



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
WEST COAST REGION
650 Capitol Mall, Suite 5-100
Sacramento, California 95814-4706

December 20, 2016

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

RE: NOAA's National Marine Fisheries Service, West Coast Region, Comments on the Applicant's Relicensing Studies for the Camp Far West Hydroelectric Project, Federal Energy Regulatory Commission Project No. P-2997

Dear Secretary Bose,

The U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) has reviewed the October 13, 2016 letter filed by South Sutter Water District (SSWD or Licensee) for the Camp Far West Hydroelectric Project, FERC No. 2997 (Project) regarding relicensing studies. NMFS appreciates the opportunity to participate in developing studies, however we do not agree that the studies as proposed by SSWD will be adequate to detect anadromous fish, establish baseline conditions or evaluate effects of the project. NMFS has requested information and studies to inform decisions made under the Federal Power Act (FPA) and the Magnuson-Stevens Act (MSA), and the Endangered Species Act (ESA). Failure by SSWD and FERC to collect adequate information could result in delays in ESA and MSA consultation between our agencies.

In our August 25, 2016 letter, NMFS requested two new studies as well as changes to several SSWD proposed studies. NMFS appreciates SSWD's adoption of some of NMFS' requested changes to their studies, including increased frequency of salmonid redd surveys and eDNA sampling. In regards to eDNA sampling, NMFS will work with relicensing participants to develop an appropriate study methodology that resembles the eDNA sampling protocol outlined in California Department of Fish and Wildlife's (CDFW) November 17 letter to SSWD.

However, the current sampling schedule for monitoring juvenile salmonids and adult sturgeon will likely not be useful to NMFS or other relicensing participants. Specific changes that NMFS would like to see implemented include beach seining at least once per month during January-June when juvenile salmonids or adult sturgeon might be present. In addition, deep water videographic surveys are needed to detect adult Green Sturgeon that may be holding in deep pools in the Bear River. CDFW has used DIDSON underwater cameras to detect sturgeon in the Bear River and California Department of Water Resources (DWR) has used DIDSON cameras to detect sturgeon near the Bear/Feather River confluence. SSWD should work with CDFW and DWR to augment DIDSON or ARIS underwater cameras deployment where necessary to detect

adult sturgeon use of the Bear and Feather Rivers in order to establish baseline conditions and responses to Project operations including abrupt flow changes.

The rationale given by SSWD not to adopt elements of NMFS new requested studies, *Effects of the Camp Far West Project and Related Facilities On Coldwater Delivery Feasibility for Anadromous Fish* and *Effects of the Camp Far West Project and Related Facilities On Fluvial Processes and Channel Morphology for Anadromous Fish* was given as: "...NMFS' new study is inconsistent with the purpose of relicensing studies, which is to supplement existing, relevant and reasonably available information – not assess Project effects. Interested parties will use existing information and information from relicensing studies to perform their own assessment of Project effects and propose requirements in the new license, and SSWD will assess Project effects in its DLA and FLA, and FERC will assess Project effects in its NEPA document." (SSWD pg. 4 Attachment 2)

NMFS disagrees with SSWD's assertion that licensing studies should "not assess Project effects". In fact, assessment of project effects is an integral part of the relicensing process and serves to inform NMFS' recommendations under section 10(j), 10(a) and 18 of the Federal Power Act, The Magnuson-Stevens Act and the Endangered Species Act as well as FERC's and other TLP participants' recommendations. FERC cannot issue its License for a project absent an adequate evaluation of potential Project impacts. Interpreting the FPA, the 9th Circuit Court of Appeals has held that "[t]he law, then is well-defined: Prior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigation measures."⁴ FERC cannot issue a hydroelectric license while deferring consideration and implementation of fishery protection measures; rather, FERC is required to make detailed inquiries in the licensing proceeding. There can be no question that fishery protection is among the licensing issues that must be addressed when evaluating whether issuance of a license will serve the public interest in a river basin as required by § 10(a) of the FPA.

Furthermore, elements of NMFS requested studies were not adopted by SSWD because "FERC's baseline is existing condition. Affects [sic] of Project construction are not addressed in relicensing." (SSWD pg.3 attachment 2). This represents a fundamental misunderstanding of the FERC process and how it relates to the ESA section 7 process. The legislative history of the FPA supports a detailed and comprehensive environmental evaluation. The Electric Consumers Protection Act conference report notes that "in exercising its responsibilities in relicensing, the conferees expect FERC to take into account existing structures and facilities in providing for these non-power and non-developmental values." Consistent with this legislative imperative, FERC must also fully evaluate the environmental harms caused by these structures and facilities, in order give "equal consideration" of non-power values as mandated by FPA section 4(e) and must evaluate relicensing issues "in light of today's standards and concerns," and that "procedures and substance applicable to original licenses, including the treatment of non-developmental values, apply fully in relicensing." H.R.Rep. No. 99-507, at 33-34 (1986), reprinted in 1986 U.S.C.C.A.N. 2496, 2521.

