normal functions of rivers, and (d) improvement and conservation of the river environment.

Rivers are divided into four levels by the Minister of National Land and Transportation, prefectural governors, or mayors of cities, towns, and villages according to their importance from the perspective of national land conservation, national economy, and public interest. The River Act applies to the rivers in the first three levels. The first level rivers, that is to say, the most important rivers in Japan, are designated by the Minister of National Land and Transportation, and managed by the Minister and prefectural governors.[138] The second level rivers are designated and managed by prefectural governors.[139] The third level rivers are designated and managed by mayors of cities, towns, or villages.[140] The fourth level rivers are all public flow and water except for rivers included in the first, second, and third level rivers.

Nobody can use river water without permission from the managers of rivers (the Minister of National Land and Transportation, prefectural governors, and mayors of cities, towns, and villages).[141] The user of river water will be given water rights in accordance with this permission. The water right is a kind of private right which is guaranteed by statute. Water rights can be divided into two types: customary water rights and permitted water rights. The users of river water who had used river water before the Original River Act was enacted in 1896 were given customary water rights.[142] The permitted water rights system was created by the River Act of 1964. The permitted water rights are mainly used for agricultural irrigation, hydroelectric power development, mining, industrial activities, drinking water, raising fish, and sewage disposal.

The managers of rivers are authorized to give the applicant

permission to use river water without hearing any comments from the general public. Usually the water rights for hydroelectric power development are valid for thirty years, and the water rights for other purposes are valid for ten years. However, water rights are almost permanent in fact because it is very easy for right holders to renew their rights. On the renewal, the managers of rivers are not required to collect comments from the general public and have no authority to require water rights holders to return certain amounts of water to the original river. Since generally water rights holders never relinquish their water rights and keep removing water for decades, sometimes for over a century, many rivers are totally dried up in parts and their watershed ecosystems are completely destroyed.

To build a dam, the managers of rivers must create two documents: a River Improvement Basic Policy and a River Improvement Plan. The River Improvement Basic Policy includes (a) the basic policy on comprehensive conservation and use of the river, (b) the basic high water level, (c) the planned high volume of water at principal spots, (d) the planned high water level and width of river at principal spots, and (e) the necessary water volume at principal spots.[143] The Minister of National Land and Transportation must ask the Social Capital Preparation Council for comments on the planned River Improvement Basic Policy. The prefectural governors must ask the Prefectural River Council (if any) for comments on the planned River Improvement Basic Policies. This is the only chance for the managers of rivers to receive comments before they decide the Policies. The River Act has no provision for public participation in this stage.

The River Improvement Plan includes (a) the purpose of the River Improvement Plan, (b) the goal, type, and place of the river construction project, (c) the overview of the planned dam function, and (d) the goal, type, and place of river maintenance.[144] The more detailed and relevant information for the general public, such as the concrete place, size, structure, and method of constructing the dam, or conservation countermeasures for the national environment,

wildlife, and wooded zones, are not to be included in the Plan. The Minister of National Land and Transportation has no need to ask the Social Capital Preparation Council about the Plan before he or she decides it, but the Minister must ask for comments on the Plan from the related prefectural governors and the mayors of cities, towns, and villages.[145] The prefectural governors must ask for comments on the Plans from the Minister before the governors decide the Plans. Both the Minister and prefectural governors are able to ask for comments from experts or to hold a public hearing, when the Minister or prefectural governors recognize that it is necessary to do so.[146] This is one of the important amendments of 1997. The River Act had no provision of public participation until then. However, even experts do not have the opportunity to submit their comments in the following cases: (a) a small scale project; (b) an extension of an existing project or very simple project; or (c) a project requested by local residents.

b. The Special Multipurpose Dam Act of 1957

A special multipurpose dam is a dam developed by the Minister of National Land and Transportation for the purposes of hydroelectric power development, drinking water or industrial water, and located under the direct control of the Ministry of National Land and Transportation.

To build a special multipurpose dam, the Minister of National Land and Transportation takes three steps. First, the Minister must prepare a Basic Plan which includes the purposes, place, scale, and type of dam, volume of water to be kept in the reservoir, volume of water to be taken from the reservoir, allotment ratio of water among users, applicants for water rights, construction expenses, person's name who bears the expenses, etc.[147] Although the Basic Plan is extremely important because it contains many key factors which characterize the dam, the Special Multipurpose Dam Act has no provision to let the general public submit their comments on the

Basic Plan. The Minister decides the Basic Plan after he or she asks for comments from the related administrative agencies, prefectural governors, and applicants of water rights for the dam.[148] However, it is practically impossible for the prefectural governors and mayors of related cities, towns, and villages to raise an objection to the Basic Plan because they are afraid their objection will cause a split between the national government and local governments. The Act has no provision to moderate different or opposing views since it does not foresee such objection from related administrative agencies, prefectural governors, mayors of related cities, towns, and villages, and applicants of water rights for the dam.

