

COMMENTS
ILP STUDY DISPUTE
STUDY DISPUTE PANEL REPORTS
MERCED RIVER HYDROELECTRIC PROJECT (P-2179)

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

Conservation Groups respectfully submit these comments on the two reports filed by members of the Study Dispute Panel for the relicensing of the Merced River Hydroelectric Project (P-2179). We respectfully request that FERC's Director of the Office of Energy Projects (Director) consider our comments and recommendations as he prepares to issue a determination regarding several disputed studies for the Merced River Hydroelectric Project.

Introduction

We wish to thank all three members of the Study Dispute Panel for their work on a process that lacked clear definition and that took place in part over the Thanksgiving holiday. It is clear that each Panel member was tireless in seeking to elucidate the important issues underlying the Study Dispute. While it is regrettable that the Panel was not able to file a single report, this was clearly not for lack of diligence or effort on the part of any Panelist.¹

The Panelists not only devoted extensive time to the project, they also did their job in the broadest sense: they defended the public interest. In its Comments on the Panel's Report, Merced ID considers it wrong that the Panel, in the District's words, "made a valiant effort to go back into the record to recreate the basis for each of the NMFS's, USFWS's and SWRCB's study disputes."² We fundamentally disagree. By digging into the substance of the disputes, independently evaluating and weighing the evidence, and providing an explanation for how it did so, the panel got its fundamental mission exactly right.

We do not agree with everything that was stated or decided by the Study Dispute Panelists in either of their two reports. We will discuss what we see as the key strengths and weaknesses of the reports below. However, in our view, all three of the Panelists performed their duties admirably under tough circumstances by affirmatively addressing the substantive issues of the relicensing proceeding, in this case largely having to do with the fisheries of the Merced River.

The Panel was correct to disregard Merced ID's arguments that the agencies failed to follow proper procedures

According to Merced ID, the Panel should have simply rejected the dispute on procedural grounds and called it a day:

Once the Panel recognized that '...neither NMFS, FWS or the Water Board in their respective study dispute filings explained how their study requests satisfied the criteria set forth under 18 CFR § 5.9(b) as required by 18 CFR § 5.14(b)' and concluded that '...the agencies have failed to conform to these requirements' (IBID, p. 9), the Panel should have stopped. It is not the Panel's responsibility, but the disputing agencies' responsibility, to meet the critical threshold of 18 CFR § 5.14(b).³

¹ Merced ID, in 20091207-5109, refers to Panelists Aaron Liberty and Robert Deibel as "the Panel," and their report as "the Panel's Report." For reference, we shall generally follow that convention, and shall refer to Larry Thompson as "the Agency Panelist," and his report as "the Agency Panelist's Report."

² 20091207-5109 at p. 2.

³ Ibid.

Merced ID's approach here is true to form; throughout this relicensing, Merced ID has consistently attempted to promote an extremely narrow reading of FERC's regulations in order to prevent substantive information from being introduced into the decisional record at all.

The Panel did not err in proceeding. These agencies had already framed their study requests and comments in the context of the seven study criteria defined in § 5.9(b). As pointed out by both the Panel and the Agency Panelist, the FERC Study Plan Determination itself did not respond to each of the studies explicitly, nor did it address each of the seven study criteria for each study. Of the ten studies proposed by Resource Agencies and Conservation Groups for the Merced River project, nine were rejected based on an explicit reference to criterion 5, without any discussion or mention of the other study criteria. The tenth study was also rejected with a reference to criterion 5, but made reference to criterion 4 as well. In rejecting proposed agency modifications to the Merced ID's proposed studies, FERC also referred only to a small subset of the seven criteria.

Therefore, it was reasonable for the agencies to ignore the criteria that were not in dispute. And it was reasonable for both the agencies and the Panel to rely on the previously developed record for information relevant to the criteria that were in dispute.⁴ Thus, although we believe the Panel overstated its case when it wrote that the agencies had not fully explained how their requests satisfied the criteria in section 5.9(b), that question is ultimately irrelevant because the Panel was plainly within its bounds to undertake a review of the record.⁵

⁴ The notices of dispute referred to the agency/conservation group study requests, (Notice of Study Dispute, California State Water Resources Control Board, SWRCB Dispute 20091005-5127, at pp. 1,7) and their compliance with 5.9:

“NMFS is but one of many agencies and conservation groups that have previously submitted to the Commission information and study requests, at virtually every stage of this integrated licensing process (ILP), in accordance with CFR §5.9” (NMFS Dispute 20091005-5113, enclosure A, at p. 5). “Most specifically, the Service submitted these comments and study requests related to anadromous salmonids in accordance with the regulatory requirements of 18CFR 5.9...” (USFWS Notice of Dispute 20091005-5014 at p.1).

