



**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

**DEC 12 2005**

**In response refer to:**  
150304SWR03SR8706:ET  
150304SWR03SR8598:ET

Magalie Roman Salas, Secretary (original & 8 copies)  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C. 20426

Re: Amendments to the Comments, Terms and Conditions, and Modified Prescription for the Upper North Fork Feather River Project No. P-2105; and the Comments, Terms and Conditions, and Preliminary Prescription for the Poe Project No. P-2107

Dear Secretary Salas,

Enclosed for filing in the above referenced proceedings is an original and eight copies of NOAA's National Marine Fisheries Service (NMFS) request to amend its comments, terms and conditions, and preliminary prescriptions for the Poe Project, No. 2107, and to amend its comments, modified terms and conditions, and modified prescriptions for the Upper North Fork Feather River Project, No. P-2105.

### ***Introduction***

Pursuant to its responsibilities and authorities, including the Federal Power Act (FPA), NMFS has investigated the potential for **anadromous** fish restoration in the Feather River watershed. During our investigations, NMFS found that dams have played a substantial role in the decline of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and Central Valley steelhead (*O. mykiss*), which are listed as threatened under the Endangered Species Act (64 FR 50394 and 63 FR 13347). The Feather River (Oroville) Project (FERC No. P-2100), Poe Project, and the Upper North Fork Feather River Project and other Federal Energy Regulatory Commission (FERC) licensed projects contribute to the decline of these species.

NMFS has concurrent jurisdiction to prescribe fishways at these projects, and has considered that the roughly concurrent timing of these relicensing proceedings allows for simultaneous



development of fishway prescriptions. **Anadromous** fish passage is feasible, will provide substantial resource benefits, and can be implemented at several **projects** concurrently and in a coordinated **manner**.<sup>1</sup> Accordingly, NMFS was timely in filing its comments, terms and conditions, and preliminary prescriptions for the Poe Project (April 20, 2005) and comments, modified terms and conditions, and modified prescriptions for the Upper North Fork Feather River Project (March 21, 2005). Further, in both of the above proceedings (Poe Project and Upper North Fork Feather River Project), NMFS expressly and timely reserved its authority under section 18 of the FPA, 16 USC § 811, as amended, to prescribe the construction, operation, and maintenance of such fishways deemed necessary, including measures to evaluate the need for fishways, and to determine, ensure, or improve the effectiveness of such fishways. However, negotiations are currently underway between NMFS, the Pacific Gas and Electric Company (licensee for the Upper North Fork Feather River Project and Poe Project), and other interested parties and an **agreement-in-principle** to address fish passage issues on the Upper North Fork Feather River Project and Poe Project was recently reached by the parties. NMFS is reasonably certain that a settlement agreement will be reached between these parties which will provide greater protections for Central Valley spring-run Chinook salmon and Central Valley steelhead than the subject filings.

This request to amend our terms and conditions and prescriptions is filed in response to that **agreement-in-principle** and is intended to reflect the terms of the agreements which NMFS expects to be incorporated into a future settlement agreement. Because the agreement-in-principle is tentative in nature, it is possible that changes to the agreement may occur, or that finalization of a settlement agreement is not achieved. Such events may require subsequent changes to the prescriptions. Therefore, a modification of our terms, conditions and Section 18 fishway prescription is requested, conditioned on FERC retaining the reservations of authority that NMFS has already filed in these proceedings. In addition, NMFS reserves the right to modify the prescriptions in the future as necessary and appropriate following public review in these FERC proceedings or under the terms of the expected settlement agreement.

### ***Amendment Request***

#### **Upper North Fork Feather River Project, No. 2105**

For the Comments, Modified Terms and Conditions, and Modified Prescription for the Upper North Fork Feather River Project, No. 2105, dated March 11, 2005, NMFS requests that under Appendix C, Modified Section 10(j) Terms and Conditions, the sections *entitled Introduction,*

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<sup>1</sup> Letter with attachment from Rodney **McInnis**, National Marine Fisheries Service, to Lester **Snow**, California Department of Water **Resources**, concerning "Technical Assistance Concerning the Feasibility and Benefits of Providing Fish Passage at FERC Licensed Hydroelectric Facilities on the Feather River" for the Feather River (Oroville) Project. National Marine Fisheries **Service**, Southwest Region, Long Beach, CA. October 27, 2004.

*Gravel Enhancement, and Mining Impacts* be withdrawn. For the Modified Section 18 Fishway Prescription, NMFS requests that the sections entitled *Purpose, Description, and Coordination* be withdrawn; and the section entitled *Reservation of Authority* be retained. This amendment is also intended to supersede the Preliminary Section 18 Fishway Prescription filed for this project (dated November 26, 2003).

NMFS reserves its right under section 18 of the FPA to modify these fishway prescriptions and recommend terms and conditions based upon significant new information, failure to achieve settlement or failure by one or more parties to comply with the intent and stipulations contained in the settlement. NMFS respectfully requests the Commission, upon issuance of a new license in this proceeding, retain by means of a specific reopener provision for fishway prescriptions in accordance with Section 18 of the FPA, recommendations or comments pursuant to Section 10(a) of the FPA, 16 USC §803(a), and NMFS' recommendations for the protection, mitigation of damages to, and enhancement of fish and wildlife resources pursuant to the FWCA, as amended, and Section 10(j) of the FPA, 16 USC § 803(j), including recommendations for the construction operation and maintenance of fish passage facilities and such modifications to project facilities and operations deemed necessary by NMFS to provide for the protection, mitigation and enhancement of anadromous fish resources.

#### Poe Project, No. 2107

For the Comments, Terms and Conditions, and Preliminary Prescriptions for the Poe Project, No. 2107, dated April 8, 2005, NMFS requests that under Appendix B, Section 10(j) Terms and Conditions, the sections entitled *Introduction, Gravel, Flow, and Large Woody Debris* be withdrawn. For the Preliminary Section 18 Fishway Prescription, NMFS requests that the sections entitled *Purpose Description* and *Coordination* be withdrawn; and the section entitled *Reservation of Authority* be retained. NMFS intends to file language reflecting these changes in our modified prescription.

NMFS reserves its right under section 18 of the FPA to modify these fishway prescriptions and recommend terms and conditions based upon significant new information, failure to achieve settlement or failure by one or more parties to comply with the intent and stipulations contained in the settlement. NMFS respectfully requests the Commission, upon issuance of a new license in this proceeding, retain by means of a specific reopener provision for fishway prescriptions in accordance with Section 18 of the FPA, recommendations or comments pursuant to Section 10(a) of the FPA, 16 USC § 803(a), and NMFS' recommendations for the protection, mitigation of damages to, and enhancement of fish and wildlife resources pursuant to the FWCA, as amended, and Section 10(j) of the FPA, 16 USC § 803(j) including recommendations for the construction operation and maintenance of fish passage facilities and such modifications to project facilities and operations deemed necessary by NMFS to provide for the protection, mitigation and enhancement of anadromous fish resources.

An important goal of NMFS is to ensure that the process of negotiation, and public and environmental review, result in decisions that provide for full and adequate protection,

mitigation, and enhancement of anadromous fish and other resources affected by the Projects, in accordance with our statutory obligations under the FPA, the ESA, and other relevant jurisdictional authorities.

If you have any questions about this filing, please contact Eric Theiss at 916-930-3613, or Eric.Theiss@noaa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Rodney R. McInnis". The signature is written in a cursive style with a large, prominent initial "R".

~~R~~Rodney R. McInnis  
Regional Administrator

Enclosure

cc: P-2105 Service List  
P-2107 Service List