



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802- 4213

May 21, 2012

In response, refer to:
FERC P-2299-076/-075

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

Re: Motion to Intervene and Request for Rehearing of the Federal Energy Regulatory Commission's Order Clarifying Proceeding on Interim Conditions (P-2299-076) for the Don Pedro Hydroelectric Project and its Relicensing (P-2299-075), Tuolumne River, California

Dear Secretary Bose:

The United States Department of Commerce's National Oceanic and Atmospheric Administration's National Marine Fisheries Service provides our Motion to Intervene and Request for Rehearing in Enclosure A regarding the Federal Energy Regulatory Commission's "Order Clarifying Proceeding On Interim Conditions" (P-2299-076), dated April 19, 2012, for the Don Pedro Hydroelectric Project and its Relicensing (P-2299-075).

Thank you for the opportunity to participate in these proceedings. If you have questions regarding these documents, please contact Mr. Richard Wantuck at (707) 575-6063.

Sincerely,

for Rodney R. McInnis
Regional Administrator

Enclosures

cc: Steve Edmondson, NMFS, Santa Rosa, Ca
Maria Rea, NMFS, Sacramento, CA
Service List P-2299-076/-075



UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Turlock and Modesto Irrigation Districts)	
New Don Pedro Hydroelectric Project)	Project No. 2299-075
Order Clarifying Proceeding on Interim Conditions)	Project No. 2299-076
<u>Tuolumne River</u>)	

U.S. DEPARTMENT OF COMMERCE'S
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S
NATIONAL MARINE FISHERIES SERVICE'S MOTION TO INTERVENE AND
REQUEST FOR REHEARING OF THE ORDER CLARIFYING PROCEEDING ON
INTERIM CONDITIONS

Pursuant to Rules 214 and 713 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure,¹ the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, United States Department of Commerce hereby timely moves for intervention and submits its Request for Rehearing of the Commission's April 19, 2012 "Order Clarifying Proceeding on Interim Conditions" ("Order Clarifying Proceeding").²

I. Background

On December 28, 2010, the Tuolumne Preservation Trust, California Trout, Friends of the River, and California River Restoration Fund ("Conservation Groups") filed a "Request for Final Action on Proceeding on Interim Measures to Protect Fishery Resources Pending Reclicensing" ("Request for Final Action").³ On April 19, 2012, in response to the Conservation

¹ 18 C.F.R. §§ 385.214, 385.713 (2011).

² FERC, *Order Clarifying Proceeding on Interim Conditions*, 139 FERC ¶ 61,045 (April 19, 2012).

³ Conservation Groups' *Request for Final Action on Proceeding on Interim Measures to Protect Fishery*

Groups' Request, the Federal Energy Regulatory Commission's ("FERC" or "Commission") issued its Order Clarifying Proceeding in the above-referenced matter.

NMFS timely intervened in these proceedings on July 25, 2005. Following its July 2005 intervention and continuing to the present, NMFS has actively participated as a party to these proceedings, including full participation in the non-adversarial fact-finding ("Interim Measures") proceeding that is the subject of the above-referenced Conservation Groups' Request and subsequent Commission Order. Nevertheless, out of an abundance of caution, and should the Commission deem the instant proceeding to constitute a new separate proceeding requiring a new motion to intervene, NMFS hereby timely moves for intervention.

Service of process and other communications concerning this proceeding should be made to:

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And, for the reasons more fully set forth below, NMFS further moves to request rehearing of the Commission Order Clarifying Proceeding on Interim Conditions.

Resources Pending Relicensing, e-library no. 20101228-5063 (December 28, 2010).

II. NMFS' Interest in this Proceeding

NMFS has statutory responsibility for the protection and enhancement of living marine resources, including anadromous fish and their supporting habitats, under the ESA, 16 U.S.C. §1531 *et seq.*, Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §1801 *et seq.*, Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §661 *et seq.*, and Reorganization Plan No.4 of 1970, 84 Stat. 2090. The San Joaquin River Basin once supported a number of anadromous fish species, including Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and California Central Valley steelhead (*O. mykiss*), which are listed under the Endangered Species Act (ESA) as threatened.

