

# Washington Law Review

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Volume 74 | Number 1

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1-1-1999

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### Recommended Citation

Beth C. Bryant, Notes and Comments, *FERC's Dam Decommissioning Authority under the Federal Power Act*, 74 Wash. L. Rev. 95 (1999).

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## FERC'S DAM DECOMMISSIONING AUTHORITY UNDER THE FEDERAL POWER ACT

Beth C. Bryant

*Abstract:* The Federal Energy Regulatory Commission (FERC) asserted in a 1994 Policy Statement that it has the authority under the Federal Power Act to deny a new license for a hydroelectric dam or impose environmental conditions on a new license that may render a project unprofitable, when doing so is in the public interest. In addition, FERC stated that it would impose decommissioning costs on the dam owner. The hydroelectric industry claims that FERC lacks the authority to take these actions, and that if maintaining a dam is no longer in the public interest, either the federal government or another party must pay the current owner to take over the project. To date, FERC has only invoked the Policy Statement twice. The hydroelectric industry is opposed to both FERC orders, but the FERC Policy Statement remains untested in court. This Comment analyzes the Federal Power Act in light of FERC's claimed authority under the Policy Statement, and argues that FERC possesses the authority to deny a license or to impose uneconomic conditions in fulfilling its statutory duty to protect the public interest.

The hydroelectric industry is in the midst of a major paradigm shift. In the early 1990s, many original fifty-year hydroelectric licenses granted by the Federal Energy Regulatory Commission (FERC or Commission)<sup>1</sup> began to expire.<sup>2</sup> Many more licenses are scheduled to expire over the next several years,<sup>3</sup> affecting dams in almost every state.<sup>4</sup> Licensees are eager to get their licenses renewed; in most cases, the dams were amortized decades ago, and a new license represents almost pure

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1. Comprehensive federal involvement in private hydropower development began in 1920 with the passage of the Federal Water Power Act (FWPA) of 1920, ch. 285, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791a–828c (1994)). The Public Utility Act of 1935, ch. 687, 49 Stat. 803 (codified at 15 U.S.C. §§ 79a–79z-6 and in scattered sections of 16 U.S.C. (1994)), amended the FWPA and changed its title to the Federal Power Act (FPA). FERC assumed the regulatory functions of the Federal Power Commission (FPC) on October 1, 1977 pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified in scattered sections of 3 U.S.C., 5 U.S.C., 7 U.S.C., 15 U.S.C. & 42 U.S.C. (1994)). This Comment uses the term “Commission” interchangeably to refer to both the FPC (prior to October 1977) and FERC thereafter.

2. One hundred seventy-three licenses expired in 1993 alone. This unprecedented large group of expiring licenses became known as “The Class of '93” and served as an impetus for new FERC regulations on license renewal. Donald H. Clarke, *Relicensing Hydropower: The Many Faces of Competition*, 11 Nat. Resources & Env't, Fall 1996, at 8, 9.

3. In the years 2000–01, 69 more licenses will expire. *Water Power: Use and Regulation of a Renewable Resource* (visited Sept. 23, 1998) <<http://www.ferc.fed.us/hydro/docs/waterpwr.htm>>.

4. All states have FERC-licensed projects except Delaware, Hawaii, Mississippi, North Dakota, and South Dakota. California, Oregon, and Washington are the leading hydropower production states. *Id.*

revenue.<sup>5</sup> For decades, the Commission freely granted fifty-year licenses to most applicants<sup>6</sup> despite provisions in the Federal Power Act (FPA)<sup>7</sup> designed to prevent licensing unless dam construction is consistent with the public interest.<sup>8</sup> Thus, it is not surprising that the Commission earned a reputation as a friend of the hydroelectricity industry and a nemesis of environmentalists.<sup>9</sup>

Hydroelectric dam licenses now expire in a considerably different regulatory and economic environment than the one in which they were originally granted earlier this century. Values and attitudes toward the environment have changed significantly.<sup>10</sup> The original licenses were granted prior to passage of many important environmental laws,<sup>11</sup> and amendments to the FPA itself now force the Commission to consider explicitly nonpower values in licensing decisions.<sup>12</sup> In addition, deregulation of the electric power industry is underway, made possible by significant technological advances allowing electricity to be transmitted over vast distances.<sup>13</sup>

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5. Hence, license renewals are "perhaps even more highly coveted than initial licenses to construct and operate new hydro-electric facilities." H.R. Rep. No. 99-507, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2501.

6. During the first 60 years of the Commission's existence, it only turned down one proposed license on recreational and aesthetic grounds. John D. Echeverria et al., *Rivers at Risk: The Concerned Citizen's Guide to Hydropower* 8 (1989).

7. 16 U.S.C.A. §§ 791a-828c (West 1994 & Supp. 1998).

8. 16 U.S.C. § 803(a) (1994). "The Commission and the courts have held the Section 10(a) standard to be [a] broad public interest standard, requiring consideration of all factors affecting the public interest." H.R. Rep. No. 99-507, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2499; *see also* Udall v. FPC, 387 U.S. 428, 450 (1967).

9. According to some FERC observers, FERC is a "renegade agency" that is "utterly oblivious to the natural world;" the FERC commissioners are "faceless bureaucrats preempting state law, state rights;" and FERC's decisionmaking process is "fundamentally lawless." Ted Williams, *Freeing the Kennebec River*, Audubon, Sept.-Oct. 1993, at 36, 36-38.

10. H.R. Rep. No. 99-507, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2504-05.

11. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1994), and the Endangered Species Act (ESA), 16 U.S.C. § 1531-1544 (1994), now supplement the FPA by requiring FERC to consider environmental values in licensing decisions.

12. Electric Consumers Protection Act (ECPA), Pub. L. No. 99-945, 100 Stat. 1243 (codified in scattered sections of 16 U.S.C. (1994)). Nonpower values include "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." 16 U.S.C. § 797(e) (1994).

13. When the FPA was passed in 1920, it was technologically feasible to transmit electricity over a distance of only 250 miles. Jerome G. Kerwin, *Federal Water-Power Legislation* 26 (1926). Today's modern transmission grid allows long-distance energy transmission. Recently, FERC has begun taking advantage of this situation to encourage competition in the electricity industry. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission

Hydropower does have certain benefits. Many dams can be operated with conditions designed to minimize their environmental impacts.<sup>14</sup> Considered by some as a “near-perfect” method of energy production,<sup>15</sup> hydropower is promoted as efficient, non-polluting, and renewable.<sup>16</sup> Most projects serve other purposes in addition to power production, such as navigation, flood control, recreation, irrigation, and flow augmentation.<sup>17</sup>

Yet, the environmental impacts of dams are often profound and extremely difficult to avoid.<sup>18</sup> Dams flood natural stream areas, disrupting the local ecosystem; cause nutrient-rich silt to build up behind the dams, depleting oxygen from the water; and block the passage of adult fish moving upstream and kill young fish moving downstream, decimating anadromous<sup>19</sup> and other migratory fish runs.<sup>20</sup> Thus, although a source of renewable energy, hydropower consumes another valuable natural resource: free-flowing rivers and the many ecological, recreational, aesthetic, and economic benefits that rivers provide.

Recently, there has been a remarkable about-face at FERC, once known exclusively as a “hydropower promoter.”<sup>21</sup> In December 1994, faced with hundreds of expiring licenses, FERC promulgated a Policy Statement<sup>22</sup> asserting that it has the authority to deny a new license at the time of relicensing or impose environmental conditions on a new license

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Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996).

14. Peter J. Kirsch, *Maine Dam Decision Reverberates in the West*, Denver Post, Jan. 29, 1998, at B-07 (“Mainstream environmentalists and the hydroelectricity industry agree that dams are the most environmentally benign and economically viable source of electricity.”); see also *River Renewal: Restoring Rivers Through Hydropower Dam Relicensing* (visited Sept. 23, 1998) <<http://www.amrivers.org/rintro.html>>.

15. Ben W. Ebenhack, *Nontechnical Guide to Energy Resources: Availability, Use and Impact* 223 (1995).

16. *Id.*; see also Donald N. Zillman & Lawrence H. Lattman, *Energy Law* 549–52 (1983).

17. Zillman & Lattman, *supra* note 16, at 549–52.

18. See generally Wilson V. Binger et al., *Environmental Effects of Large Dams* (1978) (providing collection of scientific studies on environmental impacts of dams); Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 Stan. Envtl. L.J. 97 (1995) (providing broad overview of dam removal issues).

19. Anadromous fishes spend the adult phase of their lives in salt water and return to freshwater streams and lakes to spawn. Peter B. Moyle & Joseph J. Cech, Jr., *Fishes: An Introduction to Ichthyology* 332 (1982).

20. See *Dam Facts* (visited Sept. 23, 1998) <<http://www.amrivers.org/dam.html>>. Young outmigrating fish drawn into the generating turbines are chopped into pieces, thus lending the nickname “Chowder Alley” to the area downstream of the turbines. Williams, *supra* note 9, at 38.

