

Federal Power Act Limitations on FERC Dam Decommissioning Authority: Shielding Preexisting Licensees and Revisiting Trust Funds to Protect the Public Interest

Carlos M. Marquez, II*

* J.D., The George Washington University Law School; B.A. in Political Science, University of Florida. The author thanks Jay Calhoun and Caroline Gignoux for their helpful comments, as well as his family for their support. The author also thanks the editors of the *Colorado Natural Resources, Energy & Environmental Law Review* for their advice in preparing this article for publication.

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I. INTRODUCTION

Hydropower is one of humankind's oldest sources of energy.¹ Civilizations from the ancient Mesopotamian region utilized dams in one form or another as early as 8,000 years ago.² More than 2,000 years ago, the Greeks utilized the flow of rivers to turn water wheels which then ground wheat into flour.³ Indeed, it is difficult to imagine any society that did not harness “[t]he power of water . . . for irrigation, grinding corn, metal forging, [or] mining” when environmental conditions allowed.⁴ And despite its age, hydropower remains an important source of energy in the global arena, comprising more than sixteen percent of the world's total energy supply, and roughly eighty-five percent of its total renewable energy supply, as of 2010.⁵ In the United States, hydroelectric power accounted for more than six percent of overall energy generation and forty-eight percent of generation from renewable sources in 2014.⁶

At first, six percent may not seem like much. Percentages, however, can mask the importance of underlying data. In 2014, for example, 6.3 percent of U.S. electricity generation came from hydroelectric power, meaning water power generated 259,367,000 megawatt-hours of electricity⁷—enough to power over 23 million homes.⁸ While generating roughly the same amount of energy in 2010,⁹ the United States ranked as the world's fourth largest hydropower-producing country.¹⁰ Meanwhile Russia, the next closest competitor, would need to generate twice as

1. *E.g.*, *Hydropower Explained: Basics*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=hydropower_home (last updated May 12, 2015).

2. Michael P. Lawrence, *Damming Rivers, Damning Cultures*, 30 AM. INDIAN L. REV. 247, 248 (2005).

3. *E.g.*, *The History of Hydropower Development in the United States*, U.S. BUREAU RECLAMATION, <http://www.usbr.gov/power/edu/history.html> (last updated Feb. 3, 2016).

4. JOHN ANDREWS & NICK JELLEY, *ENERGY SCIENCE: PRINCIPLES, TECHNOLOGIES, AND IMPACTS* 71 (2007).

5. INT'L ENERGY AGENCY, *TECHNOLOGY ROADMAP: HYDROPOWER* 7, 9 (2012).

6. *Hydropower Explained: Basics*, *supra* note 1.

7. U.S. ENERGY INFO. ADMIN., *ELECTRIC POWER MONTHLY WITH DATA FOR NOVEMBER 2015*, tbl.1.1 (2015).

8. *How Much Electricity Does an American Home Use?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3> (last updated Oct. 21, 2015). After converting megawatt-hours into kilowatt-hours, and dividing that statistic by 10,932 kilowatt-hours (the “average annual electricity consumption for . . . U.S. residential utility customer[s]”), the result is 23,725,480 homes. *See id.*

9. U.S. ENERGY INFO. ADMIN., *supra* note 7, at tbl.1.1 (attributing 260,203 thousand megawatt-hours of electricity generation to conventional hydropower in 2010).

10. INT'L ENERGY AGENCY, *supra* note 5, at 10, tbl.1.

much to overcome the United States.¹¹

In addition to the historical importance and energy security implications of hydropower, this source of energy provides a plethora of benefits—“low operating costs, minimal impact on the atmosphere, quick response to sudden changes in electricity demand” (thereby helping to prevent electricity blackouts), and “long plant life” where many decades can pass before major refurbishment is needed.¹² No energy source is without its cost, however.¹³ Like wind and solar power, hydropower can adversely affect native fish and wildlife.¹⁴ Other repercussions have included the “displacement of population [both human and nonhuman], sedimentation, [and] changes in water quality.”¹⁵

Due to hydroelectric power’s continuing importance to the United States, it is worrisome that in 1994 the Federal Energy Regulatory Commission (“FERC”) declared it could not only order decommissioning of hydroelectric dams but also require the operator to pay all associated costs.¹⁶ FERC defines the term “decommissioning” broadly to encompass anything from “simply shutting down the power operations to tearing out all parts of the project, including the dam, and restoring the site to its pre-project condition.”¹⁷ Over the next twenty years, approximately 550 hydroelectric facility licenses are set to expire.¹⁸ Allowing FERC to unilaterally amend preexisting licenses to

11. *See id.*

12. ANDREWS & JELLEY, *supra* note 4, at 71.

13. *E.g.*, REBECCA A. KAGAN ET AL., U.S. FISH & WILDLIFE SERV., AVIAN MORTALITY AT SOLAR ENERGY FACILITIES IN SOUTHERN CALIFORNIA: A PRELIMINARY ANALYSIS 13, tbl.5 (2014) (finding that at least 233 identifiable birds, more than half of which are protected by the Migratory Bird Treaty Act, have been killed around three solar-thermal tower facilities in southern California: Desert Sunlight, Genesis, and Ivanpah); Ronald H. Rosenberg, *Diversifying America’s Energy Future: The Future of Renewable Wind Power*, 26 VA. ENVTL. L.J. 505, 530–31 (2008) (noting that wind power turbines produce a host of negative externalities including television and radio-wave interference, noise pollution, ice thrown from fan blades, landscape change, and bird and bat deaths); Richard Sieg, Note, *A Call to Minimize the Use of Nuclear Power in the Twenty-First Century*, 9 VT. J. ENVTL. L. 305, 306, 350, 354–59 (2007) (discussing nuclear Three Mile Island incident, the Chernobyl disaster in Ukraine that contaminated land 100 miles away with radioactive material, and warning that a catastrophic nuclear disaster could result from not just from a terrorist attack but also from simple aging of equipment or seemingly harmless operator negligence).

14. *See* Charlton H. Bonham, *A Recipe from the Field for Dam Removal Agreements*, A.B.A. WATER RESOURCES NEWSL., Aug. 2008, at 4, 6.

15. ANDREWS & JELLEY, *supra* note 4, at 72.

16. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339 (Jan. 4, 1995).

17. *Id.* at 340 n.1.

18. *See Issued Licenses*, FED. ENERGY REGULATORY COMM’N (Oct. 3, 2014), <http://www.ferc.gov/industries/hydropower.asp>.

provide for decommissioning will impose upon the hydropower industry millions of dollars in dam removal and site remediation costs.¹⁹ This is an unforeseen burden and responsibility not agreed to at the time of initial project licensing.²⁰

The validity of this attempt to expand agency power has not yet been tested in court. Thus far the parties have settled, presumably to avoid an unfavorable court ruling.²¹ But FERC's reach has exceeded its grasp. Section II of this Article begins by explaining how hydroelectric dams generate electricity, the various externalities associated with operation, and the most common types of dams. Section III provides a brief history of the relevant portions of the Federal Power Act,²² pinpointing FERC's jurisdictional hook. It also discusses some of the real-world effects felt by the hydroelectric industry as a result of the Project Decommissioning at Relicensing; Policy Statement ("Decommissioning Policy Statement").

In Section IV(A), this Article asks if the Decommissioning Policy Statement is entitled to judicial deference, and if so, how much? It argues that scholars have incorrectly engaged in a *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("Chevron")²³ deference-style analysis when attempting to answer this question. That standard is inapposite when agencies choose to guide (e.g., guidance documents or policy statements) rather than "act with legal force" (e.g., notice-and-comment rule-making or formal adjudication).²⁴ Rather, *Skidmore v.*

19. NIC LANE, CONG. RESEARCH SERV., RL33480, DAM REMOVAL: ISSUES, CONSIDERATIONS, AND CONTROVERSIES CRS-4, CRS-11 (2006) (noting removal cost of 14.7 megawatt Condit Dam is \$17 million in terms of 1999-dollars and that removal and restoration of Elwha and Glines Dams amount to about \$84 million).

20. E.g., Michael A. Swiger, Ann P. Southwick & Stephanie L. Mairs, *Paying for the Change: Can the FERC Force Dam Decommissioning at Relicensing?*, 17 ENERGY L.J. 163, 167 (1996) ("Conspicuously absent from the . . . legislative history is any indication that Congress [contemplated that] a former licensee would have to pay for dam removal [or] post-license environmental mitigation.").

21. See, e.g., Natural Res. Council of Me., *Agreement Reached to Remove Edwards Dam 2-3*.

22. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 791-823d (2012)).

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

24. See Peter L. Strauss, "*Deference*" is too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUMBIA L. REV. 1143, 1146 (2012). Here, "notice-and-comment rule-making" is used to refer generally to the procedures an agency must follow to promulgate valid regulations. Informal rule-making procedures involve a three step process whereby an agency publishes notice of the proposed rule-making, solicits public comments, and issues a final rule accompanied with its rationale. 5 U.S.C. § 553 (2012). Formal rule-making includes these same three steps but with the added requirement that the agency must conduct an oral evidentiary hearing subject to cross-examination. 5 U.S.C. §§ 553, 556-557 (2012).

*Swift & Co. (“Skidmore”)*²⁵ governs the inquiry of just how much weight a court should give to an agency’s attempt to guide—here the Decommissioning Policy Statement.²⁶ After proceeding through the *Skidmore* factors, this Article concludes that the decommissioning interpretation is entitled to some respect by a reviewing court, which should treat it with persuasive weight in deciding this question of law.

With that issue settled, the question then becomes: upon whom may FERC impose decommissioning costs? Section IV(B) argues that although FERC can use existing statutory authority to allocate decommissioning cost responsibility in *newly* issued licenses,²⁷ it is forbidden from unilaterally amending *preexisting* licenses to accomplish this goal. Especially when a licensee would rather walk away at the end of the term.

