IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-73225 and 05-70391
(consolidated)

COWLITZ INDIAN TRIBE, FRIENDS,
OF THE COWLITZ, AND CPR-FISH,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

JOHN S. MOOT
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JUDITH A. ALBERT
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in issuing a license for the continued operation of a hydroelectric project on the Cowlitz River in Washington, satisfied all responsibilities under the Federal Power Act and Endangered Species Act in attaching numerous conditions, after consultation with and settlement by a broad array of governmental and private interests, designed to promote fish passage and protection.

2. Whether the Commission appropriately declined to institute an investigation of the licensee's past compliance with license conditions, when the licensee's existing compliance record was satisfactory and when an investigation would not have affected the choice of fish protection conditions ultimately imposed other than to delay their imposition.

3. Whether the Commission's determination that the flood control conditions provide appropriate protection is reasonable and supported by the evidence.

4. Whether the Commission properly determined that the Fisheries Technical Committee, which advises the licensee and not the Commission, was not subject to the Federal Advisory Committee Act.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioners' brief asserts arguments that Petitioners either failed to raise at all on rehearing before the Commission or failed to raise with specificity as required by the Federal Power Act ("FPA") § 313(a) and (b), 16 U.S.C. § 825*l*(a) and (b). Consequently, these issues are jurisdictionally barred. *See*, *e.g.*, *High Country Resources v. FERC*, 255 F.3d 741, 746 (9th Cir. 2001) (specificity in the statement

of objection in the rehearing petition required to trigger appellate jurisdiction; requirement insures that FERC has opportunity to deal with the issue prior to appellate review); *LaFlamme v. FERC*, 945 F.2d 1124, 1127 (9th Cir. 1991) ("No objection to the order of the Commission [denying the application for rehearing] shall be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing unless there is a reasonable ground for failure to do so." [quoting FPA § 313(b)]).

The arguments now urged that were not raised on rehearing, or not raised with specificity, are as follows:

- That the Fisheries Technical Committee is an advisory committee to the federal natural resource agencies. Pet. Br. at 60.
- That the Commission's adoption of the hatchery production and management condition failed to comply with the Columbia River Basin Fish and Wildlife Program. Pet. Br. at 55.
- That the hatchery condition fails to define "innovative" practices and sets production limits that are 75 percent and 65 percent of previous limits. Pet. Br. at 55-56.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

In this proceeding, the Commission issued a new license for the continued operation and maintenance by the City of Tacoma ("Tacoma") of Cowlitz River Project No. 2016 ("Cowlitz Project"). *City of Tacoma, Washington*, 98 FERC ¶

61,274 (March 13, 2002) ("Licensing Order") (Pet. Rec. Ex. 1),[1] *reh'g denied*, 104 FERC ¶ 61,092 (July 18, 2003) ("Licensing Rehearing Order") (Pet. Rec. Ex. 106). The license imposes environmental conditions initially negotiated and agreed to by Tacoma, the State of Washington natural resource agencies, the federal resource agencies, the Yakima Nation, and various environmental groups. The conditions provide numerous enhancements to the existing aquatic and terrestrial environments. The Licensing and Licensing Rehearing Orders are under review in Docket No. 03-73225.

When the license issued in 2002, the Commission had not yet received a biological opinion from the National Marine Fisheries Service ("National Marine Fisheries"). Subsequently, National Marine Fisheries submitted its biological opinion and FERC amended the new license to include additional environmental protection conditions. *City of Tacoma, Washington*, 108 FERC ¶ 61,031 (July 9, 2004) ("Amending Order") (Pet. Rec. Ex. 140), *reh'g denied*, 109 FERC ¶ 61,198 (November 22, 2004) ("Amending Rehearing Order") (Pet. Rec. Ex. 166). These orders are under review in Docket No. 05-70391. Petitioners' primary dissatisfaction is with the environmental protection conditions agreed to by the federal and state natural resource agencies and other parties to the proceeding.

II. Statement of Facts

[1] Pet. Rec. Ex. refers to Petitioners' Excerpts of Record, and Resp. Rec. Ex. refers to the record excerpts submitted by FERC.

A. Statutory and Regulatory Background

It is unlawful for any person to operate or maintain a hydroelectric project on navigable waters except in accordance with the terms of a license issued under the FPA. FPA § 23(b)(1), 16 U.S.C. § 817(1). FPA § 4(e), 16 U.S.C. § 797(e), grants FERC jurisdiction to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause. *See First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S.C. 152, 180 (1946) (the FPA constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation").

Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), requires that each license include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project. While such conditions shall be based on recommendations received from specified state and federal resource agencies, the Commission may determine not to adopt those recommendations, in whole or in part, after determining that they are inconsistent with applicable law and attempting to resolve the inconsistency. FPA § 10(j)(2), 16 U.S.C. § 803(j)(2); *see also American Rivers v. FERC*, 201 F.3d 1186, 1202 (9th Cir. 1999).

In contrast, FPA § 18, 16 U.S.C. § 811, provides that the Commission "shall require the construction, maintenance, and operation by a licensee at its own

expense of . . . such fishways as may be directed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." The Secretary of the Interior and the Secretary of Commerce have delegated the prescription of fishways to the Fish and Wildlife Service ("U.S. Fish and Wildlife") and National Marine Fisheries, respectively. This Court has determined that the Commission may not modify or reject any FPA §18 fishway prescriptions submitted by the federal resource agencies. *American Rivers*, 201 F.3d at 1210.

Congress passed the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). ESA § 9 prohibits, among other things, the "taking" of a species that is listed as an endangered species. 16 U.S.C. § 1538(a)(1)(B). A species is endangered if it is "endangered throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," 16 U.S.C. § 1532(19). ESA implementing regulations define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (sustaining 50 C.F.R. §17.3).

ESA § 7(a)(1) imposes a duty on federal agencies to use their authorities to conserve listed species. 16 U.S.C. § 1536(a)(1). ESA § 7(a)(2) requires federal agencies to assure that their actions, including the granting of licenses, are "not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2). The Commission routinely engages in formal consultation with National Marine Fisheries or U.S. Fish and Wildlife with respect to its hydropower licensing.

Initially, FERC prepares a biological assessment to determine whether ESA § 7(a)(2) applies, *i.e.*, whether the hydropower licensing is likely to jeopardize a listed species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. If the Commission concludes that a licensing action may adversely affect an endangered species, it initiates formal consultation under § ESA 7(a)(2); *see also* 50 C.F.R. § 402.14. Formal consultations result in the issuance by the Secretary (here, National Marine Fisheries) of a Biological Opinion that includes a "jeopardy" or "no jeopardy" determination. ESA 7(b), 16 U.S.C. § 1536(b)(3)(A) and (b)(4). If National Marine Fisheries decides after consultation that neither the proposed action nor a taking incidental to the action is likely to "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat"

(*see* 16 U.S.C. § 1536(a)(2)), the opinion may set forth "reasonable and prudent measures" to minimize the impact. 16 U.S.C. § 1536(b)(3)(B)(4).