The second step is the River Improvement Basic Policy, and the third step is the River Improvement Plan. As mentioned above, the people with learning and experience and the general public will be given an opportunity to submit their comments on the River Improvement Plan only when the Minister recognizes that it is necessary to do so. But in the case of a special multipurpose dam, the applicant and permitter are the same person. Consequently, the Minister rarely rejects his or her application.

c. The Water Resources Development Promotion Act of 1961

The Water Resources Development Promotion Act requires the Minister of National Land and Transportation to designate the water systems which need to be managed for industrial development and increasing urban population.[149] Seven water systems are designated by the Minister at present: the Tone River, the Ara River, the Kiso River, the Toyo River, the Yodo River, the Yoshino River, and the Chikugo River. The Minister is required to make a Basic Plan for Water Resources Development[150] which includes the proposed supply and demand of water, basic information about the planned facilities (dams), and other important information.[151] The promoters of the dams under the Water Resource Development Basic Plan are the Minister of National Land and Transportation, the Minister of

Agriculture, Forestry, and Fisheries, the Minister of Health, Welfare, and Labor, or the Minister of Economy and Industry. The constructor of the dams under the Basic Plan for Water Resources Development was the Water Resources Development Public Corporation, a special corporation established in 1962, completely controlled by the national government, in order to develop the designated water systems. The Water Resources Development Public Corporation was transformed into Japan Water Agency, an incorporated administrative agency, in October 2003.

There were three steps in building dams based on the Basic Plan for Water Resources Development: First, a promoter (Minister) creates a Work Practice Policy in accordance with the Basic Plan for Water Resources Development after he or she asks for comments from the related prefectural governors. Second, the Water Resource Development Corporation makes a detailed Work Practice Plan in accordance with the Work Practice Policy after the Corporation asks for comments from the related prefectural governors and applicants for water rights for industrial use.[152] Third, the Corporation starts construction when its Work Practice Plan is authorized by the promoter.

After the Water Resources Development Public Corporation was transformed into Japan Water Agency, Japan Water Agency, based on the Basic Plan for Water Resources Development, is constructing dams, estuary barrages, facilities for lake and marsh development, and canals by the authority of the promoters. However, the Act still has no provision to allow the mayors of cities, towns, and villages, and the general public to submit their comments on the proposed project to the promoter.

(3) Summary

In both the United States and Japan, the federal (or national) government and local governments manage rivers and water rights based on statutes. However, there are some differences between the

two countries' statutes and practices. First, the United States has a democratic commission (the Federal Energy Regulatory Commission) to investigate water rights and licenses to build dams. Japan, on the other hand, has no such commission, and the authority to manage rivers and dams is basically consolidated in the Minister of National Land and Transportation or the prefectural governors. Second, the Federal Power Act of the United States guarantees many opportunities for citizens to participate in the license issuing procedure at least for dams on the nation's largest rivers and on navigable waters. However, the related statutes in Japan have almost no provision for public participation. As mentioned above, the general public has no guaranteed opportunity to participate in deliberation over the river management activities by administrative agencies. Whether or not the general public is allowed to submit their opinion to the administrative agencies is basically at the discretion of the Minister of National Land and Transportation or the prefectural governors. Therefore, it is next to impossible for the general public to participate in the administrative activities regarding the management of rivers and dams. Third, the Federal Power Act of the United States requires the Federal Energy Regulatory Commission to give equal consideration to the affects on fish and wildlife (including related spawning grounds and habitat) as well as power and other purposes of water use. Japan, on the other hand, has no such requirement in the related statutes. Japanese statutes pertaining to dams attach great importance to the control, development, and rational use of rivers, but they are totally lacking in consideration of environmental issues.

Notes

72. An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes, Pub. L. No. 90-190, 83 Stat 852 (1970).

73. The purposes of the National Environmental Policy Act are "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C.A. §4321 (West 2003); Pub. L. No. 91-190, §2, 83 Stat. 852, 852 (1970).
74. The Council on Environmental Quality was created in the Executive Office of the President. The Council consisted of the President appointed three members who meet the strict four conditions the Act provides. "The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment." 42 U.S.C.A. §4342 (West 2003); Pub. L. No. 91-190, §202, 83 Stat. 852, 854 (1970).

Congress orders the Council on Environmental Quality eight duties and functions: "(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title; (2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining

whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends; (3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto; (4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation; (5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality; (6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes; (7) to report at least once each year to the President on the state and condition of the environment; and (8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request." 42 U.S.C.A. §4344 (West 2003); Pub. L. No. 91-190, §204, 83 Stat. 852, 855 (1970).

75. "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local

governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S. C.A. §4331(a) (West 2003); Pub. L. No. 91-190, §101, 83 Stat. 852, 852-853 (1970).

76. The federal government is to discharge these six continuing responsibilities by using "all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources." 42 U.S.C.A. §4331(b) (West 2003); Pub. L. No. 91-190, §101, 83 Stat. 852, 852-853 (1970).
77. "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C.A. §4331(c) (West 2003); Pub. L. No. 91-190, §101, 83 Stat. 852, 852-853 (1970).
78. "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes." 42 U.S.C.A. §4332 (West 2003); Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1970); An Act To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental

impacts statements, Pub. L. No. 94-83, 89 Stat. 424 (1975).

79. In 1970, President Richard Nixon authorized the Council on Environmental Quality to make the guideline for the environmental impact assessment. "The Council on Environmental Quality shall (***) issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102 (2)(C) of the Act." Protection and enhancement of environment quality, Exec. Or. 11514, 35 Fed. Reg. 4247, 4247-4248 (Mar. 7, 1970). The Council on Environmental Quality declared the guideline about the statements on proposed federal actions affecting the environment in 1971. However, it was not enforceable. 36 Fed. Reg. 7724 (Apr. 23, 1971).

