UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Pacific Gas and Electric Company Project No. 803-067

ORDER DENYING REHEARING

(Issued March 23, 2005)

1. On September 3, 2004, Petitioners filed a request for rehearing of our order of August 5, 2004.[1] In that order, we denied a petition to initiate formal consultation under section 7(a)(2) of the Endangered Species Act of 1973 (ESA),[2] concerning the effects of ongoing operation of the DeSabla-Centerville Project[3] on spring-run Chinook salmon. For the reasons discussed below, we deny rehearing. This order is in the public interest because it clarifies the nature of our ESA responsibilities when ongoing operation of already-licensed hydroelectric projects may affect newly-listed species.

Background

2. A detailed procedural history appears in our order of August 5, 2004, and we need not repeat it here. Briefly, the Commission issued a 30-year license for the DeSabla-

[1] 108 FERC ¶ 61,156. Petitioners are: California Sportfishing Protection Alliance, Friends of Butte Creek, Friends of the River, Institute for Fisheries Resources, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations, and Sacramento River Preservation Trust.

[2] 16 U.S.C. § 1536(a)(2).

[3] The 24.85-megawatt project is located on the West Branch Feather River and Butte Creek in Butte County, California.

Centerville Project in 1980, with an expiration date of October 11, 2009.[4] In 1998, the Commission authorized the licensee, Pacific Gas and Electric Company (PG&E), to modify the project's flow and temperature requirements upon mutual agreement among the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries), the U.S. Fish and Wildlife Service, and the California Department of Fish and Game, without requiring Commission approval of the agreed-upon modifications.[5] Since 1999, PG&E has filed a series of operating plans for the project reservoirs with the agreement of these agencies.

3. NOAA Fisheries listed spring-run Chinook salmon as threatened on September 16, 1999. In the summers of 2002 and 2003, high water temperatures in Butte Creek placed listed spring-run Chinook salmon at risk. In late 2002, Petitioners raised concerns about the effects of the project on spring-run Chinook salmon, and PG&E and the agencies agreed on measures to make more cold water available during spring-run salmon spawning. NOAA Fisheries requested that the Commission initiate formal ESA consultation as part of the relicensing for the project. Commission staff designated PG&E as its non-federal representative to consult informally with NOAA Fisheries concerning not only the project's relicensing, but also any interim measures that may improve conditions for listed species. PG&E continued to consult with NOAA Fisheries and the other agencies in preparing and implementing its agreed-upon reservoir operating plans, and included measures to reduce or avoid impacts to salmon and steelhead in those plans.

4. In 2003 and 2004, Petitioners again raised concerns about project effects on spring-run Chinook salmon. On April 13, 2004, Petitioners filed a petition, asking that the Commission initiate formal consultation with NOAA Fisheries concerning the effects of the project on Central Valley spring-run Chinook salmon. In our order of August 5, 2004, we denied the petition on the ground that there is currently no proposed federal action that could provide a basis for initiating formal consultation under section 7(a)(2) of the ESA.[6] Petitioners filed a request for rehearing of our denial of their petition on September 3, 2004.

5. Summer temperatures were milder in 2004 than in 2002 and 2003, and the levels of fish mortality that occurred in those previous years did not recur. Beginning in mid-

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[4] Because the licensee's field studies, conducted cooperatively with FWS, did not locate any listed species or their breeding habitats in the project area, formal consultation was not required for issuance of the license. *See* 11 FERC ¶ 62,207 at 63,395 (1980).

[5] *See* 84 FERC ¶ 62,165 (1998).

[6] 108 FERC ¶ 61,156 at P 39.

September, PG&E has continued to release higher flows under its 2004 operating plan, in consultation with the agencies, to increase available spawning habitat and provide suitable habitat conditions until the completion of fry emergence.

