

COMMENTS
Merced River Hydroelectric Project P-2179
Study Dispute Resolution Process

Chris Shutes
California Sportfishing Protection Alliance

Steve Rothert
American Rivers

Michael Martin, Ph.D.
Merced River Conservation Committee

Brian Johnson
Trout Unlimited

Ronald Stork
Friends of the River

Cindy Charles
Golden West Women Flyfishers
Northern California Council of Federation of Fly Fishers

[contact information is provided
on signature page]

November 20, 2009

E-Filing

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE Room 1-A
Washington D.C. 20426

Dear Ms. Bose:

The California Sportfishing Protection Alliance, American Rivers, Merced River Conservation Committee, Trout Unlimited, Friends of the River, Golden West Women Flyfishers, and the Northern California Council of Federation of Fly Fishers (collectively, Conservation Groups) respectfully submit the following comments regarding the Study Dispute Resolution process currently underway within the Integrated Licensing Process for relicensing the Merced River Hydroelectric Project (FERC P-2179).

Introduction

The Study Dispute Resolution process for the Merced River Hydroelectric Project (FERC P-2179) relicensing addresses issues that represent a turning point in the restoration of anadromous fish species in the Merced River. The Merced is a major tributary of the Lower San Joaquin River, and at present contains the southernmost populations of Central Valley Chinook salmon and Central Valley steelhead. Numbers of both species have, in recent years, become severely depressed.

In the view of the undersigned Conservation Groups, the immediate proceeding also represents a turning point in the sense that the precedents set on the Merced River will influence the outcome of other ongoing and upcoming relicensings, both in California's Central Valley and elsewhere. In our view, this Study Dispute gives practical expression to a number of grave concerns that our groups have with the Federal Energy Regulatory Commission's implementation of the Federal Power Act and the National Environmental Policy Act. In particular, we are concerned with FERC's implementation of its new default Integrated Licensing Process, and the Study Plan Development process.

We file this letter with the Study Dispute Resolution Panel in order to address both general policy and the substance of the immediate proceeding. The decisions, both on policy and substance, made by the Commission in this proceeding will certainly affect the future viability of salmon and steelhead in the Merced River. They may well also influence the future viability of salmon and steelhead in several other large and critical drainages. If the Commission fails to use its clear and unambiguous authority in this proceeding to ensure that the impacts of these projects on those fisheries are adequately addressed, and that the strong public interest in restoring these fisheries is addressed, it may doom timely efforts to restore these fish – along with the Commission's very credibility on fundamental issues of environmental protection – to long-term and possibly permanent failure. The stakes in this proceeding could not be higher.

Background

Merced Irrigation District's (Merced ID) Merced River Hydroelectric Project (FERC P-2179) is located on the Merced River in Mariposa and Merced counties, California. It consists of a major storage reservoir, New Exchequer Reservoir (also known as Lake McClure) with storage of just over one million acre-feet; New Exchequer Powerhouse at the downstream base of New Exchequer Dam; 9730 acre-foot McSwain Reservoir, which backs up the Merced River seven miles almost to the outfall from New Exchequer Powerhouse and which serves as an afterbay; and McSwain Powerhouse, at the base of McSwain Dam.

Located immediately downstream of McSwain Powerhouse is Merced Falls Reservoir, a small 900 acre-foot reservoir owned by Pacific Gas & Electric Company. The Merced Falls Project (FERC P-2467) also includes Merced Falls Dam and, at the base of the dam, Merced Falls Powerhouse. The Merced Falls Project is operated in run-of-the-river mode,

passing through the outflow from McSwain Powerhouse. Merced ID operates the Merced Falls Project for PG&E on a contract basis. Merced ID has a 100 plus cfs agricultural diversion, the Northside Canal, whose point of diversion is located within the Merced Falls Project boundary on the north side of Merced Falls Reservoir.

Approximately three miles downstream of Merced Falls Dam is Merced Irrigation District's Crocker-Huffman Diversion Dam. Crocker-Huffman Diversion Dam serves as a diversion pool for Merced ID's Main Canal diversion; the Main Canal has a capacity of approximately 2000 cfs. The main purpose of the Merced River Hydroelectric Project facilities is to provide agricultural water for Merced ID (a section on page one of the Executive Summary of Merced ID's Pre-Application Document is entitled: "Water Supply Highest Priority").

It is clear that the Merced River project (P-2179) has direct impacts on the river below the Crocker-Huffman Diversion Dam. FERC's existing license acknowledges this fact: articles 40-42 of the current license for the project require the licensee to meet specified streamflows in the Merced River to regulate streamflow and avoid flow fluctuations downstream of Crocker-Huffman, appropriately setting a compliance point for flow requirements at Shaffer Bridge, *19.5 miles downstream of Crocker-Huffman Diversion Dam*. Article 38 of FERC's license for the Merced Falls project (P-2467) also acknowledges the nexus between Merced River releases and flows downstream of Crocker-Huffman by requiring the licensee to coordinate operations with the Merced River project in order to meet flow requirements.

