IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-73064

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), obligates the Federal Energy Regulatory Commission ("Commission" or "FERC"), which already has initiated informal and early consultation, to proceed immediately to formal consultation with the National Marine Fisheries Service regarding the effect of ongoing operations of a hydroelectric project under an existing license on a threatened species present in the project area.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the FERC orders being challenged here because, as set forth more fully in Part I of the Argument, *infra,* it is not clear what relief Petitioners are seeking or could obtain from this Court.

In addition, Petitioners have failed to meet the statutory prerequisites under Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), for several issues they now raise (*see infra* pages 32 n.10, 46 n.16, and 53) because they failed to raise those issues with specificity on rehearing. *See California Dep't of Water Resources v. FERC,* 341 F.3d 906, 910-11 (9th Cir. 2003) (citing cases).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns when the Commission must take certain additional actions under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536 ("ESA"), the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA"), and an existing license in response to concerns that the operation of a hydroelectric project in certain conditions may adversely affect endangered species or habitat. Petitioners contend that the Commission upon learning of any such situation must immediately begin

formal consultation under ESA § 7 with the relevant federal resource agency — here, the National Marine Fisheries Service ("NOAA Fisheries" or "NMFS"). Petitioners contend that it is not enough for the Commission to initiate informal and early consultation that might, upon the discovery of additional facts or the initiation of later actions, lead to formal consultation.

This case involves the DeSabla-Centerville Project ("Project"), located in Butte County, California. The Project is operated by Pacific Gas and Electric Company ("PG&E") pursuant to a 30-year license issued by the Commission in 1980. The Project consists of two reservoirs and a series of powerhouses and canals, some of which divert water from and return flows into Butte Creek.

The facts at issue concern Central Valley spring-run Chinook salmon, which were listed as a threatened species for ESA purposes in 1999. During the summers of 2002 and 2003, certain conditions, including high water temperatures and an outbreak of disease compounded by high fish densities, resulted in high fish mortality in Butte Creek. Starting in the summer of 2002, NOAA Fisheries, the California Department of Fish and Game ("California Fish and Game"), PG&E, and FERC Staff have engaged in informal consultation, pursuant to which they have agreed annually on measures to protect spring-run Chinook in the Project area. In the same time period, PG&E was designated as FERC's non-federal representative for early consultation with NOAA Fisheries concerning the potential

relicensing of the Project, with the expectation that interim operations would also be addressed.

Petitioners, however, filed a petition claiming the Commission was required immediately to initiate a specific type of consultation (formal consultation) with NOAA Fisheries under ESA § 7(a)(2) concerning the ongoing operation of the Project. The first Order challenged here, after recounting the parties' considerable efforts to address any impacts of the Project's operation on fish populations, denied the petition without prejudice, explaining that it was premature because there was no proposed federal "agency action." Order Denying Petition, *Pacific Gas & Elec. Co.*, 108 FERC ¶ 61,156 at P 2 (2004) ("Initial Order"), P-ER 22.[1] The second Order challenged here denied rehearing because it again concluded there was no "agency action" for ESA purposes. Order Denying Rehearing, *Pacific Gas & Elec. Co.*, 110 FERC ¶ 61,323 at P 16 (2005) ("Rehearing Order," and together with the Initial Order, the "Orders"), P-ER 77.

This appeal followed.

[1] "P-ER" refers to the Excerpts of Record filed by Petitioners. "F-ER" refers to FERC's Supplemental Excerpts of Record filed herewith. "P" refers to the internal paragraph number within a FERC order. "Br." refers to Petitioners' Opening Brief.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Federal Power Act

Under the Federal Power Act, the Commission is authorized to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA § 4(e), 16 U.S.C. § 797(e). In deciding whether to issue a license, the Commission is required, "in addition to the power and development purposes for which licenses are issued," to "give equal consideration to" the purposes of energy conservation, fish and wildlife protection, protection of recreational opportunities, and preservation of other aspects of environmental quality. *Id.* A license "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe"; it "may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter and may be altered or surrendered only upon mutual agreement between the licensee and the Commission . . . ." FPA § 6, 16 U.S.C. § 799.

A license can be modified during the course of the licensing period if the license contains a "reopener clause." 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. Federal Power Comm'n*, 345 F.2d 917 (9th Cir. 1965); *United States Dep't of Interior v. FERC*,

952 F.2d 538 (D.C. Cir. 1992).

2. Endangered Species Act

The Endangered Species Act provides that Federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA]." ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1). Section § 7(a)(2) provides that a Federal agency

> shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.

16 U.S.C. § 1536(a)(2). Section 7(a)(3) provides that a Federal agency must consult with the Secretary "on any prospective agency action" at the request of a prospective permit or license applicant who has reason to believe that an endangered or threatened species may be present in the area affected by the project and that implementation of such action will likely affect such species. 16 U.S.C. § 1536(a)(3).

For purposes of this case, the relevant consultation is between FERC (the Federal agency) and the Secretary of Commerce, as represented by the National Marine Fisheries Service ("NOAA Fisheries" or "NMFS"), which has principal responsibility for administering the ESA with regard to anadromous fish such as

Chinook salmon.[2] *See* Reorganization Plan No. 4 of 1970, § 6(a)(1), 35 Fed. Reg. 15627, 84 Stat. 2090 (effective Oct. 2, 1970); 50 C.F.R. § 402.02 (defining "*Service*" to mean either NOAA Fisheries or the U.S. Fish and Wildlife Service, as appropriate).

Regulations implementing ESA § 7 are set forth in 50 C.F.R. Part 402. In particular, § 402.02 defines "*Action*" to mean "all activities or programs of any kind authorized, funded, or carried out" by Federal agencies, and cites "the granting of licenses" as an example. Section 402.03 provides that ESA § 7 and the requirements of Part 402 "apply to all actions in which there is discretionary Federal involvement or control."

Section 402.02 also defines various forms of consultation with NOAA Fisheries, the procedures and requirements for which are set forth in §§ 402.10-.14. In particular, "*Formal consultation*" is defined as "a process between [NOAA Fisheries] and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the [ESA] and concludes with [NOAA Fisheries'] issuance of the biological opinion under section 7(b)(3) of

[2] Anadromous fish migrate from the marine environment into the freshwater rivers and streams of their birth. *See* Endangered and Threatened Species; Threatened Status for Two Chinook Salmon Evolutionarily Significant Units (ESUs) in California, 64 Fed. Reg. 50,394 (Sept. 16, 1999).

the [ESA]." 50 C.F.R. § 402.02[3]; *see also* 50 C.F.R. § 402.14 (setting forth requirements and procedures for formal consultations). Formal consultation is required if an agency action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Section 402.14(c) provides that "Formal consultation shall not be initiated by the Federal agency until any biological assessment has been completed and submitted" to a designated NOAA Fisheries official.[4]

In accordance with ESA § 7(a)(3), the implementing regulations also provide for "*Early consultation*," a process conducted prior to the filing of a license application to reduce the likelihood of conflicts between the proposed agency action and listed species or critical habitat. *See* 50 C.F.R. §§ 402.02 (defining term), 402.11(a) (stating purpose). The early consultation process similarly is initiated by the Federal agency (upon the prospective applicant's

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[3] A "*Biological opinion*" is "the document [required by ESA § 7(b)(3), 16 U.S.C. § 1536(b)(3)] that states the opinion of [NOAA Fisheries] as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02; *see also* 50 C.F.R. § 402.14(h) (setting forth required contents of biological opinion).

[4] "*Biological assessment* refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat." 50 C.F.R. § 402.02; *see also* 50 C.F.R. § 402.12 (setting forth purpose, requirement, and procedures for biological assessments). Under § 402.12(b), biological assessments are required only for major construction activities; nevertheless, FERC routinely includes them.

request)[5] and concludes with NOAA Fisheries' issuance of a preliminary biological opinion, which may be confirmed as a final biological opinion after formal consultation. 50 C.F.R. § 402.11(c)-(f).