⁵ 20091202-3015 Panel's Report at p. 9. The Panel's willingness to look beyond the SPD and Notices of Dispute went both ways. At the technical conference, FERC staff introduced new rationales for rejecting agencies studies that did not appear in the SPD. (See Technical Conference transcript 20091117-4014 at p.229:

“MR. BUYHOFF: In fact, you know, going back over this, I think a lot of it was really more than just a typographical error, because I would list study criterion number 5, which is – it's really two different things. It's a nexus and how the study results would inform the development of license requirements. And, you know, it's my mistake. I think I listed them both, when nexus might not apply, when I actually meant that I didn't believe that the study informed the development of license requirements.”).

We consider that means of defending the SPD to be unfortunate, because the agencies did not have time to prepare an answer for it, but we do not go so far as to say that it was illegitimate for the Panel to entertain the discussion because the information was all in the record. In the event, we believe that

Merced ID expresses great concern over “the precedent that would be established for future ILP proceedings” if the Director does not reject the substantive issues addressed in the dispute resolution process on the procedural grounds offered by the District. We encourage the Commission to consider an additional precedent here: a relicensing proceeding where information about critical issues, including those pertaining to a project’s impacts on an endangered species, could go unaddressed because of procedural difficulties that exist (if they exist) mainly because the agencies and FERC staff are adjusting to a new process that has remained largely undefined.

Even if the Director believes that Merced ID’s procedural arguments might have merit, the Director could easily avoid the precedent that Merced ID fears without disallowing the panel’s substantive recommendations. The proper approach would be to acknowledge that the study plan dispute process is still a new and relatively untested procedure and clarify how that procedure should be conducted in the future. There have only been a small handful of study plan determinations, and only one or two where the disputed issues could not be resolved amicably. There is clearly room for improvement on the part of all of the parties to this dispute, and we encourage the Director to address those problems in his determination by clarifying the process and stating unequivocally how the Commission will expect these study disputes to be conducted in the future.

There is also a substantive precedent before the Director at this time. We do not agree with the Merced ID that “the number and condition of anadromous fish downstream of Merced Falls and Crocker-Huffman Dam is irrelevant,” either in the Section 18 context in which Merced ID states this in its comments, or more broadly.⁶ Even more than at the time of issuance of the original New Exchequer and Merced Falls licenses, which established downstream flows for “the protection, propagation, and preservation of the fish and wildlife resources on the Merced River” (License article 38, Merced Falls Project P-2467), the number and condition of anadromous fish downstream of the Project are extremely relevant, which is exactly why Merced ID is struggling so hard to convince FERC to limit its authority.

The Study Panel correctly concluded that the Merced River Project affects the lower Merced River downstream of Crocker-Huffman Dam

The Study Panel Report concludes that the Merced River Project has direct, indirect, and cumulative effects on the Merced River downstream of Crocker-Huffman Diversion Dam:

The disproportionate influence of Lake McClure compared to facilities downstream and to downstream flows is the basis for this Panel concluding that Lake McClure and project-operations have a direct effect, especially during the

this about-face by Mr. Buyhoff is based on a fundamental mistake, and we address it substantively later in these comments.

⁶ 20091207-5109 at P. 2.

non-irrigation season, on flows downstream of the Crocker-Huffman diversion dam.⁷

The panel goes on to highlight the need for a better understanding of the interplay between those project effects and both current and proposed operations:

In order to assess the effects of alternative project operating scenarios, especially the effects of moving the compliance point from Shaffer Bridge to immediately downstream of McSwain Reservoir, Commission staff must formally develop the baseline condition that is based on the operational hydrology and address how those potential changes to hydrology affect fish habitat conditions, physical channel effects, etc. It is difficult for the Panel to determine how to assess the effects of alternative operating scenarios...to fish habitat or other target resources.”⁸

The Panel erred by rejecting studies of anadromous fish downstream of Crocker-Huffman

Having concluded that the Project affects instream flows in the lower Merced River downstream of Crocker-Huffman, the Panel should have concluded that the anadromous fish studies (*Anadromous Fish Passage Facilities, Anadromy Salmonid Habitat, Salmonid Rearing, Chinook Egg Viability, and Instream Flow*) that address the fisheries in the lower Merced River downstream of Crocker-Huffman should also be conducted.

In the Panel’s report, “baseline” studies for the Study Panel appear to mean characterization of the **physical habitat** for salmonids downstream of Crocker-Huffman, but not characterization of the **use** of that habitat by salmon or *O. mykiss*,⁹ or how that use under current project operations would be affected or changed by Merced ID’s proposed project operations. We cannot follow the Panel’s logic.

The Panel states:

However, we believe this information in the record contradicts the Commission’s SPD conclusion that, “*Crocker-Huffman currently serves as the upstream barrier to anadromous fish migration and fish movement on the Merced River.*” Therefore, the Panel rejects that as the primary reason for not adopting the

⁷ Panel’s Report, 20091202-3015 at p. 6

⁸ Panel’s Report, 20091202-3015 at p. 7.

