
WHO CONTROLS THE FATE OF THE FISH? INTERAGENCY FIGHTING OVER SECTION 10(J) OF THE FEDERAL POWER ACT

KYLE J. MATHEWS*

INTRODUCTION

[D]ams that were clearly justified for their economic value gradually gave way to projects built with excessive taxpayer subsidies, then justified by dubious cost/benefit projections.

The public is now learning that we have paid a steadily accumulating price for these projects . . . : fish spawning runs destroyed, downstream rivers altered by changes in temperature, unnatural nutrient load and seasonal flows, wedges of sediment piling up behind structures, and delta wetlands degraded by lack of fresh water and saltwater intrusion.¹

The arrival of Lewis and Clark at the mouth of the Columbia River in 1805 coincided with the arrival of the salmon runs.² They marveled at the

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1. Interior Secretary Bruce Babbitt, Dams Are Not Forever, Remarks Before the Ecological Society of America (Aug. 4, 1998), in Press Release, Office of the Secretary, Department of the Interior, Babbitt Urges 3,200 Ecologists to Inform National Debate Over Future of U.S. Dams (Aug. 4, 1998), at <http://www.doi.gov/archives/speeches&articles/ecologic.htm>.

2. INDEP. SCI. GROUP, RETURN TO THE RIVER 2 (2000), <http://www.nwcouncil.org/library/return/2000-12.htm>.

number of fish that crowded the river. Scientists have estimated that between ten and sixteen million salmon migrated up the Columbia and Snake Rivers at that time.³ Today, that number is down to about one million.⁴ The Northwest Power Planning Council has estimated that nearly eighty percent of this loss is due to hydropower development.⁵

Congress has recognized the deleterious effect that dams have on the environment.⁶ In 1986, with an eye toward improving fisheries, Congress amended the Federal Power Act (FPA) by passing the Electric Consumers Protection Act (ECPA).⁷ Under the FPA, the Federal Energy Regulatory Commission (FERC or “the Commission”) is charged with the licensing of hydroelectric projects.⁸ FERC is an independent commission within the Department of Energy, and while it has a great deal of expertise in the area of hydroelectric power generation, it has not traditionally recognized the importance of environmental factors in the licensing process.⁹ When the ECPA was passed in 1986, FERC was mandated for the first time to consider nonpower (e.g., environmental) resources in its licensing decisions.¹⁰

In addition, recognizing FERC’s lack of experience in the areas of habitat preservation and environmental mitigation, Congress gave powers to the State Department of Fish and Game, the United States Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) (collectively referred to in this Note as “the agencies”) to make recommendations during the licensing process under section 10(j) of the FPA.¹¹ Congress also created a role for the Secretary of the Interior and the Secretary of Commerce to prescribe fishways under section 18 of the FPA.¹² On August 11, 1999, the Ninth Circuit Court of Appeals limited the

3. *Id.*

4. *Id.*

5. See NAT’L MARINE FISHERIES SERV., U.S. DEP’T OF COMMERCE, FACTORS FOR DECLINE: A SUPPLEMENT TO THE NOTICE OF DETERMINATION FOR WEST COAST STEELHEAD UNDER THE ENDANGERED SPECIES ACT 6 (1996) [hereinafter FACTORS FOR DECLINE].

6. See 16 U.S.C. § 803(j) (1994). The text of § 803(j) is reprinted *infra* Appendix A.

7. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (codified as amended at scattered sections of 5, 16, and 42 U.S.C.). See also H.R. CONF. REP. NO. 99-934, at 23 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2539-40 (Joint Explanatory Statement of the Committee of Conference for the ECPA).

8. 16 U.S.C. § 797(e) (1994).

9. See *infra* note 28 and accompanying text.

10. See § 803(j). In accounting for nonpower resources when assessing a dam’s proposed regime, for example, FERC may look not only at the electrical generation impacts but also at the impacts on fisheries, downstream sedimentation, and recreational uses for the waterway.

11. See *id.*

12. See 16 U.S.C. § 811 (1994). The text of § 811 is reprinted *infra* Appendix B.

power of the agencies to make recommendations under section 10(j) in *American Rivers v. Federal Energy Regulatory Commission*.¹³ By improperly applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁴ the court frustrated the clear congressional intent to protect fisheries that was manifested in the ECPA.¹⁵

Part I of this Note will examine the environmental impacts of dams on fisheries. Part II will detail Congress' response to these impacts in the form of increased conservation through the ECPA. The intent of Congress to respond to the threat of dams to wildlife and fisheries in particular will be demonstrated by examining the Act's legislative history. Part III will explore FERC's negative response to increased environmental regulation. In particular, this Note will focus on *American Rivers*, the recent Ninth Circuit case, to demonstrate FERC's continued resistance to environmental mitigation measures. Part IV critiques the *American Rivers* decision by asking whether the court properly applied *Chevron* analysis to FERC's power to reclassify recommendations submitted by statutorily authorized agencies under section 10(j). Lastly, Part V rejects *Chevron* and suggests a new standard that will better capture the true conservationist intent embodied in the ECPA. It then looks at the tangible effects such a change would have on improving fisheries and alleviating the problems discussed in Part I.

I. ENVIRONMENTAL CONSEQUENCES OF DAMS

Sections 10(j) and 18 of the FPA seek to protect fish and wildlife in different ways. In order to understand how the two provisions function, one must first examine the impacts that dams have on fish and wildlife and how those impacts can be mitigated through these sections.

As NMFS studies have shown,

[c]onstruction of dams has blocked access to miles of previously productive habitat. Modification of natural flow regimes by dams has resulted in increased water temperatures, changes in fish community structure, and increased travel time by migrating adult and juvenile salmonids. Physical features of dams[,], such as turbines, have resulted in increased mortality of adults and juvenile salmonids as well. Attempts

13. 201 F.3d 1186 (9th Cir. 1999).

14. 467 U.S. 837 (1984). *Chevron* is a well-known administrative law case that grants broad discretion to administrative agencies. For a detailed discussion, see *infra* Part IV.B.

15. See *Am. Rivers*, 201 F.3d at 1194.

to mitigate adverse impacts of these structures have to date met with limited success.¹⁶

Furthermore, “[t]he Northwest Power Planning Council . . . has estimated that current annual salmon and steelhead production in the Columbia River Basin is more than 10 million fish below historical levels, with 8 million of this annual loss attributable to hydropower development and operation.”¹⁷ This means that fishing, “forestry, grazing, agriculture, urbanization, mining, flood control, dredging, water pollution,”¹⁸ and all of the other factors that have led to the loss of salmon in the Northwest have caused only twenty percent of the decline.

