

No. 05-72513

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO RIVERS UNITED, *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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**ON PETITION FOR REVIEW OF ORDERS OF THE
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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) satisfied all statutory and regulatory requirements in approving applications for licenses to operate hydroelectric projects on the Snake River in Idaho, when those licenses contain numerous measures to protect and enhance fish and wildlife resources and when the licenses reflect a settlement with federal and state resource agencies to protect those resources.

STATUTES AND REGULATIONS

Pertinent sections of relevant statutes and regulations in issue are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

“Petitioners who ‘allege (1) personal injury (2) fairly traceable to the [respondent’s] allegedly unlawful conduct and (3) likely to be redressed by the requested relief’ establish Article III standing.” *Defenders of Wildlife v. EPA*, 420 F.3d 946, 956 (9th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). “An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 181 (2000); *see also Defenders of Wildlife*, 420 F.3d at 958 (same).

Petitioners’ standing to seek review of the orders challenged here is not self evident. Nor does their initial brief establish their standing. *See Br.* at 3 (“Petitioners Idaho Rivers United and American Rivers are non-profit river conservation groups representing thousands of people in Idaho and around the country, who care deeply about the fisheries, wildlife, recreational, economic, and

other values associated with the Snake River. They have participated throughout the FERC licensing process, advocating for better management of the hydropower projects so as to restore fisheries, wildlife and recreational values.”). Petitioners’ standing is particularly unclear in light of their reliance on “run-of-river” recommendations by federal and state resource agencies that were withdrawn after development of a comprehensive settlement, reflected in the licenses, to protect fish and wildlife resources.

STATEMENT OF THE CASE

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

In 1995, 1997, and 1998, Idaho Power Company (“Idaho Power”) filed applications for new licenses for the Upper Salmon Falls, Shoshone Falls, Lower Salmon Falls, Bliss, and C.J. Strike Projects on the Snake River in Idaho. R. 1-6. Idaho Power proposed a number of measures to protect and enhance project area resources, including fish and wildlife. Petitioners’ Excerpts of Record (“P-ER”) 534, 1223-26.

Originally, the Fish and Wildlife Service (“FWS”) and the Idaho Department of Fish and Game (“IDFG”) recommended that all load-following operations, *i.e.*, where reservoir storage is used to shape power output to follow system load changes, be ended at the projects. P-ER 109-09, 141-43, 224-28, 245, 542, 1228. Those recommendations were later withdrawn, however, when FWS entered into,

and IDFG supported approval of, a Settlement providing for a six year snail study period and the following project operations: the Upper Salmon Falls and Shoshone Falls Projects will continue to be operated in run-of-river mode; the Lower Salmon Falls and Bliss Projects begin being operated in run-of-river mode, rather than in load-following mode as under the original licenses, except when necessary for study purposes; and the C.J. Strike Project will continue to be operated in load-following mode. FERC Excerpts of Record (“F-ER”) 14; P-ER 1861, 2277, 2279, 2281, 2329, 2331-32.

The Commission prepared extensive draft and final Environmental Impact Statements (“EIS”) regarding the projects. *See* P-ER 248-295, 318-344, 478-1163, 1183-1689. In addition, FWS issued a Biological Opinion, which determined that relicensing the projects was not likely to jeopardize the continued existence of the three Endangered Species Act (“ESA”) listed snails affected by the projects. P-ER 1864, 1966-69. After considering the entire record, the Commission granted licenses for the projects that included the operational modes set forth in the Settlement Agreement, as FWS and IDFG had recommended. P-ER 2010-2343.

Petitioners Idaho Rivers United and American Rivers were the only parties to seek rehearing of the license orders. Finding no merit to their claims, the Commission denied rehearing. P-ER 2344-2390.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

1. Federal Power Act

Part I of the Federal Power Act (“FPA”) constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). FPA § 4(e), 16 U.S.C. § 797(e), grants FERC authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on waterways that are subject to congressional regulation under the Commerce Clause. *American Rivers v. FERC*, 201 F.3d 1186, 1191 (9th Cir. 1999).

In recognition of “an increased sensitivity to environmental concerns,” Congress amended the FPA’s hydroelectric licensing provisions in the mid-1980s to provide for greater consideration of a project’s overall effect on fish and wildlife. *Id.* Thus, before issuing a license, FERC must assure that, in its judgment, an approved project “will be best adapted to a comprehensive plan improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power

development, for the adequate protection, mitigation and enhancement of fish and wildlife . . . , and for other beneficial public uses” FPA § 10(a), 16 U.S.C. § 803(a)(1). “[I]n addition to the power and development purposes for which licenses are issued,” the Commission must “give equal consideration to the purposes of . . . the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” FPA § 4(e).