In 1977, the responsibility of the Council on Environmental Quality to issue guidelines to federal agencies under section 3 (h) of Executive Order No. 11514 was revised by the President Jimmy Carter as follows: "(h) issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332 (2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designated to make the environmental impact statement process more useful to decision makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedure (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their

prompt resolution." Relating to protection and enhancement of environmental quality, Exec. Or. 11991, 42 Fed. Reg. 26967 (May 24, 1977).

According to the revision, the Council on Environmental Quality issued the draft form of the regulation establishing uniform procedures for implementing the procedural provisions of the National Environmental Policy Act for public review (43 Fed. Reg. 25230 (June 9, 1978)), and issued the final regulations (43 Fed. Reg. 55978 (Nov. 29, 1978)).

80. In determining whether to prepare an environmental impact statement the federal agency shall "determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal in one which: (1) normally requires an environmental impact statement, or (2) normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion)." 40 C.F.R. §1501.4(a) (2002).

Categorical exclusion means "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have to no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact assessment is required. An agency may decide in its procedures or otherwise, to prepare environmental assessment for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4 (2002).

81. Environmental Assessment means "a concise public document for which a Federal agency in responsible that serves to (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact assessment or a

finding of no significant impact; (2) aid an agency's compliance with the Act when no environmental impact statement is necessary; (3) facilitate reparation of statement when one is necessary." Environmental Assessment "shall include brief discussions of the need for the proposal, of alternatives as required by section 102 (2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. §1508.9(a)(b) (2002). Agencies "shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement." 40 C.F.R. §1501.3(a) (2002).

82. Draft Environmental Impact Statements "shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102 (2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revisited draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. §1502.9(a) (2002).
83. 40 C.F.R. §1506.10(b)(1) (2002).
84. Final Environmental Impact Statement "shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate point in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. §1502.9(b) (2002).
85. 40 C.F.R. §1506.10(b)(2) (2002). There is an exception to the

rules on timing that may be made in the case of an agency decision that is subject to a formal internal appeal. "Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. The means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act on other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section." 40 C.F.R. §1506.10(b)(2) (2002).

86. Agencies "shall prepare supplements to either draft or final environmental impact statements if (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Agencies "may also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(C)(1), (2) (2002).
87. Three fundamental factors are to be included in the record of decision: (1) statement of what the decision was; (2) identification of all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may

discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision; and (3) statement of whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation. 40 C.F.R. §1505.2 (2002).

88. Philip Michael Ferester, *Revitalizing The National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 Harv. Envtl. L. Rev. 207, 230 (1992).
89. Cal. Public Resources Code Ann. §§21000-21178.1 (West 1996). Since its enactment, the California Environmental Quality Act has been amended many times over although the National Environmental Policy Act has never been amended.
90. The California Environmental Quality Act provides its legislative intent as follows: "(a) the maintenance of a quality environment for the people of this states now and in the future is a matter of statewide concern; (b) it is necessary to provide a high quality environment that at all times is healthful and pleasing to the senses and intellect of man; (c) there is a need to understand the relationship between the maintenance of high quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state; (d) the capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached; (e) every citizen has a responsibility to contribute to the preservation and enhancement of the environment; (f) the interrelationship of

policies and practices in the management of natural resources disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution; (g) it is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying environment for every Californian." Cal. Public Resources Code Ann. §21000 (West 1996).

91. The California Environmental Quality Act provides that it is the policy of the state to: "(a) develop and maintain a high-quality environment now and in the future, and take all action to protect, rehabilitate, and enhance the environmental quality of the state; (b) take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise; (c) prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history; (d) ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions; (f) require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality; (g) regulate governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment." Cal. Public Resources Code Ann. §21001 (West 1996).

92. Public agencies "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." Cal. Public Resources Code Ann. §21002 (West 1996). In order to achieve this objective, "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries or approves whenever it is feasible to do so." Cal. Public Resources Code Ann. §21002.1(b) (West 1996).

However, there is an exception: "in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or move significant effects thereof Cal. Public Resources Code Ann. §21002 (West 1996). Similarly, "if economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project in otherwise permissible under applicable laws and regulations." Cal. Public Resources Code Ann. §21002.1(c) (West 1996). The California Environmental Quality Act provides that feasible means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Cal. Public Resources Code Ann. §21061.1 (West 1996).

93. Cal. Public Resources Code Ann. §21001(g) (West 1996).

94. The California Environmental Quality Act provides that: "(a) all lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment. Whenever feasible, a standard format shall be used for environmental impact reports; (b) the environmental impact report shall include a detailed statement setting forth all of the following: (1) all

significant effects on the environment of the proposed project; (2) in a separate section: (A) any significant effect on the environment that cannot be avoided if the project is implemented; (B) any significant effect on the environment that would be irreversible if the project is implemented; (3) mitigation measures proposed to minimize significant effect on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy; (4) alternatives to the proposed project; (5) the growth-inducing impact of the proposed project; (c) the report shall also contain a statement briefly indicating the environment of a project are not significant and consequently have not been discussed in detail in the environmental impact report; (d) for purposes of this session, any significant effects on the environment shall changes in physical conditions which exist within the area as defined in Section 21060.5; (e) previously approved land use documents, including, but not limited to, general plans, specific plans, and local costal plans, may be used in cumulative impact analysis." Cal. Public Resources Code Ann. §21100 (West 1996).