It is clear from the history of licensing actions on these projects that the purpose of these current licensing conditions was to sustain a fall-run Chinook salmon fishery downstream of project and licensee dams on the Merced River. Licensee proposes to move the existing flow-requirement compliance point upstream to the McSwain powerhouse, in effect isolating the FERC-licensed projects from any responsibility for salmon and steelhead fisheries downstream of licensee dams.

Returns of Chinook salmon to the Merced River in the last three years are close to or at historic lows, and the Merced River project's flow releases have direct impacts on these fishery resources. Merced ID has not disputed the need to gather information regarding fisheries downstream of its non-project agricultural diversion at Crocker-Huffman Diversion Dam. Merced ID is on the record as having authorized over \$2 million for studies of Chinook salmon. However, Merced ID has steadfastly refused to include these studies within the immediate relicensing proceeding of the Merced River project. It has also refused to perform studies that will assess the impacts of project operations (or feasible alternatives to their proposed project operations that may enhance those resources) on project-affected fisheries below Crocker-Huffman Diversion Dam.¹

¹ "Merced ID's intent, which continues to this day, is to approach ecosystem restoration in a broader forum that is not jurisdictional to FERC." (20090814-5084 Licensee Revised Study Plan, p. 3-43). Given Merced ID's previous (and no longer operative) assurances that relicensing was the proper venue for addressing flow and water quality requirements for salmon and steelhead fisheries in the Lower Merced River it is unclear if it will choose to take the position that releases that may be required from FERC-licensed dams in

In short, Merced ID and its consultants appear to be making a deliberate and concerted effort to keep information about salmon and steelhead in project-affected reaches of the Merced River firewalled from the current FERC relicensing process. We can only speculate that they have chosen to do so in order to evade responsibility for its project's impacts on ESA-listed steelhead and other anadromous fish, and to secure a license with a minimum of mitigation measures. Their strategy appears to involve misrepresenting several facts about the Merced River before the Commission, and the Commission does not appear to be exercising the due diligence necessary to fact-check these assertions.

First, Merced ID incorrectly asserts that flows from the Merced River project do not have direct impacts on flows and flow-related fishery resources in the Merced River downstream of Crocker-Huffman.

Leaving aside the fact that Merced ID actually exercises operational control over all four dams and thus clear responsibility for the total effects of the development of this waterway on fish resources, this assertion is inaccurate. First, the downstream Merced Falls project does not have the ability to regulate flows from the Merced Project. Second, for four to five months each year, flows from the Merced River Project are virtually identical to flows below Crocker-Huffman. During this period, the impacts are direct and unambiguous: flows released from the project and flows in the Merced River below Crocker-Huffman are, excepting inflow from rainfall, identical.

Second, Merced ID refuses to perform any studies that would further confirm or quantify the presence and extent of steelhead (anadromous *Oncorhynchus mykiss* or *O. mykiss*) in the Merced River. In spite of substantial evidence to the contrary, Merced ID has flatly affirmed that steelhead do not exist in the Merced River.² It rejected, and offered no substitute for, the Anadromy Salmonid Habitat study proposed by the Resource Agencies and Conservation Groups.³ This study would quantify the extent of the *O. mykiss* population in the Lower Merced River and the life histories of that population, a population that is directly affected by flows from the Merced River project.

Third, Merced ID proposes to study the impacts of the project's flow on salmon only under its proposed flow regime, which is identical to the flow regime defined in the

such a "broader forum" will face federal pre-emption challenges. See Conservation Groups Comments on Preliminary Study Plan, 20090716-3060 at 19-23.

² In contrast to Merced ID's approach to salmon, Merced ID clearly does not want to manage for steelhead, or address Endangered Species Act Section 7 requirements for this listed species. Merced ID will be at the Ninth Circuit, Federal Court of Appeals on December 11, 2009, as an appellant and one of the original plaintiffs in *09-15214 Modesto Irrigation District, et al v. Carlos Gutierrez, et al*, which seeks to have Central Valley steelhead de-listed under the Endangered Species Act.

³ On page 3-46 of its Revised Study Plan, *Id.*, Merced ID lists a study that will collect existing information about steelhead, and another that will "determine the presence of adult steelhead in the Merced River." Neither of these studies addresses the juvenile lifestage, and neither is among the scheduled or funded studies described in Appendix 3A of the document.

current license for the project. The studies proposed by the Resource Agencies and Conservation Groups were designed to evaluate response to changes in flow which can clearly and reasonably be provided by project operations. Absent an analysis of any response of project-affected fisheries to changes in flow, FERC will lack data to inform its development of license conditions (or analyze license conditions recommended by agencies or other stakeholders) that seek to enhance fisheries in project-affected waters through changes to the project's flow regime.