NMFS and FWS have both conducted numerous studies on the effects of dams on anadromous and resident fish. Anadromous fish are those fish (such as salmon and steelhead) that live in the ocean as adults but travel to freshwater estuaries in order to breed. These fish are heavily impacted by dams because of their migratory nature. Salmon, for instance, instinctually attempt to return to the place where they were born; unfortunately, due to obstructions such as dams, they are often unable to make the journey.¹⁹ In order to mitigate these problems, biologists have developed a number of devices, referred to by Congress as “fishways,” that aid in the “safe and timely upstream and downstream passage of fish.”²⁰ Even with these

16. FACTORS FOR DECLINE, *supra* note 5, at 6.

17. *Id.* (citation omitted).

18. NAT’L MARINE FISHERIES SERV., U.S. DEP’T OF COMMERCE, FACTORS CONTRIBUTING TO THE DECLINE OF CHINOOK SALMON: AN ADDENDUM TO THE 1996 WEST COAST STEELHEAD FACTORS FOR DECLINE REPORT 9 (1998) [hereinafter FACTORS FOR DECLINE ADDENDUM].

19. While salmon will spawn at the location of an obstruction if they cannot reach the place of their birth, the water temperature and habitat at such locations are often not suitable for young fish, which experience high mortality rates as a result. *See id.* at 10.

20. 16 U.S.C. § 811 note (1994) (Clarification of Authority Regarding Fishways). The text of the Clarification of Authority Regarding Fishways is reprinted along with the text of § 811 *infra* Appendix B. Fishways are prescribed by the Secretary of the Interior and the Secretary of Commerce under section 18 of the FPA. *See id.* Because FERC and the Secretaries have never agreed on a definition of “fishway,” there currently is none. Congress, however, has limited the definition to “physical structures, facilities, or devices necessary to maintain all life stages of . . . fish,” and “project operations and measures related to such structures, facilities, or devices which are necessary to ensure [their] effectiveness” for the “safe and timely upstream and downstream passage of fish.” *Id.*

This is obviously a contentious issue that will spark future litigation, but for the purposes of this Note, I will assume a restrictive definition that does not encompass “natural” mitigation measures. Some examples of undisputed fishways are fish ladders (devices that typically slope along the side of a dam and allow adult fish to continue migrating upstream by swimming around the dam) and fish screens (devices that typically prevent fish that are migrating downstream from being sucked through the turbines of a dam). *See* PETER A. BISSON, CHARLES C. COUTANT, DANIEL GOODMAN, JAMES A. LICHTOWICH, WILLIAM J. LISS, LYMAN McDONALD, PHILLIP R. MUNDY, BRIAN E. RIDDELL, RICHARD R. WHITNEY & RICHARD N. WILLIAMS, INDEP. SCI. ADVISORY BD. FOR THE NW. POWER PLANNING COUNCIL & THE NAT’L MARINE FISHERIES SERV., REVIEW OF THE U.S. ARMY CORPS OF

mitigation measures, problems persist.²¹ In the Upper Willamette River, where the Leaburg-Waltermville project is located, “dams have altered the river’s natural thermal regime; the premature emergence of spring Chinook salmon fry due to releases of warmer reservoir water in the autumn may have caused high mortalities among naturally spawning fish. Conversely, cooler-than-normal waters released in the spring limit the growth of naturally rearing fish.”²²

Because of the many factors involved in the growth of salmonids, it is not always possible to protect these fish adequately through the use of fishways (e.g., fish ladders and fish screens). A healthy watershed is essential for the health of this species. “[W]atershed functions and features include the routing and quantity of water, sediments, nutrients and other dissolved chemicals; . . . water quality; . . . riparian habitat complexity; stream complexity; . . . and predator-prey relationships.”²³ Considering the different species that are affected by different factors adds another level of complexity to the situation. Furthermore, even within a species, certain stocks have adapted to conditions in different ways.²⁴

It is impossible for fishway prescriptions, which are promulgated by the Secretaries of the Department of the Interior and Department of Commerce under section 18 of the FPA, to deal with all of the issues involved in maintaining proper habitat. It is therefore essential that the agencies have the power to attach broad licensing conditions under section 10(j) of the FPA. A recent study by the Independent Scientific Group²⁵ has called into question the effectiveness of artificial stream maintenance (e.g.,

ENGINEERS’ CAPITAL CONSTRUCTION PROGRAM (1999), <http://www.nwcouncil.org/library/isab99-4.htm> [hereinafter INDEP. SCI. ADVISORY BD.].

21. See INDEP. SCI. ADVISORY BD, *supra* note 20.

Fish passage facilities are not equally effective for all anadromous species, nor for different life cycle stages within a species. For example, the majority of adult fall chinook salmon ascending above Bonneville Dam at the lower end of the federal hydroelectric system appear to eventually reach their destinations alive, however the same is not true for juvenile fall chinook entering the opposite end of the system at Lower Granite Dam. Existing fishways were not designed for sturgeon and are an obstacle to their passage. Adult Pacific lamprey appear to be only marginally successful at passing dams, and juvenile lamprey can actually be killed in screens designed to keep juvenile salmon and steelhead out of turbines.

Id.

22. FACTORS FOR DECLINE ADDENDUM, *supra* note 18, at 16 (citation omitted).

23. *Id.* at 10 (citations omitted).

24. INDEP. SCI.GROUP, *supra* note 2, at 191–92.

25. In 1980, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2700 (1980) (codified as amended at 16 U.S.C. § 839b (1994)). The Act authorized certain northwestern states to create a policymaking and planning body for power production and fish and wildlife protection. The result was the Northwest Planning Council. The council then created the Independent Scientific Group to provide scientific advice. INDEP. SCI. GROUP, *supra* note 2, at 3.

fish ladders, fish hatcheries, and fish screens).²⁶ Section 18 prescriptions are by their very nature artificial and thus are “likely to continue the present trends of declining salmon abundance, local population extinctions, and proliferating ESA [Endangered Species Act] listings.”²⁷ Section 10(j) provides the best avenue for agencies to effect natural remedies.