6. On September 15, 2004, Commission staff met with PG&E and NOAA Fisheries to discuss the status of several outstanding issues related to the protection of spring-run Chinook salmon, as well as the Commission's directive to the staff in the August 5 Order to gather sufficient information to make an independent determination of whether further interim measures are necessary. On October 4, 2004, PG&E filed its pre-application document for the upcoming relicensing proceeding, using the Commission's new integrated licensing process.[7] On December 7, 2004, PG&E filed a request, with the concurrence of NOAA Fisheries, that the Commission initiate early consultation with NOAA Fisheries to identify potential project-related effects on listed species, primarily spring-run Chinook salmon, and to facilitate formal consultation related to relicensing the project. On January 13, 2005, Commission staff granted the request, indicating that PG&E should continue to serve as the Commission's non-federal representative and should work with NOAA Fisheries to prepare a preliminary biological assessment as soon as possible, to allow for preparation of a preliminary biological opinion prior to Summer 2005. Commission staff further indicated that it hoped to initiate early consultation with NOAA Fisheries soon after receipt of the preliminary biological assessment.[8]

Discussion

7. As described above, PG&E and NOAA Fisheries are currently engaged in an early consultation process that we believe should allow the Commission staff to initiate early consultation soon, and should result in a preliminary biological opinion from NOAA Fisheries by this summer. Under the ESA and its implementing regulations, early

[7] The integrated licensing process is a relatively new hydroelectric licensing process in which a potential license applicant's pre-filing consultation is conducted concurrently with the Commission's scoping pursuant to the National Environmental Policy Act (NEPA). It provides for increased public participation in pre-filing consultation; development of a Commission-approved study plan; better coordination between the Commission's processes and those of federal and state agencies with authority to require conditions for Commission-issued licenses; encouragement of informal resolution of study disagreements, followed by dispute resolution; and issuance of public schedules and deadlines. *See* 18 C.F.R. Part 5, §§ 5.1 through 5.31.

[8] *See* Letter from George Taylor, FERC, to Randal Livingston, PG&E (dated January 13, 2005).

consultation occurs prior to the filing of an application for a federal license or permit. It involves the same procedures and responsibilities as formal consultation, except that the incidental take statement included with a preliminary biological opinion does not constitute authority to take listed species.[9] Early consultation can eliminate the need for formal consultation, if a preliminary biological opinion is confirmed as the final biological opinion.[10] Because PG&E and NOAA Fisheries agreed to use the early consultation approach after Petitioners filed their rehearing request, we do not know whether Petitioners would consider it an acceptable alternative to formal consultation. Nevertheless, because their petition and rehearing request are based on the proposition that the Commission must, as a matter of law, enter into formal consultation with NOAA Fisheries immediately in the circumstances of this case, we assume for purposes of this order that a decision to enter into early consultation would not influence Petitioners' views.

8. In their rehearing request, Petitioners raise essentially the same arguments that formed the basis for their petition. They maintain that the Commission must immediately initiate formal consultation with NOAA Fisheries under section 7(a)(2) of the ESA in this case, because the license for the DeSabla-Centerville Project includes a reservation of the Commission's authority to require changes to the license, and ongoing operation of the project may affect threatened spring-run Chinook salmon. We considered and rejected this argument in our order denying the petition, and we find nothing in their rehearing request to convince us that our decision was incorrect.

9. Section 7(a)(2) of the ESA requires each federal agency to ensure, in consultation with FWS or NOAA Fisheries, as appropriate, that any "action authorized, funded, or carried out" by the federal agency is not likely to jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat for those species. If a federal agency determines that its proposed actions "may affect" a threatened or endangered species, the agency must consult formally with the relevant Service, unless the federal agency obtains the written concurrence of the Service that the proposed action is "not likely to adversely affect" listed species.[11] It is the responsibility of the federal agency to determine whether its actions may affect listed species or their critical habitat and, if so, to enter into formal consultation concerning those actions. Thus, a key inquiry is whether there is any federal agency action that can trigger the consultation requirement. It is clear that section 7(a)(2) applies, by its terms, when a

[9] *See* 6 U.S.C. §§ 1536(a)(3), 1536(b)(2), and 1536(b)(3)(B); 50 C.F.R. § 402.11.

[10] *See* 50 C.F.R. § 402.14(b)(2).

[11] *See* 50 C.F.R. § 402.14(b)(1).

federal agency engages in an *action* that authorizes, funds, or carries out an activity that may affect listed species.

10. The Commission does not fund the activities of its licensees, or otherwise carry out any of the actions that may be necessary to construct, maintain, or operate a hydroelectric project under the terms of a Commission-issued license. Rather, the Commission authorizes the licensee, a private entity, to carry out those actions pursuant to the license terms. Therefore, the Commission's issuance or amendment of a license is clearly a federal agency action for purposes of ESA section 7(a)(2), and the Commission routinely engages in formal consultation with FWS or NOAA Fisheries, as appropriate, with respect to those actions when they may affect listed species.