Finally, "*Informal consultation* is an optional process that includes all discussions, correspondence, etc., between [NOAA Fisheries] and the Federal agency or the designated non-Federal representative prior to formal consultation, if required." 50 C.F.R. § 402.02; *see also* 50 C.F.R. § 402.13 (governing informal consultations). "A Federal agency may designate a non-Federal representative," such as a license applicant, "to conduct informal consultation or prepare a biological assessment . . . ." 50 C.F.R. § 402.08.

B. The Commission Proceedings and Orders

1. The DeSabla-Centerville Project License

The DeSabla-Centerville Project is a 24.85-megawatt hydroelectric project that essentially operates in a run-of-river mode, diverting flows from two reservoirs and from Butte Creek through a series of powerhouses and canals and returning flows to Butte Creek. *See* Initial Order at P 2; Rehearing Order at P 16. In 1980, the Commission issued a 30-year license to PG&E to operate the DeSabla-Centerville Project, with an expiration date of October 11, 2009. *See* Initial Order at P 3 (citing 11 FERC ¶ 62,207 (1980), P-ER 79).

[5] If the action is a "major construction activity," the request to initiate early consultation must include a biological assessment. 50 C.F.R. § 402.11(c).

The license contains two provisions that reserve the Commission's authority to require changes to the license in certain circumstances. Standard License Article 15, found in all FERC hydroelectric licenses, provides:

> 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.

Article 15, Form L-1, Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States, 54 FPC 1799, 1847 (1975) (excerpt at P-ER 78 at 42), *quoted in* Rehearing Order at P 14 n.14. Article 37 of the license, adopted specifically for the DeSabla-Centerville Project, states:

> 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.

Order Issuing License (Major), *Pacific Gas & Elec. Co.*, 11 FERC ¶ 62,207 at 63,398 (1980), P-ER 79 at 12, *quoted in* Rehearing Order at P 14 n.15.

The Commission also included in the license Article 39, which required PG&E to file for Commission approval, following consultation with NOAA

Fisheries and the other federal and state agencies listed in Article 37, a comprehensive plan for the protection of fish and wildlife resources affected by the project. 11 FERC ¶ 62,207 at 63,398, P-ER 79 at 13. The plan was to include recommendations for minimum flow releases for the project's canal, Butte Creek, and the West Branch Feather River, and recommendations for reservoir operation levels for the enhancement of fishery resources. *Id.* PG&E filed the plan, which was supported by the federal and state resource agencies, in 1983, and the Commission approved the plan in 1984. *See* Order Amending Revised Exhibit S, *Pacific Gas & Elec. Co.*, 26 FERC ¶ 62,236 (1984).

2. License Amendments And Ongoing Monitoring

In 1992, the Commission granted an application by PG&E to amend the license in various respects. *See* Order Amending License, *Pacific Gas & Elec. Co.*, 58 FERC ¶ 62,093 (1992), P-ER 80. In response to concerns raised by resource agencies about the project's impacts on fish and wildlife, including spring-run Chinook salmon, the order required increased instream flows in the bypassed reach below the Lower Centreville Diversion Dam. *See id.* at 63,208. The Commission also added Article 402 to the license, requiring PG&E to file for Commission approval a plan to study the project's impacts on streamflow and water temperature. *See id.* at 63,209-10.

Subsequently, the Commission approved the plan required by Article 402,[6] and PG&E filed the study in 1994. The study showed that summer releases from the project's reservoirs could under some circumstances raise water temperatures in the West Branch Feather River and Butte Creek above the optimal levels for spring-run Chinook salmon. Order Approving Water Temperature Study Report, *Pacific Gas & Elec. Co.*, 80 FERC ¶ 62,171 (1997), P-ER 83.

In response to the study, the Commission required PG&E to limit reservoir discharges when water temperatures rose above specified levels. *See id.* at 64,274-75. In addition, because a 1927 water rights agreement obligated PG&E to deliver flows at times when doing so might require the passage of warm reservoir water, the Commission required PG&E to develop and file a plan to reduce the need to make such deliveries. *Id.* at 64,276-77.

In 1998, the Commission granted a request by PG&E for a temporary waiver of the temperature requirements, due to unusual weather conditions, and amended the 1997 order to provide that the temperature/flow requirements therein could be modified upon mutual agreement among NOAA Fisheries, the U.S. Fish and Wildlife Service ("Fish and Wildlife"), and California Fish and Game, without FERC approval. *See* Order Amending Temperature Requirements, *Pacific Gas &*

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[6] *See* Order Approving Temperature Monitoring Plan, *Pacific Gas & Elec. Co.*, 63 FERC ¶ 62,360 (1993), P-ER 81.

Elec. Co., 84 FERC ¶ 62,165 (1998).

In June 1999, PG&E filed an operating plan for the project reservoirs, agreed to by the aforementioned resource agencies. *See* Initial Order at P 9 (citing transmittal letter). In June 2001, PG&E filed an amended agreement with the resource agencies concerning the operation of the reservoirs for the summer of 2001; in June 2002, it filed a 2002 reservoir operating plan developed with the resource agencies' agreement. *See id.* at PP 12, 13.

In the meantime, on September 16, 1999, NOAA Fisheries listed Central Valley spring-run Chinook salmon as a threatened species. *See* 64 Fed. Reg. 50,394, 50,412 (Sept. 16, 1999).

On August 28, 2002, NOAA Fisheries filed with FERC a letter discussing reports concerning mortality of spring-run Chinook salmon in Butte Creek downstream of the DeSabla-Centerville Project. F-ER 1. The letter stated that NOAA Fisheries, California Fish and Game, and PG&E had agreed that PG&E would pursue an emergency or short-term amendment of Article 39 of the license in order to reduce flows and increase coldwater storage in a project reservoir, and that PG&E would ask FERC to initiate consultation with NOAA Fisheries under ESA § 7(a)(2). F-ER 1-2. The letter stated that "the parties agreed that this consultation should be considered as part of the relicensing for this project." F-ER 2.

On September 5, 2002, PG&E requested FERC authorization to make the short-term flow reductions discussed in the NOAA Fisheries letter. *See* P-ER 84 at 1 (describing letter). FERC Staff responded that Article 39 of the license already permitted short-term deviation from the required flows due to operating emergencies, with the agreement of California Fish and Game. P-ER 84 at 2. FERC Staff also asked PG&E to respond to the request by NOAA Fisheries that PG&E ask the Commission to initiate ESA consultation. *Id.*; Rehearing Order at P 15.

On September 17, 2002, PG&E filed a letter stating it intended to file a notice of intent to relicense the DeSabla-Centerville Project, and asking the Commission to designate it as the non-federal representative for the purpose of initiating informal consultation. *See* F-ER 7 (describing letter). FERC Staff granted that request on November 26, 2002, and further specified that the consultation should focus not only on the relicensing of the project but also on the ongoing operation of the project: "Given the conditions in September 2002 (where high water temperatures placed spring-run Chinook salmon at risk), Commission staff feel you should begin consultation with [NOAA Fisheries] immediately regarding any interim measures that may improve conditions for listed species in Butte Creek, particularly in the warm summer months." *Id.* FERC Staff also asked PG&E to file quarterly progress reports documenting the consultation and

"the progress you have made over the previous three months regarding project effects on spring-run Chinook." *Id.*

PG&E filed its first progress report on February 26, 2003 and has continued to file such reports, most recently on December 30, 2005. *See* F-ER 33-40 (excerpts from FERC Docket No. P-803, publicly available at <http://elibrary.ferc.gov>).