NMFS has found that impacts from hydropower development have contributed substantially to the decline of these fishes (63 Fed. Reg. 11482, March 9, 1998; 63 Fed. Reg. 13347, March 19, 1998; 64 Fed. Reg. 50394, September 16, 1999; 69 Fed. Reg. 33102, June 14, 2004; 70 Fed. Reg. 37160, June 28, 2005; and 71 Fed. Reg. 834, January 5, 2006). NMFS has designated critical habitat on the Tuolumne River for California Central Valley steelhead (70 Fed. Reg. 52488, September 2, 2005). In addition, the San Joaquin River may have supported green sturgeon, the Southern DPS of North American green sturgeon (*Acipenser medirostris*) is listed under the ESA as threatened, and hydropower development contributed to the decline of this DPS (70 Fed. Reg. 17386, April 6, 2005; 71 Fed. Reg. 17757, April 7, 2006). Dams have also contributed to the decline of Central Valley fall and late fall-run Chinook salmon ESU, which is listed as a species of concern, including the San Joaquin River basin (64 Fed. Reg. 50394, September 16, 1999; 71 Fed. Reg. 61022, October 17, 2006).

The effects of dams on passage and flow conditions, habitat, water quality, and other effects on anadromous fish resources directly concern NMFS under the statutory authorities listed above.

III. Statement of Issues and NMFS' Position on the Issues Presented

NMFS incorporates the description of the procedural history of this matter as set forth in several of NMFS' previous filings in this proceeding, as well as by reference to the Conservation Groups' recent Request for Final Action.⁴ NMFS further incorporates by reference and reasserts every allegation of fact and law set forth in its previous filings in this matter. *See* fn. 4, *supra*. To the extent consistent with NMFS' interest in these proceedings, NMFS also incorporates by reference, adopts, and reasserts every allegation of fact and law set forth in the Conservation Groups' December 2010 Request for Final Action. *Id.*

The Commission erred in issuing the Order for the following reasons:

A. The Commission's Failure to Issue a Timely Decision on the Need for Interim Measures to Protect Fishery Resources Pending Relicensing Violates Administrative Procedure Act (APA) Section 706(1), and the Commission's Subsequent Determination that a Decision is Not Warranted is Erroneous and Unsupported in the Record

The FERC Order Clarifying Proceeding avers that no decision or action by FERC is now necessary because the Commission "previously found in its July 2009 order that interim conditions were not warranted." Order Clarifying Proceeding at ¶¶ 26, 74. The Commission attempts to support its erroneous conclusion by suggesting that the sole purpose of the interim

⁴ *See National Marine Fisheries Service's Request for Rehearing of Order on Ten-Year Summary Report Under Article 58*, e-library no. 20080505-5007 (May 2, 2008); *Statement of the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and Conservation Groups Regarding Report to the Commission by Administrative Law Judge Charlotte J. Hardnett in Don Pedro Project Rehearing*, 20100105-5060 (January 5, 2010); *Conservation Groups' Request for Final Action on Proceeding on Interim Measures to Protect Fishery Resources Pending Relicensing*, e-library no. 20101228-5063 (December 28, 2010).

conditions hearing was, in essence, mediation established to help broker a settlement between the parties. In short, the Commission contends that its July 2009 order represents its final decision on interim measures, and that absent a brokered settlement, or recommendations by the assigned ALJ, there was nothing further for the Commission to do. In this regard, the Commission alleges:

As explained in more detail below, the Commission previously found in its July 2009 order that interim conditions were not warranted. The non-adversarial fact finding proceeding on interim conditions before a settlement judge ended without any recommendation for Commission action. It did not identify a clear need for interim measures to protect fishery resources, and also did not identify any interim measures that could feasibly be implemented pending relicensing without the need for an environmental review and further proceedings. As a result, we clarify that no further action is required with respect to that proceeding.