11. That does not mean, however, that because the Commission has authorized the licensee's private actions pursuant to a federal license, the licensee's ongoing operation of its project under the license may likewise be considered federal agency action. Ongoing operation of a licensed hydroelectric project does not require any particular action on the Commission's part. It is the licensee that is authorized, pursuant to the license, to continue to operate the project. Unless the licensee seeks to make changes to project facilities or operations that are not authorized by the license, no Commission action is required. Thus, ongoing operation of the project constitutes private, not federal action. The Commission does not "oversee" the operation of a project in the sense of managing or controlling it; the licensee is responsible for managing and operating the project in accordance with the terms of its license. If the Commission determines that a change in those terms is needed, we must take action to change them pursuant to authority reserved in the license.

12. Moreover, as discussed in more detail below, the regulations implementing section 7 of the ESA and the relevant case law establish that, if a previously-authorized private activity may affect listed species or critical habitat, the federal agency is not required to initiate formal consultation under section 7(a)(2) for that activity unless the agency has retained "sufficient discretionary involvement or control" over the activity to implement measures to benefit the newly-listed species.[12]

13. Petitioners succinctly summarize their argument as follows: "[T]here is and has been a federal action by FERC since the day the spring-run chinook was listed: The

[12] *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995); *see also Environmental Protection Information Center v. Simpson Timber Company*, 255 F.3d 1073, 1080 (9th Cir. 2001) (*EPIC v. Simpson*); and 50 C.F.R. § 402.03, which states: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."

Project's ongoing operation, licensed by FERC, is an 'action authorized' by a federal agency, over which FERC retains 'discretionary involvement or control' for the express purpose of protecting fish." In essence, Petitioners argue that, because the Commission has retained "discretionary involvement or control" over the project by reserving its authority to require changes to project facilities or operations, project operations are thereby rendered "an ongoing federal action for Section 7 consultation purposes."[13]

14. The license for the DeSabla-Centerville Project contains two provisions that reserve the Commission's authority to require changes to the license. Standard License Article 15 requires that the licensee, "for the conservation and development of fish and wildlife resources, construct, maintain, and operate . . . such reasonable modifications of the project structures and operation, as may be ordered by the Commission . . . , after notice and opportunity for hearing."[14] Article 37 of the license requires the licensee to "continue to consult with . . . appropriate environmental agencies in implementing measures to ensure continued protection and development of the natural resources of the project area" and reserves the Commission's authority, "after notice and opportunity for hearing, to require such changes in the project and its operation as may be necessary to accomplish protection and development of the natural resources at the project."[15] Depending on the circumstances, these provisions could potentially be used to require changes to benefit newly-listed species affected by operation of the project.

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[13] Request for rehearing at 5.

[14] Article 15, Form L-1, "Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States," 54 FPC 1799 (October 1975). Article 15 states, in its entirety: "The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing."

[15] 11 FERC ¶ 62,207 at 63,398. Article 37 states, in its entirety: "Licensee shall continue to consult with the U.S. Forest Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and other appropriate environmental agencies in implementing measures to ensure continued protection and development of the natural resources of the project area. The Commission reserves the right, after notice and opportunity for hearing, to require such changes in the project and its operation as may be necessary to accomplish protection and development of the natural resources at the project."

15. In our view, however, Petitioners' argument improperly relies on the mere existence of a reservation of authority in a license, instead of taking into account the nature of the authority that the Commission has actually reserved in the license. This, in turn, ignores the necessary factual predicate that must exist under the FPA before the Commission can take some action pursuant to a reservation of authority. A reservation of authority is not self-executing, and it does not give the Commission any ongoing discretionary involvement or control over the licensee's day-to-day operation of its project pursuant to the license. Rather, a reopener clause provides the Commission with the necessary authority, after notice and an opportunity for a hearing, to reopen the license and require changes to project facilities and operation, provided that those changes have a nexus to project effects and are supported by substantial evidence, as required by section 313 of the FPA. For this reason, the Commission must undertake a preliminary investigation to determine whether there is sufficient information to support reopening a license. We cannot simply order our licensees to modify their project facilities or operation. A reservation of authority provides a procedural mechanism for requiring changes if they are shown to be needed; it does not transform the licensee's operation of its project into ongoing federal agency action.

