

**The Battle for Storm King Mountain (1963-1981):**

*Private v. Public*

**Public Interest Environmental Law**

*“On remand, the Commission should take the whole fisheries question into consideration before deciding whether Storm King project is to be licensed.*

*The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence of reasonable alternatives. Of course, the Commission should make every effort to expedite the new proceedings.*

*Petitioners' application, pursuant to Federal Power Act 313(b), 16 U.S.C. 825l(b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.*

*The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.”*

Scenic Hudson v. Federal Power Commission (1965) [ 1 ]

### The Decision

On Dec. 29, 1965, Circuit Judge Hays delivered this landmark decision from the U.S. Second Circuit Court of Appeals that overturned the Federal Power Commission's order granting Consolidated Edison Inc. (Con Ed) a permit to build a hydroelectric plant on Storm King Mountain. Con Ed wanted to build a hydroelectric pump storage facility in and around the scenic and historic Storm King Mountain at the edge of the Hudson River in Cornwall, New York. The purpose of the proposed project was to create a giant “storage battery” of potential hydroelectric power that would be used to alleviate New York City's growing peak power consumption problems at certain times of the day. The growth and development of greater New York and its increasing energy demands was taxing the public power grid with brownouts and blackouts. The proposed facility would take water in from the Hudson River at the base of Storm King Mountain and use power from the grid during off-peak hours of the day to pump the river water uphill to a large storage reservoir which was to be built in a scenic forest preserve (Harvard University's Black Rock Forest) behind Storm King. Then, during the times of the day

when the peak demands were a problem, the water would be released from the storage reservoir to flow downhill back to the river. At the base of Storm King at water's edge there would be a large, 800 foot wide, pump-generator structure that would house both intake pumps and hydroelectric outlet generators. As the water flowed back to the river the generators would provide supplemental power to help the system during peak demand. [ 2 ]

### The Adversaries

In 1962 Con Ed announced its plans to build the pump storage project and applied for a permit from the Federal Power Commission (FPC), the licensing agency for all water power projects in the United States, in January of 1963. Local residents from the Town of Cornwall became alarmed at Con Ed's plans which would despoil the scenic beauty of that stretch of the Hudson River with Storm King Mountain at the water's edge. The planned storage reservoir would eliminate the Town of Cornwall's water supply lake behind Storm King Mountain and destroy a portion of Black Rock Forest, a scenic forest preserve with trails which was owned by Harvard University. Word spread quickly and a small band of local concerned citizens mobilized and began to meet in one of their living rooms to address the impact of the proposed power plant. In November of 1963 they named themselves the Scenic Hudson Preservation Conference. In February of 1964 the FPC began holding public hearings which were mandated by the Federal Power Act of 1920 (FPA) to explore reasonable opposition and alternatives (usually cost-effective related), prior to issuing licenses and allegedly under the umbrella of due process. In fact, the Federal Power Commission and public utilities had each evolved over the years to a "same-side-of-the-administrative-coin" relationship where it came to obligations to the "public interest". In the minds of the public utilities and the Commission the first duty to the public interest was to supply the public electricity. At the conclusion of the hearings in March, 1965, the FPC granted Con Ed a license to begin the Storm King project. This was after the FPC denied the Hudson River Fisherman's Association's petition to reopen hearings in light of newly

discovered dangers to river fish from the project. In July of 1965 the Scenic Hudson Preservation Conference and several local townships petitioned the 2d Circuit of the Court of Appeals for review to set aside the FPC rulings which granted the license to Con Ed and denied two petitions to hear further information. In December the Court of Appeals reversed and remanded the FPC rulings. At the heart of the matter was the conduct of the pre-licensing proceedings.

