

report on the remaining study request elements in the time available under the Commission's regulations is extremely limited and therefore it is desirable to narrow the focus of the Commission's consideration of the NMFS' Study Dispute to make the process practical and effective.

I. COMMUNICATIONS

All communications, correspondence, and documents related to this filing should be directed to the following persons:

Michael A. Swiger
Julia S. Wood
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., NW
Seventh Floor
Washington, DC 20007
Tel: (202) 298-1800
Fax: (202) 338-2416
mas@vnf.com
jsw@vnf.com

Curt Aikens
General Manager
Yuba County Water Agency
1220 F Street
Marysville, CA 95901-4226
Tel: (530) 741-6278
Fax: (530) 741-6541
caikens@ycwa.com

II. BACKGROUND

YCWA informally initiated relicensing of the Project in September 2009, when it distributed a Preliminary Information Package to agencies and other stakeholders. The formal relicensing process began in November 2010, with YCWA's filing of the Pre-Application Document as required by FERC's integrated licensing process. YCWA filed its Proposed Study Plan in April 2011, in which it proposed to conduct 41 studies—many of which related to fish and aquatic resources. Between the filing of the Preliminary Information Package and the filing of YCWA's Revised Study Plan in August 2011, YCWA held more than 50 meetings with relicensing participants to carefully craft studies tailored to addressing information needs, and the results of which would help inform the development of license requirements.

Even after the filing of YCWA's Revised Study Plan, it continued to reach out to stakeholders, including NMFS, to work out differences in the Revised Study Plan and address the agency's information needs and requests. On September 8, 2011, YCWA filed a reply to comments received on its Revised Study Plan and further modified its Revised Study Plan in an effort to address those comments and aid FERC in the development of its Study Plan Determination.

Despite these extensive outreach efforts, differences remained. NMFS's Study Dispute contests FERC's determination on seven of NMFS's eight requested studies:

1. Effects of the Project and Related Activities on Fish Passage for Anadromous Fish;
2. Effects of the Project and Related Activities on Hydrology for Anadromous Fish;
3. Effects of the Project and Related Activities on Water Temperatures for Anadromous Fish Migration, Holding, Spawning, and Rearing Needs;
4. Effects of the Project and Related Activities on Coarse Substrate for Anadromous Fish: Sediment Supply, Transport and Storage;
5. Effects of the Project and Related Activities on Large Wood and Riparian Habitat for Anadromous Fish;
6. Effects of the Project and Related Activities on the Loss of Marine-Derived Nutrients in the Yuba River; and
7. Anadromous Fish Ecosystem Effects Analysis: Synthesis of the Direct, Indirect, and Cumulative Effects of the Project and Related Facilities on Anadromous Fish.

Many of these requested studies relate, at least in part, to the passage of anadromous fish past Englebright Dam.

III. MOTION TO PARTIALLY DISMISS

NMFS disputes FERC's refusal to incorporate into the Study Plan Determination all of the elements of NMFS's requested studies. Currently, however, there are no anadromous fish upstream of the United States Army Corps of Engineer's ("Corps") Englebright Dam, and the dams blocking fish passage are not Project facilities. While there may be ongoing discussions about the feasibility of placing anadromous fish upstream of Englebright Dam and Project dams at some point in the future, such plans are speculative and uncertain. As a result, NMFS's requested studies, to the extent they relate to upstream passage, have no nexus to the Project, would not inform the development of license conditions, and are premature. In addition, NMFS's Study Dispute involves legal and policy issues that are not appropriate for resolution by a technical panel, because they would seek to inform NMFS's management decisions unrelated to the Project relicensing. For all of these reasons, the Commission should dismiss NMFS's Study Dispute as it relates to NMFS's requests for YCWA to study upstream passage of anadromous fish above Englebright Dam.

A. NMFS's Study Requests Do Not Present a Nexus to the Project and Would Not Inform the Development of License Conditions.

The record in this proceeding is clear: there are no anadromous fish upstream of the Corps' Englebright Dam, and federal facilities that existed long before the Project was constructed—not Project facilities—are blocking fish passage.⁴ Given the current lack of anadromous fish upstream of the federal Englebright Dam and the uncertainty of reintroduction of anadromous fish and fish passage, FERC concluded in its Study Plan

⁴ See, e.g., Study Plan Determination at 44; Proposed Study Plan for the Yuba River Development Project at 3-4 to 3-8, Project No. 2246-058 (Apr. 19, 2011); Revised Study Plan for the Yuba River Development Project at 3-39, Project No. 2246-058 (Aug. 17, 2011) ("Revised Study Plan").