3. Petition and Initial Order

Two Petitioners filed letters with FERC, in September and October 2002, expressing concern about the operation of the DeSabla-Centerville Project and its impacts on spring-run Chinook. *See* Rehearing Order at P 16. FERC Staff responded to each letter, in September and December 2002, respectively, explaining the agreement between NOAA Fisheries and PG&E concerning short-term flow reductions and the proposed consultation process. F-ER 3-5, 9-10. FERC Staff also stated it concluded that the mortality of spring-run Chinook had occurred for reasons beyond PG&E's control, that the company had undertaken responsive action with the concurrence of the resource agencies, and that PG&E was in compliance with all FERC requirements. F-ER 10.

On April 13, 2004, Petitioners filed a petition with FERC, claiming it was required by ESA to initiate formal consultation with NOAA Fisheries with respect to the impact of operation of the Project on Central Valley spring-run Chinook

salmon. P-ER 1. Petitioners claimed that the Project license, which includes reopener provisions, provides FERC with discretionary control over operations and thus constitutes an ongoing agency action that affects listed Chinook. *Id.*

On August 5, 2004, the Commission issued its Order Denying Petition, *Pacific Gas & Electric Company*, 108 FERC ¶ 61,156 (2004), P-ER 22. The Commission found there was "no currently proposed federal action" that could trigger ESA § 7(a)(2). *Id.* at P 39. If PG&E's ongoing discussions with NOAA Fisheries "resulted in a proposal to change project works or operations in a manner not contemplated in the license," or if the Commission were to determine to exercise its reserved authority to require such a change, then formal consultation with NOAA Fisheries would be required. *Id.*

Citing prior FERC precedents, the Commission concluded that the petition was premature. *Id.* at P 40. Consultation was ongoing between NOAA Fisheries and PG&E, as FERC's non-federal representative, and FERC Staff "clearly has been active in asserting the need to protect spring-run Chinook salmon, and in urging the parties to examine interim measures, in addition to the requirements of a new license." *Id.* To facilitate progress, the Commission directed FERC Staff "to gather necessary information to make an independent determination whether further interim measures are necessary," and whether PG&E was willing to file an amendment application to implement any such measures, or whether the

Commission should "use [its] reserved authority to begin a proceeding to consider requiring them." *Id.* In the event of an amendment application or a Commission determination to require interim measures, then formal consultation under ESA would likely be required. *Id.*

4. Rehearing Order

Petitioners filed a timely request for rehearing. P-ER 24. Shortly thereafter, on September 15, 2004, FERC Staff met with PG&E and NOAA Fisheries to discuss issues related to the protection of spring-run Chinook salmon, including the Commission's directive in the Initial Order that the FERC Staff gather sufficient information to make an independent determination of whether further interim measures were necessary. F-ER 13-17. On October 4, 2004, PG&E filed a pre-application document for the relicensing proceeding; subsequently, PG&E filed a request, with the concurrence of NOAA Fisheries, that FERC initiate early consultation with NOAA Fisheries to identify potential project-related effects on listed species and to facilitate formal consultation related to the relicensing. F-ER 19-20; P-ER 44. FERC Staff granted the request on January 13, 2005, indicating that PG&E should continue to serve as FERC's non-federal representative and should work with NOAA Fisheries to prepare a preliminary biological assessment as soon as possible. F-ER 25-26.

On March 23, 2005, the Commission issued an Order Denying Rehearing,

Pacific Gas & Electric Company, 110 FERC ¶ 61,323 (2005), P-ER 77. The Commission first noted that, after Petitioners had filed their rehearing request, PG&E and NOAA Fisheries had agreed to use early consultation. Rehearing Order at PP 6-7. Though early consultation can eliminate the need for formal consultation in some cases, the Commission assumed for purposes of rehearing that Petitioners would not consider it an acceptable alternative. *Id.*

The Commission again found there was no federal agency action to trigger the consultation requirement, as FERC does not fund its licensees' activities, nor carry out actions to construct, maintain, or operate a hydroelectric project. *Id.* at P 10. While license issuance or amendment is clearly a federal agency action for ESA § 7 purposes, *id.*, that does not mean a licensee's ongoing operation under an existing license can be considered agency action, *id.* at P 11. The Commission discussed regulations and case law establishing that, if previously authorized private activity may affect listed species, the licensing agency is not required to initiate formal consultation unless it has retained "sufficient discretionary involvement or control" to implement measures to benefit the species. *Id.* at PP 12, 24-26.

Responding to Petitioners' contention that FERC's reserved authority makes project operations an ongoing federal action, the Commission explained that the mere existence of a reopener clause does not end the inquiry: the nature of the

authority that FERC has actually reserved must be considered. *Id.* at PP 13-15. In a license under the FPA, FERC's reservation of authority is not self-executing and does not give FERC ongoing discretionary involvement or control over day-to-day operation of the project. *Id.* at P 15. FERC's ability to act is limited by the FPA's requirement that FERC actions be based on a factual predicate supported by substantial evidence, and thus requires FERC to undertake a preliminary investigation to lay a basis for invoking its authority. *Id.* at PP 15, 27.

The Commission also rebutted Petitioners' arguments that certain requirements in the license that had previously been completed and approved, FERC's continuing efforts to monitor the conditions of protected salmon in the Project area, and its actions in another hydroelectric license case were evidence of FERC's discretionary involvement or control. Rehearing Order at PP 18-19, 28. The Commission distinguished cases raised by Petitioners as inapposite. *Id.* at PP 20-26, 29-31.

Finally, the Commission responded to Petitioners' contentions that the "may affect" determination for formal consultation, *see supra* page 8, was met. Rehearing Order at PP 16-17.

5. Ongoing Consultation

On August 29, 2005, PG&E submitted a biological assessment to FERC and requested that FERC initiate early consultation with NOAA Fisheries. *See* F-

ER 28. By letter dated October 11, 2005, FERC Staff forwarded the biological assessment to NOAA Fisheries and "request[ed] initiation of early consultation under Section 7(a)(3) of the ESA regarding the proposed relicensing of the DeSabla-Centerville Project and its effects on spring-run Chinook." F-ER 32. FERC Staff summarized the findings of the biological assessment:

> As described in the attached preliminary [biological assessment], potential effects on spring-run Chinook and its habitat occur in three primary areas: hydrology, water quality, and water temperature. Our analysis indicates that, in certain areas, current project operation results in a net benefit to the species, while in other areas, some adverse effects may occur. The improvement of habitat quantity and quality from continuing operation of the Project would benefit multiple lifestages of Chinook salmon. Possible adverse effects from project maintenance activities would most often be minor, localized, and of short duration. However, as a result of these activities, an unknown level of take may occur. We believe that this take is minimal and does not jeopardize the continued existence of spring-run Chinook salmon. Implementation of the studies related to relicensing will likely provide new information that should allow us to better quantify take related to project operation. Overall, current operation of the project appears to improve conditions in the project area for spring-run Chinook.
>
> Addressing the significant pre-spawning mortality that occurred in 2002 and 2003, the [biological assessment] notes that this mortality was the result of abnormally high water temperatures (naturally occurring) and disease outbreak. . . .
>
> Lastly, we note that existing provisions contained in annual operation plans, such as increasing releases from Philbrook reservoir during extreme heat events, appear to be improving conditions for spring-run Chinook in the project area.[] Based on the information and analysis in the [biological assessment], *we conclude that no changes to project facilities or operation are currently needed to benefit spring-run Chinook*.[]

F-ER 31-32 (footnotes omitted; emphasis added).

FERC Staff requested that NOAA Fisheries file a copy of its preliminary biological opinion within 135 days of receiving the preliminary biological assessment (approximately late February 2006), in accordance with 50 C.F.R. § 402.11(e). F-ER 32.

SUMMARY OF ARGUMENT

The Commission properly concluded that Section 7 of the Endangered Species Act and its implementing regulations do not require the Commission to initiate additional (formal) consultation with NOAA Fisheries concerning the effects of PG&E's ongoing operation of a FERC-licensed hydroelectric project on a newly-listed species.