The part of the Federal Power Act which governed the purpose and scope of the pre-licensing procedures and hearings was quoted by the FPC in their respondent's brief to the 2d Circuit Court of Appeals and in turn quoted by Circuit Judge Hays in the December 29, 1965, decision, at paragraphs 9, 10, and 11:

*“To be licensed by the Commission a prospective project must meet the statutory test of being ‘best adapted to a comprehensive plan for improving or developing a waterway,’ Federal Power Act 10(a), 16 U.S.C. 803(a). In framing the issue before it the Federal Power Commission properly noted:*

*‘We must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied.’*

*If the Commission is to properly discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. See Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, cert. denied, Panhandle Eastern Pipeline Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S. Ct. 276, 5 L.Ed.2d 227 (1960). Petitioners' application pursuant to 313(b), 16 U.S.C. 825(b), to adduce additional evidence is granted. We set aside the three orders to which the petition is addressed and remand the case for further proceedings in accordance with this opinion.”*  
[ 3 ]

The December 29, 1965, Court of Appeals decision against the FPC in favor of private

citizens was a major win and a landmark moment. But it marked just the beginning of a major conflict over the fate of Storm King Mountain and the Hudson River that would not be decided for another seventeen years. At the time of the December of 1965 ruling the forces in play were still historically heavily weighed in favor of Con Ed, a regulated public utility which enjoyed the privilege of administrative deference in proceedings like these. After all, the public utilities existed to serve the “public-at-large-interest” and that would be compromised if their resources were continually going to be tapped by challenges from minority sectors of the public who were concerned about intangible resources like quality of life, scenic beauty, and historical significance; or natural resources such as clean air and water. When the battle for Storm King [ 4 ] was finally over on July 23, 1981, Con Ed’s interest in solving New York City’s wasteful energy consumption by damaging Storm King Mountain and the Hudson River had been defeated by the public’s interest in preserving natural resources and ecosystems. The ultimate solution to the Storm King conflict was achieved politically. Growing national public political support for environmental concerns resulted in Congress creating the new regulatory Environmental [ 5 ] Protection Agency (EPA) in 1970 to address the nation’s environmental issues. It was the EPA and the Hudson River’s baby striped bass and shad which finally brought the house of Consolidated Edison down. The years of legal wrangling started to wind down in 1977 when the [ 4 ] EPA was alerted that other existing power plants along the Hudson River were already killing billions of tiny river fish larvae and eggs on a regular basis by sucking them through their cooling systems, especially in Con Ed’s Indian Point atomic power plant. In December of 1978 the New York State’s Department of Environmental Conservation, the New York State Public Service Commission, the New York State Attorney General, and the Department of the Interior [ 6 ] joined Scenic Hudson and the Hudson River Fisherman’s Association to petition the Federal Energy Regulatory Commission (FERC, which had replaced the FPC in 1977) to terminate Con Ed’s Storm King license. Two years later with the EPA hot on the trail of the power plant fish kills Con Ed reached a settlement with Scenic Hudson that included dropping the Storm King

project, addressing the fish destruction problem and funding a research program for the river's  
[ 4 ]  
ecosystem. This was not the first time in the nation's history that battle lines had been drawn  
over the public's concern for the use of public resources.

### The First Conservation Movement of 1850-1920: Utilitarians and Preservationists

Controversy and concerns over the use of public natural resources fueled the nation's  
[ 7 ]  
first conservation movement from 1850 to 1920. A by-product of the country's growing pains  
from the industrial revolution, continental expansion, and gilded age phases, conservationism  
[ 8 ]  
reached its peak political power during the progressive era administration of Theodore  
Roosevelt and faded soon after World War I. The mainstream concern of the conservation  
movement, at its height under Roosevelt and his chief disciple, head of the U.S. Forest Service,  
[ 9 ]  
Gifford Pinchot, was to employ a utilitarian effort to use resources in a rational, planned, and  
orderly procedure. As territories became new states, the federal government took proceeds from  
the sale and disposal of public lands and created a special fund for the Department of the Interior,  
[ 10 ]  
the "reclamation fund" authorized by the Newlands Act (Reclamation Act) of 1902, to be used to  
investigate the construction of irrigation projects for storage and diversion to reclaim arid and  
semiarid sections of land for agricultural use. The cost of creating these reservoirs and dams was  
to be further financed by the sale of the hydroelectric power that could be generated there.