II. THE ELECTRIC CONSUMERS PROTECTION ACT AND FERC’S REACTION TO GREATER ENVIRONMENTAL RESPONSIBILITY

FERC was founded as an energy regulator, and as such, its traditional function has been to maximize electrical output. As environmental issues began to receive more Congressional attention in the late 1970s and early 1980s, FERC was slow to change. Several court cases in the early 1980s forced FERC to amend its policies to give greater weight to environmental concerns.²⁸ Unsatisfied with the level of attention that FERC paid to the environment, Congress passed the Electric Consumers Protection Act ECPA in 1986.²⁹ Environmental issues were of particular concern during deliberations surrounding the passage of the ECPA. During lengthy discussions of the ECPA, John Dingell, Chairman of the House Committee on Energy and Commerce, remarked as follows:

I want FERC to apply vigorously the existing provisions of section 10 of the act relating to this public resource and to require that fish and wildlife preservation and enhancement, including related spawning and habitat resources protection and enhancement, will be treated on a par with power and other project purposes

26. See INDEP. SCIENTIFIC GROUP, *supra* note 2, at 445.

27. *Id.* at 448.

28. See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 2105 (1984) (limiting FERC’s authority for the first time by holding that section 4(e) of the FPA provided managers of federal lands the power to set licensing conditions that FERC must include in any license it grants); *Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (finding that section 15 of FPA requires FERC to make the same inquiries at relicensing that it does at original licensing and, by making this finding, concluding that the National Environmental Protection Act and the Fish and Wildlife Coordination Act apply in the relicensing context). *But see* Michael C. Blumm, *A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing*, 10 HARV. ENVTL. L. REV. 1, 46 (1986).

Although *Yakima Indian Nation* has precedent-setting significance . . . it seems to have had little immediate effect at Rock Island Dam itself. Six months after the opinion, a coalition of state and federal fishery agencies and Indian tribes charged that FERC “appears content to allow the Mid-Columbia Proceeding to continue as if the decision in *Yakima Indian Nation* did not exist.” This apparent intransigence . . . may . . . justify Congressional action to revise FERC’s marching orders.

Id.

29. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (codified as amended at scattered sections of 5, 16, and 42 U.S.C.).

Before our hearings last September, FERC's record in this area was sad. . . .

. . . .

The best way to ensure that [FERC meets its environmental responsibilities] is to shore up the law. Then, when projects are considered for relicensing, FERC will have a clear and unmistakable mandate to include adequate provisions, based on findings and requirements of the Fish and Wildlife Service, the National Marine Fisheries Service and State fish and wildlife agencies, to protect and enhance fish and wildlife resources.³⁰

A. ROLE OF THE AGENCIES

Congress recognized that FERC was not experienced in the areas of habitat preservation and environmental mitigation, so it authorized the State Department of Fish and Game, the FWS, and the NMFS to make recommendations during the 10(j) licensing process.³¹ The Secretary of the Interior and the Secretary of Commerce were also authorized to prescribe fishways under section 18 of the FPA.³² “The House Report stressed the need for FERC to rely on the agencies’ expertise, and it warned FERC that ‘[t]he provision . . . is intended to stress the expertise of these agencies and the need for FERC to rely on them, rather than try to develop its own expertise’”³³

Unlike FERC, the essential aim of which prior to the ECPA was energy development, the agencies have always had the protection of fish and wildlife as their primary goal.³⁴ In choosing these agencies to make recommendations to FERC, Congress sent a strong message about the importance of fish and wildlife. Congress realized that FERC had little experience in protecting these resources, and it gave these agencies

30. *Hydropower Relicensing: Hearings on H.R. 44, H.R. 1815, H.R. 1959, and H.R. 2605 Before the Subcomm. on Energy Conservation & Power, Comm. on Energy & Commerce, 99th Cong. 2* (1985) (statement of John Dingell, Chairman, House Comm. on Energy & Commerce) [hereinafter Dingell, *Hydropower Relicensing Hearings*].

31. See 16 U.S.C. § 803(j) (1994).

32. See *id.* § 811.

33. Opening Brief of Petitioners American Rivers *et al.* at 32, *Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000) (Nos. 98-70079, 98-70084) (alteration in original).

34. See, e.g., Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1994) (organizing statute for Fish and Wildlife Service, stating that its purpose is “to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat . . .”).

advisory roles so that FERC could have expert advice that it could use in weighing power and nonpower values.

The agencies receive their power to advise FERC through sections 4(e),³⁵ 10(a),³⁶ 10(j),³⁷ and 18.³⁸ This Note will focus on sections 10(j) and 18, because those were the sections at issue in *American Rivers*.

Section 10(j) gives the agencies the power to recommend licensing conditions for the “protection, mitigation and enhancement” of fish and wildlife. Although these conditions are not mandatory, Congress’ intent was that FERC give deference to agency recommendations, and it relied on judicial review to enforce that deference.³⁹

Section 18 grants mandatory conditioning authority to the Secretaries of the Interior and Commerce (who usually delegate that authority to FWS and NMFS, respectively). Although the licensing conditions propounded under section 18 are mandatory, they relate only to prescriptions of fishways. While no definition of “fishway” has been propounded by FERC and accepted by the Secretaries of the Interior and Commerce, a fishway is “limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.”⁴⁰ This language limits the types of conditions that can be submitted under section 18 and also increases the importance of 10(j) conditions, because the range of conditions that may be attached to a license under 10(j) is much broader.

B. FERC’S REACTION TO SECTION 18

When section 18 was first added to the FPA, FERC objected to the conditioning authority that it granted to the Secretaries of the Interior and Commerce. In order to minimize the Secretaries’ power, FERC attempted

35. See 16 U.S.C. § 797(e) (1994).

Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations

Id.