Finally, it is reasonable to conclude that salmon and steelhead will ascend past Crocker-Huffman at some point during the term of any new license for the Merced River project. There are old fishways on Crocker-Huffman Diversion Dam and Merced Falls Dam, although water is no longer deliberately passed through them. Contrary to Merced ID's opinion, evidence suggests that anadromous species have the ability to ascend CH dam, especially at high flows. Moreover, the California Department of Fish and Game recently directed Merced ID to restore fish passage at Crocker-Huffman. It is therefore reasonable to conclude that salmon and steelhead will ascend past Crocker-Huffman at some point during the term of any new license for the Merced River project. At that point, since the Merced Falls Project does not regulate flows passed from the Merced River project, those fish will be directly affected by the operations of the Merced River project 100% of the time, without any alleged "confounding" effects from other dams owned by the licensee outside of FERC's jurisdiction.

Despite these factual errors – all of which are part of the decisional record for the immediate licensing proceeding – FERC declined in its Study Plan Determination⁴ to order studies requested by Resource Agencies and Conservation Groups that would assess the project's effects on salmon and steelhead downstream of Crocker-Huffman Diversion Dam, consider measures to address these impacts, and assess the effectiveness of possible mitigation measures. FERC's reluctance to include these studies has crystallized for us a number of policy questions about the Commission's treatment of study requests. Since it is often difficult to talk about these questions in the absence of concrete examples, and since the circumstances at this project provide a very clear illustration of a number of ongoing concerns that we have had about FERC's treatment of study requests, we would like to address several of those questions here.

FERC should investigate a project's contribution towards the sum total of an impact when there may be multiple causes

Our first question deals with FERC's treatment of study requests at projects with direct impacts on other resources that may be blended with other direct impacts. We understand that the Commission cannot necessarily hold licensees accountable for all impacts on a waterway, but the Commission clearly has the authority to require that the licensee mitigate its share of those impacts, whether those impacts are direct or cumulative. We are therefore perplexed by the Commission's apparent practice of declining to require studies that are intended to a) gather data about the scope and extent of a given impact in

⁴ Study Plan Determination 20090914-3021.

its totality in the absence of such information, b) determine what share of a given impact can be attributed to a given project, and/or c) examine the extent to which reasonable proposed changes to project operations can potentially protect, mitigate, or enhance project-affected resources in such situations.

FERC's study plan determination appears to accept Merced ID's assertion that, since there are multiple sources of direct impacts on resources downstream of Crocker-Huffman, Merced ID, as licensee of the Merced River project, should not be held responsible for the Merced River project's share of those impacts. It also suggests that FERC believes it can conduct an adequate analysis of the project's direct and cumulative impacts in the absence of hard data assessing the extent of those impacts.

Although the magnitude, duration, and timing of flows downstream of Project facilities and downstream of Crocker-Huffman occasionally correlate, most of the time these flows are mutually exclusive due to the operational differences between Project facilities and the diversion dam. Therefore, MID's independent operation of Crocker-Huffman inherently confounds direct Project effects. Because of this, any studies that attempt to correlate Project effects to downstream effects below Crocker-Huffman are prone to substantial error – unacceptable for forming reliable inferences on Project effects.⁵

FERC staff's assertion that the impacts of "MID's independent operation of Crocker-Huffman" "inherently [confound]" an assessment of direct Project effects on the Merced River does not make sense. The situation on the Merced is far from "confounding." In fact, compared to many of California's major river systems, the layout of water infrastructure on the Merced is relatively simple and straightforward.

Water quantity is a direct effect of the Project

There is only one major tributary between the Project and the confluence of the Merced and San Joaquin Rivers. That tributary is ephemeral. New Exchequer Dam, part of the licensed works for the Merced project, has not spilled once since it was constructed. Flows in the Merced River are therefore primarily a function of operational releases made by Merced ID through the Project. Merced ID operates all of the major pieces water infrastructure⁶ on the river, with the exception of the Cowell diverters whose diversions are defined and limited by written agreement with Merced ID.

There is no question that the operations of the Merced River project directly affect flows downstream of Crocker-Huffman dam. Merced ID stated in its Pre-Application Document that it has successfully been able to meet the compliance requirements of its current license, which are measured downstream of Crocker-Huffman at Shaffer Bridge, since 2002. While FERC may be confounded by how the project's operations affect flows

⁵ Study Plan Determination 20090914-3021 at p. 3.