Finally, Section V offers recommendations for how the Agency can accomplish its goal of protecting the public interest simply by using existing authority. When issuing hydroelectric licenses, FERC may include any contractual condition “not inconsistent with the provisions of this chapter.”²⁸ This Article advocates for inclusion of a decommissioning-cost provision in newly issued licenses (including those issued in relicense proceedings). To complement the cost allocation provision, FERC should also create a decommissioning trust fund similar to that utilized by the Nuclear Regulatory Commission. Doing so protects the public interest by ensuring funds exist to cover decommissioning and environmental remediation costs. It also provides the regulated community with much needed guidance and certainty. Additionally, this Article argues that Congress should shatter statutory ambiguity and firmly establish FERC decommissioning authority. Congress can accomplish this by explicitly listing “decommissioning costs” as a factor that FERC may consider when issuing hydroelectric

25. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

26. Although the standard has elsewhere been referred to as “*Skidmore* deference,” this Article agrees with those scholars that argue the standard is better conceptualized as “*Skidmore* weight.” *E.g.*, Strauss, *supra* note 24, at 1144–45. When application of *Chevron* is appropriate, a court will automatically defer to an agency’s reasonable interpretation of an ambiguous statutory provision. *See Chevron*, 467 U.S. at 842–44. However, when application of *Skidmore* is appropriate, the court does not “defer” in the normal sense of the word. Rather, it affords the agency’s opinion special respect (or weight) in light of its persuasiveness, *see Skidmore*, 323 U.S. at 140, but the judge retains “ultimate interpretive authority.” Strauss, *supra* note 24, at 1145. In other words, under *Skidmore*, an agency’s interpretation can vary in persuasive effect. Under *Chevron*, a court must defer if the interpretation is reasonable.

27. Here “new licenses” refers to licenses issued (1) to a brand new licensee and (2) through the relicensing process to a current licensee.

28. 16 U.S.C. § 803(g) (2012).

licenses. Although legislative action would be beneficial, help from Congress—whatever help it could provide in this circumstance—will not come soon. FERC must make do with the tools currently at its disposal.

II. DAMS: ELECTRICITY GENERATION, SOCIETAL BENEFITS, AND ENVIRONMENTAL HARM

Dams differ from one another in more than just relative size. Methods of operation may also differ in response to the unique geographical features at a site's location. All of these differences culminate together, influencing the level of energy benefits and the nature or extent of possible environmental harms. Yet despite these differences, a general understanding of how dams generate electricity, and their costs and benefits as an energy source, is possible.

A. Hydroelectric Power Generation Mechanics and Dam Designs

Technically speaking, the term “hydropower” refers to “the rate at which hydraulic energy is extracted from a specific amount of falling water” as a result of the water's velocity, position, or both.²⁹ In dams, river water is funneled through a narrow passage called the “penstock” and passes through at least one valve device.³⁰ These valves control the speed, acceleration, direction, pressure, and volume of water passing through the hydroelectric facility; each factor directly impacting the quantity of electricity produced.³¹ It is precisely this level of control that also provides safety. To prevent dam breaches and the uncontrolled flow of water from the dam's reservoir, the vast majority of dams have a bottom outlet (a sort of escape hatch).³² In the event of an emergency, the safety or overflow valves will be opened to divert water through the bottom outlet and preserve the dam's structural integrity.³³

Eventually, the great mass of water reaches a stationary turbine connected to a generator. A combination of the “rate of change of

29. Chiyembekezo S. Kaunda et al., *Hydropower in the Context of Sustainable Energy Supply: A Review of Technologies and Challenges*, INT'L SCHOLARLY RES. NETWORK RENEWABLE ENERGY 2012, at 4, <http://dx.doi.org/10.5402/2012/730631>.

30. *Id.* at 5, fig.3.

31. See Greg Johnson, *Those Dam Valves and the Great Job They Do*, VALVE MAG. (July 16, 2012), <http://www.valvemagazine.com/magazine/sections/where-valves-are-used/4395-those-dam-valves-and-the-great-job-they-do.html>.

32. *Dams/Hydropower*, VAG, <http://www.vag-armaturen.com/en/application-fields/dams-hydropower.html> (last visited Nov. 12, 2015).

33. See *id.*

angular momentum of falling water [and] its pressure . . . on the turbine blade[s]” creates a force differential resulting in turbine motion.³⁴ The now spinning turbines transfer this kinetic energy to a generator.³⁵ The generator itself is mainly comprised of electromagnetic rotors “located inside a cylinder (known as stator) containing a winding of electric wires (known as conductor).”³⁶ Kinetic energy causes the internal wires to spin around magnets, or vice versa, and produce a persistent electromotive force.³⁷ When electromotive force is connected to an “electrical load”—a component or circuit that consumes electric power³⁸—current flows and electricity is generated.³⁹ Electricity then passes through the aptly named “transformer” which transforms, or converts, the electricity into a higher voltage before sending it into the nation’s energy grid to power our homes, businesses, and industries.⁴⁰

Although all hydroelectric dams essentially create electricity in the manner just described, dams are not mere carbon copies of each other. Even at facilities with the same total production capacity, special design features set them apart.⁴¹ These classifications have revolved around three categories: size, head, and whether water used for power generation is impounded.⁴² “Hydropower classification according to size has led to projects being classified” as small-scale or large-scale based upon the level of installed electrical capacity.⁴³ Meanwhile, “classification by head refers to a difference in level between inlet (headrace) and outlet (tailrace) of a hydropower installation.”⁴⁴ In other words, the difference between where the water enters the penstock passage and where it exists the facility. Head is an extremely important parameter in the design, construction, and functioning of hydroelectric dams because it “determines the water pressure (hence the force) acting on the turbines.”⁴⁵ That in turn affects how much power can be produced.⁴⁶ Finally, classification by level of water impoundment includes run-of-

34. Kaunda et al., *supra* note 29, at 4.

35. *Hydropower Explained: Basics*, *supra* note 1.

36. Kaunda et al., *supra* note 29, at 5.

37. *See id.*

38. *See* J.F. MANWELL ET AL., *WIND ENERGY EXPLAINED: THEORY, DESIGN AND APPLICATION* 452–53 (2d ed. 2010).

39. *See* Kaunda et al., *supra* note 29, at 5.

40. *E.g.*, U.S. Dep’t of Energy, *How Hydropower Works*, ENERGY.GOV, <http://energy.gov/eere/water/how-hydropower-works> (last visited Nov. 12, 2015).

41. Kaunda et al., *supra* note 29, at 5.

42. *E.g.*, *id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See id.*

river dams, reservoir dams, and pumped storage dams.⁴⁷

Run-of-river dams impound water the least. These facilities primarily generate electricity from natural river flow alone.⁴⁸ However, because river flow is dependent upon precipitation levels, drier weather periods can impact electricity generation at run-of-river dams.⁴⁹ For this reason, they generally keep short-term, low-level reserves “[t]o ensure some limited degree of adaptation.”⁵⁰ Reservoir dams “store water for later power generation.”⁵¹ In comparison to its run-of-river counterpart, this type of dam offers more energy security because impounded water reserves will always be available to draw upon.⁵² The final type is a pumped storage dam. Here water is pumped “from a lower reservoir into an upper reservoir, using excess electricity generated by the hydropower plant during off-peak hours or at any other times when demand is reduced.”⁵³ In this sense, pumped storage dams interestingly function as energy-storage devices by ensuring water is always available for reuse when needed.⁵⁴

B. Costs and Benefits as an Energy Source

Hydropower is considered a renewable energy source because after water exits the facility, it continues downstream, eventually joining an ocean or lake.⁵⁵ Some of this water then evaporates and falls as rain back into the rivers from which it once flowed.⁵⁶ And thus, the process begins anew. Hydroelectric power generation results in little, if any, greenhouse gas emissions,⁵⁷ making this an invaluable option for the United States and other countries seeking to meet greenhouse gas emission goals arising from domestic political processes or international commitments.⁵⁸

Hydropower increases the energy security of the United States for two reasons. First, the United States is blessed with an abundance of

47. *Id.* at 6.

48. *See id.*

49. *See id.*

50. *Id.*

51. *Id.*

52. *Id.* at 7.

53. *Id.*

54. *Id.*

55. *See Hydropower Explained: Basics, supra* note 1.

56. *See id.*

57. *E.g.*, Office of Energy Efficiency & Renewable Energy, U.S. Dep’t of Energy, *Benefits of Hydropower*, ENERGY.GOV, <http://energy.gov/eere/water/benefits-hydropower> (last visited Mar. 30, 2015).

58. *See Z. Daniel Deng & Thomas J. Carlson, Editorial: Time for Green Certification for all Hydropower?*, 4 J. RENEWABLE & SUSTAINABLE ENERGY 02041-1, 02041-1 (2012).

natural rivers. These rivers are a valuable domestic resource and their use allows for a reduction in consumption of foreign oil.⁵⁹ Second, hydropower increases the reliability of the domestic energy grid. Since “hydropower facilities can quickly go from zero power to maximum output,”⁶⁰ they are uniquely capable of preventing energy disasters, such as blackouts. Furthermore, the relatively constant quantity of energy a hydroelectric dam generates over time addresses intermittency shortcomings of other renewable energy sources derived from wind or solar when, for example, the day is cloudy with periods of no wind.⁶¹

Yet hydropower is not without its costs to the natural environment. The very placement of a dam alters a river’s ecosystem as “[t]he ecology of a river [becomes] different from the ecology of a reservoir built behind a dam.”⁶² A river once whole is now divided. What may once have been a swift-moving water body now becomes a relatively slow-moving river beneath the dam with depths greater than what would exist naturally behind the dam.⁶³ As a result, species which have historically lived in flowing water environments are slowly supplanted by species favoring the more lake-like habitat in the dam’s reservoir.⁶⁴ Because dams serve as a physical obstacle to traversing rivers, without fish ladders,⁶⁵ the spawning ground of some migratory fish species is lost, leading to drastic declines in overall population.⁶⁶

Whether the economic and energy security benefits of hydropower outweigh the environmental harms, or whether environmental mitigation measures are effective, are inquiries beyond the scope of this Article.⁶⁷ Suffice it to say that no energy source yet invented is without its environmental problems. Nuclear power gifts us with radioactive waste. Coal and natural gas release massive quantities of greenhouse gases into

59. See Office of Energy Efficiency & Renewable Energy, *supra* note 57.

60. *Id.*

61. See Deng & Carlson, *supra* note 58, at 02041-1.

62. *Udall v. Fed. Power Comm’n*, 387 U.S. 428, 440 (1967).