Also relevant here is the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 *et seq*. ("Northwest Power Planning Act"), which imposes certain obligations on the Commission. The Commission, in exercising its existing statutory responsibilities, must provide "equitable treatment" to fish and wildlife. 16 U.S.C. § 839b(h)(11)(A)(i). Moreover, at each relevant stage of its decision-making process, the agency must take into account "to the fullest extent practicable" the Northwest Power Planning Council's Columbia Basin Fish and Wildlife Program. 16 U.S.C. § 839b(h)(11)(A)(ii). Finally, in carrying out these two responsibilities, the Commission must consult with a variety of entities, including National Marine Fisheries, the state fish and wildlife agencies, and "appropriate Indian tribes," and, to the "greatest extent practicable," coordinate its actions with other federal agencies. 16 U.S.C. § 839b(h)(11)(B).

B. Events Leading to the Challenged Orders

The Cowlitz Project, located in Lewis County, Washington, is owned and operated by the City of Tacoma, Washington. Power generated by the project meets much of the energy requirements of Tacoma's citizens. Other objectives of

the project are to provide flood control, recreation, and downstream flows for fish habitat protection. Licensing Order at 4 (Pet. Rec. Ex. 4).[2]

The Cowlitz Project consists of two dams, the Mayfield Dam (which forms Mayfield Lake) at River Mile 52 and the Mossyrock Dam (which forms Riffe Lake) upstream at River Mile 65. Other facilities include the Cowlitz Salmon Hatchery and the associated Barrier Dam (both located about 2 miles downstream of Mayfield Dam), and the Cowlitz Trout Hatchery (located about 7.5 miles downstream of Barrier Dam). Both hatcheries are managed by the Washington Department of Fish and Wildlife ("Washington Fish and Wildlife") and funded by Tacoma. The Cowlitz Salmon Hatchery produces coho, spring chinook, and fall chinook salmon juveniles for release to the Cowlitz River. The Barrier Dam directs migrating adult fish into the Salmon Hatchery sorting facilities where they are sorted by species for release to onsite holding ponds or for transport offsite. The Cowlitz Trout Hatchery is used to collect and incubate eggs and to rear sea-run cutthroat and winter and summer steelhead. Licensing Order at 3-5 (Pet. Rec. Ex. 3-5).

The original license for the Cowlitz Project issued in 1951 and expired on December 31, 2001. After expiration and prior to issuance of the new license, Tacoma operated under annual licenses. On December 27, 1999, Tacoma filed a

[2] The Licensing Order cites are to page numbers; the cites for the other challenged orders are to paragraph numbers.

relicensing application pursuant to FPA §§ 15 and 4(e), 16 U.S.C. §§ 808 and 797. On March 15, 2000, the Commission issued a notice accepting the application and setting a 60-day period for interventions and for the filing of recommendations and prescriptions. Numerous parties filed interventions.

On September 11, 2000, after a collaborative process that lasted nearly four years, Tacoma filed a Settlement Agreement signed by almost all of the interested parties, representing a wide array of governmental, private, and environmental interests. The parties included the Washington Fish and Wildlife, Washington State Department of Ecology ("Washington Ecology"), Washington State Parks and Recreation Commission, United States Department of the Interior, U.S. Fish and Wildlife, National Marine Fisheries, Forest Service, Interagency Committee for Outdoor Recreation, Lewis County, Confederated Tribes and Bands of the Yakima Nation, Washington Council of Trout Unlimited and Trout Unlimited National, and American Rivers. Licensing Order at 2-3 (Pet. Rec. Ex. 2-3). On September 18, 2000, the Commission issued a notice requesting comments on the Agreement.

On April 25, 2001, pursuant to ESA § 7, Commission staff initiated consultation by submitting a biological assessment to National Marine Fisheries and U.S. Fish and Wildlife. On June 8, 2001, staff issued the Draft Environmental Impact Statement and requested comments. The Final Environmental Impact

Statement, which issued on November 9, 2001, recommended adopting the Settlement Agreement. Licensing Order at 3 (Pet. Rec. Ex. 3).

C. The Licensing and Licensing Rehearing Orders

(a) Fish protection conditions

A principal controversy in the proceeding was fish passage and the recovery of ESA-listed salmon. Licensing Order at 15 (Pet. Rec. Ex. 15). Petitioners contended that a fish ladder should be constructed at Mayfield within 18 months of license issuance, and a ladder or other form of volitional passage at Mossyrock within five years of issuance. *Id*. Instead, the Commission imposed the fish passage prescriptions filed by National Marine Fisheries and U.S. Fish and Wildlife pursuant to FPA § 18. Moreover, although FPA § 18 mandates that the Commission impose the fishway prescriptions, *see supra* at 6, FERC agreed with the prescriptions in any case. Licensing Order at 16-17 (Pet. Rec. Ex. 16-17).

The fishway prescriptions are essentially the same as the conditions set forth in the Settlement Agreement, *id*. at 7 (Pet. Rec. Ex. 7), and are contained in Appendix D to the Licensing Order (Pet. Rec. Ex. 90-104). An adaptive management approach is central to the prescriptions. Under it, Tacoma must propose and implement measures most likely to improve fish passage, perform studies to determine the effectiveness of the measures, and propose and implement new measures if specified goals are not reached. Deadlines are set for the various

steps. In addition, the proposals are to be developed in consultation with a Fisheries Technical Committee and must be submitted to National Marine Fisheries and U.S. Fish and Wildlife for approval.

The prescriptions may be summarized more specifically as follows:

(i) Downstream fishway passage at Mossyrock

Within six months of license issuance, Tacoma must submit a plan for improving downstream fish passage and collection that includes proposed facilities and measures most likely to achieve 95 percent fish passage survival, a plan for monitoring the effectiveness of the existing and new facilities, and a construction and implementation timeline not to exceed 12 months from plan approval. Within 18 months, Tacoma must report on the effectiveness of the facilities and, if the target of 95 percent has not been reached, propose further improvements likely to achieve the target. Tacoma must continue making improvements and submitting reports until the target has been reached or until Tacoma has employed the best available technology and achieved at least a 75 percent fish passage survival. *See* Appendix D to the Licensing Order (Pet. Rec. Ex. 90-91).[3]

[3] The Appendix citations given are to the U.S. Department of the Interior (U.S. Fish and Wildlife) prescriptions. The U.S. Department of Commerce (National Marine Fisheries) prescriptions, which are essentially the same, begin at Appendix D, page 97 (Pet. Rec. Ex. 97).