⁶ New Exchequer Development, McSwain Development, Merced Falls Project, Crocker-Huffman are all operated by Merced ID.

downstream of Crocker-Huffman, Merced ID is not. Water quantity in the Merced River below Crocker-Huffman is part of Merced ID's daily calculations scheduling the operation of its dams, and has been since the original Project 2179 license was issued a half century ago. In addition, for four to five months out of each year, the diversions at Crocker-Huffman and elsewhere are not operated. At these times, stream flows are a function of only one activity: Merced ID's flow releases from the Merced River Project.⁷

Even when the other diversions are in operation, releases from the Merced River project are clearly a direct effect on flows and flow-related resources below Crocker Huffman. Merced Falls is simply a wide spot in the river; it does not store water, but operates in a run-of-river mode. Water that is taken out of the river at Crocker-Huffman does not diminish the quantity of water that is released from the project for downstream purposes and passed below the diversion for those downstream purposes. If water is not released from the Merced River Project, the Merced River downstream of Crocker-Huffman goes dry. There is nothing indirect about this effect.

If Crocker-Huffman were operated by another entity, then Merced ID would find it less convenient to assure required streamflows downstream of Crocker-Huffman. However, the idea that project flows downstream of Crocker-Huffman might not be met because someone in a different office down the hall Merced ID might accidentally diverts too much water into the Main Canal does not pass the straight-face test. ***During the irrigation season, the Merced River Project is operated, first of all, to meet Merced ID's irrigation requirements.*** As a practical matter, Merced ID, in its operation of the Project, will meet all the requirements of all the senior downstream diverters, presumably by talking to them and coordinating releases to meet actual demands. Moreover, such coordination with other diverters is not separate from the Project. It is a generic requirement for all licensees, who must operate their projects in conformance with state law, including the requirement to meet the needs of holders of senior water rights.

There are therefore two principal components to each release of water from New Exchequer Dam during the irrigation season: water that Merced ID chooses to divert into the Northside and Main canals, and water that will flow downstream of Crocker-Huffman Dam into the Merced River. Since the former is a known quantity to Merced ID, the latter is also a known quantity. There is nothing "confounding" about this relationship. FERC's lack of jurisdiction over the operations of Crocker-Huffman dam does not absolve it from responsibility for developing releases from New Exchequer that are sufficient for non-project resources downstream in the Merced River.

Indeed, the license for Project 2179 issued in 1964 recognized FERC's authority and responsibility to condition the license to protect instream resources, and established ***the existing FERC flow compliance point 19.5 miles downstream of Crocker-Huffman.*** This requirement from FERC's existing license for the Merced River Project is part of the

⁷ The Study Plan Determination grossly understates this: "timing of flows downstream of Project facilities and downstream of Crocker-Huffman occasionally correlate." *Id.* If Commission staff is concerned about being "prone to error" and about "reliable inferences," it should be more precise with its language and not equate five months a year with something "occasional."

baseline condition that the Commission, in its NEPA analysis, must analyze. The Study Plan Determination appears to pre-determine the answer to the question of whether this compliance point should be moved. Even if it were to be moved, analysis of existing conditions under the current license would require study of the 19.5 miles of river below Crocker-Huffman for which the Study Plan Determination declines to require studies.

FERC's Scoping Document 2, as quoted in the Study Plan Determination at page 4, states that the presence of Crocker-Huffman "nullifies the direct effects of the Merced River project downstream of the diversion dam." Rather than acknowledge direct effects, Commission staff states at page 3: "we acknowledge the potential for the Project, in combination with Crocker-Huffman operations, to have cumulative effects on several resources downstream of the diversion dam and have noted this where appropriate."⁸

FERC's Scoping Document 2 and the Study Plan Determination mischaracterize the Project's effects downstream of Crocker-Huffman as "cumulative." This has been the campaign theme of Merced ID and its consultant HDR/DTA from the outset. The NEPA definition of a cumulative impact comes from the Council on Environmental Quality (CEQ), which defines a cumulative impact as: "...the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time" (See 40 CFR §1508.7).

FERC has the responsibility to examine the cumulative impacts of projects that it licenses. However, there is nothing incremental about the situation downstream of Crocker-Huffman. Streamflows in the Merced River downstream of Crocker-Huffman are either released from the Project or they are not. In terms of water quantity, the fact that the Merced River project also releases water through the project to be conveyed downstream for diversion at Crocker-Huffman has nothing to do with the water that is released through the Project to meet instream flow and other requirements downstream of Crocker-Huffman. The presence of additional irrigation water in the river for three miles before it is diverted does not in any way "nullify" the direct effects of the Merced River project on the Merced River.

The Commission clearly has the authority to require reasonable studies that can help the Commission to determine the extent to which a Project may be responsible for effects which act in combination with other others. By disallowing studies simply because the license applicant asserts that the Project is not the sole or even the "essential" cause of a resource impact, the Commission essentially forecloses on the possibility of any serious consideration of such impacts during a licensing proceeding.