* * *

In providing for a proceeding on interim conditions, our intent was to assist the parties in determining whether there might be some basis for agreement on interim conditions and, if not, whether the presiding judge could recommend any measures that might feasibly be implemented pending relicensing

Order Clarifying Proceeding at ¶¶ 26, 64.

FERC's assertions are simply not consistent with the factual record. The July 2009 Order on Rehearing is replete with reference to the Commissions' acknowledged need and intent to further consider the need for interim measures pending relicensing of the Don Pedro Project:⁵

We have concluded that interim measures may be needed to protect fishery resources pending relicensing, and that *additional procedures will be necessary to assist us in determining what measures should be required.*

July 2009 Order on Rehearing at ¶ 52 (emphasis added).

⁵ FERC, *Order On Rehearing, Amending License, Denying Late Intervention, Denying Petition, And Directing Appointment Of A Presiding Judge For A Proceeding On Interim Conditions*, 128 FERC ¶ 61,035 (July 16, 2009) ("July 2009 Order on Rehearing").

In light of our finding that steelhead are present, *we have determined that several actions are required to assist in determining whether interim measures are needed pending relicensing.*

July 2009 Order on Rehearing at ¶ 66 (emphasis added).

However, based on our reevaluation of existing information and consideration of this new evidence, we find that the Districts should be required to develop and implement an instream flow study to determine flow requirements for Central Valley steelhead and Chinook salmon. We further find that *additional procedures are needed to assist in determining whether interim measures should be required pending relicensing*, and, if so, what measures are feasible.

July 2009 Order on Rehearing at ¶ 86 (emphasis added).

However, in light of the presence of ESA-listed steelhead and the serious decline of fall-run Chinook salmon that is occurring, *there may be a need for interim protective measures pending relicensing.*

July 2009 Order on Rehearing at ¶ 88 (emphasis added).

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.

July 2009 Order on Rehearing at ¶ 99 (emphasis added).

After reviewing the report and the parties' comments, we will reconsider the need for interim protective measures pending relicensing, in light of the information developed in this proceeding on interim conditions. We will also consider whether further procedures, such as preparation of an environmental assessment or initiation of ESA consultation, may be needed before any proposed interim measures can be implemented.

July 2009 Order on Rehearing at ¶ 102 (emphasis added). Finally, as the Conservation Groups correctly indicate in their Request for Final Action, the assigned ALJ herself clearly understood that the Commission was to issue a final decision in this matter.

The July 16, 2009 Order . . . specifies that the Commission will make the ultimate decision, on the basis of the Final Report and parties' comments, whether interim protective measures are necessary and, if so, how such measures can be implemented.

Final Report of the Presiding Judge on Interim Measures, 129 FERC ¶ 63, 015 at ¶ 14 (November 20, 2009).

As the above-quoted portions of the July 2009 FERC Order on Rehearing and the Final Report of the Presiding Judge on Interim Measures demonstrate, the interim measures proceeding was intended to serve several purposes. NMFS certainly acknowledge that one such purpose of the interim measures proceeding was to assist the parties in evaluating mutually acceptable solutions. The July 2009 Order goes well beyond simply having the ALJ serve in the role of mediator to the parties, however. That Order quite clearly requires development of the record in order to assist *the Commission* in making a final decision on the need for interim protective measures pending relicensing.

Because the Commission *is* required to take final action on the proceeding on interim measures to protect fishery resources in the lower Tuolumne River pending relicensing, its failure to do so in a reasonable period of time is a clear violation of Administrative Procedure Act section 706(1).⁶ To the extent that the Commission's

⁶ 5 U.S.C. § 706(1) (2006) (providing that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed"). We reincorporate by reference and adopt the argument and citation contained in the Conservation Groups' Request for Final Action on this point.

Order Clarifying Proceeding finds otherwise, it reaches a demonstrably erroneous result and must be reconsidered.