But this practical approach to conservation wasn't the only popular sentiment regarding  
[ 11 ]  
protecting the nation's resources. John Muir, another influential friend of Roosevelt, represented  
the preservationist conservationist's stance that the beauty of nature was sacred and it should be  
protected as such. In the midst of the utilitarian conservationist policies, Muir successfully  
championed and lobbied the setting aside for public use large tracts of forest, mountains, and  
spectacular canyons. Muir's conservationism harkened back to the romantic and nature oriented  
literary sentiments that were prevalent earlier in the century. The American Transcendentalist  
[ 12 ]  
literary movement centered on the essays, lectures, and writings of Ralph Waldo Emerson

[ 13 ]  
and a chief disciple, Henry David Thoreau, both of whom preached a very nature-centered and idealistic philosophy during mid-nineteenth century. Nature essays emerged as a popular genre [ 14 ]  
in the second half. John Burroughs, a devoted admirer of Emerson, reached millions of readers with his nature writings in magazines like the *Atlantic Monthly*, and was popular up until his death in 1921. The nation's collective public interest included a significant component of preservationist conservationism which considered the beauty of unspoiled nature a public resource.

### The Public Interest

The utilitarian conservationists of Roosevelt's administration represented the major thrust of the conservation movement's political influence in the first decade of the twentieth century. But as Roosevelt's second term was winding down business interests were mounting strong resistance to the conservationist efforts. In his December 3, 1907, annual message to Congress Roosevelt warned of the dangers of the settlement and development of the substantial untapped wealth of the uninhabited new state and territorial public land being "monopolized by a few men." He warned that:

"...The government should part with its title only to the actual home-maker, not to the profit-maker who does not care to make a home. Our prime object is to secure the rights and guard the interests of the small ranchman, this actual settler and home-maker, who in the long run is most hurt by permitting thefts of the public land in whatever form." [ 15 ]

### The Federal Power Commission

On June 10, 1920, Congress passed the Federal Water Power Act which consolidated the federal control of the nation's water and related land resources under the authority of a Federal Power Commission. In 1935 President Franklin D. Roosevelt amended the Federal Water Power [ 16 ]  
Act and renamed it the Federal Power Act (FPA). Its Federal Power Commission, formerly composed of the secretaries of war, interior, and agriculture, was now an independent agency of five men appointed by the President with the consent of the Senate. The duty of the Commission

was to address: navigation improvement; water power development; use of related public lands; and the regulation and licensing of electric utility companies engaged in interstate commerce; "...in the public interest...". During his April 28, 1935, 'fireside chat' radio broadcast to the nation from the White House, President Franklin D. Roosevelt described the pending Federal Power Act amendments and legislation that would address the private monopolization of the electric utility industry by eliminating unnecessary holding companies in that sector:

"I consider this legislation a positive recovery measure. Power production in this country is virtually back to the 1929 peak. The operating companies in the gas and electric field are by and large in good condition. But under holding company domination the utility industry has long been hopelessly at war within itself and with public sentiment. By far the greater part of the general decline in utility securities had occurred before I was inaugurated. The absentee management of unnecessary holding company control has lost touch with and has lost the sympathy of the communities it pretends to serve. Even more significantly, it has given the country as a whole an uneasy apprehension of over-concentrated economic power." [ 17 ]

#### *Private v. Public: Public Interest*

President Franklin Roosevelt amended and beefed up the authority of the Federal Power Commission in 1935 in order to curb the profit abuse of the public interest by utility companies. This was a move representative of the perpetual back and forth battle between proponents of government control and defenders of private control of public services. There are upsides and downsides to both positions. Historically, the very nature of the public power utility industry has a built-in "natural" monopoly characteristic, and will continue to enjoy that characteristic until there is no more market for centrally generated power transmitted across state lines over the existing power-lines infrastructure. Attempts to regulate power utilities by government administration regulations tend to protect the public's interest against the private monopoly evils, but it is at the expense of the evils that come with a public agency that is only policed by another public agency. And the alternative is not necessarily any better, just different; and depending on the circumstances and the times one approach is bound to seem more viable to the voting public

than the other.

