



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
777 Sonoma Ave., Room 325
Santa Rosa, CA 95404-6528

December 20, 2005

In response refer to :
150304SWR03SR8706 :ET

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

Re: Comments on the Final Environmental Impact Statement for the Upper North Fork Feather River Project, No. P-2105

Dear Secretary Salas,

The National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) provides comments on the Final Environmental Impact Statement (FEIS) on the Upper North Fork Feather River Project (Project), Federal Energy Regulatory Commission (FERC) No. P-2105. In its letter dated December 12, 2005,¹ NMFS requested to amend its comments, modified terms and conditions, and modified prescriptions for the Upper North Fork Feather River Project, No. P-2105. Accordingly, FERC's discussion in this FEIS of the modified prescription for this Project should be amended. In addition, NMFS provides these comments on the FEIS to clarify inaccuracies in the FEIS regarding fish passage.

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 Upper North Fork Feather River Project and other 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

¹ 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.



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. Accordingly, NMFS was timely in filing comments, modified terms and conditions, and modified prescriptions for the Upper North Fork Feather River Project (March 21, 2005). However, for the reasons provided in its letter dated December 12, 2005, NMFS requested to amend its comments, modified terms and conditions, and modified prescription of this project.

In the FEIS, FERC provides:

The introduction and subsequent collection of these fish and the construction of the physical facilities specified in the prescription have the potential to adversely affect several facets of the currently existing aquatic biota in the UNFFR Project area including:

1. the population dynamics of the existing fish community through predation, competition, and habitat partitioning;
2. populations of Federally threatened California red-legged frogs, CSC and FSS (*e.g.*, hardhead) through predation or interspecific competition;
3. the transport, range and intensity of fish-borne disease including infectious hematopoietic necrosis virus (IHNV), *Certomyxa shasta* (CS), and whirling disease (*Myxobolus cerebralis*);
4. riparian habitat, instream habitat, and aquatic biota at [sic] from construction of adult release and juvenile collection facilities and associated construction;
5. behavior and migratory patterns of existing fish populations in and around Yellow Creek and the Seneca reach where downstream collection and upstream release facilities are prescribed;
6. hydrological and geomorphic riverine processes in and around Yellow Creek and the Seneca reach where downstream collection and upstream release facilities would be constructed;
7. spawning gravel availability for resident trout species in the Seneca reach and in Yellow Creek; and
8. current fishery harvest management objectives, enforcement of fishing regulations, and recreational angling opportunities in the Seneca reach and in Yellow Creek.

NMFS provided sufficient analyses of all of these potential impacts in its modified prescription (March 21, 2005), and FERC does not provide scientific or technical information to obviate NMFS' analyses. In addition, the Licensee rejected NMFS' study requests that would have further clarified any such potential impacts.

With regard to disease impacts, FERC has agreed with NMFS that "the introduction of anadromous salmonids to upstream reaches of the NFFR would likely have little effect on the overall spread of these diseases in the watershed." NMFS reiterates that appropriate measures should be taken wherever practicable with regard to disease impacts, but these disease issues should not prevent reintroduction.

In section 5.1.4.2 of the FEIS, FERC concludes:

Although the fish passage measures prescribed by NOAA Fisheries would likely be a more effective means of passing upstream and downstream migratory fish as compared to other more traditional measures (*e.g.*, intake screens or fish ladders), there remains a wide discrepancy between the concepts presented by NOAA Fisheries in its March 14, 2005, prescription and the scientific evidentiary support necessary to guarantee the success of such efforts. Given that uncertainty, the potential adverse effects, and the cost of this measure (an estimated decrease of the net annual benefit of the Project of \$2,435,400), we do not recommend the implementation of the NOAA Fisheries Section 18 fishway prescription.

FPA section 18, 16 U.S.C. 811, provides, in relevant part, "The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." FERC does not have authority to modify, reject or reclassify fishway prescriptions submitted by NMFS under FPA section 18 (*American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186, 1210 (9th Cir. 2000); *Bangor Hydro Electric Company v. Federal Energy Regulatory Commission*, 78 F.3d 659, 662 (D.C. Cir. 1996)). Even when courts have reviewed fishway prescriptions under FPA section 18, the standard is not whether the prescribing agency has submitted "scientific evidentiary support necessary to guarantee the success of such efforts" as FERC implies. (Emphasis added.) The fishway prescription must be supported by substantial evidence in the record, which "means more than a 'scintilla,' but less than a preponderance of the evidence." (*Wisconsin Power & Light Company v. Federal Energy Regulatory Commission*, 363 F.3d 453, 461 (D.C. Cir. 2004); *Bangor Hydro Electric Company v. Federal Energy Regulatory Commission*, 78 F.3d 659, 663 (D.C. Cir. 1996)). On May 25, 2005 (or May 27, 2005, according to FERC's filing date), NMFS filed with FERC the extensive administrative record, which provides substantial evidence in support of the fishway prescription.

In the EIS, FERC acknowledges that NMFS' section 18 fishway prescription meets many of the elements necessary to provide safe, timely, and effective fish passage, including:

- NMFS' "fishway prescription for the UNFFR Project appears to be a part of its larger strategy to reintroduce anadromous salmonids into historical habitat;"
- "the aquatic habitat in the Seneca reach would likely be usable by adult and juvenile Chinook salmon and steelhead;"
- "because it supports a wild rainbow trout fishery, it is likely that [Yellow Creek] would support juvenile steelhead and juvenile Chinook salmon, provided that adult spawning was successful;"
- NMFS' "Section 18 prescription for the UNFFR would provide access to approximately 15 river miles of spawning and juvenile rearing habitat for Central Valley spring-run Chinook salmon and Central valley steelhead;"

- "[f]rom an engineering standpoint, we agree that a trap-and haul approach, such as that prescribed by NOAA Fisheries for the UNFFR Project, in conjunction with a complementary prescription for the Oroville Project, would likely, for the foreseeable future, be a more effective means of providing access for anadromous salmonids to the UNFFR than more traditional fish passage measures such as fish ladders and downstream bypass systems at each of the dams."

FERC makes a number of conclusory statements regarding the uncertainty of the prescribed fish passage and potential adverse effects with little citation to any potential evidence to support those statements (it is noteworthy that one of the few citations that FERC uses is a citation to confidential notes from a meeting that was held for purposes of settlement negotiation on the Oroville project, which the applicant in the UNFFR Project submitted to FERC). However, as described above, FPA section 18 does not require a guarantee or certainty, and FPA section 18 does not require that there be no potential adverse effects from fish passage. FERC must analyze the potential adverse effects in the EIS, but those are limited as described in NMFS' prescription and supported in the administrative record. FPA section 18 prescriptions, and court opinions that have construed that section, require substantial evidence on the record that the prescription will provide safe, timely, and effective fish passage, which NMFS has filed with FERC.

In summary, NMFS' modified fish passage prescription for the Project would provide for safe, timely, and effective fish passage. However, NMFS has requested to amend that modified prescription as provided in its letter dated December 12, 2005, because NMFS is reasonably certain that a settlement agreement will be reached that will provide greater protections for Central Valley spring-run Chinook salmon and Central Valley steelhead. If you have any questions regarding these documents, please contact Eric Theiss by phone at (916) 930-3613, or via electronic mail at Eric.Theiss@noaa.gov.

Sincerely,



Steve Edmondson
Northern California Habitat Supervisor

cc: Service List