1. The Commission's Determination that the Need for Interim Measures was Finally Decided in the July 2009 Order on Rehearing, and Not Now Subject to Challenge, is Erroneous and Unsupported in the Record of this Proceeding

The Commission contends that its July 2009 Order on Rehearing represented a final Commission decision on the need for interim measures, and that the parties to this proceeding should have requested a new rehearing of that decision if they disagreed. If only the Commission's Order was quite so clear. Unfortunately, the Commission now not only attempts to rewrite history, it also denies the parties to this proceeding due process.

As the Commission stated in the July 2009 Order on Rehearing, “[w]e do not currently have sufficient information to conclude that the agency-recommended flows should be required on an interim basis.” July 2009 Order on Rehearing at ¶ 85. The obvious corollary to this is that neither did the Commission have sufficient information to conclude that the agency-recommended conditions should not be required. For that very reason – to develop the record sufficiently enough to make a final determination on whether interim conditions were warranted – the Commission set this matter for a fact-finding proceeding before an ALJ. To claim now that the Commission had, in July 2009, already reached a final decision on the need for interim measures is not supportable in the record.

Furthermore, NMFS cannot now fathom how it could have known to request rehearing of what appeared at the time to be a favorable result. To be clear, the Commission's July 2009 Order on Rehearing granted NMFS 2008 request for rehearing (*see* fn. 4, *supra*), in part, by ordering 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.” To suggest that NMFS should have known that this outwardly favorable result actually represented an unfavorable final Commission decision that no interim measures are necessary, is simply illogical.

If it was the Commission’s subjective intent to issue a final decision on the need for interim measures in its July 2009 Order on Rehearing, it certainly was not made clear to the parties at the time. What is objectively clear, on review of all of the facts of this case as set forth above, is that the 2009 Order on Rehearing did no such thing. The Commission’s decision that the 2009 Order on Rehearing represents a final decision on the need for interim measures is erroneous and unsupported in the record and it must now be reconsidered.

B. The Commission’s April 2008 Order on the Summary Report⁷ AND its July 2009 Order on Rehearing and Order Clarifying Proceeding all Represent Federal Actions Requiring Consultation Under Section 7 (a)(2) of the ESA

NMFS feels compelled to reiterate the positions that it has previously raised regarding consultation under the ESA to ensure that this Request for Rehearing is not interpreted as implicitly waiving any arguments previously raised. Moreover, NMFS avers that the actions taken by the Commission in its July 2009 Order on Rehearing (*see* fn. 4, *supra*) and in its subsequent Order Clarifying Proceeding (*see* fn. 4, *supra*) are federal actions sufficient to trigger the requirement to initiate consultation under the ESA.

Under Section 7(a)(2) of the ESA, the Commission is required to insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species or adversely modify or destroy critical habitat. 16 U.S.C. § 1536 (a)(2). The Commission’s July 2009 Order on Rehearing and its Order Clarifying

⁷ *Order on Ten-Year Summary Report Under Article 58*, 123 FERC ¶ 62,012 (April 3, 2008).

Proceeding continue to refer to informal consultation between the parties. July 2009 Order on Rehearing ¶ 35 (“[T]he Commission anticipated that the parties would consult informally and perhaps agree on whether any changes in project operations might be necessary, . . . [i]f the parties agreed on a proposal to amend the license, the Commission could then initiate formal consultation on that proposed action”). However, the Commission’s apparent reliance on informal consultation does not satisfy its statutory obligations under the ESA. Under the ESA’s implementing regulations, consultation can only be initiated by FERC and occurs between FERC and NMFS. Although NMFS has formally petitioned FERC twice, to initiate consultation and requested several times, the Commission has never initiated consultation and therefore operates outside the requirements of section 7(a)(2).