The term "significant effect" on the environment means "a substantial, or potentially substantial, adverse change in the environment." Cal. Public Resources Code Ann. §21068 (West 1996). The term "environment" means "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." Cal. Public Resources Code Ann. §21060.5 (West 1996).

The term "environmental impact report" means "a detailed statement setting froth the matters specified in Section 21100 and 21100.1; provided that information or data which is relevant to such a statement and is a matter of public record or is generally available to the public need not be repeated in its entirely in such statement, but may be specifically cited as the source for conclusions stated therein; and provided further that

such information or data shall be briefly described, that its relationship to the environmental impact report shall be indicated, and that the source thereof shall be reasonably available for inspection at a public place or public building. An environmental impact report also includes any comments which are obtained pursuant to Section 21104 or 21153, or which are required to be obtained pursuant to this division.

An environmental impact report in an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.

In order to facilitate the use of environmental impact reports, public agencies shall require that such reports contain an index or table of contents and a summary. Failure to include such index, table of contents, or summary shall not constitute a cause of action pursuant to section 21167." Cal. Public Resources Code Ann. §21061 (West 1996).

The Act requires the state lead agency, "prior to completing an environmental impact report," "to consult with, and obtain comments from, each responsible agency, any public agency which has jurisdiction by law with respect to the project, and any city or county which borders on a city or county within which the project is located unless otherwise designated annually by agreement between the state lead agency and the city or county, and may consult with any person who has special expertise with respect to any environmental impact involved." Cal. Public Resources Code Ann. §21104 (West 1996). In the similar way, the Act requires every local lead agency "prior to completing an environmental impact report, to consult with, and obtain com-

ments from, each responsible agency, any public agency which has jurisdiction by law with respect to the project, and any city or county which borders on a city or county within which the project is located unless otherwise designated annually by agreement between the local lead agency and the city or county, and may consult with any person who has special expertise with respect to any environmental impact involved." Cal. Public Resources Code Ann. §21153 (West 1996).

95. Wash. Rev. Code Ann. §§43.21C.010-43.21C914 (West 1998).
96. Wash. Rev. Code Ann. §43.21C.020(3) (West 1998). Although the State Environmental Policy Act obviously recognizes "the right" to a healthful environment, the National Environment Policy Act does not. The National Environmental Policy Act provides: "the Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C.A. §4331(c) (West 2003); Pub. L. No. 91-190, § 101, 83 Stat. 852, 852-853 (1970).
97. "Any governmental action may be conditioned or denied." "Such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible." "Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents." "Mitigation measures shall be reasonable and capable of being accomplished." In order to deny a proposal, an agency must find that: "(1) the proposal would result in significant adverse impacts identified in a final or supplemental environment impact statement;" and that "(2) reasonable mitigation measures are insufficient to mitigate the identified impact." Wash. Rev. Code Ann. §43.21C.060 (West 1998).
98. The purpose of the Act is "to comprehensively and systemat-

ically promote policies for environmental conservation to ensure healthy and cultivated living for both the present and future generation of the nation as well as to contribute to the welfare of mankind, through articulating the basic principles, clarifying the responsibilities of the Nation, local governments, corporations and citizens, and prescribing the basic policy considerations for environmental conservation." §1, the Basic Environment Act, Law No. 91 of 1993.

99. §1, the Basic Environment Act, Law No. 91 of 1993.
100. §20, the Basic Environment Act, Law No. 91 of 1993.
101. Since 1972, the environmental assessment had been merely executed as an administrative guidance until the Environmental Impact Assessment Act was enacted in 1997. The Act provides its purpose as follows; "because it is extremely important, in terms of protecting the environment, for a corporation that is undertaking a project that changes the shape of the terrain or that involves the construction of a new structure, or that is engaging in other similar activities, to conduct an environment impact assessment in advance of such a project, the purpose of this law are to ensure that proper consideration is given to environmental protection issues relating to such a project and, ultimately, to ensure that present and future generations of this nations people enjoy healthy and culturally rewarding lives." § 1, the Environmental Impact Assessment Act, Law No. 81 of 1997. Environmental impact assessment means "the process of (a) surveying, predicting, and assessing the likely impact that a project (hereinafter meaning changes in the shape of the terrain including dredging being conducted simultaneously, and the establishing, modifying, and expanding of a structure for specific purposes) will have on various aspects of the environment; (b) studying possible environmental protection measures relating to the project; and (c) assessing the likely overall environmental impact of such measures." §2(1), the Environmental Impact Assessment Act, Law No. 81 of 1997.