21. Echeverria et al., *supra* note 6, at 8.

22. Project Decommissioning at Relicensing: Policy Statement, 60 Fed. Reg. 339 (1995) (codified at 18 C.F.R. § 2.24 (1997)) [hereinafter *Policy Statement*].

that may render a project unprofitable. In addition, FERC stated that it would impose decommissioning costs on the dam owner.<sup>23</sup> In November 1997, FERC exercised its dam decommissioning authority for the first time when it denied an application for a new license for the Edwards Dam in Maine and ordered the owners to remove the dam at their own expense.<sup>24</sup> In July 1998, FERC again relied on the Policy Statement, this time to grant an uneconomic license for the Cushman Project in Washington State.<sup>25</sup>

The hydroelectric industry is staunchly opposed to the Policy Statement.<sup>26</sup> It claims that FERC lacks the authority under the FPA to deny a license or impose uneconomic conditions, and that such action constitutes a regulatory taking in violation of the Fifth Amendment of the U.S. Constitution<sup>27</sup> and a breach of contract.<sup>28</sup> River conservationists, however, welcomed the Policy Statement in most respects, and have argued that FERC possesses broad authority to deny license renewal and impose decommissioning costs, or grant a license with uneconomic conditions.<sup>29</sup>

This Comment analyzes the Federal Power Act to determine whether FERC has the authority to deny a dam license and impose decommissioning costs on the dam owner under the FPA. Part I reviews the background of the FPA and its key provisions. Part II discusses the Policy Statement, describing FERC's new interpretation of the FPA. It also examines the Edwards Dam and Cushman Project relicensing cases to illustrate FERC's application of the Policy Statement. Part III analyzes the FPA in light of its legislative history and judicial interpretations of FERC's authority, and applies the doctrine of navigation servitude to the question of decommissioning costs. This Comment concludes that FERC has the statutory authority to deny a license and impose decom-

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23. *Id.* at 346.

24. See Edwards Mfg. Co., 81 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,255 (Nov. 25, 1997) [hereinafter *Edwards Order*].

25. See City of Tacoma, Washington, 84 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,107 (July 30, 1998) [hereinafter *Cushman Order*].

26. See Michael A. Swiger et al., *Paying for the Change: Can the FERC Force Dam Decommissioning at Relicensing?*, 17 Energy L.J. 163 (1996).

27. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

28. See Swiger et al., *supra* note 26. Analysis of the takings and breach of contract claims are outside the scope of this Comment.

29. See Katherine Costenbader, *Damning Dams: Bearing the Cost of Restoring America's Rivers*, 6 George Mason L. Rev. 635 (1998) (concluding that FERC's decommissioning policy does not constitute taking); Pyle, *supra* note 18, at 132-37.

missioning costs, or to grant a license with uneconomic conditions, when doing so is necessary to protect the public interest.

## I. HISTORICAL AND STATUTORY BASES FOR HYDROPOWER REGULATION

### A. *Congress's Constitutional Power to Regulate Hydropower Development*

The primary source of Congress's authority to regulate water resources is rooted in the navigation power implicit in the Commerce Clause of the U.S. Constitution.<sup>30</sup> In 1824, the Supreme Court confirmed in *Gibbons v. Ogden* that:

All America understands, and has uniformly understood, the word "commerce," to comprehend navigation.

....

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."<sup>31</sup>

Congress has plenary power over interstate commerce, and because navigation is commerce, it may protect the navigable capacity of navigable streams within the United States.<sup>32</sup> This power gives Congress the authority to prohibit any structure within or over navigable waters or nonnavigable tributaries of navigable waters,<sup>33</sup> or permit obstructions that destroy a stream's navigable capacity.<sup>34</sup> Congress's power to give or withhold consent to place obstructions is entirely discretionary and encompasses the authority to grant that privilege upon terms and conditions, and to terminate the privilege once made.<sup>35</sup>

The FPA is based on the navigation power, under which Congress may grant a private hydropower developer the privilege of erecting an

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30. "The Congress shall have power: . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . ." U.S. Const. art. I, § 8, cl. 3.

31. 22 U.S. (9 Wheat) 1, 190, 193 (1824).

32. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899).

33. River and Harbor Act of 1899, ch. 425, § 10, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 403 (1994)); see also Amy K. Kelley, *Constitutional Foundations of Federal Water Law*, in *Water and Water Rights* § 35.02(b) (Robert E. Beck ed., 1996).

34. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404–05 (1940).

35. *Id.* at 426–27; see also Jerome G. Kerwin, *Federal Water-Power Legislation* 84 (1926).

obstruction in a waterway under whatever terms, conditions, and limits Congress chooses.<sup>36</sup> Congress's intention to invoke fully its constitutional power over navigation in the regulation of hydropower can be seen in the FPA's broad and expansive definition of "navigable waters."<sup>37</sup>

Navigability is a question of fact; generally, if a stream can be used for commerce, it is navigable.<sup>38</sup> The navigation power invoked by the FPA has been interpreted broadly to encompass navigable streams, streams that once were navigable<sup>39</sup> or could be made so with reasonable improvements,<sup>40</sup> nonnavigable portions of navigable waterways,<sup>41</sup> and nonnavigable tributaries that affect the navigable capacity of navigable waters.<sup>42</sup> The navigation power is even broad enough to extend to matters not directly related to navigation. In *United States v. Appalachian Electric Power Co.*, the U.S. Supreme Court stated: "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce. . . . That authority is as broad as the needs of commerce."<sup>43</sup> Thus, although navigation is the basis of the power, the measure and the limit of the power is not confined to securing the free passage of the waterways for commerce.<sup>44</sup>

### B. *Passage of the Federal Water Power Act*

The Federal Water Power Act (FWPA) of 1920<sup>45</sup> was the result of efforts to bring about a comprehensive water power development scheme

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36. *Appalachian Elec.*, 311 U.S. at 427.

37. Navigable waters are "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . and which either in their natural or improved condition . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce." 16 U.S.C. § 796(8) (1994).

38. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

39. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941).

40. *Appalachian Elec.*, 311 U.S. at 407-08.

41. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899).

42. *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960). FERC now also has jurisdiction over projects on nonnavigable waters that affect commerce through interstate transportation of hydroelectricity. *See FPC v. Union Elec. Co.*, 381 U.S. 90, 95-97 (1965).

43. 311 U.S. at 426 (upholding FPA licensing requirements, including conditions unrelated to navigation, for project on river that was arguably not navigable); *see also United States v. Twin City Power Co.*, 350 U.S. 222, 223-24 (1956) (sanctioning project that provided little or no improvement to navigation).

44. Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 Nat. Res. J. 1, 12 (1963).

45. *Supra* note 1.

to replace the piecemeal, restrictive approach of previously enacted federal laws.<sup>46</sup> It was the culmination of a lengthy battle between conservationists, led by President Theodore Roosevelt and Gifford Pinchot, and a coalition of private hydropower developers and states' rights advocates.<sup>47</sup> Both sides sought to bring about private development of waterpower, but on vastly different terms. Conservationists wanted strong federal control over waterpower development to protect the public interest, while developers sought to minimize federal control.<sup>48</sup> Both groups brought tremendous pressure to bear on Congress, and the struggle for water power legislation lasted for fifteen years.<sup>49</sup>

Congress began regulating obstructions to navigation long before enactment of the FWPA. The first comprehensive legislation on this matter was the River and Harbor Act of 1884,<sup>50</sup> which directed the Secretary of War to notify Congress of structures placed in navigable waters that could affect navigation. Sections 9 and 10 of the River and Harbor Act of 1899 took another step towards federal control by expressly prohibiting all obstructions to navigation not affirmatively authorized by Congress.<sup>51</sup> Sections 9 and 10 are virtually unchanged and remain in effect to the present day.<sup>52</sup> Congress passed two other general dam acts in 1906 and 1910 that attempted to establish a uniform policy for granting conditional permits via special acts of Congress.<sup>53</sup> These statutes failed to satisfy either conservationists or developers, and did not bring about large-scale hydropower development.<sup>54</sup>

In 1908, a bill passed pursuant to the 1906 Act instigated a pivotal moment in the water power debate.<sup>55</sup> The bill granted a fourth extension for completion of waterpower works on the Rainy River in Minnesota.<sup>56</sup>

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46. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946).

47. For a detailed history of the events leading up to the Federal Water Power Act, see Kerwin, *supra* note 35.

48. *Id.* at 8.

49. *Id.* at 7–8.

50. Ch. 229, 23 Stat. 133 (1884); see also Jerry L. Mashaw & Richard A. Merrill, *Introduction to the American Public Law System* 3–101 (1975) (providing case study of river and harbor legislation).

51. 30 Stat. 1121 (1899).

52. 33 U.S.C §§ 401, 403 (1994).

53. Kerwin, *supra* note 35, at 111–14.

54. *Id.* at 129–30; see also M. Curtis Whittaker, *The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 *Harv. Envtl. L. Rev.* 135, 149 (1986).

55. Kerwin, *supra* note 35, at 116.

56. *Id.* at 115.