In its July 2009 Order on Rehearing, the Commission argues that the Ninth Circuit Court of Appeals decision in *California Sportfishing Protection Alliance v. Federal Energy Regulatory Comm’n*, 472 F.3d 593 (9th Cir. 2006) controls the resolution of this matter. 2009 Order on Rehearing at ¶ 38 (“This case falls squarely within the holding of *California Sportfishing*”). As NMFS previously explained in its May 2008 Request for Rehearing (*see* fn. 4, *supra*), the circumstances for the Commission’s Order on Ten-Year Summary Report Under Article 58 are easily distinguished from the circumstances addressed by *California Sportfishing*. The circumstances for the Commission’s July 2009 Order on Rehearing and Order Clarifying Proceeding are similarly distinguished. In fact, the reasoning in the Ninth Circuit’s decision supports the need for the Commission to initiate formal consultation under ESA section 7 in this matter. As we stated in our 2008 Request for Rehearing:

In determining whether consultation was required under ESA section 7(a)(2), the court in *California Sportfishing* focused on the triggering mechanism for consultation, which is an agency action, not the listing of a species under the circumstances. *Id.* at 597. The court noted that a private party, the licensee, operates the hydroelectric project, and the

Commission “has proposed no affirmative act that would trigger the consultation requirement for current operations.” *Id.* at 598. In addition, the court discussed the reopener provisions of the license. The court concluded, “[t]he reopener provisions in and of themselves are not sufficient to constitute any discretionary agency ‘involvement or control’ that might mandate consultation by FERC.” *Id.* at 599. Finally, the court concluded, “[t]here is no ongoing government action within the meaning of the ESA.” Therefore, the court held that the Commission was “not required to initiate separate consultation with respect to [the licensee’s] operation of the project under the existing, 1980 license agreement.” *Id.* at 599.

The circumstances for the Commission’s 2008 Order on Ten-Year Summary Report in the Don Pedro Project are substantially different than those addressed in the *California Sportfishing* decision. In the Order on Ten-Year Summary Report, the Commission amended Article 58 of the license to implement a monitoring program and reserved the following specific authority related to the results of this monitoring program:

Based on the information provided in the Licensees’ study results to be filed by April 1, 2005, the Commission will determine whether to require further monitoring studies and changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing.

76 FERC - 61,117 (1996), paragraph G. After the Districts filed the Summary Report, the Commission provided notice, dated June 24, 2005, of filing of the Summary Report, including notice of “licensees’ proposals for continuing their current monitoring program, consultation and reporting efforts, flow release schedule, flow fluctuation controls, and habitat restoration projects.” This notice began a proceeding in which NMFS and other agencies and organizations have participated and provided numerous, substantial comments (see the Background section of NMFS 2008 Request for Rehearing). Finally, in the Order on Ten-Year Summary Report, the Commission took “final agency action” which includes its determination that no change is necessary to existing flow requirements under Article 37 of the license and its determination regarding monitoring studies that will or will not be required under the license. In the language of the Commission’s License Amendment order quoted above, the Commission has determined “whether to require further monitoring studies and

changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing.” Unlike the circumstances addressed in the *California Sportfishing* decision, the action under consideration here is more than simply a private party's continuing action of operating the project under an existing license. The Commission has exercised its discretion under the license, it is authorizing the licensees to take certain actions under the license related to flows and monitoring, and it is taking “final agency action” in the Commission's own words. NMFS 2008 Request for Rehearing at 10-12.

In its 2009 Order on Rehearing (addressing NMFS' 2008 Request for Rehearing), the Commission notes that the court in *California Sportfishing* found that the “ongoing operation of a licensed hydropower project is private, not federal agency action, and . . . the existence of a reopener provision, without more, does not constitute discretionary federal involvement.” 2009 Order on Rehearing at ¶38. However, as NMFS's explains above, this case is not merely about the ongoing operation of the Don Pedro project or the existence of a reopener provision in the Don Pedro project license. Here, the Commission has in fact taken action in its determinations regarding flow requirements for the project, including its retained discretion over such flows, as well as in its amendment of Article 58 of the license to implement a monitoring program. In its July 2009 Order on Rehearing, the Commission states that its “retained discretion over minimum flows for fishery resources, as reflected in Articles 37 and 58 of the license” are not sufficient to trigger consultation. NMFS respectfully disagrees. Moreover, the Commission fails to explain why its amendment of Article 58 of the license is not sufficient to trigger consultation.