102. §3, the Environmental Impact Assessment Act, Law No. 81 of 1997.
103. They are construction works of (a) national expressways and national roads, (b) dams or river waterworks, (c) railways or railway tracks, (d) airport or airport facilities, (e) hydroelectric power plants, (f) final domestic-waste disposal sites or final industrial-waste disposal sites, (g) reclamation or dumping public waters, (h) land readjustment projects, (i) new urban residential areas, (j) industrial estate, (k) new urban infrastructure, (l) distribution-business centers. §2(2), the Environmental Impact Assessment Act, Law No. 81 of 1997. A government ordinance declares that the environmental impact assessment is also applicable to the housing development projects by the Housing and Urban Development Corporation.
104. The Act has an attached detail table of these two groups of works. The agency concerned must ask the related prefectural governor's advice. It is possible to voluntarily execute the Environmental Impact Assessment without screening the work. §2(2) and (3), the Environmental Impact Assessment Act, Law No. 81 of 1997.
105. In a scoping document, the proponent must publish his or her name, address, purpose and content of the project, the general condition of the planned site and its vicinity, and the planned assessment items. The date to carry on an investigation, detailed method, the way of prediction and valuation are not opened to the public. §5(1), the Environmental Impact Assessment Act, Law No. 81 of 1997.
106. A scoping document is open to the public for one month after it is sent to the prefectural governor and the mayors of the cities, towns, and villages to ask their comments and published in the official gazette. Anyone who has comment from the standing point of protecting environment could submit his or her comment to the proponent within two weeks after the day following the termination of the period during which the statement is to be

available for public review. The prefectural governor states his or her view by writing, taking comments from the mayors of the cities, towns, and villages and the general public into consideration. §6 to 10, the Environmental Impact Assessment Act, Law No. 81 of 1997.

107. Section 14 of the Act requires a Draft Environmental Impact Statement to have eight contents at least: (1) contents and area of the planned project, (2) method document, the comments from prefectural governor and public on it, and the promoter's view of those comments, (3) overview of the planned site, (4) result of environment investigation, (5) prediction and valuation of the effects of the planned project upon environment, (6) measures to conserve environment, (7) countermeasures for potential conditions, and (8) synthesis valuation.
108. A Draft Environmental Impact Statement is open to the general public for one month after it is sent to the prefectural governor and local governments to ask their comments and published in the official gazette. §§15 and 16, the Environmental Impact Assessment Act, Law No. 81 of 1997. The promoter must hold a public hearing to make the Draft Environmental Impact Statement to everybody. The public hearing is only for public information, not for discussion or exchange views. §17, the Environmental Impact Assessment Act, Law No. 81 of 1997.
109. The acceptable public comment is strictly limited to the comment from environmental conservation point of view. For example, comments for or against the planned work is not accepted.
110. §21, the Environmental Impact Assessment Act, Law No. 81 of 1997.
111. §23, the Environmental Impact Assessment Act, Law No. 81 of 1997.
112. §§23 to 25, the Environmental Impact Assessment Act, Law No. 81 of 1997.
113. §33, the Environmental Impact Assessment Act, Law No. 81 of

1997.

114. §61(1), the Environmental Impact Assessment Act, Law No. 81 of 1997.

115. The Fundamental Matters on Environmental Conservation Measures Guideline, decided by the Minister of Environment in accordance with sections 4 (10) and 13 of the Environmental Impact Act, requires the proponent to compare and examine some alternative plans for environmental conservation measures. However, same as the Act, it also does not require the proponent to make and examine alternative plans for the planned project.

116. Hatakayama, supra note. 59, at 279-282.

117. The Act originally named the Federal Water Power Act. An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes, 16 U.S.C.A. §§791a to 825r (West 2000); Pub. L. No. 280, Chap. 285, 41 Stat. 1063 (1920). It was renamed into the Federal Power Act in 1935. An Act to provide for control and regulation of public-utility holding companies, and for other purposes, Pub. L. No. 333, Chap. 687, §320, 49 Stat. 803, 863 (1935).

Written approval of the Federal Power Commission is necessary to transfer license. A successor of license must be subject to all the conditions of the license. "No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under

this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section." 16 U.S. C.A. §801 (West 2000); Pub. L. No. 280, Chap. 285, §8, 41 Stat. 1063, 1068 (1920).

"Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable demages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission." 16 U.S.C.A. §807(a) (West 2000).

However, "if the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be

issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid." 16 U.S.C.A. §808(a)(1) (West 2000).

118. 16 U.S.C.A. §§791a to 825r (West 2000); Pub. L. No. 286, Chap. 285, 41 Stat. 1063 (1920). The Act is also called Esch Water Power Act, Public Utility Act of 1935, Water Power Act, or Federal Water Power Act (FWPA). There are some cases mentioned the purposes of the Act. See Chemehuevi Tribe of Indian v. Federal Power Commission, U.S. Dist. Col. 1975, 95 S. Ct. 1066, 420 U.S. 395, 43 L. Ed. 2d 279; Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light CO., C.A. 3 (Pa.) 1997, 113 F. 3d 405; Pacific Gas & Elec. CO. v. Federal Energy Regulatory Commission, C.A.D.C. 1983, 720 F. 2d 78, 231 U.S. App. D.C. 314; Montana Power CO., v. Federal Power Commission, C.A. 9 (Mont.) 1964, 330 F. 2d 781; Georgia Power CO. v. Federal Power Commission, C.C.A. 5 1946, 152 F. 2d 908.