16. Petitioners assert that it is "beyond question" that the project "may affect" spring-run Chinook salmon.[16] They maintain that this is "strongly evidenced" by the major kills of pre-spawning adult spring-run Chinook salmon in both 2002 and 2003 in a reach of Butte Creek "where Project operations keep the flow level in summer months substantially below the natural flow of the creek."[17] This ignores evidence suggesting that, although changes in project operation may help ameliorate to some extent the conditions that precipitated them, these events resulted from factors beyond PG&E's control, such as weather conditions and large numbers of returning fish.[18] Because the project is essentially operated in a run-of-river mode and has little storage in its reservoirs and forebay, the project's ability to influence water temperatures is limited. Water

[16] Request for rehearing at 2.

[17] *Id*.

[18] Commission staff attributed the problems in the summer and fall of 2002 to the combination of a low-water year and an exceptionally strong spawning run that exceeded the average return. *See* letter from George Taylor, FERC, to Jerry Mensch, dated December 11, 2002. Similarly, PG&E's report on salmon mortality in the summer of 2003 stated that the mortality was linked to an outbreak of disease, compounded by high fish densities and high water temperatures due to atmospheric conditions. *See* letter to Magalie Salas, FERC, from Bill Zemke, PG&E, filed September 15, 2003.

temperatures in Butte Creek are primarily the result of natural atmospheric conditions. In other words, although the changes instituted to date have been beneficial, and it may be possible to make some further changes in project operation that also might prove helpful, it is unclear whether project operation is causing adverse effects to the listed fish species.

17. Moreover, "[a] 'may effect' determination does not provide statutory authority to regulate" a private activity.[19] Rather, it is a "preliminary step" in a procedural process designed to identify federal actions that are likely to jeopardize the continued existence of listed species.[20] Before formal consultation under ESA section 7(a)(2) can be required, there must be some proposed federal agency action that can provide a basis for initiating consultation.

18. Petitioners argue that the Commission's actions with respect to the project demonstrate that it has retained and exercised discretionary involvement and control over the project's ongoing operation to protect spring-run Chinook salmon. In support, Petitioners cite Article 39 of the license, which required PG&E to file a comprehensive plan for the protection and enhancement of fish and wildlife resources affected by the project; and Article 402 of the license, which required PG&E to file a plan for conducting a study of stream flow and water temperature impacts. Both articles concern actions that were completed before spring-run Chinook salmon were listed as threatened in 1999. The Article 39 plan was approved in 1984.[21] The Article 402 study plan was approved in 1993, the results were filed in 1994, and the Commission required some changes in project operations, based on the study results, in 1997.[22] The Commission subsequently amended the 1987 order to allow the licensee to modify the temperature requirements upon mutual agreement among FWS, NOAA Fisheries, and the California Department of Fish and Game, without the need for Commission approval.[23] Because the actions required by these articles have been completed, the Commission could not use these articles as a basis for requiring any additional changes to benefit spring-run Chinook salmon without first invoking the reserved authority of Articles 15 or 37.[24]

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[19] *Sierra Club v. Babbit*, 65 F.3d 1502, 1509 n. 10 (9th Cir. 1995).

[20] *Id*.

[21] 26 FERC ¶ 62,236 (1984).

[22] 80 FERC ¶ 62,171 (1997).

[23] 84 FERC ¶ 62,165 (1998).

[24] As an example of the Commission's retained discretionary control over project operations, Petitioners also cite the Commission's refusal to remove Article 402 from the

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19. Petitioners also assert that the Commission has "continued to monitor the condition" of the listed species and their habitat, and has "acted on a number of occasions through its staff" to address the project's ongoing effects on the species.[25] In support, Petitioners cite Commission staff's designation of PG&E as its non-federal representative for purposes of informal ESA consultation, request for quarterly progress reports, and request for a report on adult Chinook mortality in Butte Creek. However, none of these actions show that the Commission has retained sufficient discretionary involvement in or control over the licensee's ongoing operation of the project to require immediate initiation of formal consultation. Rather, they show the Commission's interest in obtaining information about project operation and effects, to assist in determining whether the Commission may appropriately take some action to protect listed species pursuant to its reserved authority.[26] At this juncture, the key inquiry for purposes of ESA section 7(a)(2) is whether the Commission has retained sufficient discretionary involvement or control in the license to trigger the formal consultation requirement now, or whether such consultation must await some federal action on the Commission's part, pursuant to that reserved authority.