⁴ Confederated Tribes and Bands of the Yakima Indian Nation et al. v. FERC, et al., 746 F.2d 466, 471, 473 (9th Cir. 1984)(warning also that a distinct possibility for harm exists in the utilization of a modification procedure to address fish protection measures, rather than addressing them upon issuance of a new license.).

The regulations that govern the FPA further requires that study requests include information needed for consultation under section 7 of the Endangered Species Act (18 CFR § 5.9 (a)). As NMFS noted in previous letters to the licensee and FERC, for ESA purposes, the action, action area, and the effects of an action are defined broadly, and are not restricted to the “Project facilities” or “Project area”, and must include the direct, indirect, and cumulative effects of the action as well as an analysis of the environmental baseline.

In order to conduct an efficient consultation under section 7 of the ESA, NMFS and FERC need to have a shared understanding of the environmental effects of the “environmental baseline” under the ESA. In describing the relicensing of ongoing FERC projects, the ESA consultation handbook (FWS 1998) states a section 7 analysis of the project's effects on listed species is done in the same way as new projects (pg. 4-30):

- The total effects of all past activities, including effects of the past operation of the project, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline.
- To this baseline, future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects), are **added** to determine the total effect on listed species and their habitat (emphasis added).

Because the effects of the action (FERC’s issuance of a license) will be **added** to the environmental baseline to determine the total effect on listed species, it is crucial to understand the effects of all past activities (including effects of the past operation of the Project), and the current, ongoing effects of the Project that form the environmental baseline. Only then can the effects of the proposed licensing action be evaluated during ESA section 7 consultation.

By misinterpreting the environmental baseline under the ESA and conducting inadequate studies that do not gather basic data on anadromous resources in the Bear River, SSWD and FERC risk unnecessary delays when they initiate formal ESA section 7 consultation with NMFS. In order to avoid delays and streamline section 7 consultation, FERC and NMFS should meet to discuss ESA consultation procedures including developing a shared understanding of the environmental baseline, including related structures such as CFW diversion dam in the analysis of the Project’s effects. The relicensing of the Camp Far West Project may affect the following ESA listed resources:

- 1) Central Valley (CV) spring-run Chinook salmon evolutionarily significant unit (ESU) (*Oncorhynchus tshawytscha*), threatened (June 28, 2005, 70 FR 37160);
- 2) CV spring-run Chinook salmon critical habitat (September 2, 2005, 70 FR 52488);
- 3) CV steelhead distinct population segment (DPS) (*Oncorhynchus mykiss*), threatened (January 5, 2006, 71 FR 834);

- 4) CV steelhead critical habitat (September 2, 2005, 70 FR 52488);
- 5) Southern DPS of North American green sturgeon (*Acipenser medirostris*), threatened (April 7, 2006, 71 FR 17757);
- 6) Southern DPS of North American green sturgeon designated critical habitat (October 9, 2009, 74 FR 52300);
- 7) CV fall/late fall-run Chinook salmon ESU, Species of Concern (those species about which NMFS has concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA): April 15, 2004, 69 FR 19975;

Anadromous fish habitat resources protected under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) include:

- 1) Chinook salmon "Essential Fish Habitat" (EFH), (October 15, 2008 73 FR 60987); EFH has been identified in the Bear River extending upstream to approximately Camp Far West Dam and in areas downstream in the Feather and Sacramento Rivers, and the Sacramento-San Joaquin Delta.

If you have questions regarding this letter, please contact Mr. Thomas Holley at (916) 930-5592.

Sincerely,



Steve Edmondson
FERC Hydropower Branch Supervisor
NMFS, WCR, Central Valley Area Office

Enclosures

cc: FERC Service Lists for P-2997

Enclosure A

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**South Sutter Water District)
Camp Far West Hydroelectric Project)**

Project No. 2997

Bear River)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, by first class mail or electronic mail, a letter to Secretary Bose, Federal Energy Regulatory Commission, the National Marine Fisheries Service's comments on the preferred use of the ILP and this Certificate of Service upon each person designated on the official service list compiled by the Commission in the above-captioned proceeding.

Dated this 20th day of December 2016



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