119. The Federal Energy Regulatory Commission was established within the Department of Energy by the Department of Energy Organization Act in 1977. An Act to establish a Department of Energy in the executive branch by the reorganization of energy functions within the Federal Government in order to secure effective management to assure a coordinated national energy policy, and for other purposes. 42 U.S.C.A. §7171(a) (West 2003); Pub. L. No. 95-91, 91 Stat. 565 (1977); Pub. L. No. 95-91, §401(a), 91 Stat. 582 (1977). The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were

transferred to the Secretary of Energy except for certain function, which were transferred to the Federal Energy Regulatory Commission. 42 U.S.C.A. §7151(b) (West 2003), Pub. L. No. 95-91, §301, 91 Stat. 577 (1977); 42 U.S.C.A. §7291 (West 2003); Pub. L. No. 95-91, §701, 91 Stat. 605 (1977); 42 U.S.C.A. §7293 (West 2003); Pub. L. No. 95-91, §703, 91 Stat. 606 (1977).

120. "A commission is created and established, to be known as the Federal Power Commission (hereinafter referred to as the "commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

The commissioners first appointed under this section, as amended, shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination. Their successors shall be appointed each for a term of five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioners.

Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. Three members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal of which judicial notice shall be taken. The commission shall annually elect a vice chairman to act in case of the absence or disability of the chairman or in case of a vacancy in the office of chairman.

Each commissioner shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, within the limitation prescribed by law, while away from the seat of government upon official business.

The principal office of the commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States." 16 U.S.C.A. §792 (West 2000); Pub. L. No. 280, Chap. 285, §1, 41 Stat. 1063, 1063 (1920); Pub. L. No. 412, Chap. 572, §1, 46 Stat. 797, 797 (1930); Reorganization Plan No. 9 of 1950, §3, eff. Filed on May 24, 1950, 15 Fed. Reg. 3175, 3175 (May 25, 1950); 64 Stat. 1265, 1265 (1950); Pub. L. No. 86-619, §1, 74 Stat. 407, 407 (1960).

121. About jurisdiction of the Federal Energy Regulatory Commission, see generally Pub. L. No. 95-91, section 402, 91 Stat. 565, 583-585 (1977). The Federal Energy Regulatory Commission is authorized and empowered to carry out: (a) Investigations and data; (b) Statements as to investment of licensees in projects; access to projects, maps, etc.; (c) Cooperation with executive departments; information and aid furnished Commission; (d) Publication of information, etc.; reports to Congress; (e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.; (f) Preliminary permits; notice of application; (g) Investigation of occupancy for developing power; orders. 16 U.S.C.A. §797 (West

2000); Pub. L. No. 280, Chap. 285, §4, 41 Stat. 1063, 1065 (1920); Pub. L. No. 412, Chap. 572, §2, 46 Stat. 798, 798 (1930); Pub. L. No. 333, Chap. 687, §202, 49 Stat. 803, 839-841 (1935); Pub. L. No. 97-375, §212, 96 Stat. 1819, 1826 (1982); Pub. L. No. 99-495, §3(a), 100 Stat.1243, 1243 (1986).

122. The Wild and Scenic Rivers Act. 16 U.S.C.A. §§1271-1287 (West 2000); Pub. L. No. 90-542, 82 Stat. 906 (as amended, 1968). The Act established a method for providing Federal protection for certain of our country's remaining free-flowing rivers, preserving them and their immediate environments for use and enjoyment of present and future generations. Rivers are included in the system so that they may benefit from the protective management and control of development for which the Act provides. The preamble of the Act states: "it is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." 16 U.S.C.A. §1271 (West 2000); Pub. L. No. 90-542, §1(b), 82 Stat. 906, 906 (1968).

Every river in this system is to be classified into the three categories. The Wild and Scenic Rivers Act states: "a wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in

section 1271 of this title. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following: (1) Wild river areas — Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America; (2) Scenic river areas — Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads; (3) Recreational river areas — Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past." 16 U.S.C.A. §1273(b) (West 2000); Pub. L. No. 90-542, §2, 82 Stat. 906, 906-907 (1968); Pub. L. No. 94-407, § 1(1), 90 Stat. 1238, 1238 (1976); Pub. L. No. 95-625, §761, 92 Stat. 3467, 3533 (1978). See 47 Fed. Reg. 39454-39461 (September 7, 1982) for the more detailed guidelines to refine these definitions.

The Wild and Scenic River Act designation forbids dams and other interferences with the free-flowing condition of the designated river segment, regardless of whether it is classified as wild, scenic, or recreational. The Act states: "the Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (41 Stat. 1063), as amended (16 U.S.C. 791a et seq.), on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of

any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall 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 the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter. Any license heretofore or hereafter issued by the Federal Energy Regulatory Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 1273 of this title and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment." 16 U.S.C.A. §1278(a) (West 2000).

"The Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir,

powerhouse, transmission line, or other project works under the Federal Power Act, as amended [16 U.S.C.A. §791a et seq.], on or directly affecting any river which is listed in section 1276(a) of this title, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval ——

(i) during the ten-year period following October 2, 1968 or for a three complete fiscal year period following any Act of Congress designating any river for potential addition to the national wild and scenic rivers system, whichever is later, unless, prior to the expiration of the relevant period, the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, on the basis of study, determine that such river should not be included in the national wild and scenic rivers system and notify the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives, in writing, including a copy of the study upon which the determination was made, at least one hundred and eighty days while Congress is in session prior to publishing notice to that effect in the Federal Resister: *Provided*, That if any Act designating any river or rivers for potential addition to the national wild and scenic rivers system provides a period for the study or studies which exceeds such three complete fiscal year period the period provided for in such Act shall be substituted for the three complete fiscal year period in the provisions of this clause (i); and (ii) during such interim period from the date a report is due and the time a report is actually submitted to the Congress; and (iii) during such additional period thereafter as, in the case of any river the report for which is submitted to the President and the Congress, is necessary for congressional consideration thereof or, in the case of

any river recommended to the Secretary of the Interior for inclusion in the national wild and scenic rivers system under section 1273(a)(ii) of this title, is necessary for the Secretary's consideration thereof, which additional period, however, shall not exceed three years in the first case and one year in the second.

Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a potential wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or diminish the scenic or recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area on the date of designation of a river for study as provided for in section 1276 of this title. No department or agency of the United States shall, during the periods hereinbefore specified, recommend authorization of any water resources project on any such river or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture in writing of its intention so to do at least sixty days in advance of doing so and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter." 16 U.S.C.A. § 1278(b) (West 2000).

"The Federal Energy Regulatory Commission and all other Federal agencies shall, promptly upon enactment of this chapter, inform the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, of any proceedings, studies, or other activities within their jurisdiction which are now in progress and which affect or may affect any of the rivers specified in section 1276(a) of this title. They shall like-

wise inform him of any such proceedings, studies, or other activities which are hereafter commenced or resumed before they are commenced or resumed." 16 U.S.C.A. §1278(c) (West 2000); Pub. L. No. 90-542, §7, 82 Stat. 906, 913-915 (1968); Pub. L. No. 93-279, §1(b)(3) and (4), 88 Stat. 122, 123 (1974); Pub. L. No. 93-621, §1(c), 88 Stat. 2094, 2096 (1975); Pub. L. No. 94-407, §1(2), 90 Stat. 1238, 1238 (1976); Pub. L. No. 95-91, §402(a)(1)(A), 91 Stat. 565, 583-584 (1977); Pub. L. No. 99-590, §505, 100 Stat. 3330, 3336 (1986); Pub. L. No. 103-437, §6(a)(7), 108 Stat. 4581, 4583 (1994).

The section (16 U.S.C.A. §1278(a) (West 2000)) does not apply to a congressionally authorized dam, so that the consent of the agencies administering a designated wild and scenic river is not required. See Oregon Natural Resources Council v. Harrell, 52 F. 3d 1499 (9th Cir. 1955).

There is a controversial sentence in 16 U.S.C.A. §1278(a) (West 2000); "Nothing contained in the foregoing sentence, however, shall 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 the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System." Swanson Mining Co. v. Federal Energy Regulatory Commission, 790 F. 2d 96 (D. C. Cir. 1986) and High Country Resources and Glacier Energy Co. v. Federal Energy Regulatory Commission, 255 F. 3d 741 (9th Cir. 2001) are representative cases discussing the sentence of the section. Swanson Mining Corp. v. Federal Energy Regulatory Commission, 790 F. 2d 96 (D.C. Cir. 1986), holds that section 7 of the Wild and Scenic Rivers Act, 16 U.S.C.A. §1278 (West 2000), meant what it said when it prohibited development on designated rivers that would interfere with their free-flowing condition. An applicant wanted to develop a project near the bank of the South Fork of the Trinity River in California, a state-administered component of the system that

used water from a tributary of the river. It argued that the project would not impair the values of the river that led to its inclusion in the system, but the court refused to allow the Federal Energy Regulatory Commission to exempt itself from the Wild and Scenic River Act on a case-by-case basis (p. 747).

123. "After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under part I of the Federal Power Act [16 U.S.C.A. §791a et seq.] (nor an exemption from part I of the Federal Power Act [16 U.S.C.A. §791a et seq.]) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be constructed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project." 16 U.S.C.A. §797c (West 2000). An Act to provide for improved energy efficiency (the Energy Policy Act of 1992). Pub. L. No. 102-486, §2402, 106 Stat. 2776, 3097 (1992).

124. The national monument is one of the federal land categories which lands so designated are to be devoted primarily to preservation. The national monument is usually created by Presidential proclamation under authority of the Antiquities Act of 1906. An Act For the preservation of American antiquities, 16 U.S.C. A. §§431 to 433 (West 2000); Pub. L. No. 209, Chap. 3060, 34 Stat. 225(1906). The Act states: "the President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unper-

fected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States." 16 U.S.C.A. §431 (West 2000); Pub. L. No. 209, Chap. 3060, §2, 34 Stat. 225, 225 (1906). There are 121 national monuments established under Presidential Proclamation, 18 miscellaneous national monuments, and 36 national memorials at least.

125. 16 U.S.C.A. §803 (West 2000) provides that all licenses shall be on the following conditions: (a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions; (b) Alterations in project works; (c) Maintenance and repair of project works; liability of licensee for damages; (d) Amortization reserves; (e) Annual charges payable by licensees; maximum rates; application; review and report to Congress; (f) Reimbursement by licensee of other licensees, etc.; (g) Conditions in discretion of Commission; (h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project; (i) Waiver of conditions; (j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings.

126. Licenses "shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice." 16

U.S.C.A. §799 (West 2000); Pub. L. No. 280, Chap. 285, §6, 41 Stat. 1063, 1067 (1920); Pub. L. No. 333, Chap. 687, §204, 49 Stat. 803, 841 (1935); Pub. L. No. 104-106, §4321(i)(6), 110 Stat. 186, 676 (1996); Pub. L. No. 104-316, §108(a), 110 Stat. 3826, 3832 (1996); Pub. L. No. 105-192. §2, 112 Stat. 625, 625 (1998).