⁹ *Oncorhynchus mykiss*, or *O. mykiss*, exhibit both anadromous and resident life history in California’s Central Valley where connectivity to the ocean exists. The anadromous form is commonly referred to as steelhead. The resident form is commonly referred to as rainbow trout. Central Valley steelhead are listed as threatened under the Federal Endangered Species Act. Resident rainbow trout are not listed.

Anadromous Fish Passage, Anadromy Salmonid Habitat, Salmonid Rearing, Chinook Egg Viability, and Instream Flow studies.¹⁰

If, as stated by the Panel at p. 6, the project directly affects the hydrology of the river downstream of Crocker-Huffman, then surely the project must directly affect the fish that are downstream of Crocker-Huffman, whether anadromous fish are also upstream of Crocker-Huffman or not.

At the Study Dispute Technical Meeting held on November 17, Mr. Buyhoff, the FERC staff person who was the lead on the Study Plan Determination, suggested that there was a broad, unstated rationale for his denial of studies of the fisheries studies downstream of Crocker-Huffman.¹¹ Since it appears that the Study Panel may be similarly confused regarding the legal authority of the Commission to set license conditions for fisheries downstream of Crocker Huffman, we reproduce a substantial part of Mr. Buyhoff's statement here:

MR. BUYHOFF: ...And, you know, I think just basically looking at the basic water balance, our thinking was that with the operations model and development, that it would be first important to determine exactly what are your operational parameters before you can do assessments based upon flow-related parameters below Crocker Huffman.

Because, again, it's not that we don't believe there are effects below Crocker Huffman. We just believe that, you know, obviously they're confounded by the irrigation nature of MID.

And so we have to make sure that the studies we're performing can provide data that will inform license requirements on the project, not the irrigation project.

So, you know, our thought was, you know, it's important to determine what's the range of possible parameters based upon operations, the output of the operation models. You know, instead of performing some flow-related study where, you know, you're performing with a variable that can't possibly be exercised through FERC.

So, you know, again that's something we're looking at. I think, you know, that's something that we didn't explicitly state, that, you know, one could lead into the other in terms of, you know, determining first your parameters, and then

¹⁰ Panel's Report at p. 9. There has been consistent confusion of the *Anadromous Fish Passage* study and the *Anadromous Fish Passage Facilities* study. The latter does not exclusively address facilities. It also contains a significant component of studies of the fisheries downstream of Crocker-Huffman.

¹¹ See Dispute Resolution Panel Meeting and Technical Conference Transcript, 20091117-4104 (hereafter, "Transcript") at pp. 224-229.

determining what's, you know, once you determine what FERC controls, you can determine, you know, how to study that.¹²

In effect, Mr. Buyhoff, a project manager, has made a legal determination on the Commission's authority, and has defined the disposition of the most critical issue in a major relicensing, reversing the decision made by the Commission in the original license. His determination is based on an apparent perception that the Commission cannot encroach into the consumptive deliveries of the Merced Irrigation District in order to set instream flows for the benefit of crashing populations of Chinook salmon and ESA-listed steelhead, or of resident rainbow trout. This quasi-legal determination, which if upheld would significantly restrict the Commission's jurisdiction over public trust resources that are directly affected by a hydroelectric project, has been made with little or no apparent benefit of senior FERC staff or counsel.

The Study Plan Determination erred in ignoring the explicit fisheries protection purposes of articles in the existing licenses for Projects 2179 and 2467. As Conservation Groups pointed out in our July 15, 2009 comments on the Licensee Proposed Study Plan, license articles in the FERC licenses for the Merced River Project and the Merced Falls Project were specifically established to protect fisheries downstream of the two projects.¹³

FERC No 2179

"Article 40. The Licensee shall provide minimum streamflow in the Merced River downstream from the project reservoirs in accordance with the following schedule:....(b) At Shaffer Bridge (RM 32.5) downstream from Exchequer Afterbay Dam, a minimum streamflow shall be maintained as follows:...."

FERC No 2467

"Article 38. Licensee, for the protection, propagation, and preservation of the fish and wildlife resources of the Merced River shall coordinate project operations with the project operations of the Merced Irrigation District's Project No. 2179 and shall, insofar as releases from Merced Irrigation District's Project No. 2179 permit, release past Merced Falls dam (RM 55) such minimum flows as have been designated in Articles 40, 41 and 42 of the license for Project No. 2179."

However, Commission staff, in assembling the Study Plan Determination, failed to grasp the significance of these license articles. These articles demonstrate in black ink that the Commission's forerunner already decided, when licenses on the Merced River were issued

¹² 20091117-4014 Transcript at 226-7.