First, jurisdictionally, Petitioners' claims are not justiciable, as it is not clear what relief they are seeking or could obtain in this appeal. The Commission, NOAA Fisheries, and PG&E have been engaged in informal consultation regarding protection of threatened spring-run Chinook salmon since at least 2002, focusing not only on the prospective relicensing of the project but also on the current operations and whether interim measures are warranted. In 2005, the Commission initiated early consultation, culminating in its recent submission to NOAA Fisheries of a preliminary biological assessment, with findings that current operation of the project appears to benefit spring-run Chinook, and that no changes

to project facilities or operation are currently needed. NOAA Fisheries is now preparing its preliminary biological opinion. Therefore, it is unclear what purpose formal consultation would further that is not already being served by the ongoing consultation processes.

On the merits, there is no basis for reversing the Commission's Orders. The Commission does not carry out the day-to-day operation of a licensed hydroelectric project. Therefore, the Commission followed its precedents and leading decisions of this Court, and concluded there is no agency action requiring immediate, formal consultation under the Endangered Species Act. This Court's case law requires consideration not only of the existence of some discretionary involvement or control regarding the private activity but also of the nature of that involvement or control; cases concerning federal agencies' *own* ongoing actions are distinguishable.

Moreover, the existence of reopener clauses in the project license does not give the Commission broad discretion. The Commission's ability to exercise its reserved authority is limited by the requirements of the Federal Power Act, and thus any changes must have a nexus to project effects and be supported by substantial evidence. To reopen a license, the Commission must first undertake a preliminary investigation to determine whether there is sufficient information to support reopening the license. Contrary to Petitioners' claims, the Commission's

actions with regard to a prior license amendment, its continuing efforts to monitor the conditions of protected Chinook in the Project area, and its actions in another license case do not demonstrate that it has retained discretionary involvement and control.

Finally, the Commission reasonably determined that the "may affect" trigger for formal consultation had not been met, as Petitioners' allegations were unsupported and ignored contrary evidence. On appeal, Petitioners continue to rely on conclusory assertions, and advance a broad reading of the "may affect" trigger that, together with their expansive view of FERC's discretion, would effectively require perpetual formal consultation, resulting in serious disruption of hydroelectric licensing.

ARGUMENT

I. PETITIONERS' CLAIMS ARE NOT JUSTICIABLE AT THIS TIME

It is not clear what relief Petitioners are seeking or could obtain from this Court, as a practical matter. Petitioners' claims are purely procedural; at no point in this litigation have they articulated what measures they believe FERC and NOAA Fisheries should require PG&E to implement to protect listed Chinook in Butte Creek. And with respect to their procedural arguments, Petitioners fail to explain what they believe is deficient in the current procedures — that is, what formal consultation would add to the process that is already taking place.

Petitioners contend that early consultation or informal consultation is not a substitute for formal consultation (Br. 39), that FERC is not excused "from its current duty to ensure that ongoing Project operations will not jeopardize the spring-run Chinook" (Br. 40), and that formal consultation would give NOAA Fisheries "an opportunity to study the current, ongoing effects of the project" and to exert legal authority to impose measures to protect Chinook (Br. 41). But Petitioners ignore FERC's ongoing interaction with NOAA Fisheries and PG&E, which has included consideration by all of those entities of the *current* effects of the Project — not simply the possibility of future consultation in the relicensing process (*see* Br. 40) — and whether interim measures are warranted. Accordingly, Petitioners have failed to explain what benefits to listed species formal consultation

would provide that cannot likewise result from the processes of both informal consultation and now early consultation, in which NOAA Fisheries, FERC, PG&E, and others have been and continue to be engaged.

As described above, NOAA Fisheries and California Fish and Game have been consulting with PG&E regarding the current operation and the prospect of interim measures to protect spring-run Chinook, including various meetings and numerous reports to and communications with FERC Staff, since at least 2002. *See generally* Initial Order PP 14-36; *see also* F-ER 6-7, 11-18, 22-23. Moreover, the current process may proceed to formal consultation if further actions are taken. For that reason, the Commission denied Petitioners' claims on the grounds that they were premature, without prejudice to Petitioners' ability to renew the petition following completion of informal consultation and FERC's review of what, if any, actions may be appropriate. *See* Initial Order at P 40. In addition, the Commission designated PG&E as its non-federal representative for purposes of early consultation with NOAA Fisheries, a process that culminated in FERC's submission of a preliminary biological assessment to NOAA Fisheries in October 2005, with NOAA Fisheries' preliminary biological opinion anticipated to be filed by late February 2006. F-ER 30-32.

Furthermore, in forwarding the preliminary biological assessment, FERC Staff noted that existing provisions in operation plans "appear to be improving

conditions for the Chinook in the Project area" and concluded, based on the information gathered in the consultation process, that "no changes to project facilities or operation are currently needed to benefit spring-run Chinook." F-ER 31-32; *see supra* page 20. NOAA Fisheries now has the opportunity to consider that conclusion — regarding not only the relicensing but also current operations — in preparing its own preliminary biological opinion. As the Commission noted in the Rehearing Order, "[e]arly consultation can eliminate the need for formal consultation, if a preliminary biological opinion is confirmed as the final biological opinion." Rehearing Order at P 7 (citing 50 C.F.R. § 402.14(b)(2)).

The Commission observed that Petitioners had not addressed the issue of early consultation, as NOAA Fisheries and PG&E had agreed to use that process after Petitioners filed their Rehearing Request. Rehearing Order at P 7. Though Petitioners, on appeal, do address early consultation and contend it is still insufficient (Br. 39-41), they gloss over the fact that NOAA Fisheries agreed to use and has participated in that process (*see, e.g.,* F-ER 22, 28), and has not renewed its previous request that the Commission initiate formal consultation. Nor has NOAA Fisheries suggested, in this or any other forum, that the early consultation process is not sufficient to protect spring-run Chinook.

Whether a case is justiciable touches upon several interrelated constitutional and prudential doctrines addressing "both the appropriateness of the issues for

decision by courts and the hardship of denying judicial relief." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring). As this Court has noted, justiciability is a "flexible" concept that "is less concerned with specific categories, and more with underlying policies" and that, at bottom, concerns whether the reviewing court "is the most appropriate institution to address [a petitioner's] claims at this particular time." *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 787 (9th Cir. 1986); *see also The Steamboaters v. FERC*, 759 F.2d 1382, 1387 (9th Cir. 1985) (judicial review of FERC orders is "limited to orders of definitive substantive impact, where judicial abstention would result in irreparable injury to a party").

Whether based on nonfinality or ripeness (because the Commission found the petition "premature," Initial Order at P 40, as consultation was and is ongoing), mootness (because the Commission initiated early consultation and subsequently concluded that interim measures are not warranted, and NOAA Fisheries is now preparing its preliminary biological opinion), standing based on lack of aggrievement or on nonredressability (because Petitioners can point to no substantive or procedural injury that likely will be redressed by this Court's reversal of the FERC Orders), or some other doctrine, the Court should hold that it

is not the most appropriate institution to address these claims at this time.[7]

II. STANDARD OF REVIEW

The ESA's statutory structure requires that FERC, as the Federal agency, consider how best to carry out its obligations under the ESA. *See, e.g.*, ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1) ("All other Federal agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter . . . ."); *see also, e.g.*, 50 C.F.R. § 402.15(a) ("the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and [NOAA Fisheries'] biological opinion."); *Turtle Island Restoration Network v. National Marine Fisheries Serv.*, 340 F.3d 969, 975-76 (9th Cir. 2003) (construing enabling act to determine whether agency had discretion to protect listed species). Courts have accorded deference to such agency determinations under Administrative Procedure Act review guidelines. "Judicial review of administrative decisions involving the ESA is governed by section 706 of the Administrative Procedure Act . . . ." *Environmental Protection Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001) ("*EPIC*") (citing 5 U.S.C. § 706). Under this APA standard, agency action is upheld unless it is arbitrary, capricious, an abuse of

[7] On October 11, 2005, PG&E, having intervened in this appeal, filed a motion to dismiss the instant petition for review on similar grounds. The Commission supported the motion. In an order issued December 6, 2005, the Court denied the motion without prejudice to renewing the arguments in the parties' briefs.

discretion, or otherwise not in accordance with law. *Id.*; *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003).