63. See Bonham, *supra* note 14, at 5.

64. HEINZ CTR., DAM REMOVAL: SCIENCE AND DECISION MAKING 137–38 (2002).

65. “Fish ladders” are “a series of ascending pools of running water constructed to enable fish to swim upstream around or over a dam.” *Id.* at 198.

66. Bonham, *supra* note 14, at 6.

67. Indeed, these questions have been discussed and argued at length elsewhere. *E.g.*, Karlie Shea Clemons, Comment, *Hydroelectric Dams: Transboundary Environmental Effects and International Law*, 36 FLA. ST. U. L. REV. 487, 489–99 (2009) (focusing on environmental pros and cons of dams); Nancy K. Kubasek & Chaz A. Giles, *Dammed to be Divided: Resolving the Controversy over the Destruction of the Snake River Dams and Providing a Model for Future Decision-Making*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 675, 693–94 (2001) (discussing effectiveness of some environmental mitigation measures).

the earth's atmosphere. Wind turbines cause avian deaths.⁶⁸ Even solar power, the most seemingly benign and readily available renewable resource, is not without environmental costs.⁶⁹

III. FERC JURISDICTION AND DECOMMISSIONING POLICY STATEMENT IMPLICATIONS OVER HYDROPOWER LICENSES

To better understand the magnitude of what is at stake, it is necessary to discuss FERC's role in issuing licenses, the purported reach of the Decommissioning Policy Statement, and the possible standards of review a court may apply should regulated entities challenge FERC's

68. *E.g.*, Rosenberg, *supra* note 13, at 530–31.

69. *See* KAGAN ET AL., *supra* note 13, at 13, tbl.5 (noting 233 identifiable birds have been killed by around three solar-thermal tower facilities). Within the Mojave Desert of California exists the world's largest solar-thermal power tower system. *Ivanpah Project Facts*, IVANPAH SOLAR ELECTRIC GENERATING SYSTEM, <http://www.ivanpahsolar.com/about> (last visited Nov. 12, 2015). Each of the three towers are surrounded by numerous mirrors (each about the size of a garage door) reflecting the sun's energy toward the boiler tower to heat water and create steam. *Id.* The amount of sunlight being reflected and concentrated, however, is so intense that birds' feathers are being burned midflight, ruining flight capability, and resulting in death. KAGAN ET AL., *supra* note 13, at 12–14. Estimates for the yearly total bird deaths occurring at the Ivanpah Solar Electric Generating System ("Ivanpah") project have varied greatly—ranging from 1,000 to 28,000. *E.g.*, Bonner R. Cohen, *California Solar Towers Blamed for Massive Bird Kills*, HEARTLAND INST. (Sept. 15, 2014), <http://news.heartland.org/newspaper-article/2014/09/15/california-solar-towers-blamed-massive-bird-kills> (pointing out that BrightSource Energy, a partial owner of Ivanpah, estimates resulting bird deaths to be about 1,000 per year, but that the Center for Biological Diversity estimates as many as 28,000 annual bird deaths).

Over a seventeen-month period, the U.S. Fish and Wildlife Service recovered and examined just over 140 birds around the Ivanpah facility. *See* KAGAN ET AL., *supra* note 13, at 12. Of the 127 identifiable remains, 104 unquestionably fall within the Migratory Bird Treaty Act's protective embrace. *Compare* KAGAN ET AL., *supra* note 13, at 10–11, tbl.4 (listing the scientific species and quantity of identifiable avian remains at Ivanpah), with 50 C.F.R. § 10.13(c)(1) (2015) (listing scientific species covered by the Migratory Bird Treaty Act). The remaining 23 birds are arguably protected as well. Consider that the U.S. Fish and Wildlife Service report lists the "*Cardellina pusilla*" in the category of discovered bird remains. KAGAN ET AL., *supra* note 13, at 10, tbl.4. Meanwhile, the "*Wilsonia pusilla*" is listed as a protected migratory bird species. 50 C.F.R. § 10.13(c)(1). These two classifications are considered taxonomic synonyms for each other. *See* Interagency Taxonomic Info. Sys., *Cardellina pusilla* (*A. Wilson, 1811*), ITIS.GOV, http://www.itis.gov/servlet/SingleRpt/SingleRpt?search_topic=TSN&search_value=950080 (last visited Nov. 15, 2014). This is because the bird originally classified as *Wilsonia pusilla* was re-categorized as *Cardellina pusilla*. *E.g.*, *id.* Therefore, the reference in 50 C.F.R. § 10.13(c)(1) to the former covers the bird now classified as the latter. This same logic applies to each species that, at first glance here, appears to fall outside the bounds of the Migratory Bird Treaty Act.

interpretation.

A. Regulatory Authority to Issue Hydroelectric Project Licenses

The Federal Power Act provides FERC with authority to regulate nonfederal hydropower projects.⁷⁰ Any person, state, or municipality seeking to develop a hydropower project must first obtain an approval license from FERC if any one of the four following factors is met.⁷¹ The first two factors triggering FERC approval requirements are when a hydroelectric project is to be established on a navigable water of the United States (as defined by the Federal Power Act) or any other body of water over which Congress possesses Commerce Clause jurisdiction.⁷² Similarly, approval must be obtained if any part of the project will occupy lands of the United States.⁷³ An example of this would include construction of a nearby power house where the electricity generated is sent into the energy grid. Finally, if the proposed hydropower project was to utilize surplus water, or water power, from a federal government dam, prior project approval from FERC must be obtained.⁷⁴

Hydropower licenses typically last between thirty and fifty years from the date of issuance.⁷⁵ The only exception occurs during interim relicensing periods where a private operator is actively engaged in the relicensing process or when FERC is unable to find an alternative operator.⁷⁶ During these exceptions, FERC is authorized to issue consecutive annual licenses.⁷⁷ In determining whether or not to approve a hydropower application and grant a license to operate, FERC must consider a wide variety of factors, ranging from traditional power demand and development concerns, to energy-efficiency standards, to the enhancement, mitigation, and protection of fish and wildlife ecosystems.⁷⁸ Not one of which, by itself, is necessarily more important than the other,⁷⁹ although appropriate considerations in each factor can

70. Federal Water Power Act, ch. 285, § 4(d), 41 Stat. 1063, 1065–66 (1920) (codified as amended at 16 U.S.C. § 797(e) (2012)).

71. See 16 U.S.C. § 817(1) (2012).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* § 808(e).

76. See *id.* § 808(a)(1).

77. *Id.*

78. See 16 U.S.C. § 797(e) (2012) (including factors such as power and development concerns, energy conservation, environmental protection, ecosystem enhancement, protection of recreational opportunities, and preservation of environmental quality generally).

79. *Id.* (giving “equal consideration to” all factors).

be quite broad.⁸⁰

B. The FERC Bombshell: The Decommissioning Policy Statement and Its Real-World Implications

The cost-allocation problem began near the end of 1994 when FERC decided who was to bear the expense of decommissioning a dam.⁸¹ In its Decommissioning Policy Statement, FERC made four major findings.

First, the Agency asserted that it possesses authority to deny a relicensing application.⁸² This statement should be unsurprising because the Federal Power Act gives FERC jurisdiction to grant or deny any license.⁸³ Although 16 U.S.C. § 797(e) authorizes and empowers FERC to issue hydropower licenses, this Section does not require FERC to do so.⁸⁴ In fact, that Section only utilizes mandatory language to *prevent* issuance of a license when, for example, construction plans have not been pre-approved by the U.S. Army Corps of Engineers.⁸⁵ Not only is a command that FERC “must” or “shall” issue a license missing from § 797(e), the provision unambiguously provides FERC with discretionary authority.⁸⁶ The second major finding was that FERC could impose conditions (environmental or otherwise) that render a project economically unviable.⁸⁷ Third, that FERC has authority to order the complete removal of a dam.⁸⁸ Fourth, that it is the responsibility of hydropower facility operators to bear the majority, if not all,

80. *See, e.g.*, *Scenic Hudson Preservation Conference v. Fed. Power Comm'n*, 354 F.2d 608, 614 (2d Cir. 1965) (“The phrase [‘recreational purposes’] undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.”); *Namekagon Hydro Co. v. Fed. Power Comm'n*, 216 F.2d 509, 511–12 (7th Cir. 1954) (suggesting nature tourism falls within “recreational purposes”).

81. *See generally* Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339 (Jan. 4, 1995).

82. *See id.* at 340.

83. *See, e.g.*, 16 U.S.C. § 797(e); *see also* *City of Tacoma v. FERC*, 460 F.3d 53, 74 (D.C. Cir. 2006) (“Congress implicitly extended to FERC the power to shut down projects . . . by denying a new license . . .”).

84. 16 U.S.C. § 797(e).

85. *See id.*

86. *Id.* (“In deciding *whether* to issue *any license* under this subchapter for *any project* . . .”) (emphasis added).

87. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 340 (Jan. 4, 1995) (noting that imposed factors would be appropriately related to its statutory responsibilities).

88. *Id.*

decommissioning costs.⁸⁹

And then there was silence.⁹⁰ For almost three years after issuing the Decommissioning Policy Statement, nothing came of it.⁹¹ That is, until FERC decided what was to become of the Edwards Dam;⁹² it was the first time FERC tried to exercise decommissioning authority. Encouraged by its so-called “victory” with the Edwards Dam, FERC later attempted to order a de facto decommissioning of the Cushman hydroelectric project by imposing conditions that would render the project economically unviable. Those outcomes seem to have made the hydroelectric industry cautious. Today the industry tends to prefer settling with local nongovernmental organizations as opposed to arguing in court. The Great Works and Veazie Dams’ settlement agreements exemplify this trend.

1. *The Edwards Dam*

In 1991, the operators of the Edwards Dam filed relicensing applications.⁹³ Before FERC could issue any decision on project approval or denial, the Agency needed to consider numerous factors, including energy needs and environmental protection.⁹⁴ In compliance with the National Environmental Policy Act (“NEPA”),⁹⁵ FERC commissioned an environmental impact statement (“EIS”) to help inform its decision.⁹⁶ The EIS concluded that “the project’s significant negative impacts on fishery resources could not be mitigated except by removal of the dam.”⁹⁷ FERC also found that the electricity generated by the Edwards Dam could easily be replaced by other regional sources, such as

89. *See id.*

90. *See* Beth C. Bryant, *FERC’s Dam Decommissioning Authority under the Federal Power Act*, 74 WASH. L. REV. 95, 109 (1999).