(ii) Downstream fish passage: Mayfield

Within 6 months of license issuance, Tacoma must file a study plan or study results evaluating turbine morbidity and the effectiveness of the existing Mayfield downstream fish passage system. Within three years of license issuance, Tacoma must file a plan for improvements to achieve a fish passage survival rate of 95 percent. As with Mossyrock, Tacoma must report on the effectiveness of the improvements and continue making improvements and reporting until either a 95 percent downstream fish passage survival is achieved or the federal resource agencies determine that: (1) passage effectiveness and survival are high enough to support self-sustaining populations of anadromous fish stocks, (2) protection of anadromous fish migrating downstream at Mayfield Dam has been maximized by all reasonable measures, and (3) adjustments to hatchery production and habitat measures will be required in lieu of further attempts to improve downstream passage at Mayfield Dam. *See* Appendix D at 91-94 (Pet. Rec. Ex. 91-94).

(iii) Upstream fish passage: Barrier, Mayfield, and Mossyrock

Tacoma will provide upstream fish passage through trap-and-haul facilities until the criteria precedent to implementation of volitional upstream passage systems have been met. These criteria include, *inter alia,* a determination that adult fish in Mayfield Lake are able to choose their tributary of origin and survive Mayfield Lake transit at rates determined by the federal resource agencies to be

sufficient to achieve effective upstream passage through volitional facilities. *See* Appendix D at 94-95 (Pet. Rec. Ex. 94-95).

For any annual report filed within 12 years of license issuance in which study results indicate that, within the next three years or less, the criteria will be met with respect to relevant species, Tacoma must include proposed preliminary designs and schedules for the construction of upstream passage facilities. In the case of Barrier Dam, the proposal shall provide for breaching the dam. Fish ladders may be constructed for Barrier Dam if the federal resource agencies determine that a tram would be more appropriate than breaching. For Mayfield Dam, the upstream passage facility must be a ladder with sorting facilities unless the resource agencies determine that a tram is more effective. The proposed upstream passage system for Mossyrock Dam must be an adult trap and haul facility unless the resource agencies determine that a comparably priced tram is more appropriate. *See id*. at 95 (Pet. Rec. Ex. 95).

Additionally, within five years of license issuance, Tacoma must establish an interest-bearing escrow account in the amount of $15 million to contribute to the cost of constructing volitional upstream fish passage facilities. If within 14 years of license issuance the criteria for volitional upstream passage systems have not been met and expenditure of the escrow fund on additional measures in lieu of volitional upstream passage facilities is necessary for recovery of ESA-listed

stocks, Tacoma must submit a plan to abandon volitional upstream facilities and expend the escrow fund for hatchery production and habitat measures. *See* Appendix D at 96-97 (Pet. Rec. Ex. 96-97).

(iv) Fish production and hatcheries

These conditions, recommended by the resource agencies pursuant to FPA § 10(j), are set forth in the Settlement Agreement, Articles 5-7 (Pet. Rec. Ex. 64-66). Article 7 requires Tacoma to submit a plan, including construction timetables, for the Hatchery Complex remodeling. Article 5 requires Tacoma to fund the operation and maintenance of the Cowlitz Hatchery Complex, consisting of the remodeled Cowlitz Salmon Hatchery, the remodeled Cowlitz Trout Hatchery, and three satellite rearing facilities. Under Article 6, Tacoma must submit (and update every six years) a Fisheries and Hatchery Management Plan including rearing and releasing strategies for each stock.

(b) Other conditions and issues

The Licensing and Licensing Rehearing Orders, as explained further *infra*, also approved flood control measures formulated in consultation with the U.S. Army Corps of Engineers, determined that Tacoma's record of compliance with existing license conditions was satisfactory, concluded that the Fisheries Technical Committee was not a federal advisory committee, and found that the fish protection conditions accorded with the Northwest Power Planning Act.

Additionally, when the license issued in 2002, the Commission had not yet received a National Marine Fisheries Biological Opinion. After considerable deliberation, FERC issued the Licensing and Licensing Rehearing Orders anyway because National Marine Fisheries itself had submitted the fishery protection conditions which the Commission included in the new license and because the conditions would benefit listed species. Licensing Rehearing Order at 12 (Pet. Rec. Ex. 117).

D. The Amending and Amending Rehearing Orders

National Marine Fisheries filed its draft Biological Opinion for comment with the Commission on December 19, 2003, and its final Biological Opinion on March 25, 2004. The Commission then issued the Amending and Amending Rehearing Orders.

The Biological Opinion found that the proposed action, defined as the continued operation and maintenance of the Cowlitz Project under the terms of the new license, is not likely to jeopardize the continued existence of the ESA-listed species (Lower Columbia River Chinook salmon, Lower Columbia River steelhead, and Columbia River chum salmon). Amending Order at 3 (Pet. Rec. Ex. 141); Final Biological Opinion at 9-2 (Resp. Rec. Ex. 49). National Marine Fisheries also identified reasonable and prudent measures to avoid or minimize incidental taking, as well as terms and conditions to implement those measures.

Amending Order at 3 (Pet. Rec. Ex. 141). These terms and conditions "provide[d] details on more general license and/or Settlement Agreement conditions" and "constitute[d] no more than a minor change in the proposed action." *Id*. at 4, quoting the Biological Opinion at 9-3 (Pet. Rec. Ex. 142). The Commission amended the new license to include the additional conditions.

SUMMARY OF ARGUMENT

The conditions which the Commission incorporated into the license were the culmination of nearly four years of negotiations resulting in a settlement supported by a broad array of interests. Moreover, the federal natural resource agencies, the agencies with primary responsibility for protecting endangered species and habitat, have approved the conditions as providing the level of protection required here. Under these circumstances, the Commission's balancing of the competing objectives of the Cowlitz River Project was reasonable and satisfied all of its responsibilities under the FPA and ESA.

The Commission's conditioning of the license with the fish passage prescriptions filed by National Marine Fisheries was appropriate. As FPA § 18 prescriptions are mandatory, the Commission has no discretion and must impose them. FERC's adoption of the Biological Opinion "no jeopardy" finding was also appropriate. Although the Biological Opinion theoretically serves only an advisory function, the statutory framework is based on the assumption that the Biological

Opinion will play a central role, and an agency that disregards one "does so at its own peril." *Bennett v. Spear*, 520 U.S. 154, 170 (1997). In any event, the Commission's Final Environmental Impact Statement concluded that relicensing the project in accordance with the prescriptions and recommendations of the federal natural resource agencies would benefit the listed fish species and improve the probability of their recovery. Accordingly, the Commission's adoption of the Biological Opinion and the conditions specified therein was reasonable.

The Commission properly determined that FPA § 15, which requires consideration of "the existing licensee's record of compliance," mandates only consideration of existing records and not the initiation of investigations at the time of relicensing. FPA § 31(a), which explicitly addresses investigations, gives the Commission virtually unreviewable discretion in determining whether to conduct an investigation. Here, after careful consideration of the facts, the Commission reasonably declined to initiate an investigation that would likely take considerable resources, delay needed enhancement measures for fish and wildlife, and not aid in determining the level of natural resource protection that should be imposed.