¹³ 20090716-5008, at pp. 12-13.

in 1964, that authority existed to require releases below Merced ID's agricultural diversion.¹⁴

In Conservation Groups' August 30, 2009 Comments on the Revised Study Plan, we pointed out that the issue of legal authority under the Federal Power Act to require release of agricultural water for fisheries purposes was directly analyzed and ordered in the original 1964 license order for the New Don Pedro Project (P-2299), which is located on the Tuolumne River just a few miles north of the Merced River Project.¹⁵ As a reminder, we quote more extensively, in a footnote below, from the court decision that upheld that action by the Federal Power Commission.¹⁶

¹⁴ During the Study Dispute Panel Meeting, Commission staff expressed puzzlement regarding the rationale for placing the flow compliance point for the Merced River Project at Shaffer Bridge, 19.5 miles downstream of Merced ID's agricultural diversion:

CHAIRPERSON LIBERTY: Do you think that there's any biological significance to putting the gauge where it is? MR. BUHYOFF: At the compliance point? I don't think I'm in position to say at this point. It would depend on the existing data and the data that we would be collecting. CHAIRPERSON LIBERTY: Because it's hard for me. I also tried to go back through the record to see why some of these conditions were put in the license back in 1964. And I guess it was difficult, of course, -- but [sic] find any reasoning for what was done.

MR. BUHYOFF: Yes, but I -- the Commission compliance points don't have any biological significance. They're just a way for us to make sure that a licensee is complying with, you know, a certain aspect of the license. (20091117-4014 Study Dispute Meeting Transcript at pp. 42-43, 45).

There is no doubt the current compliance point has biological significance. It was meant to ensure that enough water was released from the New Exchequer, McSwain, and Merced Falls dams and past the major legally operating irrigation diversions to provide for (admittedly unsuccessfully in hindsight), in the words of Article 38 of the Merced Falls license, "the protection, propagation, and preservation of the fish and wildlife resources on the Merced River."

¹⁵ 20090831-5138 at p. 9.

¹⁶ See *State of California v. Federal Power Commission* No. 19394, 59 P.U.R.3d. 175, 345 F.2d.917: "The districts contend that Article 37 impairs the irrigation uses of the districts covered by water rights acquired under California law, and that the Commission is without authority to impair those rights. ... In granting such a license the Commission is required, under section 10(a) of the Federal Power Act, 49 Stat. 842 (1935), as amended 16 U.S.C. § 803(a) (1962), to consider all beneficial public uses including recreational uses. Under that section, and under section 4(g) of the Act, 16 U.S.C. § 797(g) (1958), the Commission is made the 'guardian of the public domain.' *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 23, 73 S.Ct. 85, 97 L.Ed. 15. We therefore conclude that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year. ... Should such an eventuality come to pass, any such Commission action will be subject to review as to the sufficiency of the evidence to support findings upon which such action is based, and as to whether the action is arbitrary and capricious. But we now hold that the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise."

Finally, we must refer to the present, ongoing fact-finding proceeding for the same (now renamed) Don Pedro Project. The very purpose of that proceeding was defined by the Commission as follows:

We direct the Chief Administrative Law Judge or his designee to appoint an administrative law judge to conduct and facilitate an expedited, non-adversarial fact-finding proceeding on possible interim measures to benefit Central Valley steelhead and fall-run Chinook salmon pending relicensing, in order to develop a more complete factual record and to assist the parties in evaluating possible interim solutions. Participation will be limited to the existing parties to this proceeding; that is, the Districts, the intervenors set forth in paragraph 13 of this order, and Commission staff. The scope of the proceeding will be limited to an assessment of the conditions in the Tuolumne River downstream of the Don Pedro Project that may affect these fish, and any interim protective measures, including minimum flows, that may be needed to improve conditions for the fishery resources.¹⁷

In addition, licensees of the Don Pedro Project, Turlock Irrigation District and Modesto Irrigation District are ordered to develop an instream flow study to evaluate salmon and steelhead habitat, as well as a temperature model, for the Tuolumne River downstream of the project.¹⁸

The Commission has ordered a fact-finding proceeding and studies of anadromous fisheries a few miles up the highway from the Merced River Project, for a project that is not yet being relicensed, in order to determine whether flows from the project's storage reservoir might reasonably be augmented to benefit salmon and steelhead. The decision to undertake this extraordinary proceeding should provide guidance to the Director on both the legal framework for acting and the will of the Commission in protecting declining salmonids in the San Joaquin River basin.

In his decision on the dispute process, the Director should specify the legal basis for his ruling, as well as carefully and thoroughly describing the rationale for each part of his decision.

Studies of the Anadromous Fisheries in the Lower Merced River Are Needed

The Panel's other rationale for rejecting anadromous fish studies in the Lower Merced River is that they are not needed because existing information is adequate.

¹⁷ 20090716-3060 Order on rehearing, amending license, denying late intervention, denying petition, and directing appointment of a presiding judge for a proceeding on interim conditions, P-2299-053, P-2299-065. §90 at p. 40.

¹⁸ Ibid, §114(F) at p. 44.