20. Concerning that issue, Petitioners assert that the most relevant cases are *Pacific Rivers*, *NRDC v. Houston*, and *WaterWatch*.[27] In *Pacific Rivers*, the court held that the Forest Service's land resource management plans constituted "ongoing agency action" throughout their duration for purposes of the Forest Service's consultation with NOAA

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license after PG&E decided to abandon its plans to replace the Centerville Powerhouse. *See* 71 FERC ¶ 62,073 (1995). In explaining why this article should be retained, the Commission stated that the water temperature in Butte Creek affected by project operations should be monitored for the protection of fishery resources. *Id*. at 64,102. At that time, the study results had been filed, but the Commission had not yet required any changes based on them. As discussed above, however, the Commission subsequently ordered some changes based on the study results, and all actions required pursuant to Article 402 have been completed.

[25] Request for rehearing at 7.

[26] In that regard, we note that the ability to seek further information is not the same as the authority to implement measures to benefit listed species. *See EPIC v. Simpson*, note 30, *infra*, 255 F.3d at 1081.

[27] *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1995), *cert. denied*, 514 U.S. 1082 (1995); *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998); *WaterWatch of Oregon v. U.S. Army Corps of Engineers*, Civ. No. 99-861, 2000 U.S. Dist. LEXIS 17650 (D. Or. June 7, 2000) (*WaterWatch*).

Fisheries on the effect of agency action on threatened Chinook salmon. Although the management plans were adopted before the species were listed, they established guidelines for future actions, such as timber sales, range activities, and road building projects, that could affect the species. The court therefore concluded that the management plans represented ongoing agency action, and that the Forest Service was required to consult formally with NOAA Fisheries on their provisions before it could announce, award, or conduct any additional timber, range, or road projects pursuant to the plans.

21. Similarly, in *NRDC v. Houston*, the court held that the Bureau of Reclamation could not renew long-term water delivery contracts with water users without first completing formal ESA consultation with FWS and NOAA Fisheries. The court found that the contract renewals were "agency action" subject to the ESA, and that the Bureau had retained not only "some" discretion to negotiate the renewal terms, but also sufficient discretion to deliver less water, if necessary for ESA compliance. The court therefore concluded that the Bureau was required to complete formal ESA consultation before renewing the contracts.

22. Significantly, both *Pacific Rivers* and *NRDC v. Houston* involved federal agencies. Therefore, the actions for which consultation was required were federal, not private. An action agency undertakes its own federal actions, whereas a licensing agency authorizes the actions of private entities pursuant to the terms of a license. Thus, these cases are not particularly helpful in determining whether a private action is one in which there is sufficient discretionary federal involvement or control to require initiation of formal ESA consultation.

23. Petitioners' third case, *WaterWatch*, is one a few cases addressing the latter situation. In that case, a federal district court held that permits issued by the U.S. Army Corps of Engineers to private entities for the construction and operation of irrigation pumping stations constituted federal agency action because the Crops had retained sufficient discretionary involvement or control over the permits it had issued. The permits included conditions that allowed the Corps to suspend, modify, or revoke the permits at any time if the Corps determined that doing so was in the public interest (defined to include fish and wildlife concerns). The court concluded that this gave the Corps "a notable degree of discretion" to act for the benefit of listed species.[28]

[28] *WaterWatch*, 2000 U.S. Dist. LEXIS 17650 at *24. Because the Corps had not yet determined whether actions under the permits may affect listed species, the district court denied a motion for summary judgment on the issue.

24. *WaterWatch* was an unreviewed district court opinion rendered in an early stage of litigation. We give greater weight to the two Ninth Circuit cases involving federal permits. These cases illustrate that there is a need to distinguish between federal agency action and private action pursuant to federal authorization. They also demonstrate the need to consider not only the existence of some sort of discretionary federal involvement or control with respect to a private activity, but also the precise nature of that involvement or control. For example, in *Sierra Club v. Babbitt*,[29] the court found that, although the Bureau of Land Management had retained some discretion with regard to a private entity's construction of a road pursuant to a right-of-way agreement, that discretion was limited to matters unrelated to protection of endangered or threatened species. As a result, the Bureau was not required to consult with FWS concerning the road construction because it could not implement measures to benefit the northern spotted owl.