Petitioners failed to raise on rehearing its arguments pertaining to hatchery production and management conditions. To the extent the Court finds that Petitioners adequately preserved these arguments, FERC's denial of rehearing on

grounds that Petitioners had not explained or supported their assertions should be affirmed.

The Commission's imposition of the flood control measures endorsed by the U.S. Army Corps of Engineers was reasonable and supported by the record. For example, flood flow analyses found that Petitioners' recommendations were likely to result in greater frequency of flows associated with flooding than would those of the Army Corps. The Commission, moreover, reasonably balanced flood control with other competing purposes of the project.

Since the Fisheries Technical Committee advises Tacoma and not the Commission, the Commission properly rejected the contention that the Committee is a "federal advisory committee" as to FERC. Petitioners' contention that the Committee is an advisory committee to the federal natural resource agencies is not properly before the Court because it was not raised on rehearing, but, in any event, lacks merit. A committee is not "utilized" by a federal agency under the Federal Advisory Committee Act simply because the agency must review plans submitted by a private party which has consulted the committee during plan development.

ARGUMENT

I. Standard of Review

Judicial review of the Commission's licensing decisions is limited to determining whether the Commission's action was arbitrary and capricious, and

whether the factual findings underlying the decision were supported by substantial evidence. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003); *American Rivers*, 201 F.3d at 1194; *see also* FPA § 313(b), 16 U.S.C. § 825*l*(b). Likewise, agency decisions under the ESA are reviewed under the arbitrary and capricious standard. *Ariz. Cattle Growers' Ass'n. v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1235-36 (9th Cir. 2001). Under that standard, the court is not empowered to substitute its judgment for that of the agency. Rather, as long as the agency decision is based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious. *Id.* at 1236.

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.C. 837, 842-43 (1984). *See also, e.g., Whitman v. American Trucking Assn's*, 531 U.S. 457, 481 (2001). If the statute is silent or ambiguous as to the question at issue, then the Court "must defer to a reasonable interpretation made by the . . . agency." *Whitman*, 531 U.S. at 481; *Chevron*, 467 U.S. at 843.

II. The Commission's Adoption Of The Fish Protection Conditions Was Reasonable And Satisfied All Statutory Requirements.

A. The Commission Imposed The Conditions After Developing An Extensive Record, Giving Appropriate Consideration To The Opinions Of The Federal Natural Resource Agencies And Other Parties.

Hydropower projects serve many different (and competing) purposes, including power production, recreation, flood protection, and protection and enhancement of fish and wildlife resources. Maximizing one purpose usually results in detrimental effects on other purposes. Licensing Rehearing Order at P 54 (Pet. Rec. Ex. 124). The Commission must balance all these competing interests in approving a project that "will be best adapted to a comprehensive plan for improving or developing" the affected waterway. FPA § 10(a)(1), 16 U.S.C. § 803(a)(1).

In the case here, the Settlement Agreement, the conditions of which the Commission incorporated into the new license, was the culmination of nearly four years of negotiations which started before Tacoma filed its license application. The numerous parties involved in this collaborative process explored many alternatives before reaching a consensus. Ultimately, the Settlement Agreement garnered support from a broad spectrum of parties representing an array of interests: Tacoma, the state natural resource agencies (Washington Fish and Wildlife, Washington Department of Ecology, Washington State Parks and

Recreation Commission), the federal natural resource agencies (U.S. Fish and Wildlife, National Marine Fisheries, U.S. Forest Service), and private environmental advocates (Interagency Committee for Outdoor Recreation, Confederated Tribes and Bands of the Yakima Nation, Washington Council of Trout Unlimited, and American Rivers). *See* Amending Rehearing Order at P 10 (Pet. Rec. Ex. 170) (recognizing "broad support" for the Settlement's resolution of a "wide range of issues, including fish passage, fish production, fish habitat, and cultural and historic resources").

Even with such a broad consensus, the Commission was still required to consider whether the license would comply with FPA and ESA environmental protection requirements. The Commission did so. The Commission prepared draft and final environmental impact statements that examined the many provisions of the Settlement Agreement and found that they were reasonable. As mandated by FPA § 18, the Commission imposed the fish passage conditions submitted by National Marine Fisheries and U.S. Fish and Wildlife pursuant to that provision. Moreover, although under the ESA a federal agency must ensure that its action will not jeopardize the continued existence of an endangered species, the resource agencies are the acknowledged experts with regard to listed species and habitat. Here, the Commission determined that an extensive record, including the environmental impact statements and National Marine Fisheries' Biological

Opinion, supports the resource agency finding that, as conditioned, continued operation and maintenance of the Cowlitz Project will not jeopardize the continued existence of endangered species.

Finally, all parties, including Petitioners, recognize that the conditions imposed on the new license are an improvement over the old conditions. The new license includes measures for upstream and downstream fish passage, hatchery production, minimum flows, fish monitoring, sediment and spawning gravel augmentation, and placement of large woody debris. Amending Rehearing Order at P 12 (Pet. Rec. Ex. 171). Tacoma is required to monitor the results, and, if these measures do not work as planned, must change them. The Commission has also reserved the right to modify the license if so required, and may reinitiate consultation with National Marine Fisheries as necessary. *See* Amending Rehearing Order at PP 13-15 (Pet. Rec. Ex. at 171-73) (if license conditions "are not sufficient or do not work as intended, the license provides for a process of adaptive management to change them;" use of adaptive management is a "reasonable response to scientific uncertainty").

Petitioners obviously would prefer different fish protection conditions. However, the Commission's adoption of the federal natural resource agencies' findings and recommendations is reasonable and supported by the record. While continued hydroelectric operation may have some adverse impact on fish, the

conditions imposed satisfy FPA and ESA environmental requirements and represent an appropriate balance of the conflicting purposes of the Cowlitz Project. Nothing more is required.

B. The Commission's Adoption Of The Fish Passage Conditions Was Reasonable And Complied Fully With The FPA And ESA.

For their part, Petitioners contend (Br. at 42-55) that the downstream and upstream fish passage conditions, *see supra* at 11-15, are arbitrary and capricious and not in accordance with law. These conditions were submitted by National Marine Fisheries and U.S. Fish and Wildlife pursuant to FPA § 18. Consequently, the Commission was required to impose them and did so. *See America Rivers*, 201 F.3d at 1210.

In any event, the Commission fully considered the submitted fish passage conditions in its draft and final environmental impact statements and found them to be entirely reasonable under the circumstances. *See* Licensing Order at 16-17 (Pet. Rec. Ex. 16-17) and Final Environmental Impact Statement at 6-3 to 6-5 (Resp. Rec. Ex. 14-16) (discussing potentially negative effects of shifting to volitional passage too early, including disease introduction, genetic introgression of hatchery and wild fish, and exposure to multiple passage structures, turbines, and reservoirs). Moreover, if the fish passage conditions do not work as predicted, then the Commission is entitled to rely on adaptive management provisions of the license providing for periodic reevaluation and modification as necessary. *See*

Amending Rehearing Order at PP 13-15 (Pet. Rec. Ex. at 171-73); *see also, e.g.*, *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1238-39 (D.C. Cir. 2005) (Commission is entitled to deference when its "predictive judgment" is subject to monitoring and future modification if "future predictions fail to be borne out by experience").