91. *See id.*

92. *See* Edwards Mfg. Co., 81 FERC ¶ 61,255, at 62,199 (1997); *see also* Bryant, *supra* note 90, at 98 (stating that this was first time FERC exercised decommissioning authority); Katherine Costenbader, *Damning Dams: Bearing the Cost of Restoring America’s Rivers*, 6 GEO. MASON L. REV. 635, 636 (1998) (stating same).

93. *Edwards Mfg.*, 81 FERC at 62,200.

94. *See, e.g.*, 16 U.S.C. § 797(e) (2012) (“In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, 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.”).

95. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

96. 42 U.S.C. § 4332(2)(C)(i) (2012).

97. *Edwards Mfg.*, 81 FERC at 62,202.

gas-combustion turbine generators.⁹⁸

Despite the wishes of the license holder, FERC ordered the dam removed at the operator's expense.⁹⁹ This decision, unsurprisingly, did not sit well with the operators of the Edwards Dam.¹⁰⁰ Before anyone could challenge FERC's authority to order removal of the dam, however, a settlement was reached.¹⁰¹ FERC transferred the license held by Edwards Dam to the State of Maine, thus absolving the operating company from all potential decommissioning responsibility.¹⁰² Maine then used its new ownership of the site to entice Bath Iron Works (a company seeking to build a harbor on the old site of the dam) to contribute \$2.5 million of the decommissioning costs in exchange for being allowed to build its harbor.¹⁰³ The remaining \$4.75 million needed to cover decommissioning costs came from Kennebec Hydro Developers Group, a collective of other dam operators on the river, in exchange for term extensions on their hydropower licenses.¹⁰⁴

2. *The Cushman Project*

A second example is that of the Cushman Project located in the State of Washington and originally approved in 1924.¹⁰⁵ The project consisted of two hydropower dams, both located on the North Fork of the Skokomish River.¹⁰⁶ Lake Cushman is a 9.6 mile-long reservoir created by the northernmost dam and may be operated up to an elevation of 742 feet.¹⁰⁷ Located approximately two miles downstream, the southernmost dam draws upon the Lake Kokanee reservoir, which spans 100 acres and may be operated up to an elevation of 480 feet.¹⁰⁸ At the time, the northernmost dam generated 50 megawatts ("MW") of electricity and the southernmost dam 54 MW, though with capacity upgrades the southernmost dam now produces a total of 84 MW of electricity.¹⁰⁹

Unlike with Edwards Dam where FERC ordered the dam removed,

98. *Id.* at 62,201.

99. *Id.* at 62,210.

100. *See* Natural Res. Council of Me., *supra* note 21, at 2.

101. *See id.* at 2-3.

102. *See* Peter J. Carney, *Dam Removal: Evolving Federal Policy Opens a New Avenue of Fisheries and Ecosystem Management*, 5 OCEAN & COASTAL L.J. 309, 326 (2000).

103. *See* Natural Res. Council of Me., *supra* note 21, at 3.

104. *See id.*

105. FED. ENERGY REGULATORY COMM'N, FERC/EIS-0095F, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE CUSHMAN HYDROELECTRIC PROJECT 1-1 (2010).

106. *See id.* at 2-1.

107. *Id.*

108. *Id.* at 2-1 to 2-4.

109. *Id.* at 2-1, 2-4.

the Cushman scenario demonstrates another power FERC purports to possess.¹¹⁰ In 1998, FERC chose to relicense the project,¹¹¹ but with conditions making the project uneconomical to operate.¹¹² Had Cushman accepted the terms at relicensing, it would have generated an estimated “annual power value of \$6.39 million . . . at an annual cost of about \$8.87 million.”¹¹³ Thus the dam would generate no profit at all but instead operate at a yearly loss of about \$2.5 million.¹¹⁴ So adamantly opposed to these terms was Cushman that no resolution to this conflict came until over a decade later.¹¹⁵

Even appearing before the U.S. Court of Appeals for the District of Columbia Circuit did not speedily resolve the matter.¹¹⁶ In *City of Tacoma v. FERC*,¹¹⁷ the court concluded that FERC could indirectly shut down projects by incorporating reasonable and necessary conditions that make a new license highly unattractive to the licensee.¹¹⁸ However, it took another four years after that decision was rendered for an agreement to be reached, whereby Cushman’s maximum electricity-generating capacity was increased, many environmental mitigation measures (like fish ladders) would be implemented, and Cushman would pay an American Indian Tribe \$20,000 annually for use of tribal land.¹¹⁹

3. *The Great Works Dam and The Veazie Dam*

In a final case worth mentioning, again taking place in the State of Maine, both the Great Works Dam¹²⁰ and the Veazie Dam¹²¹ were

110. See Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 340 (Jan. 4, 1995).

111. Although Cushman’s license expired in 1974, it continued to operate the dam for an additional 24 years on annual licenses due to a contentious relicensing proceeding. See *City of Tacoma v. FERC*, 460 F.3d 53, 59–60 (D.C. Cir. 2006).

112. See *City of Tacoma*, 84 FERC ¶ 61,107, at 61,570 (1998).

113. *Id.*

114. See *id.*

115. See Order on Remand & on Offer of Settlement, Amending License, Authorizing New Powerhouse, & Lifting Stay, 132 FERC ¶ 61,037 at PP 1, 5, 304 (2010) (noting disagreement began in 1998 and involved several petitions for rehearing, delays, and successfully persuading FERC to stay issuance of the new license until after appeals were exhausted).

116. See generally *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

117. *Id.*

118. *Id.* at 74.

119. See Order on Remand & on Offer of Settlement, 132 FERC ¶ 61,037 at PP 64, 66, 290.

120. Order Accepting Surrender of Licenses with Dam Removal and Dismissing Applications for New Licenses, 131 FERC ¶ 62,238 at P 6 (2010) (“An original license for the Great Works Project was issued on December 9, 1963, expiring March 31, 2002. PPL Great Works, LLC filed an application for a new license on March 31, 2000.”).

121. *Id.* at P 4 (“A new license for the Veazie Project was issued on April 20, 1998,

successfully removed in 2012 and 2014, respectively.¹²² Representing an “unprecedented collaborative effort” between public, private, and nongovernmental organizations, the Penobscot River Restoration Trust sought to “rebalance fisheries restoration with hydropower production in the largest watershed within Maine.”¹²³ In 2004, a multiparty settlement agreement was entered into¹²⁴ and subsequently approved by FERC.¹²⁵ The Penobscot River Restoration Trust received the option to purchase three dams from the license holders and could then remove the two most seaward dams—the Great Works Dam and the Veazie Dam.¹²⁶ As to the fate of the third dam, fish bypass measures, such as fish ladders, would be installed to further mitigate hardship to salmon and other migratory fish.¹²⁷ Meanwhile, the current licensees were allowed to increase electricity generation at the remaining six dams on the river.¹²⁸ The end result was that the total quantity of electricity generated remained the same despite the removal of the two dams.¹²⁹

Whereas the impetus for pursuing dam removal and other environmental damage-mitigation measures originated from FERC in the cases of the Edwards Dam and Cushman Project, here it originated from private-public cooperation.¹³⁰ This outcome is surely consistent with FERC’s goals in issuing its Decommissioning Policy Statement: to “encourage[] all . . . interested parties to work together to accomplish . . . mutually acceptable resolution[s]”¹³¹ and “encourage[] affected parties to

and expires on March 31, 2038.”).

122. Penobscot River Restoration Trust, *Penobscot River Restoration Project Timeline*, PENOBSCOTRIVER.ORG, <http://www.penobscotrriver.org/content/4031/timeline?ext=> (last updated Oct. 2013).

123. Penobscot River Restoration Trust, *Fact Sheet*, PENOBSCOTRIVER.ORG (Oct. 17, 2013), http://www.penobscotrriver.org/assets/Fact_Sheet_Oct17_2013.pdf [hereinafter Penobscot River Restoration Trust, *Fact Sheet*] (benefiting entire ecosystem, including population growth for endangered Atlantic salmon and multiple other migratory fish species, as well as increased food source for birds and mammals in addition to projected commercial fishery revenues).

124. Penobscot River Restoration Trust, *Laying the Groundwork for Unprecedented Collaboration*, PENOBSCOTRIVER.ORG, <http://www.penobscotrriver.org/content/4030/unprecedented-collaboration?ext=> (last visited Apr. 5, 2015) (including PPL Corporation, U.S. Bureau of Fish and Wildlife Services, U.S. Bureau of Indian Affairs, U.S. National Park Service, four State of Maine natural resource agencies, American Rivers, Maine Audubon, and Natural Resources Council of Maine, among many others).

125. See, e.g., Order Accepting Surrender of Licenses with Dam Removal, 131 FERC ¶ 62,238 at P 43.

126. Penobscot River Restoration Trust, *Fact Sheet*, *supra* note 123.

127. *See id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339,

develop creative solutions to pre-retirement funding.”¹³² However, that many appear to view settlement as preferable to challenging FERC authority to order decommissioning, does not resolve the important questions of (1) whether FERC *does* have this authority or (2) *who* is truly responsible for bearing the costs of decommissioning?

C. FERC and the Three Bears: *Chevron*, *Skidmore*, and *Seminole Rock*

Administrative agencies regularly interpret congressional acts and statutes. Yet the degree of judicial deference provided on review is highly contingent upon the specific facts underlying each case. Courts must consider: *which* agency issued the interpretation and ask if it is the *same* agency tasked with implementing the statute in question;¹³³ *how* the agency made its pronouncement (e.g., in an adjudication, following notice-and-comment rule-making procedures, or simply by publishing an opinion letter);¹³⁴ and *what* the agency is interpreting.¹³⁵ While answers to some of these questions obviate the need to ask others, each question is important in its own right. For only after answering them does it become clear which of the three forms of judicial deference—*Chevron*, *Skidmore*, or *Bowles v. Seminole Rock & Sand Co.* (“*Seminole Rock*”)¹³⁶—is appropriate to apply in a particular case.

1. *Chevron* Deference Standard

One deferential standard of review was announced by the United States Supreme Court in *Chevron*.¹³⁷ The Court endorsed a two-step inquiry when confronted with “an agency’s construction of the statute . . . it administers.”¹³⁸ In step one of the analysis, a court asks, “[W]hether Congress has directly spoken to the precise question at issue? If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹³⁹ If, however, the statute is silent or ambiguous about a precise issue, then the inquiry proceeds to step two,

340 (Jan. 4, 1995).