The FPA's judicial review provision requires that all FERC decisions, including those to modify existing licenses, be supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). Under the FPA, substantial evidence "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC's] findings.'" *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)) (alteration in original); *accord California ex rel. Lockyer v. FERC*, 329 F.3d 700, 714 (9th Cir. 2003). Thus, an agency has a duty to obtain the necessary evidence before it acts. *See McKart v. United States*, 395 U.S. 195, 194 (1969) ("it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based").

Finally, the Commission's interpretation of the hydroelectric licenses it issues is entitled to deference. *See City of Seattle v. FERC*, 923 F.2d 713, 716 (9th Cir. 1991) (citing *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 84 (D.C. Cir. 1983)).

III. THE COMMISSION PROPERLY RULED THERE WAS NO "AGENCY ACTION" UNDER SECTION 7(A)(2) OF THE ENDANGERED SPECIES ACT

ESA § 7(a)(2) applies to "any action authorized, funded, or carried out by such agency," 16 U.S.C. § 1536(a)(2), including "the granting of licenses," 50 C.F.R. § 402.02.[8] The implementing regulations state that consultation requirements "apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.[9] Accordingly, "a key inquiry is whether there is any federal agency action that can trigger the consultation requirement." Rehearing Order at P 9.

Though it is undisputed that day-to-day operation of the DeSabla-Centerville

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[8] *See also Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 967 (9th Cir. 2005) (interpreting ESA § 7(a)(2) as "confer[ring] authority and responsibility on agencies to protect listed species when the agency engages in an *affirmative action* that is both within its decisionmaking authority and unconstrained by earlier agency commitments") (emphasis added).

[9] *See also Defenders of Wildlife*, 420 F.3d at 968:

> [C]ases applying § 402.03 are consistent with our understanding that the regulation's reference to "discretionary . . . involvement" is congruent with the statutory reference to actions "authorized, funded, or carried out" by the agency. . . .
>
> Our § 402.03 . . . cases hold section 7(a)(2) inapplicable if the agency in question had "no ongoing regulatory authority" and thus was not an entity responsible for decisionmaking with respect to the particular action in question.

(citation omitted).

Project is carried out by PG&E, Petitioners nonetheless claim the existence of the reopener clause gives the Commission the necessary involvement and control to constitute ongoing agency action. Br. 21, 26. But this Court's precedents "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." Rehearing Order at P 24; *see also id.* at PP 24-25 (discussing *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), and *EPIC*).

A. Operation Of The Project Is Not An Ongoing Agency Action

1. Private Activity Pursuant To A License Is Not Federal Agency Action

Where, as here, a private entity operates a project under a license previously issued by a federal agency, there is no agency action. To hold otherwise would convert every agency-issued license into an ongoing duty of the agency to micromanage each project, and would effectively impose a requirement of perpetual consultation, triggered by any new listing of a species. *Cf.* Br. 21 ("[T]he listing of the spring-run Chinook as a threatened species in 1999 triggered FERC's duty to formally consult with NMFS under Section 7(a)(2) of the ESA."); P-ER 24 at 2 (Rehearing Request) ("FERC is required by ESA Section 7 to consult *immediately* with NMFS regarding the effects of the Project on the spring-run chinook and has been so obligated since this species was listed as threatened . . . .")

(emphasis in original).[10]

In its Orders, the Commission emphasized the distinction between actions of federal agencies and those of private entities: "It is clear that section 7(a)(2) applies, by its terms, when a federal agency engages in an *action* that authorizes, funds, or carries out an activity that may affect listed species." Rehearing Order at P 9 (emphasis in original). The Commission went on to point out that it does not fund or otherwise carry out the activities of its licensees or "any of the actions that may be necessary to construct, maintain, or operate a hydroelectric project . . . ." *Id.* at P 10; *see also* Initial Order at P 38. Therefore, whereas the issuance or amendment of a license is clearly a federal agency action for ESA § 7 purposes, Rehearing Order at P 10, the licensee's ongoing operation pursuant to that license is not:

> Ongoing operation of a licensed hydroelectric project does not require any particular action on the Commission's part. . . . 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

[10] Petitioners argue that, unless consultation is triggered by each new listing, species could go extinct over the term of a hydroelectric license. Br. 27. This argument is barred because Petitioners failed to raise it before the Commission. 16 U.S.C. § 825*l*(b). It also is fallacious because, as discussed below in Part III.B, the Commission could invoke a reopener clause if substantial evidence supported doing so.

of its license.

Id. at P 11; *accord* Initial Order at P 38 (quoting *Phelps-Dodge Morenci, Inc.*, 94 FERC ¶ 61,202 at 61,753 (2001)).

The Commission relied on the regulation defining agency action under ESA § 7 to include actions "in which there is discretionary Federal involvement or control," 50 C.F.R. § 402.03, and this Court's case law applying that language. Rehearing Order at P 12; *see generally id.* at PP 24-25. Petitioners misleadingly claim that FERC's contention that it does not have "sufficient control over the day-to-day operations of the Project to require formal consultation *has previously been rejected by several courts*." Br. 28 (emphasis added); *id.* at 28-33 (discussing cases). But *not one case* cited by Petitioners involved FERC, the FPA, or a license for a hydroelectric project.

The Commission looked to two Ninth Circuit cases involving private activity under federal permits and found those precedents "illustrate that there is a need to distinguish between federal agency action and private action pursuant to federal authorization." Rehearing Order at P 24; *see also id.* at PP 24-25 (discussing *Sierra Club* and *EPIC*).

In *Sierra Club*, the Court held that consultation under ESA § 7 was not required where a logging company constructed a road across federal land pursuant to an existing right-of-way agreement. Though the Court found that the Bureau of

Land Management had retained some discretion with regard to the right-of-way agreement, that discretion was limited to matters unrelated to protection of endangered or threatened species. 65 F.3d at 1507-08. Therefore, the Bureau was not required to consult with Fish and Wildlife concerning road construction because it could not implement measures to benefit the affected species. *Id.* at 1509.

Citing the definitions and examples of "action" in ESA § 7(a)(2) and 50 C.F.R. § 402.02, the Court noted that an agency's execution of such a right-of-way agreement would bring ESA's procedural requirements into play, as would "a project undertaken pursuant to a preexisting agreement . . . if the project's implementation depended on an additional agency action." *Sierra Club*, 65 F.3d at 1508. But where the right-of-way had been previously granted and the agency's continuing ability to influence the company's private conduct was limited, the presence of an "action" turned on whether there was "'*discretionary* Federal involvement or control.'" *Id.* at 1509 (quoting 50 C.F.R. § 402.03) (emphasis in original). In that case, the Court concluded, based on the limited grounds provided in the right-of-way agreement for blocking a construction project, that the Bureau lacked sufficient "discretion to influence the private action." *Id.* at 1509 & n.10. Likewise, in the instant case, the Commission found it necessary to consider the limited nature of the discretion to influence PG&E's activity that was retained by

the Commission in the license. *See* Rehearing Order at PP 24, 26.

Similarly, in *EPIC*, this Court held that Fish and Wildlife itself had not retained sufficient discretionary control over an incidental take permit previously issued to a private timber company to require changes to benefit newly-listed species. Fish and Wildlife "retained some ongoing authority over [the] permit," in that the agency would review the permit after ten years and would determine whether to allow continued logging operations, and the agency could suspend or revoke the permit under specified circumstances. 255 F.3d at 1078. Nevertheless, the district court had concluded that provisions giving Fish and Wildlife "some involvement in the continuing administration of the permit" were not sufficient to establish the discretionary federal involvement or control required by the ESA regulations. *Id.* (internal quotation marks omitted).