36. See *id.* § 803(a).

37. See *id.* § 803(j).

38. See *id.* § 811.

39. H.R. REP. NO. 99-934, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2539-40.

40. § 811 note (Clarification of Authority Regarding Fishways).

to undercut their conditioning authority by redefining the term “fishway.”⁴¹ Using its “discretion,” FERC created a definition of fishway that included only the upstream passage of fish.⁴² “A significant body of literature” predating the FPA “substantiates the ‘two-way’ definition of fishway.”⁴³ An 1883 bulletin of the United States Fish Commission refers to a state law that “makes it the duty of all persons owning or erecting dams to furnish them with suitable fishways, so that the migratory species of fish may have free passage to and *from* their spawning grounds.”⁴⁴

After a period of significant public outrage, FERC changed its definition to include downstream passage, but it still only applied that definition to migratory fish. Congress then intervened by removing the power to define the term “fishway” from FERC. The legislation clarifying the authority to define “fishway” reads as follows:

The definition of the term “fishway” contained in 18 C.F.R. 4.30(b)(9)(iii), as in effect on the date of enactment of this Act [Oct. 24, 1992], is vacated without prejudice to any definition or interpretation by rule of the term “fishway” by the Federal Energy Regulatory Commission for purposes of implementing section 18 of the Federal Power Act [16 U.S.C. § 811]: *Provided*, That any future definition promulgated by regulatory rulemaking shall have no force or effect unless concurred in by the Secretary of the Interior and the Secretary of Commerce⁴⁵

This legislation was a drastic step for Congress and a slap in the face to FERC. Congress made FERC’s authority to define the term “fishway” conditional on the approval of the Secretaries of Interior and Commerce. Even after this drastic step, FERC has not ceased its attempts to resist

41. Brief for the Federal Intervenors at 29–31, *Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000) (Nos. 98-70079, 98-70084). FERC may have defined fishway in a narrow way for more innocent reasons. When the ECPA was first passed, FERC was composed mostly of engineers and had only a few biologists on staff. FERC may simply not have understood the biological implications of such a rule. Whichever justification one accepts, the circumstances surrounding the definition are suspicious. Other mysterious conduct by FERC makes the conclusion that FERC acted in bad faith look more probable. For example, in 1995, after settlement talks with fish and wildlife agencies stalled over the relicensing of the Bend Project, FERC ruled that the waterway in question was not navigable. This ruling removed federal jurisdiction from the project. The result was that FERC had no authority to grant a license and fish and wildlife agencies had no authority to attach licensing conditions. Thus, the project was allowed to operate free of federal regulation. See *PacifiCorp Elect. Operations*, 73 F.E.R.C. ¶ 61,365 (1995), <http://cips.ferc.fed.us/hydro/p/p%2D2643.00b.txt>.

42. Brief for the Federal Intervenors at 29–31, *Am. Rivers* (Nos. 98-70079, 98-70084).

43. H.R. REP. NO. 102-474(I), at 223 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 2046.

44. *Id.*

45. 16 U.S.C. § 811 note (1994) (Clarification of Authority Regarding Fishways). See also *Am. Rivers*, 201 F.3d at 1208.

section 18 fishway prescriptions. In the Leaburg-Waltermville project (the subject of the litigation in the *American Rivers* decision), FERC continued its attempts to circumvent section 18.⁴⁶ The agencies made the following claim in *American Rivers*:

FERC rejected several of the resource agencies [sic] Section 18 prescriptions outright. Even when the Commission *agreed* that the resource agencies had prescribed “fishways” within the meaning of Section 18, it frequently failed to implement more than the barest outline of the detailed prescriptions

. . . By attempting to enforce its own “narrow” construction of Section 18, . . . FERC usurped both the resource agencies’ exclusive authority to impose prescriptions and the exclusive review role of the court of appeals.⁴⁷

While the complaining agency cannot be seen as an impartial source of information, this claim makes clear that FERC still has not fully accepted the constraints of section 18.⁴⁸

III. THE *AMERICAN RIVERS* DECISION

The current Ninth Circuit approach to FERC’s hydropower re-licensing was set out in *American Rivers*. The court ruled on a number of issues; of particular concern to this Note is how the court treated FERC’s handling of the agencies’ recommendations under 10(j) of the FPA and those of the Interior and Commerce Secretaries under section 18.

The case was an appeal by American Rivers, an environmental organization, joined by federal intervenors (FWS, NMFS, and the Environmental Protection Agency (EPA)) from a decision by FERC to grant a license to the Leaburg-Waltermville dam.⁴⁹ This river is known for its pristine waters as well as for being home to several dwindling fish populations, including Chinook salmon, rainbow trout, bull trout, and cutthroat trout.⁵⁰ The appellants were concerned that FERC had not incorporated sufficient environmental conditions into the Leaburg-

46. Brief for the Federal Intervenors at 36–38, *Am. Rivers* (Nos. 98-70079, 98-70084).

47. *Id.* at 37–38 (citation omitted).

48. The court in *American Rivers* agreed with many of the petitioners’ arguments made under section 18, adding credibility to this reasoning. *Am. Rivers*, 201 F.3d at 1206.

49. *Id.* at 1190.

50. Opening Brief of the Petitioners American Rivers *et al.* at 3–4, *Am. Rivers* (Nos. 98-70079, 98-70084). The abbreviated case background presented here reflects the focus of this Note on the section 10(j) and section 18 holdings.

Walterville license to protect this diverse fishery.⁵¹ After the agencies had submitted their recommendations under sections 18⁵² and 10(j), FERC reviewed and reclassified those recommendations that it felt were outside the definition of those sections.⁵³ As a result, some submissions that were put forth under section 18 were reclassified under the more lenient section 10(j) and some of the 10(j) recommendations were reclassified as 10(a) recommendations, which have no binding authority.⁵⁴

The court applied *Chevron v. Natural Resources Defense Council*⁵⁵ in order to evaluate the propriety of FERC's decision to reclassify certain 10(j) recommendations.⁵⁶ The court found that the "*Chevron* analysis begins and ends with the statute itself";⁵⁷ the statute contained the "type of clear Congressional mandate that suffices to curtail a *Chevron* query at step one."⁵⁸ The court read section 10(j)(2)⁵⁹ as granting FERC broad power to reject and reclassify section 10(j) recommendations.⁶⁰ The court stated that "nothing . . . dissuades us from adopting the sound reasoning in *United States Department of [the] Interior* which withholds from the agencies a 'veto power' over the section 10(j) process."⁶¹

The court began its discussion of section 18 recommendations by drawing a distinction between section 18 and section 10(j).⁶² While section 10(j)(2) was important in the 10(j) context, the lack of a similar provision was equally important in the section 18 analysis.⁶³ The court ruled that FERC had no authority to reclassify section 18 prescriptions because there was clear congressional intent to make section 18 prescriptions

51. *Id.*

52. Technically, the Secretaries of Commerce and the Interior make section 18 prescriptions; in practice, however, these prescriptions are based on recommendations of NMFS and FWS, respectively. This Note will often refer to section 18 prescriptions as being those of the agencies.

53. *Am. Rivers*, 201 F.3d at 1192.