Determination that there is no nexus between studying anadromous fish passage upstream of Englebright Dam and the Project facilities.⁵ NMFS has not presented any compelling new information in its Study Dispute that changes FERC's conclusion. NMFS tries to create a nexus by asserting that some of the potential options for future fish passage in the Yuba River basin are "in the vicinity of" the Project's Narrows 2 powerhouse outlet facilities.⁶ This does not alter the fact that responsibility for future fish passage should justly belong to the owner of the federal dam that completely blocks fish passage, not the owner of any nearby facility.

FERC's Study Plan Determination rejecting NMFS's requested studies on these issues is fully consistent with FERC precedent. FERC does not require license applicants to study species that are simply not present at a project.⁷ In these situations, FERC has found no nexus to project operations, and that such studies would not inform the development of license conditions.⁸ The Commission need not convene a technical advisory panel, or take up valuable time needed to consider other technical issues to affirm the findings it has already made in this proceeding, which are fully supported by its past practice.

⁵ Study Plan Determination at 38, 39.

⁶ Study Dispute at 8.

⁷ *See, e.g., Ga. Power Co.*, 111 FERC ¶ 61,433 at PP 43-45 (2005) (denying a study request to support a fish passage recommendation where the target species was not present at the project); Revisions to Study Plan for the Merced River Hydroelectric Project at 13-16, Project No. 2179-042 (Apr. 1, 2011) (rejecting study requests where there was no evidence that anadromous fish were present or passed upstream of the project dam, or that there was suitable habitat for such species upstream).

⁸ *See, e.g., Ga. Power Co.*, 111 FERC ¶ 61,433 at P 45 (affirming Director's decision that there was no nexus between the requested study and project operations).

B. NMFS's Requested Studies Are Premature.

Numerous entities—YCWA and NMFS among them—are engaged in ongoing discussions outside the relicensing process regarding the possibility of reintroducing anadromous fish in the Yuba River basin at some point in the future, and whether fish passage facilities within the basin are appropriate or feasible, in the event that these species are reintroduced. NMFS acknowledges a range of possibilities and means for potential future reintroduction and passage,⁹ and YCWA has detailed its contributions to some of these efforts in the record in this proceeding.¹⁰ Yet none of these discussions involve concrete, imminent plans to reintroduce anadromous fish upstream of the Project or build fishways to pass them.¹¹ Furthermore, it is common during a relicensing proceeding for licensees to discuss, and sometimes negotiate settlement agreements, on issues outside FERC's jurisdiction. The mere fact of considering such issues does not automatically make them jurisdictional. That would be absurd and would inhibit relicensing consultation over any questionable jurisdictional issue.

As FERC stated in its Study Plan Determination, “it is unknown when fish passage might occur, how fish passage would be accomplished, or which part of the basin would be targeted.”¹² It therefore concluded that “fish passage studies at this time are

⁹ NMFS mentions three: (1) the Habitat Expansion Agreement for Central Valley Spring-Run Chinook Salmon and California Central Valley Steelhead to mitigate for impacts of the blockage of fish passage in the Feather River; (2) collaborative efforts, such as the Yuba Salmon Forum, in which YCWA is involved; and (3) “potential future actions” in the relicensing of two upstream hydroelectric projects. Study Dispute at 20.

¹⁰ Revised Study Plan at 3-36 to 3-40.

¹¹ In contrast, in the case NMFS cites to support its requested studies, Study Dispute at 21-22, there were definitive plans to reintroduce anadromous fish at the Project. *Symbiotics, LLC*, 129 FERC ¶ 62,207 at P 45 (2009) (noting that the state provided plans in January 2008 to reintroduce anadromous fish upstream of the Corps dam at which the project would be located, that NMFS revised its prescription in March 2008, and that the state began releasing anadromous fish in April 2008).