President Roosevelt expressed his disagreement with the entire federal dam scheme with a landmark message that triggered a twelve-year debate regarding critical water power development issues.<sup>57</sup> In vetoing the bill, President Roosevelt stated:

The public must retain the control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand. . . . Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at that time.<sup>58</sup>

In 1920, a water power bill finally passed the House and the Senate.<sup>59</sup> Changes recommended by the House Committee were incorporated into the bill, and in May 1920 both the House and the Senate approved it.<sup>60</sup> The Federal Water Power Act was signed into law on June 11, 1920.<sup>61</sup>

### C. *The Federal Power Act: Mandates and Key Provisions*

The FWPA (now FPA)<sup>62</sup> was designed to give licensees security in their investments during the fifty-year license term, while still retaining in Congress long-term federal control over the utilization of the nation's water resources for the public interest. At that time, Congress wanted to ensure that the federal government had the option to take over and operate projects if necessary to retain federal control over an important public resource and protect the public from uncontrolled water power monopolies.<sup>63</sup> Congress has amended the FPA several times since 1920,

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57. Whittaker, *supra* note 54, at 148.

58. H.R. Rep. No. 99-507, at 11-12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2498.

59. Whittaker, *supra* note 54, at 152.

60. *Id.*

61. Kerwin, *supra* note 35, at 260-61.

62. *See supra* note 1.

63. Vetoing a 1909 water power bill that had no recapture provision, President Roosevelt stated, "I esteem it my duty to use every endeavor to prevent the growing monopoly, the most threatening which has ever appeared, from being fastened upon the people of this nation." H.R. Doc. No. 1350 (1909), *reprinted in* Kerwin, *supra* note 35, at 123. During a discussion of the federal takeover provisions, Representative Ferris said, "[T]he Congress should at all times be very careful—yea; be more than careful—that they do not allow the people to be saddled with a corporation control of this natural monopoly." 58 Cong. Rec. 1939 (1919) (statement of Rep. Ferris); *see also* Kerwin, *supra* note 35, at 57 ("It is an unquestioned fact that the hydroelectric industry tends toward monopoly.").

most notably in 1935<sup>64</sup> and 1986.<sup>65</sup> However, the basic plan of the FPA remains unchanged. It grants the Commission broad authority to administer the FPA.<sup>66</sup> It imposes comprehensive federal regulatory control over the terms and conditions of private hydropower development<sup>67</sup> while preserving state water law and water rights<sup>68</sup> and giving licensees considerable security during the license term.<sup>69</sup> Furthermore, it contains provisions allowing FERC to transfer the project from one licensee to another at the end of the license term.<sup>70</sup> However, it is silent on the key issue of decommissioning.

The FPA contains a very broad grant of authority to the Commission. The Commission has power to “perform any and all acts” and to “prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions” of the FPA.<sup>71</sup> It may impose other conditions that are consistent with the FPA<sup>72</sup> and further the public interest.<sup>73</sup> In addition, these conditions may require licensees to conserve and utilize the navigation and waterpower resources of the region<sup>74</sup> or protect life, health, and property.<sup>75</sup> Finally, the FPA expressly incorporates the broad federal navigation power, making it unlawful to construct, maintain, or operate any hydroelectric dam project in the navigable waters of the United States without a valid license.<sup>76</sup>

Section 6 of the FPA states that licenses may be granted for a period of fifty years or less.<sup>77</sup> The Commission may award licenses to project proposals “best adapted to a comprehensive plan for improving or

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64. Public Utility Act, ch. 687, 49 Stat. 803 (1935) (codified at 16 U.S.C. §§ 79a–79z-6 & scattered sections of 16 U.S.C. (1994)).

65. Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified in scattered sections of 16 U.S.C. (1994)).

66. *See infra* notes 71–76 and accompanying text.

67. *See* First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152, 180–81 (1945).

68. 16 U.S.C. § 821 (1994).

69. *See infra* notes 87–90 and accompanying text.

70. 16 U.S.C. §§ 807–808 (1994).

71. 16 U.S.C. § 825h (1994).

72. 16 U.S.C. § 803(g) (1994).

73. 16 U.S.C. § 797(g) (1994).

74. 16 U.S.C. § 797(g).

75. 16 U.S.C. § 803(c) (1994).

76. 16 U.S.C. § 817(1) (1994); *see also supra* notes 36–37 and accompanying text.

77. 16 U.S.C.A. § 799 (West Supp. 1998).

developing a waterway.”<sup>78</sup> The controlling standard is whether a particular project will be in the public interest.<sup>79</sup> In *Udall v. Federal Power Commission*, the U.S. Supreme Court broadly defined this public interest test to include factors such as future power supply and demand, alternate power sources, preservation of wild rivers and wilderness areas, preservation of anadromous fish runs, and protection of wildlife.<sup>80</sup>

In 1986, having found that FERC had failed to give nonpower interests sufficient weight in its licensing decisions,<sup>81</sup> Congress amended the FPA by passing the Electric Consumers Protection Act (ECPA).<sup>82</sup> The ECPA contains several new requirements designed to provide greater environmental protections. First, it strengthens the public interest standard by explicitly forcing FERC, when deciding whether to issue a license, to give “equal consideration” to power and nonpower values such as fish and wildlife preservation, mitigation, and enhancement; recreation opportunities; energy conservation; and the preservation of other aspects of environmental quality.<sup>83</sup> Second, it requires the Commission to consider the recommendations of Indian tribes affected by the project, as well as those of federal or state agencies exercising administration over project-impacted resources.<sup>84</sup> Third, it obligates the Commission to include license conditions based on the recommendations of federal and state resource agencies for protection, mitigation and enhancement of fish and wildlife.<sup>85</sup> Fourth, it mandates that licensees accept all terms and conditions of the FPA, along with any additional conditions that the Commission may impose.<sup>86</sup>

The FPA grants licensees considerable security during the fifty-year license term,<sup>87</sup> giving them enough time to realize a profit from their investment.<sup>88</sup> Congress expressly reserved the right to alter, amend, or repeal the FPA, but provided that such changes would not affect

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78. 16 U.S.C. § 803(a)(1) (1994).

79. *Udall v. FPC*, 387 U.S. 428, 450 (1967).

80. *Id.*

81. H.R. Rep. No. 99-507, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2503-04.

82. Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified in scattered sections of 16 U.S.C. (1994)).

83. 16 U.S.C. § 797(e) (1994).

84. 16 U.S.C. § 803(a)(2)(B) (1994).

85. 16 U.S.C. § 803(j)(1) (1994).

86. 16 U.S.C.A. § 799 (West Supp. 1998).

87. 16 U.S.C.A. § 799.

88. However, the FPA does not guarantee that a project will be profitable. *Wisconsin Pub. Serv. Corp. v. FERC*, 32 F.3d 1165, 1168 (7th Cir. 1994).

currently valid licenses or licensees' rights.<sup>89</sup> However, after a license expires, FERC subjects renewal applications to the same rigorous public interest review as original licenses and may impose whatever new conditions it finds are required to meet the standards of the FPA, FERC regulations, and other laws in effect at that time.<sup>90</sup>

Sections 14 and 15 address license transfer and relicensing procedures. License transfer options include federal takeover, granting a new license to the original licensee, or transferring the project to a new licensee. Section 14 provides that at the end of the license term, the United States has the right to "take over and thereafter to maintain and operate" any project upon payment of "net investment"<sup>91</sup> plus "severance damages,"<sup>92</sup> if any, to compensate for the owner's investment in the electricity generating equipment.<sup>93</sup> The government may also take over, maintain, and operate a licensed project during the license period by condemnation proceedings upon payment of just compensation.<sup>94</sup> This arrangement preserves the licensee's security in its investment over the fifty-year license term by requiring a significantly higher price tag for federal takeover during the term than after the license expires.

If the federal government does not take over a project, section 15 authorizes the Commission to issue a new license to the original licensee, or to a new licensee.<sup>95</sup> A new licensee takes over the project on the same terms as the government would by paying net investment and severance costs to the former licensee.<sup>96</sup> The Commission may issue a new license to the applicant having the final proposal "best adapted to serve the

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89. 16 U.S.C. § 822 (1994).

90. 16 U.S.C. § 808(a) (1994).

91. "Net investment" is the original cost of the project, plus the cost of subsequent improvements, minus total accumulated depreciation. 16 U.S.C. § 808(a); Echeverria et al., *supra* note 6, at 74. Net investment specifically excludes good will, going value, and prospective revenues. 16 U.S.C. § 807(a) (1994). At the end of a 50-year license term this amount is typically very low. Echeverria et al., *supra* note 6, at 74; *see also* H.R. Rep. No. 99-507, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2501 ("By the time a license comes up for renewal, the project has been operating for thirty to fifty years and is substantially, if not fully, depreciated.").

92. The term "severance" in this context literally means severing one piece of equipment from the whole and is not to be confused with severance damages paid for contracts. *See In re Pacific Power & Light*, 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 63,037 (FERC Apr. 28, 1983). Severance damages are likely to be very small. Echeverria, *supra* note 6, at 74.