The Panel ignores several important ways that the proposed studies are designed to elicit information that is not currently available, and will not be made available by the “MOU studies” discussed below.

Some of the studies of anadromous fish downstream of Crocker-Huffman proposed by the Resource Agencies and Conservation Groups specifically address the response of anadromous salmonids to changes in hydrology, particularly the “lower flows during high runoff periods” that is described on page 6 by the Panel as a direct effect of the project.

The proposed analysis is to be accomplished by experimentally restoring some portion of the river’s natural high flows during February and March for juvenile rearing (*Salmonid Floodplain Rearing* study, Section 6.3) and measuring the response of juvenile salmonids. This study is dismissed by the Panel as “too intensive to establish defensible relationships between the three target flow releases and the growth, survival, and health of juvenile salmonids within the ILP timeframe.”¹⁹ A second study that proposes to measure response of salmonids to flow changes is found in the “Migration Corridor Protection” portion of the *Anadromous Fish Passage Facilities* study, notably in Section 6.3, Part 2, Task 6, which proposes to elevate flows in April and May and measure outmigration response and success. The entire “Migration Corridor Protection” aspect of this study was completely ignored by the Panel, was not addressed by FERC staff either in its Study Plan Determination or during the Dispute Panel technical meeting, and was unfortunately not explicitly defended by the disputing agencies.

The need to measure response of salmonids to changes in flow was dismissed by the Panel in favor of a proposed habitat modeling exercise to analyze juvenile rearing habitat.²⁰ For

¹⁹ In Comments on Licensee Proposed Study Plan, 20090716-5008, pp. 17-23, Conservation Groups quote extensively from letters written by licensee to the Commission or other parties which promise imminent pursuit of studies of salmon downstream of Crocker-Huffman. Most of these studies were never completed. In addition, licensee wrote to the Commission on January 11, 2001:

“By the time those studies are completed and adequate data exists to assess the relative impact of freshwater flows and other factors on salmon production and survival, the District will be approaching the end of its current license for Project 2179 (the license expires in 2014). **The relicensing process will be the appropriate forum to address the needs for any permanent modification to the project’s minimum flow requirements or other terms and conditions.**” (p. 3).

The Panel was likely unaware of this history of delay, but the Commission should not forget it. Licensee was clearly aware of its opportunity to provide study results that would have more completely informed the relicensing record regarding Merced River salmon. Instead, they are now proposing to move the compliance point upstream where dams owned by Commission licensees currently block most salmon passage, entirely changing the purpose of FERC-required releases. Rather than reward licensee for its strategy of delay and switch, the Commission should make the best use of evidence that can be collected within the ILP timeframe. If evidence collected within the ILP timeframe is not sufficiently defensible, the Commission should adopt broadly protective interim measures for Merced River salmonids while at the same time establishing continuing studies and a clear process for their evaluation within the terms of the new project license.

²⁰ Panel’s Report, at p. 31 and pp. 34-35.

their part, the “MOU studies” proposed by the licensee to be conducted “outside of relicensing” over a longer, indefinite timeframe contain no flow-response aspects: they simply propose to measure what happens to fish under existing conditions. Unfortunately, we already know that under existing flow conditions: salmonids in the lower Merced River are on a fast road to extinction.

During the technical conference on November 17, one of the licensee’s consultants described technical issues with the proposed *Salmonid Floodplain Rearing* study and the proposed and proposed *Anadromous Fish Passage Facilities* (without referring to the studies by name). These issues included the potential that insufficient numbers of hatchery fish would be available to use in order to measure response to flow. Concern was also raised with the proposal to kill a significant number of juvenile fish in order to gather data.

To some extent, this concern may have merit. This is no reason to summarily reject the entire concept, however. Just as nothing prevented the Study Panelists from proposing modifications to the studies, nothing stops the Commission from consulting with the parties and modifying the studies in order to address technical problems.

In addition, the Panel proposed eliminating the *Anadromy Salmonid Habitat* study, which focuses explicitly on *O. mykiss* in the lower Merced River. The Panel was apparently unaware of the fact that there is almost no information available about population, abundance and, above all, life history of *O. mykiss* in the lower Merced. (The existing studies focused almost exclusively on Chinook salmon.)²¹ This is all the more perplexing since Central Valley steelhead are a listed species,²² and considerable controversy exists over the extent of their populations and opportunities for the restoration or enhancement of their population in the lower Merced River. The Panel recommends using a previously-published, broad-brush document as a surrogate, but that document is entirely inadequate to the task, and the document actually states that it **does not** serve the function for which the Panel would use it²³.

To the extent they have value, the MOU studies must be incorporated into the FERC process

Agency Panelist Larry Thompson also notes on pages 5–6 of his Report that there are proposed other studies (“MOU studies”) of salmon downstream of Crocker-Huffman. He

²¹ “Now, summertime flows for steelhead is a whole different issue, because, you know, allegedly there's one steelhead that's ever been found in the Merced River. So that's never really -- to be frank, that's never been a focus of the research.” Merced ID fisheries consultant Dave Vogel, Study Dispute Meeting transcript, at p. 275. (20091117-4014).