¹² Study Plan Determination at 38.

premature and could result in unnecessary expenditures.”¹³ This is consistent with other licensing proceedings, in which FERC has found that a license applicant need not conduct a study based on hypothetical events that may occur in the future.¹⁴

It could take decades to effectuate the passage of anadromous fish in the Yuba River basin. NMFS appears to acknowledge that its requested studies would not inform the development of license conditions at this time, but instead would “inform any future, potential exercise of NMFS[s’] fishway prescriptive authority.”¹⁵ In the event anadromous fish are reintroduced in the Project area at some time in the future, and fish passage is feasible and appropriate, the specific issues for study are likely to be much different, more focused, and less abstract than they would be today. Even assuming, *arguendo*, that requiring YCWA to build fish passage facilities at the Corps dam were within the scope of NMFS’s authority under Section 18 of the Federal Power Act (“FPA”)—a proposition YCWA questions¹⁶—its requested passage studies are premature. A reopener to address future passage issues is far more appropriate here, as FERC points out.¹⁷

¹³ *Id.*

¹⁴ *See, e.g.*, Findings and Recommendations of the Study Dispute Resolution Panel for the Hogansburg Hydroelectric Project at 29-30, Project No. P-7518 (Oct. 18, 2011) (finding it premature to require the license applicant to conduct studies relating to decommissioning, which had not yet been selected as the preferred option).

¹⁵ Study Dispute at 24.

¹⁶ FERC also suggests, given the Corps’ Englebright Dam is not part of the Project, that any studies of fish passage would be related to NMFS’s ongoing consultation with the Corps under the Endangered Species Act. Study Plan Determination at 38.

¹⁷ Study Plan Determination at 39.

C. NMFS’s Requested Studies Involve Policy Issues Unrelated to the Project Relicensing that Are Not Appropriate for Dispute Resolution.

Even though the Project is not blocking the passage of anadromous fish, YCWA, recognizing that the recovery of anadromous fish is an important directive of the Endangered Species Act—and that the Yuba River basin could play a significant role in recovery efforts—is voluntarily engaged in collaborative, multi-stakeholder discussions, through the Yuba Salmon Forum and North Yuba Reintroduction Initiative, to explore the potential for reintroduction of anadromous fish in the basin upstream of Englebright Dam.¹⁸ These discussions are occurring outside of the Project relicensing, because they are wholly independent of the effects of Project operations.

NMFS also is involved in these basin-wide discussions. But NMFS cannot be permitted to require studies in the Project relicensing that will inform its management strategies and policies in other areas of the Yuba River basin.¹⁹ FERC does not require a license applicant to conduct a study that would generically contribute to an agency’s efforts to develop resource management policies, when such studies are not project-related.²⁰ If an agency were able to require license applicants to do studies through the FERC relicensing process in order to guide the agency’s general management decisions or policy positions—rather than address project-related effects—there would be no end to the type of studies license applicants would be required to conduct.

¹⁸ See Revised Study Plan at 3-39 to 3-40.

¹⁹ Study Plan Determination at 57 (rejecting NMFS’s study because it was “designed to inform agency management strategies . . . not to address project-related effects.”).

²⁰ See Revisions to Study Plan for the Merced River Hydroelectric Project at 15, Project No. 2179-042 (rejecting a study that did not relate to project operations and effects, but instead would only inform agency management decisions and actions).

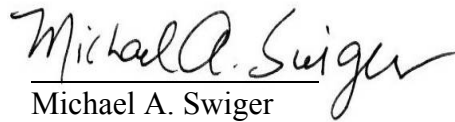
NMFS's misunderstanding of the purpose of the relicensing study process, and in particular the technical conference available in the event of study disputes, is clear. Instead of examining factual disputes related to FERC's Study Plan Determination, "NMFS expects equal time will be devoted [at the technical conference] to Commission's staff's explanations of how all elements of the Proposed Study Plan . . . met the study plan content criteria" and "that the format and agenda of the Conference will include a specific time period or method to look at issues related to the consistency of [the] Commission's determinations with the § 5.9(b) and § 5.11(d) regulations."²¹ Legal issues about the scope of the agency's authority, discussion of policy issues not pertinent to relicensing, and an explanation of FERC's regulations, are not appropriate for consideration by a technical dispute resolution panel.

²¹ Study Dispute at 6.

IV. CONCLUSION

For the reasons set forth above, YCWA respectfully requests that the Commission dismiss those portions of NMFS's Study Dispute related to fish passage above the federal Englebright Dam, without convening a technical dispute resolution panel to resolve those issues.

Respectfully submitted,



Michael A. Swiger

Julia S. Wood

Van Ness Feldman, P.C.

1050 Thomas Jefferson St., NW

Seventh Floor

Washington, D.C. 20007

Tel: (202) 298-1800

Fax: (202) 338-2416

Counsel for the Yuba County Water Agency

Date: October 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service lists compiled by the Secretary in Project No. 2246.

Dated at Washington, D.C. this 31st day of October, 2011.

/s/ Julia S. Wood _____
Julia S. Wood
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800