54. Section 10(a) will receive little attention in this Note. While FERC has a duty to protect wildlife under section 10(a), that duty is reviewed using the highly deferential "substantial evidence" standard. *Kelley ex rel. Mich. Dep't of Natural Res. v. FERC*, 96 F.3d 1482, 1489 (D.C. Cir. 1996) (quoting *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994)). The Supreme Court has defined "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Thus, FERC has wide discretion to dismiss 10(a) recommendations.

55. 467 U.S. 837 (1984).

56. *See Am. Rivers*, 201 F.3d at 1194.

57. *Id.* at 1202.

58. *Id.*

59. For a full text of the subsection, see *infra* Appendix A.

60. *See Am. Rivers*, 201 F.3d at 1203-04.

61. *Id.* at 1203.

62. *See id.* at 1206.

63. *Id.*

mandatory.⁶⁴ FERC countered that the mandatory nature of these prescriptions removes from FERC the ability to decide whether to grant or to deny a license.⁶⁵ In answer, the court stated that “[t]he ultimate decision whether to issue the license belongs to the Commission, but the Secretary’s proposed conditions must be included if the license issues.”⁶⁶ This ruling reiterated the finding made in prior case law that the court, not FERC, has the power to reclassify section 18 prescriptions that fall outside the parameters of the section.⁶⁷

IV. CRITIQUE OF THE SECTION 10(J) RULING

A. IMPORTANCE OF 10(J) RULING

1. *10(j) Reclassifications Are Abundant*

The impact of 10(j) reclassifications is amplified by the fact that they are so frequent, which is demonstrated by the Leaburg-Waltermville Environmental Impact Statement (EIS) and the Commission’s Order on Rehearing. “Fish and wildlife agencies submitted 56 recommendations, of which the Director found 21 to be outside the scope of Section 10(j), because they were not specific measures to protect fish and wildlife resources, or they asserted final authority over the licensee’s implementation of fish and wildlife measures.”⁶⁸ Of the twenty 10(j) recommendations listed in the EIS that were reclassified as 10(a), nine were rejected (45%). By comparison, two 10(j) recommendations were rejected (5.6%).⁶⁹ There are, of course, other factors that could account for

64. *See id.* at 1210.

65. *Id.* at 1208–09.

66. *Id.* at 1210 (quoting *Escondido Mut. Water Corp. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778 n.21 (1984)).

67. *See, e.g.,* *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 n.2 (D.C. Cir. 1996) (finding that section 18 is mandatory because it contains language similar to section 4(e) of the Act, which the Supreme Court found mandatory in *Escondido Mutual Water Corp.*).

68. *Eugene Water & Elec. Bd.*, 81 F.E.R.C. ¶ 61,270 (1997). *See also* FED. ENERGY REGULATORY COMM’N, U.S. DEP’T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT: LEABURG-WALTERVILLE HYDROELECTRIC PROJECT 6-16 to 6-22 (1996) [hereinafter FINAL EIS]. Only twenty of the twenty-one recommendations found to have exceeded the scope of section 10(j) were listed in the *Final Environmental Impact Statement*.

69. FINAL EIS, *supra* note 68. Of the fifty-six 10(j) recommendations in the environmental impact statement, thirty-two were accepted, eleven were rejected, and thirteen were partially accepted. Of those that were reclassified, seven were accepted, nine were rejected, and four were partially accepted. Of the 10(j) recommendations not reclassified, twenty-five were accepted, two were rejected, and nine were partially accepted. *Id.*

some of the disparity, but part of it is due to the fact that FERC gives greater deference to 10(j) recommendations.

2. *Section 18 Cannot Protect All of the Resources Involved*

Although the power to prescribe “fishways” is provided under section 18, section 10(j) is still important. As seen in Part II, section 18 “fishways” are only one of many ways to mitigate damage to fish and wildlife. The agencies made the following recommendations under section 10(j) because they fell outside section 18: do not raise Leaburg Lake; maintain minimum instream flows; implement proposed wood duck, osprey, purple martin, and northwest pond turtle habitat; and implement proposed bald eagle protection measures.⁷⁰ None of these recommendations can be called a “fishway,” yet each is an important environmental factor that should be considered in relicensing. In addition, if the Independent Scientific Group assessments are correct and a greater degree of “naturalness” is required in order to increase the survival of salmon, section 18 artificial licensing conditions will not be as effective as 10(j) natural licensing conditions.

3. *10(j) Procedural Protections*

When an agency submits a recommendation under section 10(j), the Commission follows special procedural guidelines in the handling of those recommendations.⁷¹ If FERC chooses to reject a recommendation, it is under a statutory mandate to follow certain procedures outlined in section 10(j)(2).⁷² Submissions under Section 10(a) do not receive an equivalent degree of procedural protection.⁷³ While courts are hesitant to look at the substance of the 10(j) process, they are more receptive to analyzing its procedures. These procedural safeguards play an important role in environmental and administrative law.

70. *Id.* at 6-15.

71. *See* 18 C.F.R. § 4.34 (1999). Selected text from § 4.34 is reprinted *infra* Appendix C.

72. *See* 16 U.S.C. § 803(j) (1994).

73. FERC regulations never specifically describe consultation procedures for section 10(a). The only mention of the section is as follows: “Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) . . .” 18 C.F.R. § 4.34.

B. FERC HAS NO AUTHORITY TO RECLASSIFY 10(J) RECOMMENDATIONS

1. *Chevron Application*

As the court in *American Rivers* explained, “[t]he Commission’s interpretation of the FPA implicates the now familiar process of reviewing agency actions exemplified by the Supreme Court’s watershed opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*”⁷⁴ In *Chevron*, the court set out a two-part test for reviewing “an agency’s construction of the statute which it administers”⁷⁵ The first step asks whether Congress has “directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter” and the court must yield to the will of Congress.⁷⁶ The second step states that “if the 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.”⁷⁷

a. *Step One—Clear Congressional Intent*

The court claims that the clear language of section 10(j)(2) demonstrates a clear Congressional intent to allow FERC to reclassify agency recommendations, thereby ending the *Chevron* analysis at step one.⁷⁸ The court argued that the statute clearly indicates that “Congress intended to vest the Commission with ultimate authority to *reject* agency recommendations improperly lodged under section 10(j).”⁷⁹ Nevertheless, “the petitioners . . . urge that the legislative history of the ECPA amendments to the FPA cast doubt on the Commission’s section 10(j) *reclassification* authority.”⁸⁰ The question that was before the court was whether FERC had the authority to *reclassify* 10(j) recommendations made by the agencies, not whether it could *reject* these recommendations.⁸¹ Even so, the court used section 10(j)(2), which deals with the Commission’s power to reject classifications, to justify FERC’s authority to reclassify those recommendations.⁸²

74. *Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999).