The Commission also gave appropriate deference to National Marine Fisheries' Biological Opinion, explaining its responsibilities under the ESA as follows:

> Although a federal agency must ensure that its action will not jeopardize the continued existence of listed species or destroy or modify their designated critical habitat, it must do so in consultation with [National Marine Fisheries] or [U.S. Fish and Wildlife], as appropriate. Because those agencies are charged with implementing the ESA, they are recognized experts with regard to matters of listed species and their habitat. Thus, the Supreme Court has observed that, while a biological opinion "theoretically serves an advisory function," . . . in reality it has a powerful coercive effect on the action agency. The statutory framework is based on the assumption that the biological opinion will play a central role in the action agency's decision making, and an agency that disregards a biological opinion . . . "does so at its own peril."

Amending Rehearing Order at P 8 (Pet. Rec. Ex. 169), *quoting Bennett v. Spear*, 520 U.S. at 169-170.

In this case, there was an extensive analysis of the fisheries issues in the Biological Opinion. Amending Order at P 9 (Pet. Rec. Ex. 169); *see e.g.*, Section 6 of the Final Biological Opinion, "Analysis of Effects of the Proposed Action"

(Resp. Rec. Ex. 21-47); *see also* Final Environmental Impact Statement at 6-3 to 6-5 (Resp. Rec. Ex. 14-16). Consequently, FERC's reliance on that analysis was entirely reasonable. *See generally Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453 (D.C. 2004) (judicial review of mandatory fish passage conditions in FERC-issued license focuses on reasonableness of the actions of federal resource agencies in preparing and submitting conditions, not FERC's non-discretionary action in including the conditions in the license).

C. Petitioners' Arguments Concerning The Hatchery Conditions Were Not Properly Preserved For Appeal, But In Any Case, The Conditions Are Reasonable.

Petitioners contend (Br. at 55) that the Commission's adoption of the hatchery production and management conditions failed to comply with the Pacific Northwest Electric Power and Conservation Planning Council's Columbia River Basin Fish and Wildlife Program. However, as Petitioners did not raise that issue on rehearing, the Court lacks jurisdiction to consider it.[4] *See* FPA § 313(b); *see*

[4] Petitioners' rehearing request did assert that the fish passage conditions (as opposed to the hatchery conditions) are inconsistent with the Northwest Power Planning Act because "they do not provide the 'best available means for aiding downstream and upstream passage of anadromous and resident fish.'" Licensing Rehearing Order at P 48 (Pet. Rec. Ex. 124); Pet. Reh. Req. at 7 (Resp. Rec. Ex. at 2). The FEIS examined this issue and concluded that that fish passage conditions, along with the "means to refine those measures to improve passage as more information is developed," represent the best available means of providing fish passage. Licensing Rehearing Order at P 49 and n. 40 (Pet. Rec. Ex. 124); Licensing Order at 23-25 (Pet. Rec. Ex. 23-25).

also discussion *supra* at 2 and cases cited therein; Petitioners' Reh. Req. at 8 (Resp. Rec. Ex. 3).

Similarly, Petitioners' remaining arguments (Br. at 55-57) were not presented to FERC with the specificity required by FPA § 313 and are likewise not properly before the Court. *See* Petitioners' Reh. Req. at 8 (Resp. Rec. Ex. 3). To the extent the Court finds that Petitioners adequately preserved these arguments, the Commission reasonably denied rehearing on the ground that Petitioners had not explained or supported their assertions. *See* Licensing Rehearing Order at P 57-58 (Pet. Rec. Ex. 127). Tacoma agreed to upgrade both the Cowlitz Salmon Hatchery and the Cowlitz Trout Hatchery and to provide three satellite rearing facilities that would accommodate a range of fish production levels up to 800,00 pounds. Final Environmental Impact Statement at 4-40 (Resp. Rec. Ex. 7). The rearing and release strategies for each stock include upward or downward adjustments to accommodate recovery of indigenous stocks, *see id*. The management strategy as whole follows concepts developed by the Northwest Power Planning Council to review current artificial production practices in the Columbia River Basin, *id*. at n. 41. Moreover, the goal of the hatchery improvements is to improve adult returns by emphasizing smolt quality over smolt quantity through, for example, reducing disease and developing new and improved rearing ponds. Final Environmental Impact Statement at 4-42 (Resp. Rec. Ex. 9).

III. FERC Fully Considered Tacoma's Compliance Record.

Cowlitz contends (Br. at 34) that the Commission failed to exercise its statutory duty under FPA § 15(a)(3)(A), 16 U.S.C. § 808(a)(3)(A), to "take into consideration . . . the existing licensee's record of compliance with the terms and conditions of the existing license." To the contrary, the challenged orders gave full and appropriate consideration to Tacoma's compliance record. FERC reviewed Exhibit H of the relicense application and Commission records,[5] and concluded that "Tacoma's overall record of making timely filings and compliance with its license is satisfactory." Licensing Order at 31 (Pet. Rec. Ex. at 31).

More specifically, the Commission found that, aside from the Cowlitz complaint (discussed *infra*), Commission records showed only two allegations of Tacoma license violation and that FERC staff had investigated each allegation when made and had found no merit to either. *Id*. at 32 (Pet. Rec. Ex. 32). Allegations that Mossyrock and Mayfield Dams had not been operated in accordance with the license during certain flooding periods were found meritless because the peak flow release had been considerably less than peak inflow and because Tacoma (as required) had received the concurrence of the U.S. Army Corps of Engineers during the flood operations. Licensing Order at 32 (Pet. Rec.

[5] The Commission reviewed both records maintained at FERC headquarters and responses to inquiries of the Commission's Portland Regional Office. Licensing Order at 31-32 (Pet. Rec. Ex. 31-32).

Ex. 31-32). Similarly, a private landowner's allegation that Tacoma's wetland mitigation project might have negatively affected his adjacent property was deemed to lack merit because the landowner's property contained wetlands prior to Tacoma's actions and Tacoma had done nothing to influence water levels on the property. *Id*.

For their part, Petitioners characterize the Commission's finding of compliance as relying solely on a "conclusion that Tacoma had filed its required reports." *See* Pet. Br. at 36. As just demonstrated, however, FERC considered other matters as well. Petitioners' characterization is thus without merit.

Petitioners also contend that the Commission's refusal to investigate Petitioners' allegations of non-compliance as part of the licensing process is directly contrary to FPA § 15(a)(3), which states that the Commission "shall" consider the licensee's record of compliance. Pet. Br. at 35, *citing*, *inter alia*, *California ex rel Lockyer v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2004) ("*Lockyer*"), and *Chevron*, 467 U.S. at 843. FPA § 15(a)(3), however, does not "plainly" require the initiation of investigations. If anything, it "plainly" requires consideration of existing compliance records:

> That section requires us to examine an existing licensee's record of compliance with the terms of its license. This involves examining existing information contained in our administrative records. It does not require us to create information that does not already exist, through the use of investigations or enforcement proceedings. In our relicensing decision, we examined Tacoma's

> record of compliance with the terms of its license, and concluded that record was satisfactory. Nothing more is contemplated by Section 15(a)(3)(A) of the FPA.