132. *Id.*

133. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

134. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

135. *See id.* at 588.

136. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

137. *See Chevron*, 467 U.S. at 842–43.

138. *Id.* at 842.

139. *Id.*

where the court asks whether the agency's answer is a reasonable construction of the statute.¹⁴⁰ If the answer to this final question is, "Yes," then the agency's interpretation is upheld because it is permissible.¹⁴¹ That a reviewing court may have reached a different conclusion had the issue initially arisen in a judicial proceeding is irrelevant.¹⁴² Subsequent cases have generally limited this form of deference to interpretations announced through formal adjudicatory proceedings or notice-and-comment rule-making.¹⁴³

2. *Skidmore Weight Standard*

Another deferential standard of review stems from the United States Supreme Court decision in *Skidmore*.¹⁴⁴ In *Skidmore*, seven fire station employees sought recovery of overtime wages denied them.¹⁴⁵ The men worked from "7:00 a.m. to 3:30 p.m., with a half-hour lunch period, five days a week" and were paid for these services.¹⁴⁶ However, pursuant to an oral agreement, the men were also required to remain within the fire station, or close by, three-and-a-half to four nights per week in order to respond to any fire alarms.¹⁴⁷ Other than a requirement to respond to such alarms, the employees had no specific duties to carry out during this time.¹⁴⁸

Swift & Co. maintained that it was already paying the employees for each fire alarm responded to and that the remaining free time did not constitute overtime.¹⁴⁹ The Secretary of Labor, however, had previously announced views on what constituted "working time" in an interpretative bulletin and informal rulings.¹⁵⁰ Filing an amicus curiae brief with the Court, the U.S. Department of Labor stated that its prior guidance suggested that while sleeping time could not be counted, all other time dedicated to an employer was, in fact, working time.¹⁵¹

The Supreme Court concluded that although the Secretary's interpretations did not bind the courts, the "policies [were] made in

140. *E.g., id.* at 843.

141. *Id.* at 843–44.

142. *See id.* at 843 n.11.

143. *See, e.g.,* United States v. Mead Corp., 533 U.S. 218, 219 (2001); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

144. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

145. *Id.* at 135.

146. *Id.*

147. *Id.*

148. *Id.* at 136.

149. *See id.* at 135–36.

150. *Id.* at 138.

151. *Id.* at 139.

pursuance of official duty, based upon more specialized experience and broader investigations and information,”¹⁵² and “constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁵³ As such, the Secretary’s interpretation was entitled to judicial respect.¹⁵⁴

Under the *Skidmore* framework, the weight given to an agency’s interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁵⁵ Whereas *Chevron* deference applies to reasonable interpretations of an administering agency’s own ambiguous statute announced through formal adjudication or notice-and-comment rule-making,¹⁵⁶ *Skidmore* applies to statutory interpretations contained in anything less formal, and the court must determine how much, if any, weight to give the interpretation.¹⁵⁷ Thus, interpretations contained in opinion letters, policy statements, agency manuals, enforcement guidelines,¹⁵⁸ and informal adjudications¹⁵⁹ would all be potentially entitled to *some* degree of weight¹⁶⁰ whether or not the agency was interpreting its own statute.¹⁶¹

3. *Seminole Rock Deference Standard*

Finally, there is *Seminole Rock* deference; yet another standard announced by the United States Supreme Court.¹⁶² Professors Hickman and Pierce, Jr. point out that “[j]ust as agencies promulgate regulations to resolve ambiguous statutory language and fill statutory gaps, agencies often issue rulings, orders, or other guidance that interpret those regulations.”¹⁶³ An agency’s interpretation of its *own* regulation is

152. *Id.*

153. *Id.* at 140.

154. *See id.*

155. *Id.*

156. *See* United States v. Mead Corp., 533 U.S. 218, 219 (2001).

157. *See, e.g.,* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

158. *E.g., id.*

159. *E.g., Mead Corp.*, 533 U.S. at 239 n.1 (Scalia, J., dissenting) (noting test extends to interpretations announced via informal adjudication).

160. *See Skidmore*, 323 U.S. at 140.

161. *See* Gonzales v. Oregon, 546 U.S. 243, 258–69 (2006) (proceeding through *Skidmore* analysis despite finding that Attorney General issued interpretation of the Controlled Substances Act based upon provision he was not tasked by Congress to implement or carry out).

162. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

163. KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW CASES AND MATERIALS 645 (Robert C. Clark et al. eds., 1st ed. 2010).

binding upon a reviewing court “unless it is plainly erroneous or inconsistent with the regulation.”¹⁶⁴

The case of *Seminole Rock* involved a manufacturer and distributor of crushed stone.¹⁶⁵ In October of 1941, Seminole Rock & Sand Co. entered into a contract with Seaboard Air Line Railway (“Seaboard”) to provide crushed stone at a price of \$0.60 per ton, “to be delivered when called for by Seaboard.”¹⁶⁶ The product was not requested to be delivered until March of 1942, the very month when Maximum Price Regulation No. 188 took effect.¹⁶⁷ Issued by the Office of Price Administration, this regulation required every seller of specified building materials (including crushed stone) to charge no more than the maximum price it charged between March 1, 1942 and March 31, 1942.¹⁶⁸

After Seminole Rock & Sand Co. delivered crushed stone to Seaboard in March, it sought to enter into new contracts at rates of \$0.85 per ton and \$1.00 per ton (with \$1.00 being the price cap set by regulation No. 188).¹⁶⁹ The Administrator argued this price violated the regulation.¹⁷⁰ Because the delivery at \$0.60 per ton was made to Seaboard in March of 1942, the Agency claimed Seminole Rock & Sand Co. was bound by that maximum price, not the \$1.50 contract price Seminole Rock & Sand Co. had charged to another company over this time period.¹⁷¹

In reconciling the dispute in *Seminole Rock*, the Supreme Court stated that it first turns to the plain meaning of the regulation and, if there is ambiguity, it “must necessarily look to the administrative construction of the regulation.”¹⁷² In these situations, the “ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”¹⁷³ The Supreme Court implicitly found the phrase “highest price charged during March[] 1942” sufficiently ambiguous to support either party’s interpretation.¹⁷⁴ However, because the Administrator’s interpretation of the regulation was not inconsistent with its plain meaning, the Supreme

164. *Seminole Rock*, 325 U.S. at 414.

165. *See id.* at 412.

166. *Id.*

167. *See id.* at 413.

168. *See id.* at 412–13.

169. *See id.* at 412.

170. *Id.*

171. *See id.* at 412–13.

172. *Id.* at 414.

173. *Id.*

174. *See id.* 417–18.

Court held that his interpretation controlled.¹⁷⁵ Seminole Rock & Sand Co. could, therefore, charge no more than \$0.60 per ton to Seaboard because that was “the highest price charged for stone actually delivered [to Seaboard] during that month.”¹⁷⁶

IV. SIFTING THROUGH DEFERENTIAL STANDARDS TO ILLUMINATE THE LIMITS OF FERC POWER

A. Which Standard is Just Right? FERC’s Assertion of Decommissioning Authority is Entitled to Judicial Respect under Skidmore

In its 1994 Decommissioning Policy Statement, FERC declared it could order dam decommissioning and impose those costs upon the licensee.¹⁷⁷ Without qualification then, FERC could unilaterally impose massive costs and responsibilities on current licensees who not only never agreed to that condition but also had no notice of the need to increase rates and set funds away for decommissioning. Is FERC empowered to include conditions in licenses apportioning decommissioning costs to licensees? This Section examines which standard of judicial deference should be applied when reviewing the Decommissioning Policy Statement.

1. The Decommissioning Policy Statement Should be Analyzed under Skidmore

Unlike in *Seminole Rock*, where the agency was interpreting its own price-cap regulation, here there is no interpretation of an agency’s own regulation; rather, there is an interpretation of a congressional statute.¹⁷⁸ FERC is interpreting legislative history and the statutory language of the Federal Power Act.¹⁷⁹ Invocation of the highly deferential *Seminole Rock*

175. *Id.*

176. *Id.* at 418.

177. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 340 (Jan. 4, 1995).

178. Compare *Seminole Rock*, 325 U.S. at 412–13 (involving agency interpreting own promulgated regulation), with Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. at 340–43 (involving agency interpretation of Act passed by Congress).

179. See Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. at 340–43.

standard, which applies only to agency interpretations of its own legislative regulations, is therefore inappropriate.¹⁸⁰

If not *Seminole Rock* deference, then is *Chevron* deference warranted? Some scholars have alleged that the decommissioning authority declaration is a reasonable interpretation entitled to *Chevron* deference on judicial review.¹⁸¹ Even the D.C. Circuit, in *City of Tacoma v. FERC*, applied *Chevron* deference when analyzing the purported *de facto* decommissioning power: imposing conditions at the relicensing phase that render operation of a hydroelectric facility uneconomical and all but assure a current licensee walks away.¹⁸² However, the *Chevron* inquiry is the wrong standard to apply. A court should not seek to determine whether the interpretation was “reasonable” or “permissible” and, assuming it was, automatically defer to the views of the agency. FERC did not announce this interpretation by promulgating a rule or even through the process of formal adjudication. Rather, it made its pronouncement in a mere policy statement.¹⁸³

To reiterate briefly, *Chevron* deference applies to an agency’s interpretation of a congressional statute it is tasked with administering when announced through notice-and-comment rule-making procedures or formal adjudication.¹⁸⁴ On the other hand, *Skidmore* weight applies to scenarios where an agency announces such an interpretation via any less formal means, such as policy statements or enforcement guidelines.¹⁸⁵ Here, the document in which FERC made its proclamation is not only titled “Project Decommissioning at Relicensing; *Policy Statement*,” but it also describes the “ACTION” being taken as a “Policy Statement.”¹⁸⁶ Although FERC makes it known that public comments were solicited from interested parties before announcing the Agency’s decommissioning position, this does not magically transform the power of the document from a nonbinding policy statement into a legally-binding regulation. Interpretative rules and policy statements have been submitted for public comment in the past and later published in the Code

180. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

181. See *Bryant*, *supra* note 90, at 114–24 (incorporating *Chevron*-style analysis to conclude reasonableness of FERC decommissioning authority); see also *Costenbader*, *supra* note 92, at 652 (incorporating same).