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

76. *Id.* at 842–43.

77. *Id.* at 843.

78. *Am. Rivers*, 201 F.3d at 1202. “Here, our *Chevron* analysis begins and ends with the statute itself. We detect in section 10(j) the type of clear congressional mandate that suffices to curtail a *Chevron* query at step one.” *Id.*

79. *Id.* at 1204 (emphasis added).

80. *Id.* at 1204 (emphasis added).

81. *See id.* at 1202.

82. *See id.* at 1203–04.

Section 10(j)(2) states that if “the Commission does not adopt in whole or in part a recommendation” then it must follow the procedures laid out in that section.⁸³ This statement implies that FERC can reject agency recommendations provided that it follows the procedures of section 10(j)(2). It also implies that FERC can modify recommendations as long as it gives deference to the expertise of the agency. It does not, however, address the issue of reclassifying recommendations.

One might argue that the power to reject is stronger than the power to reclassify, and therefore, the power to reject necessarily entails the power to reclassify. Rather than reclassifying the recommendations, FERC could accomplish the same ends by rejecting them and then reconsidering them under section 10(a). There is a flaw to this reasoning, however. The procedural constraints of section 10(j)(2) apply only to rejections, making it possible for FERC to escape them by simply reclassifying 10(j) recommendations before rejecting them. While it is clear from the language of 10(j)(2) that FERC can reject 10(j) recommendations, it is not clear that it can reclassify them. Furthermore, giving FERC the power to reclassify 10(j) recommendations violates congressional intent by allowing FERC to avoid the procedural constraints of 10(j)(2) that Congress put in place.

One might counter that Congress did not intend to give the agencies a “veto power” over the 10(j) process.⁸⁴ In *American Rivers*, the court rejected the assertion that FERC lacks the power to reclassify 10(j) recommendations, stating that “nothing . . . dissuades us from adopting the sound reasoning in *United States Department of [the] Interior* which withholds from the agencies a ‘veto power’ over the section 10(j) process.”⁸⁵ As discussed previously, the court seems to have trouble differentiating the terms “rejection” and “reclassification.” This statement in particular reflects that difficulty. While it is clear from the content of section 10(j)(2) and the case law that the agencies have no “veto power” over the 10(j) process, rejecting FERC’s power to reclassify does not give it that power.

As the court points out, section 10(j)(2) gives FERC procedures for rejecting 10(j) classifications.⁸⁶ If FERC wants to reject a 10(j) recom-

83. 16 U.S.C. § 803(j) (1994).

84. “Section 10(j) does not give . . . agencies a veto, nor does it give them mandatory authority . . .” H.R. REP. NO. 99-934, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2539–40.

85. *Am. Rivers*, 201 F.3d at 1203.

86. *See id.* at 1202.

mentation, it simply has to fulfill the formal requirements of 10(j)(2).⁸⁷ Beyond that, if FERC believes that a licensing recommendation has been improperly submitted under 10(j) and should instead be submitted under 10(a), it may invoke the judicial review provision and allow the court to determine whether the recommendation properly falls under section 10(a).⁸⁸ Taking away FERC's power to reclassify in no way grants the agencies a "veto power" over the 10(j) process.

If one accepts that removing FERC's power to reclassify does not grant the agencies a "veto power" and that Congress most likely did not intend for FERC to be able to escape the procedural constraints of 10(j)(2), Congress' intent seems clear. Therefore, the court was correct in curtailing the inquiry at step one; the problem is that the court ruled in favor of the wrong party.

b. *Step Two—Permissible Construction of the Statute*

The second step of the analysis is highly deferential to the discretion of the agencies.⁸⁹ If congressional intent is not found to be violated at step one, it is not likely that the court will find that FERC's interpretation of the statute is an impermissible construction. While it is unlikely that Congress intended for FERC to be given the discretion to subvert 10(j)(2), it is not "arbitrary, capricious, or manifestly contrary to the statute" for FERC to grant itself reclassification power under section 10(j).

2. *FERC Should Not Be Granted Chevron Deference*

In deciding the 10(j) reclassification issue, the *American Rivers* court applied *Chevron* without discussion of its appropriateness in the case.⁹⁰ *Chevron* is the appropriate standard in most cases of administrative interpretation.⁹¹ For this reason it was not surprising to see the court in *American Rivers* rely so heavily on *Chevron* when it made its decision.

87. *Id.*

88. See 16 U.S.C. § 825(b) (1994).

89. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id.

90. "These challenges again engender *de novo* review and require two distinct iterations of the *Chevron* standard." *Am. Rivers*, 201 F.3d at 1201.

91. The court in *American Rivers* referred to this case as a "watershed opinion," giving some recognition to the case's importance in the field of administrative law. *Id.*

The court would have been right to apply *Chevron* if this had been an ordinary case. This was not, however, an ordinary case.

Chevron involved a dispute between the EPA and Chevron U.S.A. (an oil company).⁹² The EPA was charged with administering the Clean Air Act (CAA) and had promulgated regulations pursuant to that authority.⁹³ Chevron, as the regulated entity, argued against the regulations.⁹⁴ The conflict in the case was between the agency charged with statutory authority to promulgate regulations on the one hand and the regulated entity on the other. No other agency had jurisdiction over the CAA,⁹⁵ this act was solely within the purview of the EPA.

In *American Rivers*, four agencies were granted powers under section 10(j) of the FPA.⁹⁶ For simplicity's sake these four agencies may be divided into two groups: (1) FERC and (2) the agencies (FWS, NMFS, and the State Department of Fish and Game).⁹⁷ While FERC is charged with the general duties of attaching licensing conditions, the agencies are given the role of submitting recommendations.⁹⁸ *Chevron* made it clear that discretion should be granted to agencies, but it did not address the issue of *which* agencies should be accorded such discretion. In *Chevron*, the EPA was the only agency charged with administration of the CAA, so the question did not arise.