Licensing Rehearing Order at P 44 (Pet. Rec. Ex. 123).

The Commission's construction of FPA § 15(b)(3), that Congress did not intend to graft investigative proceedings onto already lengthy relicensing proceedings, is reasonable. Here, for example, Petitioners' allegations involved an agreement entered into 30 years ago "and presented the very real possibility that an extensive investigation, followed by an evidentiary hearing, could divert resources that might better be expended on relicensing." Licensing Rehearing Order at P 41 (Pet. Rec. Ex. 122). *See Lockyer*, 383 F.3d at 1016 ("we must be guided to a degree by common sense").

This Court has held, moreover, that a decision not to investigate alleged violations is within the Commission's discretion and is therefore unreviewable. Licensing Order at 22 (Pet. Rec. Ex. 22) and Licensing Rehearing Order at P 40 (Pet. Rec. Exc. 121), *citing Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1170 (9th Cir. 2001). *Friends of the Cowlitz* involved an earlier complaint filed by Petitioners with the Commission, alleging that Tacoma had violated its license by failing to maintain agreed-upon levels of anadromous fish populations in the Cowlitz River and by failing to cooperate with Washington Fish and Wildlife in instituting remedial measures. The Commission summarily dismissed the

complaint. On review, the Court held that the Commission had erred in its summary dismissal, but has unreviewable discretion under the whether to enforce or investigate alleged license violations. *Friends of the Cowlitz*, 252 F.3d at 1170-72.

The Commission considered the Court's decision in deciding whether it had to initiate an investigation as part of the licensing proceeding:

> The court decision makes it clear that, if we had simply declined to initiate an investigation or to hold a hearing on the complaint, without making any finding about possible license violations, we would have been entirely within our discretion. If we could have done so then, it necessarily follows that we may do so now. Therefore, we will exercise our discretion to decline to investigate the allegations of the complaint, and will instead focus our attention where we think it more properly belongs – on determining what measures are needed for the new license term.

Licensing Order at 22 (Pet. Rec. Ex. 22). Given that FPA §§ 31 and 307, 16 U.S.C. §§ 823b(a) and 825f, grant FERC broad discretion regarding investigations, *see Friends of the Cowlitz*, 253 F.3d at 1171-72, the Commission's conclusion that FPA § 15(a)(3)(A) does not mandate investigations is reasonable. *Cf. Lockyer*, 383 F.3d at 1016 ("[W]e must analyze the provision in the context of the entire governing statute . . . presuming congressional intent to create a 'symmetrical and coherent regulatory scheme.'" [citations omitted]).

Finally, Petitioners point to footnote 15 in *Friends of the Cowlitz*, which states that "[the Court's] conclusion that the Commission erred in summarily

dismissing the petitioners' complaint is not purely academic, given the fact that in reviewing relicensing applications the Commission is required to take into consideration an 'existing licensee's record of compliance . . . .'" Br. at 35, *citing Friends of the Cowlitz*, 253 F.3d at 1170. The Commission fully and appropriately considered the footnote in the challenged orders, giving the matter of Tacoma's record of compliance "additional attention in light of the court's decision." Licensing Order at 20 (Pet. Rec. Ex. 20); *see also* Licensing Rehearing Order at P 40 (Pet. Rec. Ex. 121-122) (Commission will consider all of the relevant factors in exercising its discretion).

The Commission decided that the most appropriate course of action in the licensing circumstances presented was to decline to investigate the allegations raised:

> The settlement agreement that gave rise to the complaint was not part of the license, and the failure to achieve the agreed-upon fish returns could not, in itself constitute a violation of Article 57. Rather, it could at most be considered as evidence of Tacoma's failure to cooperate with the fisheries agencies. Resolution of that issue would require a substantial investigation, and could possibly require an adjudicatory hearing. Among other things, we would have to define a standard for cooperation, consider whether the failed fish quotas were due to factors beyond Tacoma's control, and determine whether Tacoma's refusal to provide additional hatchery facilities, as [Washington Fish and Wildlife] requested, should be considered a failure to cooperate.

Licensing Order at 21 (Pet. Rec. Ex. 21). The Commission also would have had to consider other alleged violations of license articles 37 and 57, such as Tacoma's

failure to install permanent downstream fish traps, in light of FERC's 1968 order approving moveable downstream fish traps in the Mossyrock Reservoir:

> We would have to determine how to factor in the understanding of [U.S. Fish and Wildlife] that these traps should not be considered permanent until proven feasible through testing, as well as our 1971 order approving Tacoma's abandonment of the upstream fish facilities at Mayfield Dam, with the concurrence of Interior, Commerce, and [Washington Fish and Wildlife].

Licensing Order at 21 (Pet. Rec. Ex. 21). The Commission concluded that these considerations would take considerable resources and delay needed enhancement measures for fish and wildlife. *Id*.

FERC also addressed the Court's concern in *Friends of the Cowlitz* that a flawed summary dismissal could unfairly impact the relicensing negotiations. *Id*. at 22 (Pet. Rec. Ex. 22). The concern assumed that Tacoma did, in fact, violate its license. If the Commission were to find no violation, "[P]etitioners could not attempt to use that finding to require more mitigation." *Id*. Moreover, at this point the negotiations had been completed and the Settlement Agreement filed. The Commission reasonably concluded that it made more sense to use its resources to determine the adequacy of the Settlement Agreement measures than "to determine what may or may not have been required in the past." *Id.*

Nevertheless, because of the *Friends of the Cowlitz* complaint and FERC's determination under the circumstances to decline to resolve the complaint, the Commission decided to focus greater attention on compliance during the new

license term:

> To that end, we will require in Article 501 that Tacoma file a Hydropower Compliance Management Program for Commission review and approval. This should facilitate both Tacoma's compliance and the Commission staff's review of that compliance. It should also make it easier to provide a prompt response to any compliance issues that may arise during the term of the new license.

Licensing Order at 23 (Pet. Rec. Ex. 23). The Commission's allocation of priorities and resources, and decision to focus on future compliance rather than on an allegation of past non-compliance, was reasonable and entitled to judicial respect. *See, e.g.*, *Mobil Oil Exploration v. United Distribution Cos*., 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.") (internal citations omitted).