Studies of anadromous fish downstream of Crocker-Huffman Diversion Dam should be required, since Project storage is the only source of water available to improve habitat

⁸ Study Plan Determination, 20090914-3021 at pages 4 and 3.

Despite the unambiguous direct impacts of flow releases from the Merced River project on flows downstream of Crocker Huffman, FERC's Study Plan Determination declined to require any study of anadromous fish downstream of Crocker-Huffman Diversion Dam, frequently repeating statements like: "We believe that any study conducted downstream of the diversion dam cannot inform FERC or relicensing participants of the direct effects of the Project's operation."

The consequence of failing to seriously evaluate and appropriately categorize the effects of discharges from the Merced River project is far from trivial. Returns of Chinook salmon to the Merced River have undergone a steep decline in the last three years. While all three major tributaries in the San Joaquin drainage have seen declines, the declines are more precipitous in the Merced than in either the Stanislaus (where there are considerably higher flows) or even in the Tuolumne. It is reasonably likely that lack of flow in the Lower Merced River is a significant factor in this decline.

One might maintain that flows to improve the condition of anadromous fish downstream of Crocker-Huffman could be required as a function of the conditions placed on Merced ID as an agricultural diverter under Merced ID's consumptive water rights. However, the water necessary to provide those flows is stored in the Project, and thus also subject to FERC's jurisdiction. Given the relicensing, the first responsibility here lies with FERC: unless the Commission requires releases of water sufficient to protect aquatic resources in the Merced River, there will be no water available for release into the Merced River. There is no other source of water. FERC's current course of action will carve out a regulatory gap for Merced ID, where it will be free to use a FERC-jurisdictional reservoir on a navigable public waterway solely for its private use, without any constraints to protect other public uses from the negative externalities of this use. We do not see how such a course of action is consistent with FERC's requirement under section 10(a)(1) of the Federal Power Act that its licenses be best adapted to a comprehensive plan for the development of a waterway.

A reasonable likelihood of a nexus between project operations and a potential effect should be sufficient to justify a study.

The introductions to most ILP study plans we have seen contain an expression with the following form: "The Project may cause [an effect]" or "may affect [some phenomenon or condition]." This is partly out of customary deference to a licensee, an effort not to prejudge responsibility. It is partly out of some lack of certainty of project effects, or more likely out of lack of certainty of the extent of project effects.

In its Motion to Dismiss the study dispute of the State Water Resources Control Board, Merced ID attempts to manipulate this deference to avoid study:

The Board goes on to argue that, because the Commission recognized in Scoping Document 2 that the Project *may* contribute to cumulative impacts on several resource areas in the lower Merced River, the Commission necessarily must order

studies addressing habitat and water quality in the lower Merced. *Id.* at 3. While FERC certainly has authority to require an applicant to conduct a study where there is some evidence of a project-induced problem, and a study is necessary to determine the extent of harm, the Commission cannot force an applicant to determine *whether* a problem exists.⁹

MID effectively seeks to undermine the Commission's authority by disputing FERC's authority to require studies in the absence of proof of project effects. In the licensee's Revised Study Plan¹⁰, Merced ID took this argument even further, arguing not just that "some evidence" was required, but rather that FERC needed "*definitive*" evidence of the presence of Central Valley steelhead (*Oncorhynchus mykiss* with an anadromous life history) before it could require the applicant to perform studies to assess the project's impacts on steelhead. In fact, there is evidence in the decisional record demonstrating the presence of steelhead in project-affected reaches. However, Merced ID, which has an obvious interest in avoiding issues with ESA-listed species, simply disputes that evidence. As Conservation Groups pointed out in our comments on the Proposed Study Plan, Merced ID frequently relies on the disputed nature of evidence in order to argue against the inclusion of proposed studies in its study plan.¹¹

It is established under NEPA that uncertainty regarding a project's impacts should not preclude investigating those potential impacts and developing appropriate alternatives and mitigation measures. See *National Parks & Cons. Assn. v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (an agency's lack of knowledge about a potential impact "does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it"). MID's position that FERC has the authority to require a study of a project effect only when that effect can already be precisely and conclusively proven turns this precedent on its head. Where direct, indirect, or cumulative project effects potentially exist, especially impacts that may affect an ESA-listed species, FERC clearly has both the responsibility and the authority to investigate those impacts and, where impacts are found, develop license conditions that mitigate those impacts.

If FERC interpreted its authority to mean that it was required to show conclusive proof that impacts existed before requiring studies to characterize and address such impacts, very little new information would be introduced into licensing proceedings. Furthermore, if license applicants could avoid studies simply by asserting that they disagreed with record evidence supporting the study, it would be difficult if not impossible for FERC to obtain any record evidence that was inconvenient to the applicant's stated position.