In sum, the Commission's action, as embodied in the Order on Ten-Year Summary Report, which will result in adverse effects to listed steelhead, triggers the requirement for

formal consultation under ESA section 7(a)(2). In addition, the Commission must determine whether its action may affect critical habitat of Central Valley steelhead and consult with NMFS under ESA section 7(a)(2) regarding adverse Project effects to critical habitat of Central Valley steelhead resulting from the Order on Ten-Year Summary Report. *See* 50 CFR § 402.14.

1. The Commission’s July 2009 Order on Rehearing and Order Clarifying Proceeding Represent Federal Actions Triggering Consultation Under Section 7 (a)(2) of the ESA

In its July 2009 Order on Rehearing, the Commission amended license Articles 37 and 58 at the behest of the U.S. Fish and Wildlife Service to “ensure appropriate participation by NMFS” in any modifications to the flow schedule under Article 37 and in the monitoring program for Chinook salmon and steelhead under Article 58. The Commission agreed to amend the license, stating that “[b]ecause both Chinook salmon and steelhead are species for which NMFS has jurisdiction, we will amend these articles to add NMFS as a consulted agency.” July 2009 Order on Rehearing at ¶ 97. In so doing, the Commission alleges that the “amendment is procedural in nature” and “not the type of action that can trigger formal consultation under the ESA.” *Id.* at ¶ 97, fn.90. Once again, NMFS respectfully disagrees. In requiring the Don Pedro licensees to consult with NMFS with respect to flow modifications and fishery studies, the Commission has done more than simply made a “procedural” adjustment to the license. Moreover, in the act of amending the license, the Commission has gone well beyond the holding of *California Sportfishing*. The Commission’s action in this regard is sufficient to trigger consultation under section 7(a)(2). And, finally, to the extent that the Commission’s 2009 Order on Rehearing or the Order Clarifying Proceeding is taking final action on the need for interim

measures on the Don Pedro project,⁸ the Commission's actions embodied in that Order are also sufficient to trigger consultation under ESA section 7(a)(2).

C. The Commission's Failure to Take Action Violates its Responsibilities Under Section 7(a)(1) of the ESA

Section 7(a)(1) of the ESA requires federal agencies to “utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species listed pursuant to [section 4 of the ESA].” 16 U.S.C. § 1536(a)(1). The Commission's 2008 Order on Ten-Year Summary Report and its subsequent 2009 Order on Rehearing fails to comply with the Commission's obligations under section 7(a)(1). In its 2009 Order on Rehearing, the Commission states that section 7(a)(1) does “not expand the authority conferred on an agency by its enabling act” and does “not provide a basis for requiring us to take an action that is not otherwise required by the FPA or ESA 7(a)(2).” July 2009 Order on Rehearing at ¶ 45. Apparently, the Commission believes that section 7(a)(1) contains merely superfluous language. To the contrary, section 7(a)(1) creates independent duties for all federal agencies, including the Commission. To be clear, section 7(a)(1) imposes duties on the Commission to act on behalf of species conservation independent of its other primary mission programs.

NMFS has repeatedly urged the Commission to do more to protect Tuolumne River Chinook Salmon and steelhead, both of which are at risk of extinction (Mesick 2009).⁹ As the Commission acknowledges, the presiding ALJ in the interim conditions proceeding found that

⁸ As indicated in paragraph III.A.1. of this request, we disagree that the 2009 Order on Rehearing constitutes final agency action on the need for interim measures. However, in the event that the Commission fails to reconsider NMFS request and that Order becomes final, the requirement to consult under ESA section 7(a)(2) will be triggered.