Finally, Petitioners contend that an investigation was necessary to establish a baseline "starting point based on the facilities expected and required under the terms of the then-existing license." Pet. Br. at 37-38. The Commission determined, however, that "it was not readily apparent" that an investigation would have been helpful or even relevant to its relicensing decision:

> For relicensing, we seek to establish the existing condition of the resources at issue and determine what measures are needed to provide an appropriate level of protection, mitigation, or enhancement. We must determine what measures are needed, as well as how the resources came to be in their present state. However, a finding that the licensee was somehow at fault would not influence our determination of what is needed to improve the condition of the

> resource. For example, if we found that the licensee was required to install fish protection devices and did not do so under the terms of the existing license, we would not automatically require that the licensee install those devices, plus other measures, as a condition of the new license. Rather, we would reexamine the need for not only those devices but also for other measures, and would require them if the record supported the need to do so. Thus, [Petitioners] are not correct in their assumption that, if we were to find that the licensee had violated the existing license, we would impose a greater level of resource protection for the new license term.

Licensing Rehearing Order at P 42 (Pet. Rec. Ex. 122). Conversely, a finding that the licensee had not violated the existing license would not automatically result in a lower level of resource protection measures in the new license. In either case, the new license requirements would be based on an assessment of what is needed. *Id*. In sum, the Commission's consideration of Tacoma's compliance record comported fully with the statutory requirements.

IV. The Commission's Determination That The Flood Control Conditions Provide Appropriate Protection Is Reasonable And Supported By The Evidence.

License Article 303, developed through consultation with the U.S. Army Corps of Engineers, provides for flood control through regulation of reservoir levels. Licensing Order at 46-47 (Pet. Rec. Ex. 46-47). The measures adopted are similar to those imposed in the initial license and provide the same or better flood control. FEIS at 4-82, 6-2 to 6-3, and A-24 to A-26 (Resp. Rec. Ex. 12, 13-14, and 17-19).

In brief, "[t]ypically, Riffe Lake is held at an elevation of 745.5 feet between December 1 and January 31 to provide storage for winter flood flows, with the objective of keeping flows below 70,000 cfs at the downstream community of Castle Rock. From February 1 to June 1, Riffe Lake is allowed to fill in an attempt to have the reservoir at, or near, full pool for the summer recreation season. Typically, the reservoir slowly drafts through the summer, because minimum downstream flow requirements at Mayfield are frequently higher than project inflows. Gradual drawdown to the winter pool level begins between Labor Day and October 1." Licensing Order at 4 (Pet. Rec. Ex. 4).

Petitioners, arguing that the flood control measures are inadequate, contend (Br. at 57) that the Commission relied "only on conclusory assertions by the Army Corps" in adopting Article 303. This argument is without merit. In comments, Petitioners made recommendations for reservoir elevations and instream flows which they believed would, among other things, improve flood control. Licensing Rehearing Order at P 55 (Pet. Rec. Ex. 126). Consequently, "Commission staff requested additional information from Tacoma on how changes to project operation under the Agreement would affect flood control, and how [Petitioners'] recommendations would affect both flood control and project operations. Staff reviewed Tacoma's analysis and concluded that [Petitioners'] recommendations

could result in minimum flows not being sustainable, and the Agreement would provide better flood protection." *Id.* at P 55 (Pet. Rec. Ex. 126-127).

More specifically, Commission staff requested Tacoma: "(1) to provide a project operations summary of the Settlement Agreement and explain how those changes would affect flood control; and (2) explain how the [Petitioners'] reservoir elevation and flow recommendations would affect flood control and project operations." FEIS at A-24 to A-25 (Resp. Rec. Ex. 17-18). Tacoma's flood flow analysis was conducted using standard flood flow analysis (FFA) software by the Hydrologic Engineering Center, Corps of Engineers and following the "Guidelines for Determining Flood Flow Frequency" (United States Water Resources Council, Bulletin No. 17B of the Hydrology Committee, September 1981). The analysis indicated that Petitioners' recommendations would result in a greater frequency of flows associated with flooding than do the adopted license Article 303 conditions. *Id*. at A-25 (Resp. Rec. Ex. 18). In sum, Petitioners' argument, that the Commission relied only "only on conclusory assertions," is without merit.[6]

Petitioners also argue (Br. at 58) that the Commission did not "take into account" an Army Corps of Engineers' report issued May 13, 2002 on sediment

[6] The thrust of Petitioners' argument (Br. at 57), that FERC staff's review "related to" Settlement Article 13 (instream flows for fish) and not Article 303 (flood control), is unclear. The fact is, as demonstrated above, that the Commission reviewed the flood control proposals in detail.

abatement efforts following the eruption of Mount St. Helens in 1980. To the contrary, however, the Commission discussed the report in detail:

> Pursuant to the Flood Control Act of 1944, the [Army Corps of Engineers] is responsible for ensuring that the [Cowlitz Project Dams] are operated to meet their flood control obligations. *See* 33 U.S.C. § 709 and 33 C.F.R. § 208.11(e). Under this authority, the Corps developed Article 303 in consultation with Tacoma, and we have determined that it is adequate and should be included in the license. Intervenors assert that the Mount St. Helens engineering analysis (also developed by the Corps) demonstrates that Article 303 is inadequate. However, our review of that report indicates that the Corps intends to monitor sediment deposition in the Cowlitz River and does not expect flood protection to drop below Congressionally-authorized levels before 2020-2025. Therefore, if changes to Article 303 are needed, we can consider them in due course.

Licensing Rehearing Order at P 4 n. 3 (Pet. Rec. Ex. 107-108).

Finally, Petitioners seem to contend (Br. at 57-58) that license Article 303 must be modified because flooding occurred in 1995. However, Petitioners fail to recognize that the Commission is charged with balancing competing purposes:

> Hydroelectric projects serve many different purposes, including power production; recreation; flood protection; and protection, mitigation, and enhancement of fish and wildlife resources. Maximization of any one purpose usually results in detrimental effects to other purposes. For example, although keeping reservoir levels low might provide better flood protection, it would likely reduce the amount of water available for power production, recreation, and instream flows for fish and wildlife. For this reason, the FPA requires the Commission to balance these competing interests in an attempt to optimize project operation to meet a variety of developmental and environmental needs.

Licensing Rehearing Order at P 54 (Pet. Rec. Ex. 126). Given the need for power production and for instream flows for fish protection, and the fact that the flood control measures accord with Congressionally-authorized levels, the Commission's balancing of the competing purposes was reasonable.

V. The Commission Properly Found That The Fisheries Technical Committee Is Not A Federal Advisory Committee.

The Settlement Agreement established a Fisheries Technical Committee to "assist[] the licensee in the design of monitoring plans and studies, reviewing and evaluating resulting data, and decisions on adaptive management measure associated with the fisheries measure." Licensing Order at 13 (Pet. Rec. Ex. 13). The Committee consists of one representative each from Tacoma, National Marine Fisheries, U.S. Fish and Wildlife, Washington Fish and Wildlife, Washington Ecology, and the Yakima Nation, and one representative from the conservation groups (American Rivers and Trout Unlimited). *Id*.