25. Similarly, in *EPIC v. Simpson*, the court held that, because FWS had not retained sufficient discretionary control over a private timber company's incidental take permit for the northern spotted owl to require changes to benefit the newly-listed marbled murrelet and coho salmon, FWS was not required to re-initiate consultation to consider the effects of the permit on the newly-listed species. FWS retained some ongoing authority over the permit, and could suspend or revoke it if activities authorized under it result in the taking of threatened species not the subject of the permit, including the newly-listed species. However, the court distinguished the "plenary control" of the Forest Service in *Pacific Rivers* from the "more limited role" of FWS with regard to the permit, stating:[30]

> In such a case, the issue of ongoing agency involvement turns on whether the agency has retained the power to 'implement measures that inure to the benefit of the protected species.' *Sierra Club*, not *Pacific Rivers*, controls the present case.

26. In our view, the reservations of authority at issue in this case fall somewhere in between the Corps' far-reaching discretion to make changes at any time to benefit newly-listed species in *WaterWatch*, and FWS's limited discretion over the permit in *EPIC v. Simpson*. Although Articles 15 and 37 of the license for the DeSabla-Centerville Project reserve the Commission's authority to require changes in project facilities or operations to benefit fish and wildlife resources, this authority cannot be exercised without notice and an opportunity for a hearing. In addition, any proposed changes must have a nexus to the project and must be supported by substantial evidence, as required by section 313 of

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[29] *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

[30] *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001) (*EPIC v. Simpson*).

the FPA. Accordingly, we believe that the existence of these provisions in the license, coupled with newly-listed species and an allegation of adverse effects, is not sufficient to constitute discretionary federal involvement or control over the licensee's ongoing operation of its project. Therefore, these reopener provisions are insufficient, by themselves, to trigger the requirement to initiate formal consultation. Rather, we find that, before the Commission can take action to require any changes to benefit newly-listed species pursuant to the authority reserved to it in the license, the Commission must first begin informal (or early) consultation procedures or undertake an investigation to develop the necessary information and determine what changes, if any, may be necessary or desirable. Once this information has been developed, we will be in a position to make an informed choice about what actions should be required pursuant to our reserved authority. Alternatively, if the licensee and other interested participants are able to agree on what changes may be necessary or desirable, the licensee may choose to request an amendment of its license. In either case, at that point we will have a clearly-defined proposal for federal agency action that can provide a basis for initiating formal consultation under ESA section 7(a)(2).

27. Petitioners take issue with our statement in the August 5 Order that their argument calling for immediate formal consultation "improperly blurs the distinction between the Commission's discretion to act and the actual exercise of that discretion, thus ignoring the statutory requirement that ESA consultation be premised on a federal agency's action."[31] They assert that, in *WaterWatch*, the district court rejected any such distinction, stating: "This argument ignores the fact that the Corps could exercise its discretion at any time."[32] As we have seen, however, the Commission cannot exercise its reserved authority at any time. The Commission must first find a nexus between project operation and effects on listed species, and must also provide notice and an opportunity for a hearing before it may require any changes in project facilities or operation. For this reason, we think a valid distinction exists between our potential discretion to act pursuant to a reservation of authority, assuming that adequate factual support exists or can be developed, and the actual exercise of that discretion. The mere existence of a reservation of authority does not, in our view, constitute sufficient discretionary involvement or control over the licensee's actions under the license to require immediate initiation of formal consultation as a matter of law whenever it is alleged that project operation may affect a newly-listed species.[33]

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[31] 108 FERC ¶ 61,156 at P 38.

[32] *WaterWatch*, note 27 *supra*, 2000 U.S. Dist. LEXIS 17650 at *26.

[33] As discussed above, our practice concerning initiation of formal consultation for already-licensed hydroelectric projects is based on our interpretation of section 7 of the ESA, section 402.03 of the implementing regulations, and the relevant case law.

(continued…)

28. Finally, Petitioners argue that our recent order in *Idaho Power*, granting a petition for formal consultation concerning the Hells Canyon Project, demonstrates that we have a "legal obligation to consult" regarding the effects of ongoing operation of our licensed projects on species that are listed during the term of the license.[34] Because we granted the petition without first determining that new conditions are needed, or awaiting the licensee's request for a license amendment, Petitioners maintain that this repudiates our position that the Commission's oversight of project operation under the license does not constitute federal agency action.