Without discussion, the court in *American Rivers* granted *Chevron* discretion to FERC.⁹⁹ This result is odd, given that the petitioners had argued that the agencies, not FERC, should be granted discretion under section 10(j).¹⁰⁰ Section 10(j) of the FPA requires FERC to place conditions within licenses for the protection and enhancement of fish and wildlife.¹⁰¹ These conditions are to be based on recommendations from fish and wildlife agencies.¹⁰² Section 10(j) states that "conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.)"¹⁰³ This requirement

92. *Chevron*, 467 U.S. at 841.

93. *Id.* at 840.

94. *Id.* at 841.

95. *See id.* at 839-40.

96. *Am. Rivers*, 201 F.3d at 1192 n.10.

97. The situation at issue in the case could become much more complex if NMFS and FWS disagreed on a 10(j) recommendation.

98. 16 U.S.C. § 803(j) (1994).

99. *Am. Rivers*, 201 F.3d at 1194.

100. Opening Brief of Petitioners *American Rivers et al.* at 14-15 (Nos. 98-70079, 98-70084).

101. 16 U.S.C. § 803(j).

102. *Id.*

103. *Id.*

presents an interesting question when trying to decide which agency should receive *Chevron* deference. After all, “[i]t is . . . well-settled that a court reviewing agency interpretation of law owes no deference to the agency’s interpretation when the statute is not the agency’s enabling statute.”¹⁰⁴ The petitioners argued that the Fish and Wildlife Coordination Act was the enabling statute of section 10(j) recommendations because of the aforementioned language within 10(j).¹⁰⁵ If one accepts this argument, then the agencies, not FERC, would be given *Chevron* deference. Thus, courts would review the agencies’ 10(j) recommendations to make sure that they were not impermissible constructions of the statute. FERC would have no power to reclassify these recommendations, although it could still reject them as long as it followed the 10(j)(2) procedures.

There are arguments in favor of granting deference to FERC. The FPA is FERC’s organizational statute. FERC is also the agency in charge of the hydroelectric licensing process. The court, however, did not address any of these arguments and instead blindly accepted that FERC, rather than the agencies, should receive *Chevron* deference.

V. SOLUTIONS

A. REALIZING THE INTENT OF CONGRESS

Since there are two rational ways of deciding which agency should receive *Chevron* deference, how should the decision be made? Underpinning the *Chevron* decision were two important policy goals: (1) deference to the expertise of agencies and (2) separation of powers (not allowing the judiciary to usurp a congressionally granted power).¹⁰⁶ It is important that the court choose an agency in a way that would best further these goals. Unfortunately, allowing the court simply to decide which agency should be given deference would seem to violate the second policy goal of separation of powers. In order to promote this goal, the court must look to the legislative intent to determine in which agency Congress intended to vest the power to classify 10(j) recommendations. This policy-oriented goal leads one to a case that was highly similar to *Chevron* but that involved interagency conflict.

104. Opening Brief of Petitioners American Rivers *et al.* at 14 (Nos. 98-70079, 98-70084).

105. *See id.* at 15.

106. *See, e.g.,* Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1341 (1999).

In *Martin v. Occupational Safety and Health Review Commission*,¹⁰⁷ the Supreme Court decided a case involving an interagency dispute similar to that which occurs in the 10(j) context. While *Martin* concerned an agency's interpretation of its own regulation rather than interpretation of legislation, the two areas of law are largely similar.¹⁰⁸ In *Martin*, the Secretary of Labor and the Occupational Safety and Health Review Commission were given split roles under the Occupational Safety and Health Act of 1970.¹⁰⁹ Each party asserted jurisdiction over the authority to define a provision within the regulations.¹¹⁰ The court found that the authority fell to the Secretary:

Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.

The legislative history of the OSH Act supports this conclusion.¹¹¹

The Supreme Court made its decision in *Martin* by examining the legislative history and the expertise of the agency as a proxy for legislative intent.¹¹² Unlike *Chevron*, the question was not how much deference to grant to an agency but rather to which agency deference should be granted. Because *Chevron* left unanswered the important question of which agency should receive deference, *Martin* seems to be a preferable precedent to apply. *Chevron* would apply in the ordinary case involving a single agency's interpretation of its enabling statute; however, in cases involving multiple agencies interpreting different statutes, a grant of deference to an agency without regard to congressional intent is a mistake. For that reason, the court in *American Rivers* should have applied *Martin* to the question of 10(j) reclassification.

B. APPLYING *MARTIN*

Martin based its grant of deference on legislative intent.¹¹³ Unlike step one of *Chevron* analysis, this intent is not based solely on the language

107. 499 U.S. 144 (1991).

108. See Walker, *supra* note 106, at 1342 (arguing that *Chevron* should be applied to interpretations of regulations).

109. 29 U.S.C. §§ 651–678 (1994); *Martin*, 499 U.S. at 147–48.

110. *Martin*, 499 U.S. at 149.

111. *Id.* at 153 (citations omitted).

112. *Id.* at 152–53.

113. *Id.*

of the statute. Rather, it is determined using two main tests: (1) legislative history and (2) expertise in the area.¹¹⁴

1. *Legislative History*

Part II of this Note discussed in detail the events leading up to the passage of the ECPA. It examined FERC's history and congressional reasoning behind the passage of the ECPA, by which section 10(j) was added to the FPA.¹¹⁵ The legislative history shows a clear intent to constrain FERC and force it to become more environmentally responsible.¹¹⁶ Congress intended that FERC give great weight to the recommendations of the agencies and it did not want FERC to be able to reject them with ease.¹¹⁷

To address concerns that the input from [the fish and wildlife] agencies could be ignored, watered down, or undervalued, the Commission may only reject, in part or whole, a recommendation of any of these agencies concerning any specific project after attempting to resolve the difference with the agencies and after publishing a finding (and reasons therefor) that such recommendation is inconsistent with the purposes and requirements of the Federal Power Act

Under the new section 10(j), FERC is empowered to decide license terms and conditions, but there is a guarantee that the recommendations of the agencies cannot be lightly dismissed.¹¹⁸

The procedures set out in section 10(j)(2) were created to ensure that FERC would seriously consider agency recommendations before dismissing them.¹¹⁹ If FERC were allowed to circumvent these procedures by simply reclassifying them prior to rejecting them, this mechanism would not be effective. Section 10(j)(2) procedures were created to "shore up the law"¹²⁰ and make sure "that the recommendations of the agencies cannot be lightly dismissed."¹²¹ If the courts allow these procedures to be circumvented, the

114. *Id.*

115. *See supra* Part II.