²² Section 7 Consultation for steelhead will be required for this relicensing process.

²³ See *Merced River Biological Monitoring and Assessment, Vol 2, 2008*, p. 8-6, stating that the authors could not determine the life histories of the *O. mykiss* they found in surveys both above and below Crocker-Huffman.

suggests that the Commission should have "encouraged MID to incorporate the MOU study plans in their revised study plan."

We agree with the Agency Panelist. Studies of salmon in the Merced River should be incorporated into the relicensing process and subject to the reporting requirements and opportunities for comment and review under the ILP. As partially discussed above, there are significant and substantive gaps in the proposed MOU studies. Incorporating those studies into this proceeding would help the Commission to ensure that those gaps are closed and that the information provided by the studies is high quality and sufficient for the Commission to use it to make a determination.

Any incorporation of those studies into the immediate proceeding should begin by assuring that all of the study elements, including incorporation of flow-response elements, individually and in combination, of the *Anadromy Salmonid Habitat*, *Anadromous Fish Passage Facilities*, and *Salmonid Floodplain Rearing* studies are included in the relicensing process.

Conservation Groups recommend that the Commission call and actively direct a technical conference to combine and integrate needed studies of salmon and *O. mykiss* in the Merced River downstream of Crocker-Huffman Diversion Dam, within the Integrated Licensing Process.

Proposal to Phase Studies

Both the Study Dispute Panel and the Agency Panelist recommend, to varying degrees, phasing studies.

At page 17, the Panel recommends reconsideration of the *Reservoir Water Temperature Management Feasibility* study based on evaluation of some of the results of the *Water Temperature Modeling* study. Conservation Groups agree that this is appropriate: an engineering study should be conducted within a framework of specifically established conditions, opportunities and objectives.

At pages 32-33, the Panel recommends phasing the Chinook Salmon Egg Viability Study dependent on evaluation of the results of the *Water Balance/ Operations Model* study, the *Water Temperature Modeling* study, and the *Water Quality* Study. As stated above, it does not make sense to evaluate whether there are direct effects of the project on anadromous fish downstream of the project when the Panel has already determined that there are.

Merced ID, in its Comments on the Study Dispute Panel's findings states that it is not necessary to phase studies because "the ILP regulations provide that, based on the results of the first year of studies, FERC may direct Licensee to perform studies in a second year. Predisposing what those studies might be is contrary to ILP regulations."²⁴

²⁴ 20091207-5109 at pp. 4-5.

Conservation Groups take particular note of this effort by Merced ID to constrain the Study Plan Determination process.

Merced ID's principal consultant, James Lynch of HDR/DTA, who signed the certificate of service for Merced ID's December 7, 2009 comments, knows full well that the Commission has established a de facto bar for a second year of studies than is substantially higher than its requirements for first year studies. Mr. Lynch has previously exploited this procedural reality, as in, for example, his perfunctory and summary dismissal of the U.S. Forest Service's request for a second year of fish population studies on the DeSabra – Centerville Project.²⁵

It is completely appropriate, as suggested by the Panel and by the Agency Panelist, for the Commission to consider a policy of establishing specific contingencies that are folded into its Study Plan Determinations. If specific second year studies are contingent on results from a first year, that should be stated in the Study Plan Determination, and the criteria for acceptance of later studies should be made clear now, so as to avoid the usual argument later, when the bar tends to be higher.

The Director needs to address fish passage in his study determinations for both the Merced River Project and the Merced Falls Project

The Panel recommends that the Commission not order the following studies related to fish passage: *Anadromous Fish Passage Facilities*, *Anadromous Fish Passage*, *Anadromous Conservation Hatchery*, and *Upper River Fish Populations and Habitat*.

The Panel says that there are no known “proposals to reintroduce anadromous fish within Lake McClure or the upper Merced River.”²⁶ However, NMFS's October, 2009 *Public Draft*

²⁵ 20070418-5031 Response to comments on the Supplemental Initial Study Report, U.S. Forest Service, page 21:

“As a request for a new study, USFS has not shown good cause why the study should be approved. Specifically: 1) USFS has not described any material changes in the law or regulations since FERC-approved the original study plan; 2) USFS has not provided a compelling argument regarding why the methodology used in the existing FERC-approved study plan should be changed; 3) USFS did approve the use of alternative methods to electrofishing when it approved the Fish Population study plan (See Licensee's July 18, 2005, Revised Study Plan); and 4) USFS has not described any significant proposed changes to the Project or significant new information that would warrant approval of the study. USFS has not addressed FERC's 7 study plan criteria at 18 CFR § 5.9(b). Licensee believes the goals and objectives of this study were met and fish population characterization, when combined with existing fish population information, will provide Relicensing Participants with information on fish populations in Project-affected stream reaches.”