93. 16 U.S.C. § 807(a).

94. 16 U.S.C. § 807(a).

95. 16 U.S.C. § 808(a)(1).

96. 16 U.S.C. § 808(a)(1).

public interest.”<sup>97</sup> The Commission may choose to grant a temporary “nonpower use” license if it determines that a project should no longer be used for hydropower generation.<sup>98</sup> A nonpower license is temporary and terminates when a governmental agency agrees to take over jurisdiction of the project.<sup>99</sup> There has never been a federal takeover of a project, nor has a nonpower license ever been issued.<sup>100</sup>

Section 15 also contains a measure designed to allow hydroelectric facilities to remain in operation in case there is a delay in determining license disposition.<sup>101</sup> It provides that upon license expiration, a licensee receives an annual license on the same terms as the original license until a new license is issued or the property is taken over.<sup>102</sup>

The FPA is silent on the question of decommissioning. It does not specify what should happen when a dam is so uneconomical, obsolete, or environmentally damaging that FERC finds it impossible to issue a license that will comport with the broad public interest standards mandated by the FPA. Because the FPA fails to address decommissioning, it also does not specify who should incur the decommissioning costs of a hydroelectric project. When the FWPA was passed in 1920, the focus was on hydroelectric development. Congress planned for the possibility that the federal government might want to own and operate certain projects<sup>103</sup> or pass them to a more responsible licensee.<sup>104</sup> They even foresaw a need to impose new conditions at the end of the license term.<sup>105</sup> But no serious consideration was given to the possibility that a free-flowing river might someday become more valuable than the hydropower a dam produced.<sup>106</sup>

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97. 16 U.S.C. § 808(a)(2) (1994).

98. 16 U.S.C. § 808(f) (1994). Examples of nonpower uses include recreation and water supply. H.R. Rep. No. 1643, at 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3081.

99. 16 U.S.C. § 808(f).

100. *Policy Statement*, *supra* note 22, at 341.

101. “Congress fashioned Section 15 to prevent abrupt termination of a power project which should, in the public interest, be continued but with respect to which the identity of the operator and the exact method of operation must be reevaluated.” *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198, 205–06 (D.C. Cir. 1975).

102. 16 U.S.C. § 808(a)(1) (1994).

103. 16 U.S.C. § 807(a) (1994).

104. 16 U.S.C. § 808(a).

105. 16 U.S.C. § 808(a). (“[T]he Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations . . .”).

106. During the water power legislation debates, dam removal was rarely mentioned, and even then summarily dismissed without further discussion. *See, e.g.*, 59 Cong. Rec. 1474 (1920) (statement of

## II. FERC'S NEW INTERPRETATION OF THE FPA: THE POLICY STATEMENT AND ITS APPLICATIONS

### A. *The Decommissioning Policy Statement*

In 1993, faced with 173 expiring licenses<sup>107</sup> and many more scheduled to expire in the coming decade, FERC issued a Notice of Inquiry (NOI) to solicit comments from interested parties regarding the issue of dam decommissioning.<sup>108</sup> The NOI featured fifteen questions on a range of decommissioning topics including the scope of FERC's decommissioning authority, various approaches to decommissioning in the context of relicensing, and planning and funding options for decommissioning. After considering comments from the hydroelectric industry, agencies, tribes, and environmental groups, FERC issued its Policy Statement on December 14, 1994.<sup>109</sup>

In the Policy Statement, FERC interpreted the FPA in light of its legislative history and broad public interest standard and concluded that:

[FERC] has the legal authority to deny a new license at the time of relicensing if it determines that, even with ample use of its conditioning authority, no license can be fashioned that will comport with the statutory standard under section 10(a) of the Federal Power Act (the Act) and other applicable law.<sup>110</sup>

Normally, the balance between power and environmental interests required under the FPA can be accommodated through the imposition of licensing conditions designed to mitigate environmental harms caused by

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Sen. Walsh) (raising possibility that federal government might order removal of dam from navigable stream, Senator Walsh answered his own question by stating, "But, of course, it is unthinkable that the Government would do anything of that kind, and constantly we must dismiss that.").

107. Clarke, *supra* note 2, at 9.

108. 58 Fed. Reg. 48,991 (1993).

109. *Policy Statement*, *supra* note 22.

110. *Id.* at 340. Section 10(a) of the FPA provides:

That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes.

16 U.S.C. § 803(a) (1994).

the dam.<sup>111</sup> FERC stated that license denial will rarely occur because it will only deny a license when it is impossible to create a license consistent with the FPA.<sup>112</sup> Therefore, the more likely scenario for economically marginal projects with severe environmental impacts is that FERC will issue a new license, but impose conditions that render the project uneconomical, thereby leading the licensee to reject the license.<sup>113</sup> In either case, according to FERC, the project will need to be decommissioned.<sup>114</sup>

FERC concluded that it has the authority to oversee the decommissioning process to “satisfactorily protect the public interests involved.”<sup>115</sup> FERC found various practical reasons for retaining jurisdiction over decommissioning, citing its past experience with voluntary decommissioning settlements and the need to avoid a piecemeal approach.<sup>116</sup> FERC indicated that it would take a flexible approach to decommissioning.<sup>117</sup> The Policy Statement encourages settlement through negotiation among interested parties,<sup>118</sup> but maintains that FERC has the statutory authority to take action if a negotiated settlement cannot be reached.<sup>119</sup>

The Policy Statement placed the responsibility for funding decommissioning on the licensee rather than the federal taxpayer, “since the licensee created the project and benefited from its operations.”<sup>120</sup> The Commission’s primary concern was to ensure that funds are available to accomplish whatever level of decommissioning the Commission requires so that the taxpayer will not, by default, be forced to pay if the licensee

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111. *Policy Statement*, *supra* note 22, at 342. Examples include controls on the amount and timing of flow releases below a dam, installation of fish ladders, or improved recreational access. Echeverria et al., *supra* note 6, at 67.

112. *Policy Statement*, *supra* note 22, at 340.

113. *Id.*

114. The Policy Statement defined “decommissioning” very broadly to encompass all decommissioning options from simply shutting down the power operations to tearing out the dam and restoring the site to pre-project conditions. *Id.*

115. *Id.* at 344.

116. *Id.* at 344–45.

117. *Id.* at 345.

118. *Id.*

119. *Id.* at 340.

120. *Id.* at 346. The Commission did concede that there may be “some situations” in which it would be best to recommend federal takeover or to work out “some kind of cost-sharing arrangement” if the costs became “unreasonable.” *Id.* Unfortunately, the Policy Statement did not elaborate on what types of situations would suggest a need for federal takeover, or what constitutes “unreasonable” costs.

cannot.<sup>121</sup> FERC contemplated three possible mechanisms for funding decommissioning.<sup>122</sup> FERC chose to look at particular facts on the record in a given relicensing case and to impose license conditions requiring a project-specific decommissioning trust fund should the Commission find that decommissioning is likely within the next thirty years, or that the licensee lacks the financial resources to meet future decommissioning costs without a trust fund.<sup>123</sup> FERC apparently adopted this option because it allows individual licensees to avoid the decommissioning funding issue entirely until decommissioning becomes a foreseeable reality.<sup>124</sup> Although FERC claims that it has the statutory authority under the FPA to deny licenses and impose decommissioning costs, the Policy Statement fails to address the hydroelectricity industry's claim that such actions constitute a regulatory taking and a breach of contract.<sup>125</sup>

*B. Applying the Policy Statement to Deny a License and Impose Costs:  
The Edwards Dam*

For three years, FERC did not apply the Policy Statement. This changed on November 25, 1997, when FERC denied a license and ordered the decommissioning of the Edwards Project located on the Kennebec River in Augusta, Maine.<sup>126</sup> The Edwards Project site has been dammed since 1837, and hydroelectric facilities have been in place since 1913.<sup>127</sup> FERC licensed the project in 1964.<sup>128</sup> The Edwards Project produces only one-tenth of one percent of Maine's total electricity

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121. *Id.*

122. *Id.* at 346–47. FERC considered two other options. One option was to impose generically a decommissioning fund requirement on each licensee. FERC rejected this option because it would have forced licensees to tie up funds in suboptimal investments for an uncertain and possibly distant time in the future. *Id.* The second option was to establish a nationwide decommissioning fund, financed by annual charges imposed by the Commission. FERC rejected this option, claiming that there was no evidence that such a fund was needed at the time, but suggested that it might become appropriate in the future. *Id.* Some commentators have argued that FERC should establish a nationwide dam decommissioning fund now, so that dam owners will be able to internalize the costs of decommissioning and ensure that funds will always be available. *See Costenbader, supra* note 29, at 663–72.

123. *Policy Statement, supra* note 22, at 346–47.

124. *Id.*

125. *See Costenbader, supra* note 29 (discussing taking and breach of contract issues); Swiger et al., *supra* note 26 (same).

126. *Edwards Order, supra* note 24.

127. *Id.* at 62,199.