We recommend that FERC clarify its policy on study plan determinations to indicate that studies will be required when the requestor there is "reasonable likelihood" that there is a nexus between a potential effect and project operations.

⁹ 20091016-5008 at p. 6.

¹⁰ 20090814-5084 at p. ES-7: "the request does not provide definitive evidence to document that naturally spawned anadromous *O. mykiss* populations occur in the Merced River, and therefore the information developed by the study would not inform license requirements."

¹¹ 20090716-3060 at p. 14, including footnote.

A reasonable likelihood that a potential mitigation measure may be required should be sufficient to justify a study.

In its Study Plan Determination, Commission staff refused to order studies relating to the suitability of habitat upstream of the Project for re-introduction of anadromous fish. For instance, staff states at page 14:

The Resource Agencies and Conservation Groups further indicate that a habitat assessment of the upper Merced River is needed to evaluate habitat for anadromous species. [...] Due to the lack of a nexus between project operation and the resource to be studied, and because the proposed study would not inform the development of license requirements (study criterion 5), we do not adopt this requested study.¹²

Study criterion 5 reads:

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

The contention that there is no nexus “between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied” is, first of all, unfounded. The Project contains two major fish barriers and over twenty miles of reservoir that separate riverine fish habitat upstream from habitat downstream. The licensee’s assertion that Crocker-Huffman constitutes a complete barrier to anadromous fish is disputed by resource agencies. Even if it is a barrier to fish passage, it is unlikely to be for long: the Department of Fish and Game “has determined that fish passage at the Crocker-Huffman Diversion Dam must be restored.”¹³ Therefore, we fully expect that there will be fish passed above the dam in the near future, well within the life of any new license for the Merced River project.

At that point, Merced Falls will definitively be the practical upstream extent of fish passage for anadromous fish on the Merced River. Two FERC jurisdictional projects will then block passage from the Lower Merced River to the Upper Merced River. Moreover, the *operation* of both projects – particularly the Merced River project, which drives the system’s flows – currently limits the ability of anadromous fish to ascend Crocker-Huffman, since flow discharges from the Merced River project (passed through Merced Falls) reduce the frequency and magnitude of high flows that would otherwise facilitate passage. Were it not for the existence of the Merced River Hydroelectric Project and its flow discharges, passage past Merced Falls (and, for that matter, Crocker-Huffman) would be relatively simple and inexpensive; the existence of the Merced River project

¹² Study Plan Determination, 20090914-3021 at page 14.

¹³ November 16, 2009 letter from Jeffrey R. Single, Ph.D., Regional Manager, California Department of Fish and Game Central Region, to Hicham Eltal, Deputy General Manager, Merced Irrigation District.

significantly complicates a passage problem that otherwise would like have been resolved long ago.¹⁴

FERC's study plan determination states that the proposed study would not inform the development of license requirements. This is inaccurate, and effectively prejudices the outcome of the proceeding. Agencies with authority to prescribe fishways under Section 18 of the Federal Power Act require information about habitat upstream in order to understand the desirability and feasibility of prescribing fish passage.¹⁵ Neither these agencies nor the Conservation Groups have an interest in re-establishing fish where they will not survive, or will do so poorly. Everyone has an interest in identifying the habitat that will be most likely to assure successful recovery of salmon and steelhead in California's Central Valley, whether that habitat is upstream of rim dams or downstream.

The requested evaluation of the desirability of the habitat upstream will help FERC and its sister agencies to better understand the scope of the effects of project operations. Is the project preventing anadromous fish from reaching desirable and usable habitat? Or is it blocking passage to habitat that is not likely to be productive? The need to understand a reasonably likely or foreseeable potential mitigation measure can also be framed as evaluation or quantification of a project effect: what restoration opportunities does a situation offer? What possibilities does it foreclose?

The standard for studies that go to potential mitigations should be whether or not the mitigations are reasonably likely to occur and foreseeable based on existing evidence. It should come as a surprise to no one that, for projects that impact crashing populations of anadromous fish by confining them to the floor of California's Central Valley, resource agencies and river advocates will need to examine upstream passage during relicensing, when the opportunities for resolving passage issues are greatest. There is nothing speculative about this interest or the possibility that passage may be required.

The Commission should respect resource agencies' definition of their information needs and responsibilities, particularly when FERC does not have the discretion to reject their commissions.

Merced ID, in its motion to dismiss the study disputes requested by the State Water Resources Control Board, suggests that these agencies have failed to define how the disputed studies pertain to their respective authorities.

At issue here is the question of who defines what "pertains directly to the exercise of their authorities," and how that determination is made. Merced ID suggests that the State

¹⁴ In fact, as noted elsewhere, it *was* resolved long ago. However, the construction of McSwain Reservoir inundated most of the habitat to which earlier fish ladders at Merced Falls and Crocker-Huffman provided passage.