During the seventeen year battle for Storm King, the regulatory Federal Power Commission that Franny Reese, Carl Carmer, and the other members of the Scenic Hudson Preservation Committee challenged in Federal Court in July of 1965, which was shielding Con Ed, was essentially the same one put in power by FDR in 1935. In 1977 that FPC was disbanded under the deregulation campaign of the Jimmy Carter administration and replaced with a new agency, the Federal Energy Regulatory Commission (FERC), which inherited the lawsuit. [ 18 ]

The significance of Scenic Hudson's victory in 1980-81 is this:

First: Scenic Hudson was granted standing as a group of private-citizen as “aggrieved parties” which the Court allowed to file a petition against the Federal Power Commission and they did not have to present a dollar figure as the aggrieved damage.

Second: the Scenic Hudson group was allowed to represent a “public interest” that the FPC had to consider in a comprehensive manner and not merely call arbitrary “balls and strikes” and then dismiss the petition. That public interest is the same conservation interest that was championed by John Muir and the preservationists: the unique and unspoiled scenic natural beauty and the healthy ecosystem of the Hudson River and its surroundings. At paragraph 63 of the December 29, 1965, decision from the 2d Circuit Court of Appeals, Judge Hays said:

“In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.” [ 19 ]

Third: The precedent set by Scenic Hudson's win created a new type of public interest law Practice: *private* public interest environmental law. Examples of where you would likely find public interest law practitioners would be the ACLU; the Legal Defense League; Education Law advocates; or perhaps a team of pro bono attorneys working for high profile Constitutional question cases like *Brown v Board of Education* (1954) or the Hurricane Carter case. [20]

## Conclusion

Because the Storm King Mountain case was not an isolated incident, and because other environmental incidents and lawsuits were occurring elsewhere in the country during its seventeen year tenure, enough national public momentum built for Congress to pass major environmental legislation. The Environmental Protection Agency (EPA) was created on [ 21 ] December 2, 1970, under the authority of the National Environmental Policy Act of 1969 (NEPA). The environmental impact study EIS requirement of the NEPA brought scrutiny and attention to the billions of tiny game fish and commercial fish in the Hudson that had been destroyed yearly by all the public utility power plants' cooling systems up and down the river. When that happened and the EPA joined the case, Con Ed threw in the towel and surrendered on December 20, 1980. The Federal Energy Regulatory Commission (FERC), which had replaced the defeated FPC in 1977, accepted the terms of the surrender on July 23, 1981. [ 4 ]

Attorney David Sive, who litigated Scenic Hudson's win, began a private environmental law [ 22 ] practice and went on to teach environmental law throughout the country. A very significant impact of Storm King on environmental law is the fact that a private law firm won the case. Now private practice environmental lawyers are able to receive reimbursement for legal costs, even if they lose, on behalf of the public interest. This is good because the public interest requires a high quality and level of dedicated legal experts that shouldn't be discouraged by having to be constantly pro bono. [ 23 ]

## Endnotes

1. SCENIC HUDSON PRESERVATION CONFERENCE, Town of Cortlandt, Town of Putnam Valley, and Town of Yorktown, Petitioners, v. FEDERAL POWER COMMISSION, Respondent, Respondent, and Consolidated Edison Company of New York, Inc., Intervener; at paragraphs 91-94; see <http://www.altlaw.org/v1/cases/843451> ;