128. *Id.*



supply.<sup>129</sup> Central Maine Power purchased the electricity by contract for a price five times above market rate.<sup>130</sup>

The Kennebec once supported runs of every anadromous fish species native to the northeastern United States,<sup>131</sup> but this rich fishery was abruptly cut off when Edwards Dam was built without any fishways.<sup>132</sup> Fish passage facilities were installed in 1880 but proved ineffective.<sup>133</sup> The Kennebec River supports numerous hydropower projects along its 132 mile length, but Edwards is the first barrier encountered by sea-run fish entering the river from the Atlantic Ocean. Removing the dam would create a sixty-mile uninterrupted stretch of river extending to the Atlantic Ocean.<sup>134</sup>

In 1991, Edwards filed a relicensing application with FERC. The application proposed to expand the project's electricity generation capability and to mitigate damages by providing limited fish passage and recreation facilities.<sup>135</sup> The Environmental Impact Statement (EIS) on the relicensing analyzed four basic options, ranging from granting a new license as proposed by the licensees to denying a license and ordering dam removal.<sup>136</sup>

The EIS concluded that even the best available fish passage facilities would fail to restore the entire fishery, and that only dam removal would restore the river environment that is the preferred spawning habitat of many of these fish species.<sup>137</sup> FERC also found that dam removal would dramatically enhance sport and commercial fishing opportunities, resulting in substantial regional economic benefits, and create stretches of rapids suitable for various types of recreational boating.<sup>138</sup> Thus, the Final Environmental Impact Statement (FEIS) recommended the dam removal alternative.<sup>139</sup>

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129. This amount of electricity could be saved by replacing only 75,000 regular light bulbs with energy efficient ones. Kennebec Coalition, *Restoring Maine's Kennebec River: The Edwards Dam Relicensing 2* (1998) (on file with author).

130. The contract expired in 1998. *Id.* at 3.

131. *Edwards Order*, *supra* note 24, at 62,202. These include alewives, American shad, Atlantic salmon, striped bass, rainbow smelt, Atlantic sturgeon, and shortnose sturgeon. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 62,204.

135. *Id.* at 62,200.

136. *Id.* at 62,205.

137. *Id.* at 62,203.

138. *Id.* at 62,204.

139. *Id.* at 62,201.

FERC also performed an economic analysis of the project, finding that Edwards power would cost more than the current cost of alternative power, even under the licensee's proposal.<sup>140</sup> Furthermore, imposing conditions on relicensing as analyzed by FERC staff would render the project uneconomic to the licensee, while at the same time failing to mitigate the project's severe environmental damage.<sup>141</sup>

FERC concluded that it would be impossible to create a new license for Edwards Dam that would comport with the FPA's public interest mandate.<sup>142</sup> An independent analysis estimated the cost of dam removal at \$2.7 million,<sup>143</sup> and the EIS estimated the cost of imposing recommended conditions at \$10 million.<sup>144</sup> At best, imposition of costly yet necessary conditions would only partially mitigate damages, while rendering the dam uneconomic—all for the sake of producing power that could be replaced more cheaply from other sources in the region. Thus, FERC denied the license and ordered Edwards to come up with a plan for financing and carrying out decommissioning.<sup>145</sup>

For some time, the fate of Edwards Dam remained unclear. The licensee vowed to fight the decommissioning order in court should FERC decide not to stay the order.<sup>146</sup> To forestall a lengthy court battle, the licensee entered into negotiations with the State and other interested parties in an attempt to reach a settlement.<sup>147</sup> On May 26, 1998, the parties announced a voluntary settlement agreement, thus preventing the Edwards case and the Policy Statement from being tested in court.<sup>148</sup> Under the agreement, the dam would be transferred from its current owners to the State of Maine on January 1, 1999, and the State would launch a significant fisheries recovery program at that time.<sup>149</sup> Contingent

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140. *Id.* at 62,207.

141. *Id.*

142. *Id.* at 62,210.

143. *Id.* at 62,207.

144. Office of Hydropower Licensing, Fed. Energy Reg. Comm'n, FERC/FEIS No. 0097, *Final Environmental Impact Statement*, at xxvi (1997).

145. *Edwards Order*, *supra* note 24, at 62,211. Commissioner Bailey dissented. *Id.* at 62,211–12.

146. Ellen Jovin, *Edwards Dam: A Watershed Decision for Hydropower*, Elec. World, Mar. 1998, at 44, available in LEXIS, NEWS Folder, CURNWS File.

147. *King Pitches Dam Plan to City*, Portland Press Herald, Apr. 15, 1998, at 8B, available in LEXIS, NEWS Folder, CURNWS File.

148. *Contentious Edwards Dam Case Comes to a Close*, Energy Daily, May 29, 1998, available in LEXIS, NEWS Folder, CURNWS File [hereinafter *Contentious Edwards Dam Case*].

149. *Historic Agreement Reached to Remove Edwards Dam*, U.S. Newswire, May 26, 1998, available in LEXIS, NEWS Folder, CURNWS File [hereinafter *Historic Agreement*].

on government approval, Edwards Dam will be dismantled between May and September 1999.<sup>150</sup>

Funding for both dam removal and fishery restoration will come entirely from private sources, including \$2.5 million from Bath Iron Works, a shipbuilder, and \$4.75 million from the Kennebec Hydro Developers Group, a coalition of dam operators upstream of the Edwards Dam.<sup>151</sup> In return, Bath Iron Works will receive environmental mitigation credit allowing it to expand its shipyard by fifteen acres, and the upstream dam operators may defer fish passage requirements for their dams.<sup>152</sup> Neither the owners of Edwards Dam nor the taxpayers will have to pay for the dam removal and fishery restoration.<sup>153</sup>

C. *Applying the Policy Statement by Granting a License with Uneconomic Conditions: The Cushman Project*

On July 30, 1998, FERC granted a new license to the city of Tacoma, Washington's 131-megawatt Cushman Project by a four-one vote.<sup>154</sup> The Cushman Project was first licensed in 1924.<sup>155</sup> It consists of two dams, two powerhouses, and associated facilities on the North Fork of the Skokomish River.<sup>156</sup> The Cushman Project had been operating under annual licenses since 1974.<sup>157</sup> A final FERC order was delayed for two decades by a series of complex legal disputes regarding relicensing.<sup>158</sup> Because water is diverted from the river to a powerhouse located out of the basin and is not returned to the river downstream,<sup>159</sup> much of the

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150. *Id.*

151. *Contentious Edwards Dam Case*, *supra* note 148.

152. *Maine Dam Is Coming Down*, Elec. Daily, May 27, 1998, available in LEXIS, NEWS Folder, CURNWS File.

153. *Historic Agreement*, *supra* note 149.

154. *Cushman Order*, *supra* note 25, at 61,535. Commissioner Bailey dissented. *Id.* at 61,602-03.

155. *Id.* at 61,535. The original license was for a minor project that Tacoma later expanded significantly. FERC then determined that Tacoma should obtain a license for the entire project, and Tacoma filed an application to do so at relicensing. *Id.* The validity of the original license has been called into question. See F. Lorraine Bodi & Robert J. Masonis, Letter to the Editor, News Trib. (Tacoma, Wash.), Jan. 28, 1998 at C5.

156. *Cushman Order*, *supra* note 25, at 61,536.

157. *Id.*

158. *FERC Addresses Long-Standing Hydro Disputes in Nebraska and Washington with Possible Implications for Future Policy*, Foster Elec. Rep., Rep. No. 145, Aug. 5, 1998, at 2, available in LEXIS, NEWS Folder, CURNWS File [hereinafter *FERC Addresses Hydro Disputes*].

159. *Cushman Order*, *supra* note 25, at 61,536. The project completely dewatered the river from 1930 to 1988 and since 1988 only 30 cfs (cubic feet per second) have passed the project dams (compared to a pre-project flow of 750 cfs). Bodi & Masonis, *supra* note 155.

controversy surrounds the extent of the diversion of water and the appropriate level of water required to restore salmon and other fish species to the river.<sup>160</sup>

FERC had three alternatives for relicensing the project. Tacoma proposed to continue operating the project largely as it had in the past, with some environmental improvements including a minimum instream flow of 100 cubic feet per second (cfs).<sup>161</sup> The second alternative, a FERC staff adaptation of proposals presented by federal and state agencies, the Skokomish Indian Tribe, and environmental groups, would cease all out-of-basin diversions except for flood control, create extensive fish habitat enhancements and a new hatchery, and require protection and enhancement of nearly 16,000 acres of wildlife habitat.<sup>162</sup> A third option, offered as a compromise by FERC staff, required a minimum flow of 240 cfs and nearly 6,000 acres of wildlife habitat enhancement, among other environmental improvements.<sup>163</sup>

FERC chose a modified version of the third proposal, seeking a middle ground between the desires of the utility, the tribe, agencies, and environmental interests.<sup>164</sup> The order establishes a minimum flow of 240 cfs, mandates land acquisition for habitat protection, and creates a 50- to 200-yard buffer along the river below the dam.<sup>165</sup> It also requires fish passage facilities, a fish hatchery, and a fish stocking program.<sup>166</sup>

Although FERC's chosen alternative represents a compromise, FERC noted that the imposed license conditions would still result in a first year operational loss of \$2.5 million.<sup>167</sup> For this reason, Tacoma argued that these recommended license conditions would bankrupt the project and force Tacoma to decommission it.<sup>168</sup> FERC relied on the Policy Statement to explain that it has the authority to issue a new license subject to conditions that make the cost of project power greater than

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160. *Cushman Order*, *supra* note 25, at 61,536.