Petitioners contend (Br. at 60) that the Fisheries Technical Committee violates the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § App. 1 *et seq*., because it is "providing advice and recommendations" to National Marine Fisheries, U.S. Fish and Wildlife, "and/or" FERC. The Licensing Rehearing Order, however, disposed of the argument that FERC itself was utilizing the Fisheries Technical Committee:

The purpose of the Fisheries Technical Committee that [FERC]

> approved as part of the agreement is to advise and assist Tacoma in the design and monitoring of plans and studies, reviewing and evaluating resulting data, and decisions on adaptive management measures associated with the fisheries measures required in the new license. As such, it is a means of providing input to Tacoma, not to the Commission . . . .

Licensing Rehearing Order at P 47 (Pet. Rec. Ex. 123). *See also, e.g.*, license Article 401 (Pet. Rec. Ex. 47-48) (requiring the licensee to consult with the Fisheries Technical Committee). Petitioners have offered no explanation as to how the Committee could be viewed as transmitting advice directly to the Commission under these circumstances.

The claim that the Fisheries Technical Committee is an advisory committee to the federal resource agencies is not properly before the Court because Petitioners did not first raise it with specificity to FERC on rehearing as required by FPA § 313(b), 16 U.S.C. § 825*l*(b). *See* discussion *supra* at 2. Petitioners raised FACA in brief, general terms in their request for rehearing of the Licensing Order,[7] and the Commission denied rehearing on the ground that "the Fisheries

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[7] The entire rehearing request discussion consists of the following:

The Commission's approval in the relicensing order of a Fisheries Technical Committee "for the purpose of assisting the licensee in the design of monitoring plans and studies, reviewing and evaluating resulting data, and decisions on adaptive management measures associated with the fisheries measures" is in violation of [FACA]. [citation omitted] This committee confers preferential standing through the license term to the non-governmental groups that agreed to sign the settlement agreement, at the expense of true open public observation and comment. The requirement that Tacoma prepare an Information Management Plan

Technical Committee is advising Tacoma, not the Commission." Licensing Rehearing Order at P 47, n. 39 (Pet. Rec. Ex. 124). Petitioners now claim that the Fisheries Technical Committee is advising other federal agencies in addition to FERC, but if that is what they intended to raise on rehearing, the rehearing request should have so specified.[8] As it did not, the Court lacks jurisdiction to consider the argument.

In any event, Petitioners' argument is wide of the mark. As relevant here, an "advisory committee" is any committee which is "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government . . . ." 5 U.S.C. App. 2 § 3(2).

Under Petitioners' argument, any group advising an applicant for a federal license would qualify for FACA treatment even if the federal agency did not know

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to disseminate information prepared by that committee retrospectively does not correct this defect. Pet. Reh. Req. at 8-9 (Resp. Rec. Ex. 3-4).

Intervenors submit as an exhibit to this filing the meeting notes of the Fisheries Technical Committee. (They are available from Tacoma's public website, at http://www/ci.tacoma.wa.us/power/parks/ftc/ftc_m.htm.) These support the Intervenors' position that the committee is operating in violation of [FACA] [citation omitted]. Pet. Reh. Req. at 26 (Resp. Rec. Ex. 5).

[8] Moreover, although Petitioners' brief makes a general reference to the Settlement Agreement, the only record pages cited by Petitioners in support of this argument are to the Biological Opinion which issued *after* the Licensing Rehearing Order's resolution of the FACA issue. The Commission can hardly be expected to have responded to arguments pertaining to documents not yet in existence at the time of decision.

of the group's existence. Not surprisingly, Petitioners have cited no authority supporting such a broad sweep for FACA. To the contrary, the courts have construed the statute narrowly. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453 (1989) (FACA was not "intended to cover every formal and informal consultation between . . . an Executive agency and a group rendering advice").[9] A committee organized by a nongovernmental entity is "utilized" for FACA purposes by an agency only if it is so "closely tied to an agency as to be amenable to strict management by agency officials." *Aluminum Company of America v. National Marine Fisheries Service*, 92 F.3d 902, 905 (9th Cir. 1996). Petitioners have not explained how the resource agencies have the requisite "strict management control" over a committee advising Tacoma on the plans.

Petitioners cite to the Biological Opinion (Pet. Ex. 287-288, 378-383) for the proposition that "the Committee's role goes beyond advising Tacoma." Pet. Br. at 60. Nothing in the cited pages supports Petitioners' proposition or, more importantly, a finding that the resource agencies have strict management control over the Fisheries Technical Committee. Rather, as these pages indicate, although the Committee will actively assist Tacoma in developing a plan satisfactory to National Marine Fisheries, the ultimate responsibility for the plan is Tacoma's.

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[9] *See also*, *Daniel M. Byrd, III v. EPA*, 174 F.3d 239, 245-46 (D.C. Cir. 1999) ("the Supreme Court . . . squarely rejected an expansive interpretation;" the utilized test "is a stringent standard").

See, *e.g.*, Biological Opinion at 6-19 (Pet. Rec. Ex. 380) ("To guide and inform this process, an overall plan must be developed by Tacoma Power in cooperation with or involvement of the [Fisheries Technical Committee], and submitted to [National Marine Fisheries] . . .").[10]

If Tacoma acts on the advice of the Committee, and "proposes changes as part of an adaptive management approach," the Commission (and the resource agencies as well) will "seek public comment" on the changes. Licensing Rehearing Order at P 47 n. 39 (Pet. Rec. Ex. 124). In other words, contrary to Petitioners' belief, "the Committee neither advises the Commission nor precludes public participation regarding the merits of any proposed changes." *Id.*

Additionally, the Commission has imposed a condition on the license that goes "beyond what is typically included in a license and increases the level of public participation and knowledge" by requiring Tacoma to develop an Information Management Plan. Licensing Order at 19 (Pet. Rec. Ex. 19). The plan will outline "how [Tacoma] would keep the public informed and seek public

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[10] *See also*, *e.g.*, Article 401 of the license which states that, "Settlement Agreement Articles 1, 2, and 3 (Appendix A) require the licensee to prepare plans regarding fish passage in consultation with the Fisheries Technical Committee . . ." (Licensing Order at 48, Pet. Rec. Ex. 48); Article 405, which requires Tacoma to consult with the Committee during preparation of a Public Information Management Plan (Pet. Rec. Ex. 51); Article 1 of the Settlement Agreement, which requires the licensee to develop a downstream fish passage plan to be reviewed by the Committee and submitted to the resources agencies (Pet. Rec. Ex. 57); and Article 2 which requires Tacoma to consult with the Committee on downstream fish passage specifically at Mayfield (Pet. Rec. Ex. 58).

comments on fishery-related actions developed by the Fisheries Technical Committee." *Id.* Finally, "opportunities for public comment on state and federal resource agency management actions would be provided through the respective agencies' policies and practices." *Id.*

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

STATEMENT OF RELATED CASES

Respondent FERC is not aware of any related case pending in this court.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Judith A. Albert
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901
judith.albert@ferc.gov
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