¹⁵ This is particularly important in light of the 2005 amendments to the Federal Power Act, which allow Merced ID to challenge the factual basis for any fish passage prescription. By refusing to allow these studies, FERC is effectively pulling the rug out from under its sister agencies.

Water Resources Control Board does not have authority to investigate the feasibility and desirability of establishing fish passage past project facilities. The Water Board, not FERC, and not the Merced Irrigation District, is charged with implementing the Clean Water Act in the State of California, and it has jurisdiction over beneficial uses in California. In the context of a relicensing proceeding, the Water Board has the sole authority to interpret and implement State water quality standards pursuant to the Clean Water Act. If the Water Board believes that the study pertains directly to its authorities, then it does. FERC does not have the authority to second-guess that determination.

Similarly, in a motion to dismiss the study disputes of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, Merced ID has asked the Commission to disallow studies that do not directly address fishways: “Of the ten proposed new studies contained in the anadromous salmonid package, only two proposed studies bear directly on fishways at the Project facilities.”¹⁶ Merced ID’s argument relies on a mythical standard that is a far cry from the standard that appears in FERC’s regulations, which simply requires that agencies demonstrate that their information requests “directly [pertain] to the exercise of [agencies] authorities.” Here, Merced ID again seeks to limit agencies’ authority to exercise and interpret the authorities that were granted to them under the Federal Power Act. The 2005 Amendments to the Federal Power Act, and subsequent Trial-Type hearings as provided for by those amendments, have given agencies a clear sense of what information they require in order to prepare Section 4(e) conditions and Section 18 prescriptions that are based on a solid factual underpinning. Given that these agencies are now being held to a standard that requires much stronger information, it is puzzling that FERC would choose to deny them access this information.

Studies that consider the public interest will inform the development of a license that is in the public interest. FERC may have the authority to determine that a study is “not necessary to evaluate the public interest” under the Federal Power Act, but it should use that authority very judiciously when its sister agencies have indicated that a study would in fact serve the public interest. When a license applicant and an agency disagree over the information needed to exercise an agency’s responsibilities, FERC should weigh the agency’s clear mandate to protect the public interest alongside the license applicant’s need to protect only its particular interests. If the results of the study show that a recommended license condition is not in the public interest, FERC retains the authority to reject that recommendation, and can do so secure in knowing that their determination is supported by substantial evidence. But making such a determination before information has even been collected precludes the development of well-reasoned conditions

Given the extraordinarily high standards for supporting evidence created by the 2005 amendments to the Federal Power Act, the Commission should show *particular deference* to agencies with mandatory conditioning authority under Section 4(e) and prescriptive authority under Section 18 of the Federal Power Act. By refusing to require studies requested by agencies, FERC prevents those agencies from exercising their authority. Congress passed these amendments to in order to ensure that agencies would exercise these mandatory authorities judiciously, and with the support of a solid

¹⁶ 20091009-5007 at pp. 7-8.

evidentiary record. It did not pass these amendments so that FERC could effectively circumvent this authority by depriving the agencies of information necessary to exercise their authorities.

FERC has a responsibility to address cumulative impacts and ensure that its licenses are consistent with a truly comprehensive plan for the development of a waterway.

FERC has a responsibility under NEPA to analyze how a licensed project may contribute to cumulative impacts on natural resources. FERC is also required under Section 10(a) of the Federal Power Act to ensure that its projects are best adapted to a comprehensive plan for the development of a waterway. These two requirements intersect on the Merced River in the context of the impacts to anadromous fish as they are prevented from migrating upstream by two FERC-licensed projects.

Merced Falls Dam does not present a great obstacle to fish passage. Indeed, a fish ladder was successfully operated there in the past. However, the construction of the Merced River Hydroelectric Project and New Exchequer and McSwain Dams diminished and degraded fish habitat between Merced Falls and the former Exchequer Dam (and the present New Exchequer Dam). It also created a barrier to upstream fish passage at New Exchequer Dam.

These two projects, when considered separately, constitute a mobius strip of blame shifting and the denial of responsibility. PG&E can claim that, but for the Merced ID project, fish passage at its Merced Falls project would be a piece of cake. However, given the behemoth upstream, a solution to the fish passage problem is out of PG&E's hands. Similarly, Merced ID claims that it has no culpability because the PG&E project blocks passage to the base of its dams. The licensees of two separate hydroelectric projects with adjoining project boundaries, while undergoing licensing at the same time, are each being allowed to use the existence of the other's project to shield themselves from the responsibilities of their own impacts on anadromous fisheries on the Merced River. Allowing individual licensees to use other FERC-licensed projects to avoid responsibility for their own contributions to cumulative impacts is inconsistent with FERC's requirement to issue licenses that are best adapted to a comprehensive plan for the development of the Merced River.