161. *Id.* at 61,540.

162. *Id.* at 61,541.

163. *Id.*

164. *Id.* at 61,541–42.

165. *FERC's Approval of Cushman License Spurs Opposition from Area Utility and Tribe*, Energy Report, Aug. 3, 1998, available in LEXIS, NEWS Folder, CURNWS File [hereinafter *FERC's Approval of Cushman License*].

166. *FERC Addresses Hydro Disputes*, *supra* note 158.

167. *Cushman Order*, *supra* note 25, at 61,570. The project would produce an average annual power value of \$6.39 million at an annual cost of about \$8.87 million. *Id.*

168. *Id.* at 61,570–71.

available alternatives, and that such action does not constitute a taking.<sup>169</sup> FERC noted that if Tacoma chose not to accept the license, and no other resolution of the issue presented itself, then Tacoma must surrender the license.<sup>170</sup>

Tacoma indicated that it would request a rehearing of the Cushman Order and appeal to federal court if necessary.<sup>171</sup> On September 29, 1998, FERC granted rehearing of the order for the limited purpose of further consideration.<sup>172</sup> The Cushman Order could prove to be even more controversial than the Edwards Order because the Cushman Project is much larger and, although FERC did not expressly order decommissioning, Tacoma claims that the Order forces it either to decommission or operate at a loss.<sup>173</sup>

### III. ANALYSIS OF FERC'S DECOMMISSIONING AUTHORITY

In the Policy Statement, FERC made clear that it wants parties to make use of creative, voluntary settlement agreements to resolve relicensing issues, but that it retains the power to force dam decommissioning if necessary.<sup>174</sup> FERC may have calculated that the Policy Statement could serve as an effective way to force the parties to the negotiating table, thereby encouraging a mutually beneficial settlement and allowing them to avoid the prospect of a long and costly litigation process with an uncertain outcome. In the Edwards case, this is precisely what occurred.<sup>175</sup> The hydroelectric industry still disagrees with the Policy Statement, however, and it will likely be tested in court, perhaps in the Cushman case.<sup>176</sup>

FERC asserts that it may deny a license and impose decommissioning costs or grant an unprofitable license when it finds that decommissioning

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169. *Id.* at 61,571.

170. *Id.* at 61,572.

171. *FERC's Approval of Cushman License, supra* note 165, at 2.

172. *Order Granting Late Intervention and Granting Rehearing for Further Consideration*, 84 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,317 (FERC Sept. 29, 1998). Several hydroelectricity industry associations requested rehearing of legal and policy issues concerning FERC's authority pursuant to the Policy Statement. *Id.*

173. *Cushman Dam Relicensing Order Roils Hydro Industry*, Energy Daily, July 31, 1998, at 2, available in LEXIS, NEWS Folder, CURNWS File.

174. See *supra* notes 118–19 and accompanying text.

175. See *supra* Part II.B.

176. *Contentious Edwards Dam Case, supra* note 148.

is in the public interest.<sup>177</sup> The hydroelectric industry asserts that the FPA should be read narrowly to limit FERC's options upon license expiration to those expressly enumerated in the FPA.<sup>178</sup> Under this reading, when a license expires, the licensee would be entitled to annual licenses forever unless it receives a new license, a license is issued to a new licensee, or there is a federal takeover.<sup>179</sup> Moreover, the industry takes the position that if a license is granted, its conditions must not be so onerous as to render the project uneconomic.<sup>180</sup> However, the FPA, the legislative history of the Act, and judicial interpretations of the FPA do not support the industry's view. Rather, they support the conclusion that FERC properly issued the Policy Statement to fill gaps in the FPA left by Congress's failure to address directly the decommissioning problem.

*A. FERC Has Decommissioning Authority Under the Federal Power Act to Protect the Public Interest*

*1. The FPA Is Silent on Project Decommissioning*

The hydroelectric industry is striving to avoid responsibility for decommissioning by claiming that if a project is no longer in the public interest, the federal government must take over the project under section 14 and then decommission it at the taxpayer's expense.<sup>181</sup> The industry also claims that section 15 bars FERC from denying a license because it mandates that licensees receive annual licenses indefinitely unless the project is taken over or a new license is issued to the licensee.<sup>182</sup> However, analyzing the FPA as a whole in light of the legislative history and conditions existing at the time of its passage indicates that Congress did not contemplate the need to decommission hydroelectric projects. The FPA is therefore silent on this issue.

Conditions were considerably different when Congress passed the FPA nearly eighty years ago. Many feared that communities that grew up around the dam sites and were totally dependent on the power would

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177. See *supra* notes 110–14 and accompanying text.

178. See Swiger et al., *supra* note 26, at 164–66.

179. *Id.*

180. *Id.* at 166.

181. *Id.*

182. *Id.* at 165.

suffer terribly if the project were to cease power production.<sup>183</sup> At that time, power could not be transmitted more than 250 miles from the dam site;<sup>184</sup> thus, obtaining power from a distant site was not an option. For this reason, Congress put provisions in the FPA designed to ensure that projects would continue to operate, even if at license expiration a licensee rejected the new license and threatened to abandon the project.<sup>185</sup>

The purpose of the section 14 takeover provision is to allow the federal government to “take over, maintain and operate”<sup>186</sup> projects in order to retain federal control over a public resource and prevent monopoly.<sup>187</sup> Section 14 presupposes that the continued existence and operation of the project is in the public interest, and that the federal government should control the project. Federal takeover makes sense when the project should be operated for power or maintained for other public benefits such as flood control. The provision simply does not contemplate a situation where the very existence of the project is not in the public interest and the only purpose of the takeover would be to foist the costs of decommissioning onto the taxpayers.<sup>188</sup>

To protect further power-dependent communities, Congress provided in section 15 for issuance of annual licenses as an interim measure if the Commission failed to resolve license disposition by the time the license expired.<sup>189</sup> Although Congress wanted to protect these communities by

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183. The debates suggest that the FPA is silent on decommissioning because nobody could contemplate a future in which one of these dams would no longer be in the public interest. Senator Walsh speculated that the only thing that might interrupt the issuance of annual licenses would be if the Government decided to destroy the dam because it was an obstruction to navigation, but then went on to say that “of course, it is unthinkable that the Government would do anything of that kind, and constantly we must dismiss that.” 59 Cong. Rec. 1474 (1920) (statement of Sen. Walsh).

184. *See supra* note 13 and accompanying text.

185. Will the great communities that have been built up, will the populous cities that get their light from these power plants, go in darkness? Will street railways getting their power from the power plant stop running? Will the mills and factories that supply the population of great cities with labor supplied with power from the power plant go idle? Why, Mr. President, it is unthinkable.

59 Cong. Rec. 1442 (1920) (statement of Sen. Walsh); *see also supra* notes 91–100 and accompanying text.

186. 16 U.S.C. § 807(a) (1994).

187. *See supra* note 63 and accompanying text.

188. For the same reason, a nonpower license would also be inappropriate in this situation because it presupposes that the continued existence of the project is in the public interest. *See supra* notes 98–100 and accompanying text.

189. *See supra* notes 101–02 and accompanying text. Senator Nelson commented that “[i]t seems to me that that is wiser than to have the use of the power entirely lapse. It is the theory of that

ensuring that projects would continue to operate, it did not intend for annual licenses to transform the fifty-year license into a de facto perpetual license.<sup>190</sup>

Similarly, section 15 does not bar FERC from denying a license. The fifty-year limit on licenses is a cornerstone of the FPA—one that President Roosevelt considered non-negotiable and that Congress readily incorporated into the FWPA.<sup>191</sup> Furthermore, section 15 requires that new licenses be issued “upon such terms and conditions as may be authorized or required under the then existing laws and regulations,”<sup>192</sup> which strongly suggests that Congress did not intend for annual licenses based on fifty-year old laws and regulations to extend into perpetuity. To allow licensees to receive annual licenses forever when the project should cease to operate would be an absurd interpretation of the FPA that flies in the face of the fifty-year license limit.<sup>193</sup> Because there is a judicial presumption against imputing to Congress an intent to produce an absurd, unintended result,<sup>194</sup> section 15 does not support the hydroelectric industry’s contention that FERC cannot refuse to issue a new license and order decommissioning.