29. Petitioners' view is incorrect. We find nothing in the ESA to prevent a federal agency from determining that consultation in a particular case might be desirable, even

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However, the issue is not without some practical significance. There are thousands of Commission-licensed projects that include one or more provisions reserving the Commission's authority, after notice and opportunity for hearing, to require changes to project facilities or operations. Immediate formal consultation based on the existence of these reopener provisions whenever a new species is listed could seriously disrupt the Commission's hydroelectric licensing program. Under section 6 of the FPA, licenses are a contract between the Commission and the licensee, intended to provide certainty and stability for the term of the license, and may be altered "only upon mutual agreement between the licensee and the Commission." *See* 16 U.S.C. § 799. Reservations of authority are a recognized means of obtaining the licensee's consent to any future modifications to project facilities or operations that may be required. *See, e.g., California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965); *U.S. Dept. of Interior v. FERC*, 952 F. 2d 538 (D.C. Cir. 1992); *Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994). However, the Commission does not undertake reopener proceedings lightly, and must first investigate what effects, if any, may be occurring and whether there is a need to require changes to address those effects. Moreover, reopener proceedings can be lengthy and complex, requiring significant resources on the part of not only the Commission, but also the licensee and other interested parties. *See, e.g., Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 36 (D.C. Cir. 1992) (describing an eight-month inquiry into the need for interim wildlife protective conditions, during which the Commission sought recommendations and received submissions from the licensees, conservation groups, and federal and state agencies, and based its order on interim conditions on a 10,000-page record). In our experience, designating the licensee as our non-federal representative for purposes of informal ESA consultation generally works well, and results in agreed-upon protective measures for listed species much more quickly and efficiently than would be possible by conducting a reopener proceeding.

[34] Request for rehearing at 15; *See Idaho Power Co.*, 108 FERC ¶ 61,158 (2004).

though it might not be statutorily required. More importantly, however, we did not address the issue in that case. As discussed in the *Idaho Power* order, we granted the petition in response to a court order to respond, prompted in part by the lack of clarity that may have resulted from the complex procedural history of the case and our failure to directly address the petition after our staff's October 2002 letter to NOAA Fisheries requesting initiation of formal consultation. The order is silent about any possible legal basis for the decision to initiate consultation; it simply quotes staff's conclusion that the "recent development of information available to the Commission puts us in the position to effectively carry out this consultation."[35] As the order recites, NOAA Fisheries subsequently requested deferral of formal consultation in light of ongoing settlement discussions. The mandamus action followed, and staff requested to resume formal consultation in July 2004. Thereafter, we issued our decision granting the petition.

30. Idaho Power filed a request for rehearing, but asked that we defer action on the rehearing to allow time for settlement negotiations. We granted the request for a short time.[36] Idaho Power and other parties sought rehearing of the deferral for the purpose of requesting more time for settlement negotiations. We granted those rehearing requests as well.[37] On January 7, 2005, the parties filed a settlement agreement addressing the effects of ongoing operation of the Hells Canyon Project on listed salmon species and other resources. On February 9, 2005, staff informed the parties that, if no one objected, it would consider the procedures outlined in the agreement sufficient to adequately address ESA matters during the remainder of the term of the current license.[38] No objections were filed. Thus, although the licensee's request for rehearing of our order of October 27, 2004, is still pending, the controversy in that case is now moot.

31. Moreover, in *Idaho Power* the Commission had experienced difficulty convincing NOAA Fisheries to engage with it on ESA issues, due to the pendency of ongoing litigation in which a gag order had been imposed and to which the Commission was not party.[39] Here, NOAA Fisheries and the licensee have a record of working together to resolve ESA issues, thus lessening the need for Commission involvement. Given that the issue was not before us and we expressed no opinion about whether the Commission was

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[35] Id. at P 7.

[36] 109 FERC ¶ 61,077 (2004).

[37] 109 FERC ¶ 61,308 (2004).

[38] See Letter from J. Mark Robinson, FERC, to D. Robert Lohn, NOAA Fisheries, dated February 9, 2005.

[39] *See* 108 FERC ¶ 61,158 at P 8, n.3.

legally required to initiate formal consultation in that case, no conclusions can properly be drawn from our decision to grant the petition.

The Commission orders:

The request for rehearing filed in this proceeding on September 3, 2004, by the California Sportfishing Protection Alliance, Friends of Butte Creek, Friends of the River, Institute for Fisheries Resources, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations, and Sacramento River Preservation Trust, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.