In *EPIC*, it was argued that "so long as a permitting agency maintains 'some' discretionary control, it has a duty to reconsult under section 7(a)(2)." *Id.* at 1082. Relying on *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) ("*NRDC*"), the Court rejected that argument, distinguishing between "agency action" that occurs when a contract is executed or renewed, and lack of such action during the term of the contract. *EPIC*, 255 F.3d at 1082 (discussing *NRDC*, 146 F.3d at 1125-26). *NRDC* had held that consultation with NOAA Fisheries was required at the renewal of contracts between the Bureau of

Reclamation, which operated a dam, and various entities that contracted to obtain water from the dam, because renewal "involved agency discretion to set contract terms. Negotiating and executing contracts constituted 'agency action.'" *Id.* But *NRDC* "did not suggest " — as Petitioners imply here (*see* Br. 30) — "that once the renewed contracts were executed, the agency had continuing discretion to amend them at any time to address the needs of endangered or threatened species." *EPIC*, 255 F.3d at 1082 (citations omitted). Accordingly, the Commission in the instant case followed this Court's precedents in distinguishing between agency action (such as issuing or amending a license) and private operation under an existing license. Rehearing Order at PP 24, 26.

2. Cases Concerning Federal Agencies' Own Activities Are Distinguishable

In contrast to *Sierra Club* and *EPIC*, the case of *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), did not involve private activity.[11] There, the Court held that the U.S. Forest Service's land resource management plans, which established guidelines that would govern every future plan, permit, contract, or any other document pertaining to use of Forest Service land throughout their duration, "constitute[d] continuing agency action." 30 F.3d at 1051; *see also id.* at

[11] *See* Rehearing Order at PP 20, 22 (discussing *Pacific Rivers*). Before FERC, Petitioners identified *Pacific Rivers* as the case "most relevant here." P-ER 24 at 11 (Rehearing Request); *see also* P-ER 1 at ¶¶ 20, 24. On appeal, Petitioners do not even cite this case in their Opening Brief.

1053 ("ongoing agency action"). The plans did far more than reserve authority to the agency; they dictated how the Forest Service itself would manage the land under its jurisdiction over an extended period. *See id.* at 1053 ("The [plans] are comprehensive management plans governing a multitude of individual projects . . . ."); *id.* at 1056 (citing plans' "importance . . . in establishing resource and land use policies for the forests").

The direct relationship between resource management plans and the Forest Service's own ongoing reliance on those guidelines can be distinguished from the instant situation where a private licensee operates an authorized project: "the actions for which consultation was required [in *Pacific Rivers* and *NRDC*] 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." Rehearing Order at P 22. This Court recognized a similar distinction in *EPIC*, contrasting the Forest Service's "plenary control" in its forest planning decisions in *Pacific Rivers* with the issuance of permits that "involve[] agency authorization of a private action and a more limited role for [the agency]." 255 F.3d at 1080.

Petitioners principally rely on an unreviewed district court decision that is inapposite for similar reasons. *See National Wildlife Federation v. Federal Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004) ("*NWF*"),

cited in Br. 28, 32.[12] In that case, the court determined the "agency action" requiring formal consultation under ESA was FEMA's ongoing implementation of the National Flood Insurance Program, by promulgating regulations (such as minimum eligibility criteria), identifying and mapping floodplains (which determines applicability of local land use regulations), and implementing a Community Rating System that provides incentives to modify floodplains. 345 F. Supp. 2d at 1168-69; *see also id.* at 1173-74 (determining each of those actions was ongoing and discretionary). Based on those ongoing functions, the court found that the National Flood Insurance Program "is a program carried out by FEMA," *id.* at 1169, which "influences the management of an entire ecosystem (i.e., floodplains) on an ongoing basis, just as the [land resource management plans] in *Pacific Rivers Council* guided resource management on forest lands." *Id.* at 1171. In contrast, operation of the DeSabla-Centerville Project undisputedly is not "carried out" by FERC. *See* Rehearing Order at P 10.

Likewise, the instant case is distinguishable from *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003), also

[12] Because the Commission did not have an opportunity to address Petitioners' argument regarding *NWF*, FERC counsel's discussion of that case in the first instance is not an improper *post hoc* rationalization.

cited by Petitioners for the first time on appeal.[13] If anything, that case *supports* the Commission's reasoning in the challenged Orders. In *Turtle Island*, NOAA Fisheries issued permits, pursuant to the High Seas Fishing Compliance Act, for longline fishing by U.S.-flagged boats on the high seas. When environmental groups filed suit alleging ESA violations, NOAA Fisheries contended that ESA's consultation requirements did not apply because the agency lacked discretion under the Compliance Act to impose conditions on the permits to benefit listed species. The Court disagreed on the grounds that the ongoing issuance of permits constituted agency action and that the plain language of the Compliance Act did provide "ample discretion" to protect listed species, 340 F.3d at 975, in contrast to the "limited discretion" retained by the Bureau of Land Management in *Sierra Club* and by U.S. Fish and Wildlife in *EPIC*, *id.* at 976-77. Moreover,

> [*EPIC*] and *Sierra Club* factually differ from the present case because they involve situations where the agency activity had been completed and there was no ongoing agency activity, therefore, the consultation requirements of the ESA were not invoked. Conversely, [NOAA Fisheries'] continued issuance of fishing permits under the Compliance Act constitutes *ongoing agency action*, thus, under the plain language of the Compliance Act, discretion is retained by the federal agency.

Id. at 977 (emphasis added). Therefore, in *Turtle Island* this Court again

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[13] The 2003 decision in *Turtle Island* preceded not only both challenged Orders but even the petition filed at FERC in April 2004. Nevertheless, Petitioner did not raise this case before the Commission.

recognized the critical distinction between prior, completed agency actions and ongoing actions. Whereas NOAA Fisheries was continuing to take "agency actions" by issuing new fishing permits, operation of the DeSabla-Centerville Project under the previously issued license does not implicate any FERC action.

Finally, Petitioners rely on the unreported district court decision in *WaterWatch v. United States Army Corps of Engineers*, Civ. No. 88-861-BR, 2000 U.S. Dist. Lexis 17650 (D. Ore. June 7, 2000), in which a federal district court held that construction and dredging permits issued by the Army Corps of Engineers to private entities constituted federal agency action because the Corps had retained sufficient discretionary involvement or control. *Id.* at *18-31. The permits included conditions allowing the Corps to suspend, modify, or revoke the permits at any time if the Corps determined that doing so was in the public interest. The court concluded that this gave the Corps "a notable degree of discretion" to act for the benefit of listed species, *id.* at *24, and that "the Corps could exercise its discretion at any time," *id.* at *26.

In the Rehearing Order in this case, the Commission noted that the *WaterWatch* opinion was "an unreviewed district court opinion rendered in an

early stage of litigation"[14] and thus gave "greater weight to the two Ninth Circuit cases involving federal permits" — that is, *Sierra Club* and *EPIC*. Rehearing Order at P 24. The Commission went on to explain that, in its view, the reservations of authority in the DeSabla-Centerville Project license "fall somewhere between the Corps' far-reaching discretion to make changes at any time to benefit newly-listed species in *WaterWatch*, and [Fish and Wildlife's] limited discretion over the permit in *EPIC* . . . ." Rehearing Order at P 26.

The essential question presented in this case is where the Commission's reserved authority falls on that spectrum between "far-reaching discretion" and "limited discretion." As shown below, the requirements of the FPA constrain the Commission's ability to invoke its reserved authority, resulting in limited discretion.