One option to get fish to the upper watershed would involve capturing fish downstream of the Crocker-Huffman Diversion Dam and transporting them upstream. Such an approach would solve in one cut the regulatory Gordian knot presented by that non-project feature while presenting an alternative to volitional fish passage on the lower dams. It also makes considerable sense to investigate a downstream migrant trapping regime that would release smolts downstream of Crocker-Huffman, thereby eliminating the need for a fish screen at the intake to Merced ID's main canal.

The fish passage conundrum on the Merced River would be radically simplified if the Commission were willing to adopt a true comprehensive planning approach to fish passage. Such a solution would be straightforward. FERC certainly has the authority to explore and require such fish passage for the two facilities over which it has jurisdiction. By bypassing the Crocker-Huffman Diversion dam in this manner, FERC could solve jurisdictional issues, fully mitigating the contribution of its own two projects to the cumulative impacts of obstacles to fish migration without requiring either of its licensees to incur additional costs associated with mitigating the effects of the non-jurisdictional dam. Such a solution would surely serve the public interest more than a series of contested requirements for volitional fish passage and the lawsuits that would no doubt ensue.

We recommend that the combined NEPA document for the relicensing of the Merced Falls Project and the Merced River Hydroelectric Project analyze the blockage of fish passage as a combined function of the two projects. It should also analyze the cumulative effects of the blockage of fish passage that are caused by the two projects together with Crocker-Huffman. To that end, FERC should require studies that address the cumulative impacts of barriers to fish passage on the Merced River, focusing on creating solutions rather than reasons why such solutions cannot be found.

Conclusion

The dispute resolution panel has a critical task before it: its recommendation to FERC – along with FERC’s willingness to adopt that recommendation – will have a significant impact on the future of anadromous fisheries in the Merced River as well as the tone, substance, and timeliness of the relicensing of the Merced River project and the licensing of numerous other hydropower projects throughout California’s Central Valley and the nation as a whole.

Merced ID has set forth before the Commission a number of arguments that are designed to help the District avoid responsibility for the significant direct, indirect, and cumulative environmental impacts of its Merced River hydroelectric project. These arguments are also calculated to create a precedent that will restrict the Commission’s clear authority to properly address direct, indirect, and cumulative impacts at hydroelectric projects by requiring license applicants to provide study information that will help FERC, its sister agencies, and other stakeholders to develop recommendations for appropriately mitigating those impacts.

We strongly urge the Dispute Resolution Panel – and FERC staff – to not acquiesce to Merced ID’s self-serving arguments. In this relicensing proceeding, FERC has the unambiguous authority and obligation to study the effects of the Merced River project on all project-affected reaches. It should not compromise its authority or shirk its responsibility, particularly by declining to analyze the Merced River project’s clear direct, indirect, and cumulative impacts on the river reach below Crocker-Huffman, when those impacts can be quantified and addressed with straightforward mitigation. To do so would be inconsistent with law, policy, and precedent.

We sincerely appreciate the opportunity to submit these comments to the Commission and to the Study Dispute Resolution Panel, and hope that these comments will prove useful in guiding them in their consideration of the Study Dispute process for the Merced River Project relicensing.

Respectfully submitted,



Michael Martin, Ph.D.
Director
Merced River Conservation Committee
Certified Fisheries Scientist
American Fisheries Society
PO Box 2216, Mariposa, CA 95338
Ph: (209) 966-6406
mmartin@sti.net

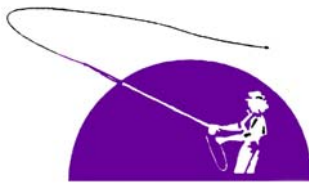


Brian J. Johnson
Staff Attorney & Director, California Water Project
Trout Unlimited
1808 B 5th Street
Berkeley, CA 94710
(510) 528-4772
bjohnson@tu.org



Chris Shutes

Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance
1608 Francisco St., Berkeley, CA 94703
(510) 421-2405
blancapaloma@msn.com



Cindy M. Charles

President, Golden West Women Flyfishers



Conservation Committee
Northern California Council Federation of Flyfishers
Cindy Charles
1403 Willard St.
San Francisco, CA 94117
cindy@ccharles.net



Steve Rothert

Steve Rothert
Director, California Field Office
American Rivers
srothert@americanrivers.org



FRIENDS
OF THE
RIVER

Ronald Stork
Senior Policy Advocate
Friends of the River
1418 20th St., Suite 100
Sacramento, CA 95811
916 442-3155 x220
rstork@friendsoftheriver.org

cc: Study Dispute Panel (via e-mail):

Aaron Liberty
aaron.liberty@ferc.gov

Robert Deibel
rhdeibel@fs.fed.us

Larry Thompson
larry.thompson@noaa.gov