116. Such intent is clear from the following statement:

The best way to ensure [that FERC meets its environmental responsibilities] is to shore up the law. Then, when projects are considered for relicensing, FERC will have a clear and unmistakable mandate to include adequate provisions, based on findings and requirements of the Fish and Wildlife Service, the National Marine Fisheries Service and State fish and wildlife agencies, to protect and enhance fish and wildlife resources.

Dingell, *Hydropower Relicensing Hearings*, *supra* note 30.

117. *See* H.R. REP. NO. 99-934, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2539-40.

118. *Id.*

119. *Id.*

120. Dingell, *Hydropower Relicensing Hearings*, *supra* note 30.

121. H.R. REP. NO. 99-934, at 23.

legislative intent as demonstrated throughout the legislative history would be subverted.

2. *Expertise*

The second factor used by the court in *Martin* to determine congressional intent was expertise.¹²² One of the reasons for the involvement of FWS, NMFS, and the State Department of Fish and Game in the 10(j) process was their expertise in the area of protecting fish and wildlife resources. While FERC is an expert in hydroelectric power generation, section 10(j) pertains to mitigation of harms to fish and wildlife resources. “The House Report stressed the need for FERC to rely on the agencies’ expertise, and it warned FERC that ‘[t]he provision . . . is intended to stress the expertise of these agencies and the need for FERC to rely on them, rather than try to develop its own expertise’”¹²³ This intent is reflected in the construction of section 10(j) to allow FERC to reject 10(j) recommendations only in limited circumstances. To allow FERC broad reclassification authority would frustrate this purpose.

Congress intended to grant the agencies authority under 10(j) because it recognized their expertise in this area.¹²⁴ In addition, Congress wrote 10(j) with the intent of constraining FERC’s discretion.¹²⁵ If FERC is allowed to reclassify recommendations it will essentially be able to bypass the procedural constraints of section 10(j)(2) and frustrate this intent. Beyond that, even if FERC cannot reclassify 10(j) recommendations, it may still reject them by following the procedures listed in section 10(j)(2). Denying the power to reclassify would not give the agencies a “veto power” over the 10(j) process. Taking all of these factors into account, it seems clear that FERC should not have the power to reclassify 10(j) recommendations. It was not Congress’ intent to allow FERC to bypass the procedural constraints of section 10(j)(2).

C. ENVIRONMENTAL IMPACT OF SOLUTIONS

If the court applied *Martin* to this case, rather than *Chevron*, environmental improvements could be realized. By granting more power to the agencies under section 10(j) and allowing experts to gauge what measures are needed to protect fish habitats, fisheries would be more

122. *Martin*, 499 U.S. at 152–53.

123. Opening Brief of Petitioners American Rivers *et al.* at 32 (Nos. 98-70079, 98-70084).

124. See H.R. REP. NO. 99-934, at 23.

125. See Dingell, *Hydropower Relicensing Hearings*, *supra* note 30.

adequately protected. As explained in Part I of this Note, mitigation of the environmental harms associated with dams is complicated. Factors such as water temperature, speed and depth of water, sedimentation, and types of plants that exist in and around the stream can affect the health of salmon and steelhead. In order to regulate such complex environmental factors, these expert agencies require more control than simply the ability to prescribe fishways. Fishways, while important to the health of these fish, cannot mitigate all of the problems associated with dams. Furthermore, if the Independent Scientific Group's assessment is correct and a more "natural" environment is required to stem the decreases in salmon populations, section 10(j) is the best means by which to make those types of prescriptions. By allowing the agencies to have greater influence when giving their expert opinions to FERC, the health of salmon and other anadromous fish can be more adequately protected. By recognizing the expertise of these agencies and granting them greater deference under section 10(j) of the FPA, the courts will be enforcing the intent of Congress by protecting fisheries.

VI. CONCLUSION

The court in *American Rivers* ruled that FERC had the power to reclassify 10(j) recommendations made by the agencies. It drew this conclusion from the provision in section 10(j)(2) that gave FERC the power to reject agency recommendations. Even though the court used section 10(j)(2) to justify the grant of this power to FERC, it did not extend its procedural protections to reclassifications. Congress did not intend to allow FERC to escape the procedural protection of section 10(j)(2). Employing the logic of *Martin*, it is clear that the court should have recognized that Congress did not intend to grant to FERC the power to reclassify 10(j) recommendations. If the court had applied *Martin* rather than *Chevron*, it would have recognized the will and intent of Congress by protecting fisheries.

APPENDIX A

16 U.S.C. § 803(j) (1994)

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

APPENDIX B

16 U.S.C. § 811 (1994)

§ 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825 o of this title.

CLARIFICATION OF AUTHORITY REGARDING FISHWAYS

Pub. L. 102-486, title XVII, § 1701(b), Oct. 24, 1992, 106 Stat. 3008, provided that: "The definition of the term 'fishway' contained in 18 C.F.R. 4.30(b)(9)(iii), as in effect on the date of enactment of this Act [Oct. 24, 1992], is vacated without prejudice to any definition or interpretation by rule of the term 'fishway' by the Federal Energy Regulatory Commission for purposes of implementing section 18 of the Federal Power Act [16 U.S.C. 811]: *Provided*, That any future definition promulgated by regulatory rulemaking shall have no force or effect unless concurred in by the Secretary of the Interior and the Secretary of Commerce: *Provided further*, That the items which may constitute a 'fishway' under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish."

APPENDIX C

18 C.F.R. § 4.34 (1999)

(b)(2) [The agencies] must set forth any recommended terms and conditions [pursuant to section 10(j)] in their initial comments filed with the Commission

. . . .

(e)(1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies

(2) Within 45 days of the filing . . . the Commission may seek clarification of it

(3) The Commission will make a preliminary determination of inconsistency of the fish and wildlife recommendation with the purposes and requirements of the Federal Power Act

(4) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency within 45 days of its issuance. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(5) If the Commission decides to conduct [a meeting, it] will give at least 15 days' advance notice to each party The Commission will prepare a written summary of any meeting held under this subsection to discuss 10(j) issues If the Commission believes that any fish and wildlife recommendation . . . may be inconsistent with [the FPA] the Commission will attempt to resolve any such inconsistency by appropriate means, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency.

. . . .

(f)(3) If, after attempting to resolve inconsistencies between the fish and wildlife recommendations . . . and the purposes and requirements of the [FPA] the Commission does not adopt [the recommendation] the Commission will publish the findings and statements required by section 10(j)2

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