[14] The district court had rejected the Corps' ripeness challenge and found the permits were agency actions over which the Corps had retained discretionary involvement or control, but denied summary judgment on plaintiffs' claims for declaratory and injunctive relief because there was an issue of fact whether the permits may affect listed species. 2000 U.S. Dist. LEXIS 17650, at *16, *31, *33-34.

B. Existence Of A Reopener Clause In A Project License Does Not Give The Commission Discretionary Involvement Or Control To Require Changes To The License Except Upon Substantial Evidence

1. The Commission's Ability To Reopen A License Is Constrained By The Requirements Of The Federal Power Act

Petitioners' argument rests on the flawed premise that FERC "*could* choose to exercise its discretion under the license *at any time*." Br. 33 (first emphasis in original; second emphasis added); *see also* Br. 28. That argument fails to "tak[e] into account the nature of the authority that the Commission has actually reserved in the license." Rehearing Order at P 15.

Specifically, a reopener clause does not give the Commission free rein to act. "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." Rehearing Order at P 15. Rather, a reopener clause provides FERC the necessary authority, in accordance with a specified process and based on specified grounds, to reopen the license and require changes. If the Commission decides, after investigation and review of additional facts, to exercise that authority and initiate a proceeding to amend the license, then at that point the formal consultation provision of the ESA likely would be implicated. *See* Initial Order at P 40.

Indeed, the very license provisions on which Petitioners stake their argument

demonstrate these limitations. Standard License Article 15 reserves authority to impose certain kinds of modifications "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." *See* Rehearing Order P 14 n.14; *see also supra* page 10 (quoting provision in full). Likewise, Article 37 of the license states that "[t]he Commission reserves the right, after notice and opportunity for hearing, to require [certain] changes in the project and its operation." Rehearing Order at P 14 n.15; *see also supra* page 10 (quoting provision in full).

Moreover, the changes to be imposed must "have a nexus to project effects and [be] 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." Rehearing Order at P 15; *see also id.* at P 27. For those reasons, the Commission explained that "[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 action." *Id.* at P 15. In short, whereas Petitioners envision the reopener clauses as providing substantive powers, the clauses essentially provide procedural tools to effectuate the FPA, and

as such are bounded by the requirements of that enabling statute.

The Commission's reasoning here is consistent with its precedents. For example, the Commission rejected a similar argument in *Phelps-Dodge*, *discussed in* Initial Order at P 38. As here, the Commission found in that case that the argument that operation of a licensed project constitutes agency action "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." 94 FERC at 61,750-51, *quoted in* Initial Order at P 38. The Commission explained that, "[i]f the Commission determines that a change in [the license] terms is needed, we must take action to change them pursuant to authority reserved in the license." 94 FERC at 61,753, *quoted in* Initial Order at P 38; *see also Puget Sound Energy, Inc.*, 95 FERC ¶ 61,015 at 61,027 (same), *reh'g denied*, 95 FERC ¶ 61,319 (2001), *pet. dismissed sub nom. Washington Trout v. FERC, ,* No. 01-71307, 2003 U.S. App. LEXIS 5813 (9th Cir. Mar. 25, 2003).

The Commission also explained the "practical significance" of this interpretation of ESA § 7 and the FPA:

> 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.

Rehearing Order at P 27 n.33.

Moreover, under 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.'" *Id.* (quoting FPA § 6, 16 U.S.C. § 799). Though reservations of authority are a recognized means of obtaining the licensee's consent to any future modifications that may be required (*see supra* page 5), "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." Rehearing Order at P 27 n.33. 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 eight-month inquiry into need for interim wildlife protective conditions, during which FERC sought recommendations and received submissions from the licensees, conservation groups, and federal and state agencies, and based its order regarding interim conditions on a 10,000-page

record).[15]

Cases cited by Petitioners (Br. 22-23) are not to the contrary. The FPA does indeed provide for consideration of fish and wildlife protection, and courts have approved FERC's inclusion of reopener clauses for that purpose. *See, e.g., United States Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992); *California v. Federal Power Comm'n*, 345 F.2d 917 (9th Cir. 1965).[16] Nevertheless, the FPA requirement of substantial evidence for Commission action also applies.

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[15] In contrast, the Commission explained that, "[i]n 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." Rehearing Order at P 27 n.33.

[16] Notwithstanding Petitioners' implication that *Interior* held that a reopener clause gives FERC "discretionary involvement and control to impose modifications," Br. 25, that case did not concern ESA consultation requirements, and, more important, does not contradict the Commission's explanation here of the limits on the *exercise* of reopener clauses. Neither does the cited excerpt of the legislative history of the Electric Consumer Protection Act (amending the FPA) that Petitioners argue "endorsed" including reopener clauses. Br. 23-24 (citing H.R. Rep. No. 99-507, at 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2519).

Indeed, the Court in *Interior* noted that FERC's action under a reopener clause would be subject to judicial review (952 F.2d at 547) — and thus to the substantial evidence requirement of FPA § 313(b) — and the legislative history cited by Petitioners goes on to note that "[t]he legislation does not change existing law, including case law, governing FERC authority to modify licenses during their term." H.R. Rep. No. 99-507, at 32, *reprinted in* 1986 U.S.C.C.A.N. at 2519.

In any event, Petitioners' arguments concerning *Interior* and the legislative history of the Electric Consumer Protection Act were not raised before the Commission and are jurisdictionally barred. 16 U.S.C. § 825*l*(b).

2. The Commission's Actions Do Not Demonstrate That It Has Retained Discretionary Involvement And Control

Contrary to Petitioners' claims (Br. 34-35), the previous addition of Article 402 of the DeSabla-Centerville Project license, *see supra* pages 11-12, does not demonstrate that FERC has discretion to require changes to the license to protect spring-run Chinook. That article was added in connection with a license amendment that PG&E had requested. *See Pacific Gas & Elec. Co.*, 58 FERC ¶ 62,093 (1992), P-ER 80.[17] As the Commission explained, Article 402 required a specific action (preparation by PG&E of a plan for conducting a study of stream flow and water temperature impacts) that was completed and approved before Central Valley spring-run Chinook salmon were ESA-listed. *See* Rehearing Order at P 18 & n.24 (citing FERC orders issued in 1993, 1997 and 1998 approving plan and requiring associated changes to license); *supra* pages 11-13 (discussing orders).[18]

Nor do the Commission's efforts to monitor the condition of spring-run Chinook prove that it has discretionary involvement or control with respect to the

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[17] *See id.* at 63,209 ("Within 6 months from the issuance date of this order, the licensee shall file with the Commission for approval a plan . . . . Upon Commission approval the licensee shall implement the plan, including any changes required by the Commission."), P-ER 80 at 9.

[18] In the August 29, 2003 letter to PG&E requesting a report on Chinook mortality, FERC Staff did not, as Petitioners appear to imply, suggest any connection to or reliance upon Article 402. *See* P-ER 86.

DeSabla-Centerville Project. The Commission's actions simply "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," in accordance with the notice and hearing requirements and the substantial evidence standard. Rehearing Order at P 19. This is not a case where the Commission has disregarded Petitioners' or resource agencies' concerns regarding the condition of protected salmon, or refused to investigate whether it should take the necessary steps to invoke its reserved authority. But it would be a substantial — and unwarranted — leap to conclude from the Commission's attentiveness that immediate, formal consultation is statutorily mandated.

Furthermore, the Commission's action on another license does not support Petitioners' broad view of its discretion. *See Idaho Power Co.*, 108 FERC ¶ 61,158 (2004), *cited in* Br. 34. The dispute in that case centered on the Commission's failure to act at all, for more than six years, on a petition for formal consultation. In other words, the petitioners in that case had not received the response that the Commission provided in the Initial Order in this case, issued less than four months after the petition was filed. "FERC is obligated under the APA to respond to the 1997 petition. . . . We are not concerned here with what answer FERC might ultimately give the petitioners . . . ." *In re American Rivers*, 372 F.3d

413, 419 (D.C. Cir. 2004) (emphasis omitted) (granting writ of mandamus ordering FERC to respond to petition). The court expressly declined to address the issue of whether formal consultation was required. *See id.* at 418-19; *see also id.* at 420 & n.14 (citing as examples of the Commission's "relatively swift" actions on similar petitions, *inter alia*, *Puget Sound* and *Phelps-Dodge*, which had dismissed and denied, respectively, petitions for formal consultation).