182. See *City of Tacoma v. FERC*, 460 F.3d 53, 63–64, 74 (D.C. Cir. 2006).

183. See *Project Decommissioning at Relicensing; Policy Statement*, 60 Fed. Reg. at 339.

184. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

185. See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

186. *Project Decommissioning at Relicensing; Policy Statement*, 60 Fed. Reg. at 339 (emphasis added).

of Federal Regulations without change to legal effect.¹⁸⁷ The appropriate deferential standard to apply, therefore, is *Skidmore* because FERC announced its decommissioning authority in a policy statement.

2. The Decommissioning Policy Statement is Thoroughly Considered and Entitled to Some Respect

The *Skidmore* Court stated that policy statements, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts . . . may properly resort [to] for guidance.”¹⁸⁸ The weight given to such a judgment in a specific case will depend upon a variety of factors.¹⁸⁹ These include: (1) the thoroughness evident in the consideration; (2) the validity of reasoning; (3) consistency with prior pronouncements; and (4) “all those factors which give it power to persuade, if lacking power to control.”¹⁹⁰

The level of thoroughness and validity of reasoning evident in the Decommissioning Policy Statement is high. First, FERC rightly points out that it is required by statute to balance between energy and environmental interests during the licensing process¹⁹¹ because it must “give equal consideration to the purposes of energy conservation, the protection . . . of fish and wildlife . . . and the preservation of other aspects of environmental quality.”¹⁹² Regular compliance with NEPA EIS requirements has demonstrated to FERC that some dams cause such unacceptable levels of harm to the environment that reasoned decision-making requires imposition of costly mitigation conditions or removal of the dam entirely.¹⁹³ Second, FERC asserts that it may need to order dam removal in order to protect the public in light of its role as “guardian of the public domain.”¹⁹⁴ In interpreting the hydropower licensing provision, the D.C. Circuit concluded that “[t]he [Federal Power] Act is not to be given a tight reading wherein every action of the Commission is

187. HICKMAN & PIERCE, *supra* note 163, at 467 (“[M]any agencies follow the practice of publishing their most important interpretative rules in the CFR to maximize their accessibility to affected members of the public.”).

188. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

189. *E.g., id.*

190. *Id.*

191. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. at 342-43.

192. 16 U.S.C. § 797(e) (2012).

193. *See, e.g., City of Tacoma*, 84 FERC ¶ 61,107, at 61,578-99 (1998) (approving relicensing application with conditions of mitigating harm to, and compensating for use of, Indian Land, restoring fish population, remedying past environmental harms and mitigating future harms).

194. *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 23 (1952).

justified only if referable to express statutory authorization. On the contrary . . . [it] entrusts . . . broad subject-matter to administration by the Commission . . . in the light of new and evolving problems”¹⁹⁵

Other factors also weigh in favor of awarding judicial respect. Although FERC may not have promulgated a regulation concluding it possesses decommissioning authority, the fact that FERC is the very entity tasked with administering the Federal Power Act strengthens the overall persuasiveness of the claim.¹⁹⁶ It is not, for example, intruding upon the domain of the U.S. Environmental Protection Agency by interpreting the Clean Air Act¹⁹⁷ or the Comprehensive Environmental Response, Compensation, and Liability Act.¹⁹⁸ In addition, statutory ambiguity weighs in favor of FERC. Nowhere in subchapter I of the Federal Power Act are the words “decommission,” “deconstruct,” “remove,” or any variant thereof used.¹⁹⁹ A reviewing court will find the “more specialized experience” of FERC in the field of hydropower licensing convincing in assessing this pronouncement “made in pursuance of official duty.”²⁰⁰

Yet there is one detracting factor from the overall persuasiveness of the assertions made in the Decommissioning Policy Statement: being able to order dam decommissioning is something new for FERC. Before issuing its policy statement, FERC had never taken the position that it could order a dam’s removal at the licensee’s expense. This abrupt change is not consistent with prior pronouncements, but rather is a marked departure from prior agency precedent. Under the totality of the circumstances, however, this single detracting factor does not outweigh those factors persuading a court to give weight to FERC’s view.

In light of the foregoing factors, a court should find the Decommissioning Policy Statement persuasive and entitled to *some* respect. But only to the point of agreeing that the Federal Power Act contemplates decommissioning authority. The extent of that power remains a question of law to be determined by the courts, not FERC.

195. *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 158 (D.C. Cir. 1967).

196. *Compare* 16 U.S.C. § 796(14) (2012) (“‘Commission’ . . . means the Federal Power Commission”), *and* 16 U.S.C. § 797 (2012) (“The Commission is authorized and empowered—to issue [hydropower] licenses”), *with* *Skidmore v. Swift & Co.*, 323 U.S. 134, 135, 137–38 (1944) (noting U.S. Department of Labor tasked with administering the Fair Labor Standards Act).

197. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

198. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

199. *See* 16 U.S.C. §§ 791a–823d (2012).

200. *Skidmore*, 323 U.S. at 139–40.

*B. FERC Cannot Order a Current Licensee to Pay for
Decommissioning*

A court should conclude that FERC may condition the grant of a *new* license upon the licensee's agreement to pay for decommissioning costs like dam removal and site remediation. However, whether this conclusion also functions as judicial blessing for FERC to impose decommissioning costs on current licensees by unilaterally amending valid, *preexisting* licenses is another matter entirely. Given that the Decommissioning Policy Statement is entitled to some judicial respect under *Skidmore*, the objective then becomes to delineate the extent of decommissioning authority. In other words, the question is now: *who* may FERC wield this power against?

At the time of the Federal Power Act's enactment, the legislative history suggests that "Congress did not intend for the burden of dam removal or other significant decommissioning costs to be borne by project licensees."²⁰¹ The congressional debate instead focused upon the federal government's responsibilities to licensees. For example, how much the "*government* was obligated to pay the *licensee*" when the United States takes over a privately-owned dam.²⁰² More support flows from the plain text of the Federal Power Act itself. The Act explicitly prohibits unilateral amendments of hydropower license agreements: "Licenses . . . may be altered or surrendered *only upon mutual agreement* between the licensee and the Commission after thirty days' public notice."²⁰³ Although FERC could include other conditions it deems appropriate, like licensee decommissioning-cost responsibility,²⁰⁴ it can only incorporate that condition in a newly issued license (including those resulting from the relicensing phase). It cannot do so in a preexisting license, at least not without the licensee's consent.

Even Congress cannot alter preexisting licenses because the Legislature tied its hands behind its back via statute. Although Congress did expressly reserve the right to alter, amend, or repeal any part of the Federal Power Act, it did so with one major caveat: "[N]o such alteration, amendment, or repeal shall affect *any license theretofore issued . . . or the rights of any licensee thereunder.*"²⁰⁵ No matter how much an agency may wish to do so, it can neither disregard the

201. Swiger et al., *supra* note 20, at 167.

202. *Id.* (citing 51 Cong. Rec. H12,700 (daily ed. Sept. 13, 1985) (statement of Rep. Stevens)).

203. 16 U.S.C. § 799 (emphasis added).

204. *See id.* § 803(g).

205. *Id.* § 822 (emphasis added).

unambiguous language of Congress,²⁰⁶ nor alter or repeal an Act,²⁰⁷ nor cause a change that Congress itself cannot implement.²⁰⁸

In enacting this provision, Congress sought to provide further incentive to invest in and develop hydropower by making clear it would not infringe upon the rights of licensees.²⁰⁹ To accomplish this, Congress limited the extent of any future action it could take. This means that if Congress amended the Federal Power Act today to codify decommissioning responsibility as a necessary condition in any hydropower license, that provision should only apply *prospectively* to newly issued licenses, *not retroactively* to those already in existence.²¹⁰ Because FERC power stems from Congress, it cannot do what Congress itself cannot do, and so, for example, FERC did not have the power to order the Edwards Dam removed at the operator's own expense.

If Congress, in all its might, cannot impose decommissioning responsibilities on current licensees, what hope does FERC, an agency exercising a fraction of Congress' power, have? Surely, despite prior statements by the U.S. Court of Appeals for the Third Circuit that FERC possesses "wide latitude and discretion in the performance of its

206. *E.g.*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

207. U.S. CONST. art. I, § 1 ("All legislative powers . . . shall be vested in a Congress of the United States . . ."); *E.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice."); *cf. Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring) ("Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees.").

208. One might argue that 16 U.S.C. § 822 does not specifically mention Congress' passing of an entirely new Act. Any conflict between the two laws, however, if irreconcilable, could be thought of as a covert attempt to repeal, amend, or alter the Federal Power Act. *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (stating that in this circumstance, the later Act should control). The United States Supreme Court has stated that "repeals by implication are not favored" by the law. *Id.* In any event, an implicit repeal operates no differently than an explicit repeal, and Congress declared that no repeal—whether implicit or explicit—could affect the rights and liabilities of preexisting hydropower licensees. *See* 16 U.S.C. § 822 (2012).

209. *See Swiger et al., supra* note 20, at 167–68 (discussing congressional concerns at the time of the Federal Power Act's passage).

210. "[S]tatutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985). "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Yet, even in situations where Congress' retroactive intent is clear, "considerations of fair notice, reasonable reliance, and settled expectations" guide judges in determining whether an Act impermissibly "attaches new legal consequences to events completed before its enactment." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). In this case, a hydropower licensee's signing the license agreement and building a dam.

licensing and regulatory functions,”²¹¹ no court would give FERC a green light to drastically alter existing license responsibilities.

In *City of Tacoma v. FERC*, the D.C. Circuit recognized that FERC possessed the discretion to shut down hydropower projects either by denying award of a new license outright or by imposing additional reasonable and necessary conditions that cause a licensee to reject the new license.²¹² Although the issue before the court related to the imposition of mitigation measures during relicensing that would result in yearly losses in the millions, the rationale is equally applicable to conditioning the grant of new licenses on agreeing to pay decommissioning expenses.²¹³ The D.C. Circuit, however, expressly avoided deciding the question of “whether, and in what circumstances, FERC can impose decommissioning obligations or costs on a former licensee.”²¹⁴ Conditioning relicensing upon a licensee’s acquiescence to the additional condition of decommissioning-cost responsibility is one thing, but unilaterally amending a preexisting license or refusing to accept natural license termination are quite different matters entirely.