Thus, Congress did not contemplate the need for decommissioning, and the FPA is silent on this important point. The FPA as written contains a built-in assumption that the continued operation of the projects would always be necessary and in the public interest. Sections 14 and 15

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provision, undoubtedly, that instead of having the use of the water power remain idle or abandoned it shall be extended from year to year.” 59 Cong. Rec. 1441 (1920) (statement of Sen. Nelson). Senator Fletcher likewise stated:

[T]he obligation of the Congress, it seems to me, is to put this great industry in such position that the public will get benefit from it and that it can not be paralyzed and dissipated merely because the Government, through its officials, fails to do that which it should do. We want to say in the bill that the commission must act, not that they may sit idle and let time go by and pay no attention to these great enterprises all over the country. They must do something.

59 Cong. Rec. 1044 (1920) (statement of Sen. Fletcher).

190. The debate centered around the wording of section 6. Some senators feared it could allow the licensee to reject a new license unless its terms were more favorable than the original one, and then just continue operating under the annual licenses forever, thus creating a perpetual license. 59 Cong. Rec. 1042–49 (1920).

191. See *supra* note 58 and accompanying text.

192. 16 U.S.C. § 808(a)(1) (1994).

193. *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198, 209–10 (D.C. Cir. 1975) (“[I]f Congress decides against federal recapture, then continued operation of Section 15 would indeed serve no rational purpose if a new license cannot issue.”).

194. See, e.g., *Red River Broad. Co. v. FCC*, 98 F.2d 282, 286–87 (D.C. Cir. 1938) (finding that construction of Communications Act and FCC rules as allowing appellant to avoid exhaustion of administrative remedies is absurd).



were designed for this scenario. Today, the concerns that gave rise to the assumption that hydropower dams would always be in the public interest are no longer valid. Cities will not come grinding to a halt if the local dam is decommissioned. Power can now be transmitted efficiently across large areas, and cheaper sources of power are often available from outside the dam area.<sup>195</sup> As the hydroelectricity industry faces deregulation, marginal dams may be rendered uneconomic and may be abandoned.<sup>196</sup> New concerns have arisen, such as the steep decline in anadromous fish stocks.<sup>197</sup> Thus, current circumstances demonstrate the need for a comprehensive decommissioning policy. With the Policy Statement, FERC appropriately stepped in to address this important need.

## 2. *The Policy Statement Is a Reasonable Exercise of FERC's Broad Authority*

The FPA contains several broad, general grants of authority that empower FERC to fill regulatory gaps in the statute.<sup>198</sup> The FPA states that FERC may issue "orders, rules and regulations as it may find necessary and appropriate,"<sup>199</sup> such as the Policy Statement, to "conserve and utilize the navigation and water-power resources of the region."<sup>200</sup> In addition, the general grant of authority in section 10 of the FPA enables FERC to make licensees subject to "such other conditions not inconsistent with the provisions of [the FPA] as the Commission may require."<sup>201</sup>

Furthermore, it is well established that an administrative agency with a broad statutory mandate has the authority to take discretionary actions to fulfill its duties.<sup>202</sup> Federal courts interpret the Commission's authority under the FPA broadly. The U.S. Supreme Court declared that under sections 4(e)<sup>203</sup> and 10(a)<sup>204</sup> of the FPA, "the Commission is plainly made

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195. See *supra* note 13 and accompanying text. This situation is exemplified by the Edwards Dam scenario.

196. See *Run-of-the-River, Hydropower Reform Coalition Annual Report, Sept. 1997, Electric Utility Restructuring: What Does It Mean for Hydropower?* (visited Sept. 23, 1998) <<http://www.amrivers.org/runriver.html>>.

197. See *supra* note 20 and accompanying text.

198. See *supra* notes 71-75 and accompanying text.

199. 16 U.S.C. § 825(h) (1994).

200. 16 U.S.C. § 797(g) (1994).

201. 16 U.S.C. § 803(g) (1994).

202. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gaps left, implicitly or explicitly, by Congress.")

203. 16 U.S.C. § 797(e) (1994).

the guardian of the public domain.”<sup>205</sup> The District of Columbia Circuit Court of Appeals has declared that the FPA is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization.<sup>206</sup> On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.<sup>207</sup>

Similarly, the Seventh Circuit has acknowledged that the FPA “should receive a practical construction,—one enabling the Commission to perform facilely the duties required of it by Congress.”<sup>208</sup> It noted that “[i]f the Commission is intelligently to exercise its extensive regulatory and supervisory power, it must have been intended that it shall have power to do everything essential to the execution of its clearly granted powers and the achievement of the purposes of the legislation.”<sup>209</sup> The Third Circuit, recognizing that “[t]o put it bluntly, there are hiatuses and inconsistencies in the Federal Power Act,”<sup>210</sup> has also noted the need for FERC to move beyond the text of the FPA to effectuate the purposes it was intended to serve. The Second Circuit has held that the Commission’s role in protecting the public interest “does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”<sup>211</sup>

The fundamental mandate of the FPA is utilization of the nation’s waterways in a manner consistent with the public interest.<sup>212</sup> Inherent in FERC’s ability to issue licenses of limited duration is its ability to deny a license that would not be consistent with the public interest or to impose whatever conditions it views as necessary to meet the public interest. The FPA mandates that FERC follow set criteria in deciding whether a license meets the broad public interest standard.<sup>213</sup> The U.S. Supreme

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204. 16 U.S.C. § 803(a) (1994).

205. *FPC v. Idaho Power Co.*, 344 U.S. 17, 23 (1952).

206. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

207. *Id.*

208. *Northern States Power Co. v. FPC*, 118 F.2d 141, 144 (7th Cir. 1941).

209. *Id.* at 143. *But see* *South Carolina Pub. Serv. Auth. v. FERC*, 850 F.2d 788, 793 (D.C. Cir. 1988) (holding that FERC cannot displace state tort law pursuant to its authority to protect life, health, and property).

210. *Metropolitan Edison Co. v. FPC*, 169 F.2d 719, 723 (3d Cir. 1948).

211. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965).

212. *See supra* notes 8, 79–86 and accompanying text.

213. 16 U.S.C. § 803(a) (1994).

Court held that “[t]he test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the ‘public interest,’ including . . . the preservation of anadromous fish for commercial and recreational purposes.”<sup>214</sup>

This requirement was strengthened by ECPA, which explicitly requires FERC to accord equal weight to nonpower values.<sup>215</sup> Indeed, the legislative history of ECPA indicates that Congress anticipated the possibility that FERC might have to exercise its authority to order dam removal: “If State or Federal fish and wildlife agencies report that a project’s impacts . . . cannot be mitigated, FERC may have to conclude that issuance of the license, whether original or otherwise, may be inappropriate . . . .”<sup>216</sup>

FERC may refuse to grant an original license that fails to meet public interest standards.<sup>217</sup> The purpose of the fifty-year limit on licenses is to provide an opportunity to reevaluate periodically hydropower projects to determine whether they still serve the public interest.<sup>218</sup> The scrutiny given to relicensing applications is the same as that given to original license applications.<sup>219</sup> Thus, a consistent interpretation of the FPA requires that FERC also decline to relicense projects that fail those same standards.

In *Chevron v. Natural Resources Defense Council*, the U.S. Supreme Court held that when a statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>220</sup> The court will

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214. *Udall v. FPC*, 387 U.S. 428, 450 (1967); *see also* *LaFlamme v. FERC*, 852 F.2d 389, 402 (9th Cir. 1988) (suspending hydroelectric dam license until NEPA requirements are met); *Friends of the River v. FERC*, 720 F.2d 93, 97–98 (D.C. Cir. 1983) (finding inadequacies in environmental impact statement, but declining to set aside dam license).

215. *See supra* note 83 and accompanying text.

216. H.R. Rep. No. 99-507, at 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2519. A House Conference Report also stated:

Projects licensed years earlier must undergo the scrutiny of today’s values as provided in this law and other environmental laws applicable to such projects. If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway.

H.R. Conf. Rep. No. 99-934, at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2538.

217. H.R. Conf. Rep. No. 99-934 at 22, *reprinted in* 1986 U.S.C.C.A.N. 2537, 2538.

218. *See supra* note 58 and accompanying text.

219. *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 470 (9th Cir. 1984) (“Congress intended the Commission to make the same inquiries on relicensing as on initial licensing.”); *see also supra* note 90 and accompanying text.

220. 467 U.S. 837, 843 (1984).

defer to the agency's interpretation of the statute if it is reasonable.<sup>221</sup> Accordingly, the issue is whether FERC's Decommissioning Policy Statement is a reasonable interpretation of the FPA.

FERC, faced with dozens of expiring licenses, realized that decommissioning would certainly be a recurring problem in the future. The Policy Statement reasonably fills this gap in the statute by recognizing that when a dam no longer serves the public interest and therefore it is impossible for FERC to create a license that meets FPA standards, decommissioning should occur. It also affirms FERC's authority to grant a license including any conditions necessary to protect the public interest.