Subsequently, the Commission granted the *Idaho Power* petition and moved forward with formal consultation. 108 FERC ¶ 61,158 at P 11. Petitioners point to that decision as evidence of FERC's discretion to invoke a reopener clause at will. Br. 33-34. But, as the Commission explained in this case, the *Idaho Power* order did not address whether formal consultation was actually required, or on what legal or factual basis FERC Staff decided to initiate consultation. Rehearing Order at P 29. As such, "no conclusions can properly be drawn from [the] decision to grant the petition." *Id.* at P 31. The *Idaho Power* order suggested that developments in the interim played a role; in October 2002, nearly five years after the petition was filed, FERC Staff had written to NOAA Fisheries to initiate formal consultation, apparently spurred by an unspecified "recent development of information available to the Commission [that] put[] us in the position to effectively carry out this consultation." 108 FERC ¶ 61,158 at P 7; Rehearing Order at P 29. The consultation process had then been put off by NOAA Fisheries; following the writ

of mandamus, the Commission stated that it would ask NOAA Fisheries to resume the consultation process. 108 FERC ¶ 61,158 at PP 8, 11; Rehearing Order P 29.

Ultimately, Idaho Power and other parties filed a settlement agreement addressing the effects of ongoing operation of the project on listed species, and FERC Staff deemed the measures adequate. Therefore, the dispute over consultation, and the question of the Commission's grounds for invoking its reserved authority, became moot. Rehearing Order at P 30.[19]

Petitioners rely on the mere existence of the reopener clause as a blanket basis for agency discretion, but never offer any evidentiary grounds for invoking it in this case, nor do they suggest any measures that should be imposed. *Cf. Phelps-Dodge*, 94 FERC at 61,751 (rejecting similar argument that immediate formal consultation was required, in part because the argument "disregards the consultation that has already occurred in this case, and fails to allege any new facts or information that might lead us to initiate further consultation"); *Platte River*, 962 F.2d at 33 n.2 ("Petitioner has not demonstrated how a more formal consultation would have resulted in any change in FERC's position.").

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[19] The Commission also noted that in *Idaho Power* FERC and NOAA Fisheries had been unable to engage on ESA issues, due to litigation and a gag order affecting the licensee, NOAA Fisheries, and other parties but not including FERC. Here, by contrast, "NOAA Fisheries and the licensee have a record of working together to resolve ESA issues, thus lessening the need for Commission involvement." Rehearing Order at P 31.

Nevertheless, the Commission itself directed FERC Staff to "gather necessary information to make an independent determination whether further interim measures are necessary" and, if so, to ascertain whether PG&E was willing to file an amended application to implement such measures, or whether the Commission should invoke its reserved authority to begin a proceeding based on that information. Initial Order at P 40. Ultimately, FERC Staff concluded that, in fact, no further interim measures were necessary. F-ER 31-32.

IV. THE COMMISSION REASONABLY FOUND THAT THE "MAY AFFECT" CONDITION HAD NOT BEEN MET

The formal consultation requirements of ESA § 7(a)(2) apply to agency actions that "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Petitioners assert that "[t]here is little doubt that operation of the DeSabla-Centerville Project 'may affect' the threatened spring-run Chinook salmon and its critical habitat." Br. 36. The Commission, however, reasonably found that this conclusory declaration was not supported by the evidence in the record.

Petitioners contend that "the Project has completely supplanted the natural hydrology of Butte Creek so that the timing, temperature, and streamflow in holding and spawning habitat for the spring-run Chinook is controlled by Project operations." Br. 36. Petitioners then point to kills of pre-spawning adult spring-run Chinook in the summers of 2002 and 2003 "in a reach of Butte Creek where the Project keeps streamflows substantially below natural levels." Br. 38.

In response, the Commission noted that Petitioners ignored evidence suggesting that the fish kills "resulted from factors beyond PG&E's control, such as weather conditions and large numbers of returning fish." Rehearing Order at P 16; *see also id.* n.18 (citing correspondence from FERC Staff attributing 2002 kills to a low-water year and an exceptionally strong spawning run, and from PG&E attributing 2003 kills to a disease outbreak, compounded by high fish densities and atmospheric conditions that caused high water temperatures); Initial Order at PP 18, 27 (same). The Commission further explained that, "[b]ecause 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 temperatures in Butte Creek are primarily the result of natural atmospheric conditions." Rehearing Order at P 16. Therefore, the Commission concluded that, contrary to Petitioners' claims, it was "unclear whether project operation is causing adverse effects to the listed fish species." *Id.*

Rather than challenge these facts or the Commission's conclusions drawn therefrom, Petitioners brush this evidence aside with the conclusory assertions that the project "certainly affects these fish by impairing the quantity and temperature of the water they inhabit." Br. 38. The Commission reasonably found this proposition to be unsupported. Rehearing Order at P 16. On appeal, Petitioners attempt to support their claim by citing a comment made by the Department of

Interior in connection with the 1980 licensing proceeding, in relation to Interior and California Fish and Game's recommendation of a fish ladder at a project dam, which is not at issue here, *see* Br. 38-39 (citing P-ER 79 at 6), and argue that federal agencies must "'give the benefit of the doubt to the species,'" Br. 39 (quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)). As neither contention was raised on rehearing, these new arguments on appeal are jurisdictionally barred. FPA § 313(b); 16 U.S.C. § 825*l*(b). And, in any event, they are unavailing.

First, Petitioners' position leads to a reading of § 402.14 that does not comport with the structure and operation of the ESA procedures and makes no sense in the context of the FPA and hydroelectric licensing. Petitioners view the trigger broadly, essentially contending that operation of the Project inherently "may affect" Chinook salmon at all times. Taken with Petitioners' argument that day-to-day operation of the Project is itself an "agency action" (*see supra* Part III), that presumption would require perpetual formal consultation throughout the entire term of the license. *Cf.* Rehearing Order at P 27 n.33 (explaining that "[i]mmediate 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").

Second, Petitioners' reliance on *Conner* is misplaced; that case concerned

the substantive determination under ESA § 7(a)(2) resulting from a formal consultation, not the procedural trigger under 50 C.F.R. § 402.14 for initiating consultation. The Court did not suggest that a federal agency must initiate consultation even where, as the Commission found here (Rehearing Order at P16), it is "unclear" that an action (assuming there even is an "agency action") may adversely affect listed species or critical habitat. Rather, *Conner* concerned the substance of a biological opinion formulated by the relevant Service as the end result of the formal consultation process. *See* 848 F.2d at 1454 (holding Fish and Wildlife had failed to use the best biological information available to prepare comprehensive biological opinions, and therefore "fail[ed] to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species"); *see also* 50 C.F.R. § 402.14(h)(3).

Moreover, even if the ongoing operation of the project "may affect" spring-run Chinook, that alone would not provide statutory authority to regulate a private activity. *Sierra Club*, 65 F.3d at 1509 n.10, *cited in* Rehearing Order at P 17. Rather, such a determination "is a 'preliminary step' in a procedural process designed to identify federal actions that are likely to jeopardize the continued existence of listed species." *Id.* (quoting *Sierra Club*). Here, as discussed above, there is no proposed federal action.

CONCLUSION

For the reasons stated, the petition should be denied, and the challenged FERC Orders should be affirmed in all respects.

STATEMENT OF RELATED CASES

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 9th Cir. R. 32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 12,549 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

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