²⁶ Panel's Report at p. 23.

*Central Valley Recovery Plan*²⁷ makes a preliminary evaluation of the Merced River upstream of New Exchequer as potential habitat for salmon and particularly for steelhead. Further, NMFS has devoted considerable staff time in maintaining a consistent presence in this relicensing and has repeatedly made study requests asking licensee to evaluate the habitat and passage.

Conservation Groups fail to understand what more in the way of a plan or proposal it is reasonable to ask for in the absence of a habitat and passage evaluation. If the panel is suggesting that it is NMFS's responsibility to conduct the evaluation of the habitat upstream that is blocked almost entirely by Merced Irrigation District, prior to asking the District itself to evaluate the habitat, then we disagree. Blockage of passage is a project effect. The nature of that effect and the difficulty in overcoming it is largely attributable to the project, in spite of cumulative contributions made to the situation by partial blockage at licensee's Crocker-Huffman facility and by the current barrier to passage at PG&E's Merced Falls. The importance of the evaluation is amplified by the dire condition of the fishery downstream of the dams on the Merced River.

The Panel suggests that studies to evaluate the fish habitat and use upstream of the Merced River Project, or to evaluate passage past the project, be disallowed by until such time as anadromous fish are able to reach McSwain Dam, although the Panel notes that "If the Commission considers assessing the effects of MID's project and PG&E's Merced Falls Project in a single NEPA analysis, then this information would be most helpful."²⁸

The Panel further proposes study to evaluate whether Crocker-Huffman is a complete barrier to anadromous fish.²⁹ If Crocker-Huffman is proven not to be a complete barrier to upstream migrating fish, then the panel leaves it to the Commission to apportion responsibility between Merced Falls Project and Merced River Project for examining passage.³⁰

It appears that the owner of the Merced Falls Project, PG&E, may be left with the entire responsibility for fish passage on the Merced River, since Merced Falls is the first dam upstream of Crocker-Huffman. Merced ID's Comments suggest exactly this linear assignment of responsibility: "If fully operational fishways were in place at the Project dams today, the fishways would not pass a single anadromous fish either upstream of downstream of the Project." Also: "Although the Panel expressed ambivalence as to whether there is competent evidence of anadromous fish ascending Crocker-Huffman Diversion Dam, the Panel acknowledges, as it must, that '*...anadromous fish can not pass*

²⁷ Available at <http://swr.nmfs.noaa.gov/recovery/centralvalleyplan.htm>.

²⁸ Panel's Report at p. 23.

²⁹ Panel's Report at p. 9.

³⁰ Ibid.

upstream of Merced Falls dam (Panel's Report, p. 23), and *'anadromous fish can not currently access the base of McSwain Dam'* (IBID, p. 23)."³¹

Since there is no riverine habitat between Merced Falls and the Merced River Project (McSwain), and little below New Exchequer, Merced ID's piecemeal approach would leave PG&E to establish a fish ladder to nowhere. Merced ID, whose project places two dams and twenty-seven miles of reservoir between upstream riverine habitat and Merced Falls, and whose financial and other direct and indirect benefits from its project are orders of magnitude greater than those gained by PG&E at Merced Falls, would be absolved of all responsibility.

No weight is given to the fact that Crocker-Huffman, the non-project partial barrier downstream of the project, is owned and operated by the owner and operator of the Merced River Project. Further, no weight is given to the fact that the Merced River Project exists largely to supply water at Crocker-Huffman.

No weight is given to the following context, which is well stated on page 7 of the proposed *Anadromous Fish Passage* study:

Although the reach between Merced Falls Dam and Crocker-Huffman Diversion Dam may have limited opportunities to create "tailwater" *O. mykiss* habitat for spawning and rearing, fish passage past Crocker-Huffman Diversion Dam and Merced Falls Dam is technically relatively simple, whilst passage past McSwain Dam (and reservoir) and New Exchequer Dam (and reservoir) are serious and formidable challenges. However, without the Merced River Hydroelectric Project in place, anadromous fish passage could be achieved with relative simplicity, by simply reconfiguring existing fish ladders to modern standards. Further, but for the Merced River Hydroelectric Project, there would be less available water to divert (only by the Crocker-Huffman Diversion Dam, which was the historic condition in 1925) and the Merced River would return to a more natural "run-of-the-river" hydrography, which would improve connectivity and habitat quantity/quality for steelhead trout.³²

Structurally, or procedurally, there is no room left even for consideration of a comprehensive solution to passage using trap and haul to bypass all the dams, including Crocker-Huffman.³³ If the Commission accepts Merced ID's self-serving linear logic, the

³¹ 20091207-5109 at p. 3.

³² See 20091104-5072, pdf pagination p. 220.