When a license expires, the United States has the option to take over, maintain, and operate any hydropower project.²¹⁵ Section 808(a)(1) of title 16 of the U.S. Code states:

If the United States does not, at the expiration of the existing license, exercise its right to take over . . . projects of the licensee . . . the [C]ommission 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 *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 [C]ommission 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.²¹⁶

The *City of Tacoma v. FERC* court rejected Tacoma’s argument that the phrase “upon reasonable terms”²¹⁷ meant the new license it sought during relicensing must have the same terms as the original license,

211. *Metro. Edison Co. v. Fed. Power Comm’n*, 169 F.2d 719, 723 (3d Cir. 1948).

212. *City of Tacoma v. FERC*, 460 F.3d 53, 74 (D.C. Cir. 2006).

213. *See id.* at 72–74.

214. *Id.* at 74.

215. 16 U.S.C. § 808(a)(1) (2012).

216. *Id.* (emphasis added).

217. *City of Tacoma*, 460 F.3d at 74.

without regard to changed present-day conditions.²¹⁸ The D.C. Circuit supported its conclusion by pointing to the first sentence of § 808(a)(1) stating that FERC “is authorized [upon expiration of a license] 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.”²¹⁹ But the reach of the court’s decision is limited because it addresses only licenses issued to a new project or to a new license sought during the relicensing phase.²²⁰ It does not address whether FERC can impose decommissioning costs on a licensee who, not wanting to accept this responsibility at relicensing, simply decides not to seek a new operating license. For this, one must move on to the second sentence of § 808(a)(1).

If a hydropower operator does not wish to accept the new license’s terms, and would rather abandon the project, FERC “*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.”²²¹ Therefore, when licenses without decommissioning-cost allocation provisions expire, FERC cannot impose decommissioning costs when the licensee is compelled to accept the annual license. Because the licensee is forced to accept the license in this situation, the statute limits the terms and conditions to those which were mutually agreed upon in the past.

One might come to the conclusion that FERC can simply issue annual licenses *ad nauseam* until the original licensee’s resolve is whittled away and he or she finally agrees to pay decommissioning costs. Indeed, the Decommissioning Policy Statement alleged as much when FERC stated it would not allow licensees “simply to walk away from a Commission-licensed project without any Commission consideration of the various public interests that might be implicated.”²²² But FERC has also “stated consistently that a licensee is not compelled to continue operating a project if it wishes to surrender its license.”²²³ Applying the Decommissioning Policy Statement rationale suggests that FERC contemplates breaking from prior precedent. However, without imposing upon itself a reasonable time limitation (e.g., limiting issuance of annual

218. *See id.*

219. *Id.* (quoting 16 U.S.C. § 808(a)(1) (2012)).

220. *See id.*

221. 16 U.S.C. § 808(a)(1) (emphasis added).

222. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 345 (Jan. 4, 1995).

223. FPL Energy Maine Hydro, LLC, 106 FERC ¶ 61,038 at P 31 (2004); *see also* Matthew D. Manahan & Sarah A. Verville, *FERC and Dam Decommissioning*, 19 NAT. RESOURCES & ENV’T 45, 48 (2005).

licenses to no more than five years when a licensee wishes to allow license expiration), FERC risks indefinitely indenturing both private and state entities into federal servitude.²²⁴

A final reason why the Decommissioning Policy Statement can only affect new licenses lies in the very nature of the document. Policy statements do not have legally-binding effect.²²⁵ General statements of policy, like press releases, merely announce to the public a policy which an agency hopes to implement through subsequent formal adjudications or rule-making procedures.²²⁶ The D.C. Circuit, in *Pacific Gas & Electric Co. v. Federal Power Commission*, stated:

[An] agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.²²⁷

Though for reasons discussed above, even if FERC did attempt to codify this power in a rule-making or formal adjudication, the responsibilities of preexisting licensees would not change. On its face, the statute is unambiguous: the rights of preexisting licensees are not to be infringed. Promulgation of a contrary regulation is unreasonable and amounts to a per se violation of the contractual protections afforded by the Federal Power Act. Therefore, even assuming for sake of argument that *Chevron* deference was appropriate here, FERC would still fail—nothing in this portion of the Act needs a clarifying interpretation by FERC.

V. SOLUTIONS

Although FERC may require that licensees shoulder the burden of dam decommissioning in new licenses, it cannot pass along those costs to any operator with a license currently in effect unless: (1) the original license did in fact have such a provision or (2) the current licensee agrees

224. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .”).

225. *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

226. *Id.*

227. *Id.* at 38–39.

to an amendment of the original license. Despite this limitation both Congress and FERC can, and should, take steps to mitigate this problem. Specifically, FERC should incorporate two contractual provisions into new licenses. The first will apportion decommissioning cost responsibility. The second will require a licensee to demonstrate it will be able to cover decommissioning costs at a later date by use of a trust fund. Meanwhile, Congress should amend the Federal Power Act to explicitly grant FERC some form of decommissioning power.

A. Incorporation of a Contractual Decommissioning Provision into Licenses

FERC can pass along future decommissioning costs by adding a new contractual provision to the license agreement. This provision would apply to people seeking a brand new license or a relicense. It could not be used to add decommissioning responsibility into preexisting licenses whose holders would rather leave a project once the license term ends. Applying this contractual provision to new licenses, as opposed to preexisting licenses, means that the previously discussed problem of unilaterally adding responsibilities does not come into play; the responsibility now exists at the inception.

In *Niagara Mohawk Power Corp. v. Federal Power Commission*, the D.C. Circuit recognized that:

Section 6 of the Act makes licenses subject not only to the conditions written into the Act by Congress, but also such additional conditions as may be required by the Commission. Section 10(g) specifically authorizes the Commission to attach such “conditions not inconsistent with the provisions of this Act as the commission may require.”²²⁸

FERC is thus able to create (using its existing authority) a contractual provision in the hydropower license stating:

Applicant shall assume all costs associated with dam decommissioning. This includes when the Commission determines at the end of the license term that significant environmental impacts cannot be reasonably addressed through additional license conditions at relicensing, the licensee refuses to accept such new conditions, or the licensee chooses not to seek a new license.

By adding this provision to newly issued licenses, FERC makes clear that licensees are responsible for decommissioning expenses.

228. *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 158 (D.C. Cir. 1967) (quoting 16 U.S.C. § 803(g)).

Without it, all such expenses fall upon the public. With it, the private sector is responsible for its fair share.

B. Creation of a Decommissioning Trust Fund Provision and the Counterarguments Against the Trust Fund's Formation

1. The Proposed Contractual Trust Fund Provision

FERC can help alleviate uncertainty that the public and the private sector both have about whether sufficient funding will be available to cover decommissioning expenses. Specifically, FERC should mandate the establishment of individual trust funds, require that licensees deposit estimated decommissioning costs into it, and allow licensees to recoup some of this expense through the electricity rates charged. Although the license holder is ultimately responsible for placing all required funds into the trust fund, this Article contemplates each side (both public and private) bearing its fair share. So, for example, a licensee could recover sixty percent of that sum by passing along those costs to customers through state ratemaking proceedings (i.e., the public's contribution). The remaining forty percent would be paid for using the dam's profits (i.e., the private investors' contribution).

The Nuclear Regulatory Commission utilizes a formula for estimating the costs of decommissioning based on the type of nuclear reactor and the power level it can generate.²²⁹ That formula also provides for flexibility in the form of “adjustment factors” for increases in costs related to labor, energy, and nuclear waste burial.²³⁰ FERC can modify this methodology to account for differences in costs due to, for example, differences in dam size or type among the license applicants. Presumably, the larger the dam, the more expensive the effort to remove it and remediate a site.

A licensee's compliance with this trust fund provision could be satisfied in one of two ways. First, a license applicant could prepay the entire estimated sum it is responsible for contributing in order to effectuate a “complete decommissioning”²³¹ of the project before an operating license is awarded.²³² Even if the actual cost incurred at the end of the license term is greater than what was previously placed into the trust fund, this would not absolve the licensee of monetary responsibility

229. See 10 C.F.R. § 50.75(c)(1)–(2) (2015).

230. *Id.* § 50.75(c)(2).

231. The phrase “complete decommissioning” is used here to mean the complete removal of a dam as well as restoring the site to its pre-project environmental status.

232. See 10 C.F.R. § 50.75(e)(1)(i).

for the difference. The contractual provision previously proposed in Section V(A) of this Article places *responsibility* on the licensee to ensure *all* funding is available for decommissioning.²³³ Meanwhile, this Section's trust fund contractual provision establishes the *means* by which a licensee demonstrates "reasonable assurance that funds will be available for the decommissioning process,"²³⁴ thereby allaying some of FERC's concerns that "[s]tate or [f]ederal taxpayers might, by default, be compelled to pay [decommissioning costs] because the licensee lacks the resources."²³⁵

The second option involves periodic payment into a separate "sinking fund," outside the control of the hydropower operator or its affiliates, which could take the form of a trust or escrow account.²³⁶ Allowing licensees to make periodic payments provides some flexibility for the licensee and prevents the tying up of substantial amounts of capital of otherwise financially-sound licensees.²³⁷ As suggested by the D.C. Circuit in *Wisconsin v. FERC*, operation of an economically viable project, without initial financial reserves to cover decommissioning, can satisfy public interest requirements.²³⁸

In either scenario (pay everything upfront or make periodic payments) licensees must be empowered to recoup some of this expenditure. As mentioned previously, the recoverable amount would be equal to the public's fair share of decommissioning costs; the licensee's fair share could not be passed along to the public. A brief illustration may be of some help here. Imagine that a dam decommissioning costs \$10 million. Continuing with the hypothetical fair-share split of 60–40, a licensee could recoup \$6 million by increasing electricity rates (the public's fair share) but could not pass along the cost of the remaining \$4 million (the private investors' fair share). States operating under traditional energy-regulatory systems allow licensees to petition public utility commissions for the right to pass along costs to customers via ratemaking proceedings. Unless FERC manages to issue an order mandating that these costs be passed through, however, the state's public utility commission would be authorized to use its discretion in apportioning responsibility—perhaps 60–40 or 50–50.