[Note: an “intervener” (sp: “intervenor”) is a party not normally required to participate in a legal proceeding but has a compelling interest in its outcome and has either petitioned the Court for permission to participate or has been added by the Court.] ;

2. Ibid. see paragraphs 1-7;

3. Ibid. see paragraphs 8-11;

4. The Marist Environmental History Project (MEHP), ‘The Scenic Hudson Decision: Timeline’: 1980 (December 20) and 1981 (July 23). A settlement between Scenic Hudson and Con Ed was reached in December of 1980 and was officially approved the following July by the Federal Energy Regulatory Commission (FERC) which had meanwhile replaced the FPC in 1977 (see note 7., below); see <http://library.marist.edu/archives/mehp/scenicdecision.html> ;

5. See history of the Environmental Protection Agency at <http://www.epa.gov/history/> ;

6. See history of the Federal Energy Regulatory Commission (FERC). This new replacement of the FPC included restructuring and deregulating the electric utilities industry away from its monopoly characteristics: <http://www.ferc.gov/students/whatisferc/history.htm> ;

7. The Conservation Movement Timeline, from the Library of Congress: <http://memory.loc.gov/ammem/amrvhtml/conshome.html> ;

8. See Progressive Era timeline at: [http://www.progressiveliving.org/history/timeline/progressive\\_era/progressive\\_era\\_timeline.htm](http://www.progressiveliving.org/history/timeline/progressive_era/progressive_era_timeline.htm)

9. Gifford Pinchot; from the *American National Biography*, Vol. 17. Oxford: NY. 1999. pgs. 531-33;

10. The Reclamation Act / Newlands Act of 1902 at: <http://www.ccrh.org/comm/umatilla/primary/newlands.htm> ;

11. John Muir, from the *American National Biography*, Vol. 16. Oxford: NY. 1999. pgs. 63-64;

12. Ralph Waldo Emerson, from the *American National Biography*, Vol. 7. Oxford: NY. 1999. pgs. 487-492;

13. Henry David Thoreau, from the *American National Biography*, Vol. 7. Oxford: NY. 1999. pgs. 599-603;

14. John Burroughs, from the *American National Biography*, Vol. 4. Oxford: NY. 1999. pgs. 49-51;

15. Theodore Roosevelt’s 1907 address to Congress on Conservation: <http://www.pbs.org/weta/thewest/resources/archives/eight/trconserv.htm> ;

16. Federal Water Power Act of 1920 /amended to Federal Power Act of 1935: <http://www.usbr.gov/power/legislation/fedwatpr.pdf> ;

17. FDR’s April 28, 1935 Fireside Chat: <http://www.mhric.org/fdr/chat7.html>

18. Public v Private Power: from FDR to today:

<http://www.pbs.org/wgbh/pages/frontline/shows/blackout/regulation/timeline.html> ;

19. See endnote 1. at paragraph 63;

20. Stanford Law Review. 1975-1976. Robert L. Rabin. *Lawyers for Social Change: Perspectives on Public Interest Law*. (Pgs. 207,224-231);

21. NEPA of 1969: [http://www.nps.gov/history/local-law/FHPL\\_NtlEnvirnPolicy.pdf](http://www.nps.gov/history/local-law/FHPL_NtlEnvirnPolicy.pdf)

22. Attorney David Sive's 'Particular Ethical Problems in Environmental Litigation' for the Colorado School of Law, 2007:

[http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CM092\\_chapter\\_34\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CM092_chapter_34_thumb.pdf)

23. Environmental Affairs in New York State: An Historical Overview.

(4. 1970 to 2000: the environmental machine). NYS Archives at NYSED.gov:

[http://www.archives.nysed.gov/a/research/res\\_topics\\_env\\_hist\\_machine\\_courts.shtml](http://www.archives.nysed.gov/a/research/res_topics_env_hist_machine_courts.shtml)

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*Inland Waterways Commission*. *Journal of Policy History*. 4 (Vol. 18). 389-418.