³³ Contrary to Merced ID's effort to narrow consideration of fishways, Conservation Groups note that the facilities required for a trap and haul program fall squarely within the purview of Section 18: See CLARIFICATION OF AUTHORITY REGARDING FISHWAYS, Pub. L. 102-486, title XVII, Sec. 1701(b), Oct. 24, 1992, 106, Stat. 3008:

"...Provided further, That the items which may constitute a 'fishway' under section 18 for

Commission will never see the forest for the branches of the individual decision trees. To investigate the feasibility of passage and the adequacy of habitat upstream of Lake McClure, the Director will need to act affirmatively. The Director has the authority to do so in order to fulfill the Commission's comprehensive planning responsibilities set forth in Section 10(a) of the Federal Power Act.

The Agency Panelist recommends adoption of the *Anadromous Fish Passage Facilities*,³⁴ *Anadromous Fish Passage*, and *Upper River Fish Populations and Habitat* studies. The Agency Panelist suggests a phased approach to the Anadromous Conservation Hatchery study. Conservation Groups agree with and support these recommendations by the Agency Panelist. We also recommend that the Director consider assigning a portion of the responsibility for these studies relating to fish passage to the licensee for Merced Falls (P-2467), under the ongoing relicensing proceeding for that project.

Conclusion

The study development process for the relicensing of Merced River Hydroelectric Project has been extraordinarily messy. This is an artifact of multiple factors:

- The short timeframes of the Integrated Licensing Process make this process difficult in the best of circumstances.
- Merced ID's and its consultant's attempt to use process to exclude all of the central substantive fishery issues from the proceeding has exponentially complicated study development.
- The lack of oversight and engagement by senior FERC staff and counsel in the face of this extraordinary effort by licensee has led to considerable confusion.
- The lack of specificity and minimal statement of rationale within the Study Plan Determination regarding the decisions made in the document frustrated clarity and confused agencies in making their responses.
- The lack of experience on the part of all parties with the Study Dispute Resolution process, combined with the lack of clear and detailed procedural requirements, caused further confusion.

Nonetheless, this process now presents an extraordinary opportunity both substantively within the proceeding and procedurally in regards to future study plan processes, determinations and disputes.

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."

³⁴ Recall that the *Anadromous Fish Passage Facilities* study also addresses study of salmon downstream of Crocker-Huffman, as noted above.

Substantively, it is never wrong or too late to get it right. The arguments about lack of nexus are untenable. The notion that there may not be enough water available to set needed instream flows for downstream fisheries is based on a legal misunderstanding by staff. And the need to address passage in response to real-world conditions of multiple factors is clear. Procedurally, FERC should consider steps to make the process better for the long run while not allowing the current procedural confusion to be used to keep vital information out of the decisional record for this proceeding. We have several recommendations for how the challenges posed by the current proceeding could be resolved.

First, Conservation Groups recommend that the Director reconsider the Study Plan Determination in light of the record to date, and issue a preliminary finding, not on which studies should be accepted at this time, but on which studies were inappropriately disallowed in the Study Plan Determination, and why that disallowance was inappropriate or inconsistent with the Commission's policies and authorities.

We recommend that the Commission issue a Scoping Document 3. As cited above, the Study Panel, the Agency Panelist, and the FERC staff project manager have all stated that the Merced River Project has direct effects downstream of Crocker-Huffman Diversion, A new scoping document should recognize these effects. In addition, the scoping document should recognize that the Merced River Project, the Merced Falls Project, and the Merced ID facility at Crocker-Huffman cumulatively block passage to the upper Merced River for anadromous salmonids, and that the effects of the Merced River Project qualitatively and decisively compounds the effects of the dams downstream. In general, therefore, the Merced River from Yosemite National Park to Shaffer Bridge is the appropriate scope for the NEPA analysis. Further, in certain clearly defined cases such as studies and issues related to Chinook salmon migration and juvenile rearing habitat, which the Commission must enumerate and for which it must provide a rationale, the Commission should recognize that the scope of project effects extends downstream to the confluence with the San Joaquin River.

Next, we recommend that the Commission and all parties to the proceeding come together in a good faith effort to get a comprehensive grip on the accepted studies, the proposed studies, and the "MOU studies" that are otherwise under consideration but not directly addressed in this licensing. As recommended above, this can be best accomplished by calling a technical conference, under direction of Commission staff, This conference should take place in January 2010, and should last as long as it takes to complete its work. Though not necessary for a resolution, the Commission could also choose to include discussion of studies for the Merced Falls relicensing at this conference.

Finally, we recommend that, after this conference, the Director should issue a Final Study Plan Determination. We are hopeful that it can be the result of sound technical decisions about how to most effectively make responsible choices to create a robust record, rather than of the fallout from the efforts by the licensee to avoid responsibility for Project effects, to the detriment of struggling populations of salmon and steelhead.

Respectfully submitted,



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"An Advocate for Fisheries, Habitat and Water Quality"

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