233. See *supra* Section V(A).

234. 10 C.F.R. § 50.75(a).

235. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 346 (Jan. 4, 1995).

236. See 10 C.F.R. § 50.75(e)(1)(ii).

237. *But see* Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. at 346.

238. See *Wisconsin v. FERC*, 104 F.3d 462, 470–71 (D.C. Cir. 1997).

Use of trust funds in this context is certainly not unheard of as the sister energy agency of FERC, the Nuclear Regulatory Commission, has been implementing a similar program for a number of years.²³⁹ In 1978, Congress statutorily authorized the Nuclear Regulatory Commission to establish:

by rule, regulation, or order . . . such standards and instructions as [it] may deem necessary or desirable to ensure that an adequate bond, surety, or other financial arrangement . . . will be provided . . . by a licensee . . . for the decontamination, decommissioning, and reclamation of sites, structures, and equipment.²⁴⁰

Although Congress did not similarly express authority for FERC to do so,²⁴¹ this does not foreclose this Article's proposed contractual trust fund provision.

In section 6 of the Federal Power Act, Congress declared that all hydropower licenses would incorporate specifically enumerated conditions.²⁴² One such condition mandated by Congress is that a licensee maintain the physical condition of the dam so that it operates efficiently in generating electrical power.²⁴³ Another is the requirement that a licensee pay reasonable annual charges to reimburse the United States government for costs incurred from the administration of the hydropower subchapter of the Federal Power Act.²⁴⁴ Despite numerous such conditions, however, Congress refused to limit a licensee's potential obligation to those few it could think of at the time.²⁴⁵ Perhaps recognizing that it may have forgotten to codify another key condition or that the future might bring with it new, unforeseen obstacles, Congress allocated immense discretion for remedying such problems to FERC.²⁴⁶ Section 6(g) of the Federal Power Act, titled "Conditions in discretion of Commission," provides that all licenses issued shall also be subject to "[s]uch other conditions not inconsistent with the provisions of this chapter as the Commission may require."²⁴⁷

Requiring future licensees to assume the duty of paying for decommissioning does not conflict with any other provision of the

239. *See* 10 C.F.R. § 50.75.

240. Uranium Mill Tailings Radiation Control Act of 1978 § 203, 42 U.S.C. § 2201(x)(1) (2012).

241. *See* 16 U.S.C. § 797 (2012) (listing what Congress has authorized and empowered FERC to do).

242. *Id.* § 803 (2012).

243. *See id.* § 803(c).

244. *Id.* § 803(e)(1).

245. *Id.* § 803(g).

246. *See id.*

247. *Id.* (emphasis added).

Federal Power Act. Given FERC's broad authority in this field, a contractual provision mandating the creation of a trust fund is well within FERC's current statutory authority. This Article's proposed decommissioning trust fund provision appears below.

STANDARDS AND INSTRUCTIONS FOR TRUST FUNDS AND
OTHER FINANCIAL ARRANGEMENTS

Licensee shall provide financial assurance for the potential costs associated with decommissioning and site restoration in one of the following manners:

(1)Pre-payment. Pre-payment is the deposit made preceding grant of a hydropower license pursuant to 16 U.S.C. § 797(e) into an account segregated from licensee's assets and outside the administrative control of the licensee and its subsidiaries or affiliates. The deposit may consist of cash and/or liquid assets, but such amount shall be sufficient to pay estimated decommissioning costs and site restoration costs, approved by FERC, at the time permanent termination of operations is expected.²⁴⁸

(2)Periodic Payments. Periodic payments deposited into a trust fund account shall be segregated from licensee's assets and outside the administrative control of the licensee and its subsidiaries or affiliates. Deposits shall be made in cash with the eventual total amount of funds sufficient to pay decommissioning costs and site restoration costs, approved by FERC, at the time permanent termination of operations is expected.²⁴⁹

(3)Alternatives. Any other financial arrangement deemed to be an acceptable alternative in the judgment of FERC. Examples may include, but are not limited to, escrow accounts and government funds.²⁵⁰

2. Counterarguments Addressed

FERC considered the topic of trust funds in its Decommissioning Policy Statement and rejected "act[ing] generically to impose such programs on all licensees."²⁵¹ Its reasoning for not doing so, however, is unconvincing. First, it notes that tying up substantial amounts of capital through a prior funding requirement would constitute a less than optimum investment and would burden financially-sound licensees.²⁵²

248. See 10 C.F.R. § 50.75(e)(1)(i) (2015).

249. See *id.* § 50.75 (e)(1)(ii).

250. See *id.* § 50.75 (e)(1)(i).

251. Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. 339, 346 (Jan. 4, 1995).

252. *Id.*

However, this Article's proposed trust fund provision is flexible. A license applicant very well could deposit, upfront, all estimated decommissioning costs into a trust fund prior to being awarded a license. Alternatively, a license applicant could satisfy the requirement by making periodic payments into an account over the life of the project, or by any other financial arrangement deemed an acceptable alternative by FERC. If FERC is concerned with protecting the public interest and avoiding "the possibility that [s]tate or [f]ederal taxpayers might . . . be compelled to pay [decommissioning costs] because the licensee lacks the resources,"²⁵³ use of this Article's two contractual provisions accomplish this goal.

Next, FERC faults "several impediments to effectively carrying out such a funding program," including determining the proper period for accumulating funds and measuring how much funding must be provided.²⁵⁴ However, these concerns are somewhat overblown. Simply because something may be difficult to accomplish neither reflects on the merits of that solution nor renders the contemplated action impossible. As already mentioned, the Nuclear Regulatory Commission has promulgated regulations dictating a fluid formula for estimating decommissioning costs based upon such factors as total energy output, the size of the nuclear power plant, and inflation.²⁵⁵ Challenging as it may be for FERC to do the same, the Nuclear Regulatory Commission proves this impediment can be overcome.

Additionally, FERC is concerned with difficulties in determining the appropriate scenario to base total estimated decommissioning cost responsibility.²⁵⁶ After all, some dams may simply continue operating at the end of a license term because the license was renewed. Some decommissionings may not require tearing up the dam or remediating the site at all but instead will merely require the far less costly action of shutting down power operations and maintaining the dam structure. In essence, the Agency's reservation boils down to the notion that each project's future is uncertain.²⁵⁷ Yet it is this uncertainty which should encourage FERC to take action to ensure that, should the worst come to pass, should a hydropower dam need to be removed and the site restored to pre-project condition, funds will be available. Returning left-over funds (whatever the extent of decommissioning) is easy enough. Some

253. *Id.*

254. *Id.*

255. 10 C.F.R. § 50.75(c)(1)–(2).

256. *See* Project Decommissioning at Relicensing; Policy Statement, 60 Fed. Reg. at 346.

257. *See id.*

funds may return to the licensee. The rest will go to individual customers, prorated based upon the amount of their contributions. Although difficulties are inherent in this process, it is far easier to return money than it is to seek it out, especially when there may be none available.

Furthermore, licensees would greatly benefit from a uniform trust fund provision in addition to Agency guidance on estimated decommissioning costs. Such actions would allow these regulated entities to plan for the future. At present, FERC suggests that it will make trust fund requirement determinations, if needed, on an ad hoc, case-by-case basis.²⁵⁸ But at what point would this be done? Must the licensee spend thousands of dollars moving through the license process, only to discover midway through that its time and money were wasted because FERC feels the applicant should have set more money away for the rainy day of decommissioning than the potential licensee originally contemplated?²⁵⁹ Implementation of this Article's proposed solutions results in fewer problems and provides greater certainty for licensees.

C. Congressional Action

Although this Article has argued that a court should treat a portion of the Decommissioning Policy Statement as persuasive, certainty is never a bad thing to have in the law. Therefore, Congress should amend 16 U.S.C. § 803(g) to definitively establish decommissioning authority for FERC and unambiguously authorize it to pass along costs to future hydropower licensees. Currently, § 803(g) provides that all hydropower licenses issued shall potentially be subject to “[s]uch other conditions not inconsistent with the provisions of this chapter as the Commission may require.”²⁶⁰ A second sentence should be added afterward stating that, “Such conditions may include, but are not limited to, imposition of necessary and reasonable conditions that (1) may render a project economically unfeasible, (2) create responsibility for paying dam decommissioning expenses, such as dam removal, site remediation, dam maintenance without operation, or (3) ensure funding is available at decommissioning.”

258. *Id.*

259. See Manahan & Verville, *supra* note 223, at 46 (noting that in 2001 the average cost to prepare license application amounts to \$85 per kilowatt of energy and that average cost to applicant for implementing mitigation measures amounts to \$212 per kilowatt of energy).

260. 16 U.S.C. § 803(g) (2012).

VI. CONCLUSION

When the validity of an agency interpretation is challenged and judicial scrutiny is brought to bear, a reviewing court must first determine through which lens to view the issue(s) before it. Although the Decommissioning Policy Statement is entitled to some judicial respect in light of its persuasiveness, courts and scholars alike have used the wrong standard in reaching that conclusion. *Skidmore* applies, not *Chevron*. No matter how much FERC may wish it, the Agency cannot impose millions of dollars in decommissioning costs on preexisting licensees when the licensees never agreed to take on that burden. FERC's authority as to decommissioning is limited to individuals seeking new licenses and, as a result, it cannot force current licensees to assume that responsibility. Neither can Congress, for that matter.

If the *Chevron* standard had actually applied, the Decommissioning Policy Statement would be struck down as per se unreasonable because specific portions run into direct conflict with the unambiguous language of the Federal Power Act. Luckily, *Skidmore* operates here as a white knight for the Agency, allowing a court to validate that FERC does in fact possess *some* decommissioning authority but withholding approval of the Agency's attempt to overstep.

In order to dispel any confusion as to the extent of FERC authority, Congress should amend the Federal Power Act to expressly create decommissioning authority. And, although FERC cannot pass along the costs to *current* licensees of hydroelectric dams, the Federal Power Act in its current form provides authority for FERC to impose these costs on *future* license holders. Thus, FERC should take the following two actions. First, amend its licenses to include the contractual provisions that would create licensee decommissioning-cost responsibility. Second, include a contractual provision establishing individual trust funds that would require hydropower licensees to either prepay the estimated costs of complete decommissioning or provide for a plan to charge customers and have those funds placed in a trust account.