⁹ “The High Risk of Extinction for the Natural Fall-Run Chinook Salmon Population in the Lower Tuolumne River due to Insufficient Instream Flow Releases.” Carl Mesick, Ph.D., U.S. Fish and Wildlife Service. September 2009.

the Don Pedro project impedes Tuolumne River flows in ways that negatively impact these species. July 2009 Order at ¶¶ 32-38. Given these findings, the Commission cannot simply wait years for this project to be relicensed to take action to conserve these fishery resources. Contrary to its suggestion, the Commission does not need expanded authority to take the action required by section 7(a)(1). The Commission has adequate existing authority under the FPA to reopen the Don Pedro license and implement the flow regime that NMFS has requested and it should do so immediately.

D. The Minimum and Amended Flow Schedules have Failed to Stem the Risk of Extirpation to Salmon and Steelhead and FERC’s Failure to Implement Agencies Interim Flows Will Put Existing Salmon and Steelhead Stocks at Risk

After 30 years of study and consultation the Licensees have failed to adopt the NMFS requested flows. There is no reason to believe that continuing this process will produce different results. There is adequate information to prescribe interim flows, as NMFS did propose interim measures, including flows, which NMFS stated “are likely to improve the condition of the steelhead and salmon fisheries prior to the new licensing of the Project.” (NMFS filing of Findings of Fact, p. 6)

E. The Commission’s Order Contradicts the Plain Language and Intent of the Original License and has the Effect of Invalidating the Commission’s Statutory “Balancing” that Occurred Under 4(e) of the FPA when the Commission Issued the Original License

NMFS again feels compelled to reiterate the positions that it has previously raised regarding balancing of developmental and environmental values in the public interest under 4(e) of the FPA so that this Request for Rehearing is not interpreted as implicitly waiving any arguments previously raised. We recognize that the Commission addressed our previous arguments on this point in its July 2009 Order on Rehearing at ¶¶ 48-52. The Commission apparently believes that NMFS’ position on this point is that “only an order that fully protects fish can meet the [public interest] standard.” 2009 Order on Rehearing at ¶ 49. Though the Commission does not explain

what it means by “fully protect,” NMFS can only reply that the fishery resources at issue in the Don Pedro project are not protected at all by the existing flow regime. Put simply, we disagree with the rationales and arguments put forth by the Commission in its 2009 Order on Rehearing and aver that the Commission continues to fail to properly balance power and non-power values in the public interest as it is statutorily obligated to do under section 4 of the FPA.

IV. Conclusion

Requested Relief: The Commission’s Order fails to show necessary deference to NMFS, the Federal entity statutorily charged with management of salmon and steelhead under the MSA and ESA.

NMFS respectfully requests that the Commission: 1) Implement the “Interim Measures Elements” put forth by NMFS, the U.S. Fish and Wildlife Service, the California Department of Fish and Game and the Conservation Groups in the Interim Measures Proceeding,¹⁰ and; 2) initiate consultation under ESA section 7(a)(2).

For the above-stated reasons, NMFS respectfully requests that its motion to intervene and request for rehearing be granted.

DATED this 21st day of May, 2012, on behalf of the National Marine Fisheries Service.

¹⁰ See *Statement of the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and Conservation Groups Regarding Report to the Commission by Administrative Law Judge Charlotte J. Hardnett in Don Pedro Project Rehearing*, 20100105-5060 (January 5, 2010) (Appendix A: Agencies Recommended Measure Elements).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Turlock and Modesto Irrigation Districts)
New Don Pedro Hydroelectric Project)
Order Clarifying Proceeding on Interim Conditions)
Tuolumne River)

Project No. 2299-075

Project No. 2299-076

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first class mail or electronic mail, a letter to Secretary Bose of the Federal Energy Regulatory Commission from the U.S. Department of Commerce's National Oceanic And Atmospheric Administration's National Marine Fisheries Service containing our Motion to Intervene and Request for Rehearing for Docket P-2299-076; and this certificate of service upon each person designated on the official service list compiled by the Commission in the above-captioned proceedings.

Dated this 21st day of May 2012



William E. Foster
National Marine Fisheries Service