*B. FERC Has Authority to Impose Decommissioning Costs*

In addition to possessing the statutory authority to deny a license, FERC may, through its broad discretionary powers to implement the FPA,<sup>222</sup> impose decommissioning costs on licensees in a reasonable manner. The FPA is based on Congress's navigation power.<sup>223</sup> The navigation servitude,<sup>224</sup> or "rule of no compensation," is a corollary to the navigation power. The navigation servitude establishes that, in its exercise of the navigation power, Congress may take private property without compensation.<sup>225</sup> The navigation power differs from all other federal regulatory powers in this regard; Congress may, in exercising the navigation power, destroy private rights for which it would otherwise have to pay just compensation if it destroyed the same rights under a different power.<sup>226</sup> Property is not "taken" because the navigation servitude is "a power to which the interests of riparian owners have always been subject."<sup>227</sup>

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221. *Id.*

222. *See supra* notes 71–75 and accompanying text.

223. *See supra* note 37 and accompanying text.

224. For discussions of navigation servitude, see Richard W. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 Or. L. Rev. 1 (1968); Leighton L. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 Land & Water L. Rev. 391 (1970); Morreale, *supra* note 44; Comment, *The Navigation Servitude and the Fifth Amendment*, 26 Wayne L. Rev. 1505 (1980).

225. The three main categories of federal activities invoking the servitude are: (1) interference with the flow of the stream, (2) actions affecting the bed or banks of the stream up to the high water mark, and (3) deprivation of access to navigable waters. Kelley, *supra* note 33, § 35.02(c)(1).

226. Morreale, *supra* note 44, at 20.

227. *United States v. Rands*, 389 U.S. 121, 123 (1967).

The navigation servitude extends to all lands below the ordinary high water mark of a navigable river.<sup>228</sup> Rooted in English common law, its original purpose was to ensure “free and unhindered passage” on navigable waterways.<sup>229</sup> The precise origins of the navigation servitude are not perfectly clear,<sup>230</sup> although the doctrine itself is “largely settled.”<sup>231</sup>

Although some cases use the terms “navigation power” and “navigation servitude” interchangeably,<sup>232</sup> the navigation servitude is not necessarily coterminous with the navigation power because not all exercises of the navigation power will relieve the government of the requirement to pay just compensation.<sup>233</sup> The question is whether the particular property rights in question are burdened with the servitude.<sup>234</sup> Congress may choose by statute not to invoke the servitude fully,<sup>235</sup> but any waiver of the servitude must be “unmistakable” to withstand judicial scrutiny.<sup>236</sup>

Section 23(b) of the FPA explicitly invokes the navigation power by making the maintenance of any unlicensed dam in a navigable waterway illegal.<sup>237</sup> Once a license is denied, the licensee possesses an unlicensed, illegal obstruction in a navigable waterway. Section 23(b), by invoking the navigation power, and by implication the navigation servitude, gives FERC the authority to order the dam removed at the licensee’s expense.<sup>238</sup>

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228. *United States v. Cherokee Nation*, 480 U.S. 700, 704 (1987).

229. *Morreale*, *supra* note 44, at 31.

230. Joseph L. Sax et al., *Legal Control of Water Resources* 530–31 (2d ed. 1991).

231. *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979); *see also* *Kelley*, *supra* note 33, § 35.02(c) (summarizing case law on navigation servitude).

232. *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956) (“The power is a privilege which we have called ‘a dominant servitude’ . . .”) (citations omitted).

233. *See, e.g., Kaiser Aetna*, 444 U.S. 164, 178–79 (finding that requirement to permit public access to marina in private pond connected to navigable waters by artificial channel constitutes taking).

234. *Morreale*, *supra* note 44, at 20.

235. *FPC v. Niagara Mohawk Power Co.*, 347 U.S. 239, 251–52 (1954) (finding dam licensee’s water rights compensable because “[w]hile leaving the way open for the exercise of the federal servitude . . . there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself”).

236. *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *see also* *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1110 (5th Cir. 1988) (finding contractor not liable for breach of contract due to government’s exercise of navigation servitude).

237. 16 U.S.C. § 817(1) (1994).

238. One potential vehicle for administering this requirement is section 10(c) of the FPA, which requires each licensee to establish and maintain adequate depreciation reserves to ensure the

A series of early U.S. Supreme Court cases regarding the modification or removal of bridges as obstructions in a navigable waterway clearly support this result.<sup>239</sup> The cases make a clear distinction between situations in which the government takes over the property for its own use,<sup>240</sup> and situations in which the government acts to clear an obstruction to navigation.<sup>241</sup> Generally, the former will require compensation, but the latter will not.<sup>242</sup> In all of these cases, the Court has found that when the federal government seeks to clear a project from the waterway to restore navigability, as opposed to taking over and operating the projects for use and profit, the navigation servitude mandates that the owners remove their property without compensation.<sup>243</sup> Thus, it makes sense to pay the licensee in cases of federal takeover or license transfer, but not in cases of license denial and dam removal. Although the navigation servitude does not automatically operate to free the government from paying compensation for all exercises of the navigation power,<sup>244</sup> clearing an

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immediate availability of funds to replace or repair project works to protect navigation, life, health, or property. 16 U.S.C. § 803(c) (1994). Because dam decommissioning is a means of protecting navigation and (especially in the case of aging abandoned dams) life, health, and property, FERC could expressly require licensees to accumulate sufficient funds for dam decommissioning based on its section 10(c) authority over depreciation funding. 16 U.S.C. § 803(c).

239. *See, e.g., Louisville Bridge Co. v. United States*, 242 U.S. 409, 421 (1917) (holding that bridge owner had no vested right to compensation for costs of rebuilding bridge for navigation purposes); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 66–72 (1913) (denying compensation for lost revenue when government required removal of dam); *Hannibal Bridge Co. v. United States*, 221 U.S. 194, 205 (1911) (holding that under navigation power, Congress may order removal of obstruction to navigation without paying compensation); *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 193–94 (1910) (same); *Union Bridge Co. v. United States*, 204 U.S. 364, 399–400 (1907) (requiring bridge company to alter bridge built under state license not taking).

240. *See, e.g., Monongahela Navigation Co. v. United States*, 148 U.S. 312, 344–45 (1893) (requiring payment for lock and dam and franchise to take tolls subsequently taken over and operated by government).

241. *See, e.g., Chandler-Dunbar*, 229 U.S. at 66–72 (denying compensation for lost revenue when government required dam removal); *Union Bridge*, 204 U.S. at 399–400 (approving removal or alteration, at owner's expense, of bridge built under state license).

242. In *Louisville Bridge*, the Court distinguished an earlier case requiring payment for appropriation of a lock and dam by saying that it “was not a case of removing a structure from a river on the ground that it interfered with navigation, but a taking over of a structure and employing it in the public use.” 242 U.S. at 422–23; *see also* Catherine R. Connors, *Appalachian Electric Revisited: The Recapture Provision of the Federal Power Act After Nollan and Kaiser Aetna*, 40 Drake L. Rev. 533, 558 (1991).

243. To summarize, if FERC decided it wanted to clear the waters on which a project was located for navigational purposes, then FERC could decline to renew a license and order the licensee to remove its project equipment from the waters without paying any compensation at all. Such a decision would fall precisely within the proper application of the federal navigation servitude.

Connors, *supra* note 242, at 556–57.

244. *See supra* note 235 and accompanying text.

obstruction from a navigable stream is the type of action that classically falls within the scope of the navigation servitude.<sup>245</sup>

#### IV. CONCLUSION

FERC has the authority under the FPA to deny a license for a hydroelectric dam and order decommissioning at the licensee's expense, and to impose uneconomic conditions on a new license. Although the FPA is silent on the precise question of decommissioning, FERC's broad statutory authority under the FPA to regulate hydropower development to protect the public interest, repeatedly upheld by courts, supports the conclusion that FERC has the power to issue the Policy Statement that filled a critical gap in the statute. Furthermore, the navigation servitude supports the conclusion that FERC also has the authority to impose decommissioning costs on the dam owners if they cannot reach a negotiated settlement.

Hydroelectric development has always been encumbered with the requirement that it be in the public interest. When the FWPA was passed in 1920, the emphasis was on comprehensive hydroelectric development coupled with strong federal control to prevent monopoly and ensure a steady supply of power to growing communities. Today, the public interest demands a sustainable balance between development and the environment. The Federal Power Act was designed to foster hydroelectric development by giving licensees security in their investments for the fifty-year license term. However, the FPA provides for a thorough reassessment of the dam license when it expires so that future generations retain control over the use of the nation's waterways. Tremendous technological advances, as well as changes in the environment and the public interest, are bound to occur over a fifty-year license period, and the use of the river must be reassessed regularly.

The hydroelectric industry must learn to work with a multitude of environmental laws while facing economic pressures concomitant with deregulation. The industry can no longer rely on a traditional bias in its favor. As dam licenses continue to expire, dam operators must be ready to accept new operating conditions that minimize the dams' environmental impacts. In the rare case when a dam's existence is no longer in the public interest, dam owners should also be willing to come to the negotiating table ready to forge new creative solutions to dam

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245. See *supra* notes 226, 243 and accompanying text.

decommissioning. The Policy Statement and the Edwards Dam and Cushman Project orders should serve as a wake-up call to the industry that rivers are a public resource, and their use must always be consistent with the public interest.