127. See 16 U.S.C.A. §801 (West 2000) for transfer of license, and 16 U.S.C.A. §§807 and 808 (West 2000) for re-licensing proceedings.

128. The licensee has obligation to: (a) maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power; (b) make all necessary renewals and replacements; (c) establish and maintain adequate depreciation reserves for such purposes; (d) so maintain and operate said works as not to impair navigation, and (e) conform to such rules and regulations as the Federal Energy Regulatory Commission may form time to time prescribe for the protection of life, health, and property. "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the Unites States be liable therefore." 16 U.S.C.A. §803(c) (West 2000).

129. As to public interest, see generally Udall v. Federal Power Commission, 387 U.S. 428, 450 (1967). This is an early landmark decision in modern environmental law, holding that the Federal Power Commission construed the public interest standard in the Federal Power Act too narrowly in connection with a proposed hydropower license, to exclude consideration of the, among other things, "the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish or commercial and recreational purposes, and the protection of wildlife." George Cameron Coggins, Charles F. Wilkinson & John D. Leshy, *Federal Public Land and Resources Law* 375-376 (5th ed., Foundation Press 2002).

130. An Act to amend the Federal Power Act to provide for more protection electric consumers. 16 U.S.C.A. §§797(e) and 803(a) (West 2000); Pub. L. No. 99-495, §3, 100 Stat. 1243, 1243-1245 (1986).

131. The Fish and Wildlife Coordination Act also requires that federal agencies give "equal consideration" to wildlife consideration when taking or authorizing water development projects. The Act requires federal agencies to ensure that "wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation." 16 U.S.C.A. §661 (West 2000). The Act requires required reports on plans for mitigation of wildlife habitat losses due to federal water projects. "The reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661 to 666c of this title apply. Recommendations

of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages." 16 U.S.C.A. §662(b) (West 2000). This Act also can be used to require mitigation measures as a condition of a project permit.

132. The decision in the principal case relied on Udall v. Federal Power Commission, 387 U.S. 428 (1967). In the case, the Supreme Court found a requirement to consider the affects of a project on anadromous fish implicit in the provision of the Act that says that the Commission must find that licensed projects are "best adapted to a comprehensive plan for navigation, water power, and for other beneficial public uses, including recreational purposes." See also Canfederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F. 2d 466 (9th Cir. 1984), in which the 9th Circuit also declared that Federal Energy Regulatory Commission must consider the potential effect upon fish and other wildlife before it issues a license.

133. 16 U.S.C.A. §797(e) (West 2000). However, "equal consideration" is not synonymous with "equal handling." "Equal consideration" does not order the Federal Energy Regulatory Commission to accept the result of recommendation from fish and wildlife agencies. The Federal Energy Regulatory Commission must keep a balance of public benefits on the specified aspects, give the conflicting interests equal consideration, and make a rational and practical decision. State of California ex rel. State Water Resources Control Board v. FERC, 966 F. 2d 1541 (9th Cir. 1992).

134. "In order 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, each license issued under this

subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) [16 U.S.C.A. §661 et seq.] from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies." 16 U.S.C.A. §803 (j)(1) (West 2000).

135. All licenses must be on the condition that "the project adopted, including the maps, plans, and specifications, shall be such as 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 (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 16 U.S.C.A. §803 (a)(1) (West 2000).

136. "The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." 16 U.S.C.A. §811 (West 2000).

137. In order to ensure that the project adopted will be best adapted to the comprehensive plan, the Federal Energy Regulatory Commission shall consider "the recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the

recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project." 16 U.S.C.A. §803 (a)(2) (B) (West 2000).

138. §§4 (1), 9 (1), 9 (2), and 98, the River Act, Law No. 167 of 1964.
139. §§5 (1) and 10 (1), the River Act, Law No. 167 of 1964.
140. §100-2, the River Act, Law No. 167 of 1964.
141. §23, the River Act, Law No. 167 of 1964.
142. Most of these customary water rights are for agricultural uses. §20 (1), the River Act Enforcement Ordinance, Ordinance No. 14 of 1965.
143. §10-2, the River Act Enforcement Ordinance, Ordinance No. 14 of 1965.
144. §10-3, the River Act Enforcement Ordinance, Ordinance No. 14 of 1965.
145. §16-2, the River Act, Law No. 167 of 1964; §10-4, the River Act Enforcement Ordinance, Ordinance No. 14 of 1965.
146. §16-2 (3), the River Act, Law No. 167 of 1964.
147. §4 (2), the Special Multipurpose Dam Act, Law No. 35 of 1957.
148. §4 (4), the Special Multipurpose Dam Act, Law No. 35 of 1957.
149. The Minister must ask comments on planned designation to the related administration agencies, prefectural governors, the National Land Council, and the Cabinet Council. §§1 and 3, the Water Resources Development Promotion Act, Law No. 217 of 1961.
150. §4 (1), the Water Resources Development Promotion Act, Law No. 217 of 1961.
151. §5, the Water Resources Development Promotion Act, Law No. 217 of 1961.
152. §§20 (1) and (2), the Water Resources Development Promotion Act, Law No .217 of 1961.