Moreover, § 10(j)(1), 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 or to modify those recommendations after giving them due weight. FPA § 10(j)(2), 16 U.S.C. § 803(j)(2); *American Rivers*, 201 F.3d at 1202.

The FPA also establishes a relicensing regime. FPA § 15(a), 16 U.S.C. § 808(a), authorizes the Commission, at the expiration of a license, “to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations.” If, at the expiration of a license, the Commission “does not issue a license to a new licensee,

or issue a new license to the original licensee . . . then [it] shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until . . . a new license is issued as aforesaid.” *Id.*

2. National Environmental Policy Act

National Environmental Policy Act of 1969 (“NEPA”) § 102, 42 U.S.C. § 4332, requires each federal agency, for all major actions significantly affecting the quality of the human environment, to prepare an EIS concerning “the environmental impact of the proposed action” as well as “alternatives to the proposed action.” “NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.” *American Rivers*, 201 F.3d at 1194 (quoting *Laguna Greenbelt, Inc. v. U.S. DOT*, 42 F.3d 517, 523 (9th Cir. 1994)). Under NEPA, FERC must adequately consider and disclose the environmental impact of its actions. *Id.* at 1194-95.

4. Pacific Northwest Electric Power Planning And Conservation Act

Under the Pacific Northwest Electric Power Planning and Conservation Act (“NPA”), 16 U.S.C. § 839b(h)(11)(A)(i), FERC shall regulate hydroelectric facilities located on the Columbia River or its tributaries “to adequately protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system

and facilities are managed and operated.” This does not require that every FERC decision treat fish and wildlife equitably. *See Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 931 (9th Cir. 2003). Rather, FERC “may make some decisions that place power above fish, so long as on the whole, it treats fish on par with power.” *Id.* (citing *Northwest Env'tl. Defense Ctr. v. BPA*, 117 F.3d 1520, 1533-34 (9th Cir. 1997)). Thus, to sustain a claim that FERC violated its obligations under the NPA, a petitioner must show not only that the challenged decision disadvantages fish and wildlife, but also “that, overall, [FERC] treats fish and wildlife second to power.” *Id.* (citing *Northwest Env'tl. Defense Ctr.*, 117 F.3d at 1533).

B. Events Leading to the Challenged Orders

In 1995, 1997 and 1998, Idaho Power filed applications for new licenses for five of its hydroelectric projects located on the central portion of the Snake River Basin in south-central Idaho. R. 1-6, 125, 270, 271. Starting farthest upstream, the projects are: the 12.5-megawatt (“MW”) Shoshone Falls, the 34.5-MW Upper Salmon Falls, the 60-MW Lower Salmon Falls, the 75-MW Bliss (collectively, the “Mid-Snake Projects”), and the 82.2-MW C.J. Strike. *See* P-ER 2217 ¶ 1, 2218 ¶ 3. Each project’s original license was issued for a 50-year term. P-ER 2012 ¶ 5, 2063 ¶ 5, 2119 ¶ 5, 2171 ¶ 5, 2219 ¶ 5.

The Shoshone Falls and Upper Salmon Falls Projects operate in run-of-river

mode, *i.e.*, water flows into the project areas, and essentially equal water flows out of the project areas. P-ER 2119 ¶ 7, 2171 ¶ 7. In contrast, the Bliss, Lower Salmon Falls and C.J. Strike Projects were operated in conjunction to supply load-following generation, *i.e.*, reservoir storage is used to shape power output to follow system load changes over time. P-ER 2220 at ¶ 7.

1. Idaho Power's Original Licensing Proposals

Idaho Power originally proposed to continue operating the Shoshone Falls and Upper Salmon Falls Projects in run-of-river mode, and the Bliss, C.J. Strike, and Lower Salmon Falls Projects in load-following mode, but with added minimum flow, reservoir and tailwater fluctuation operating restrictions. P-ER 534, 1222. In addition, Idaho Power proposed to implement a number of water quality and quantity, aquatic, terrestrial, aesthetic, recreational, and cultural resource measures to protect and enhance project area resources. P-ER 534-39, 1223-26. The aquatic resource measures included annually stocking catchable-sized fish in the Lower Salmon Falls (rainbow trout), Upper Salmon Falls (rainbow trout), and C.J. Strike (rainbow trout and fingerling channel catfish) Project areas; developing, implementing and funding (up to \$50,000 per year) a White Sturgeon Conservation Plan for the Upper Salmon Falls, Lower Salmon Falls, Bliss, and C.J. Strike Project areas; developing, implementing and funding (up to \$50,000 for five years) a Snail Conservation Plan for the Upper Salmon Falls, Lower Salmon Falls,

Bliss, and C.J. Strike Project areas; and protecting and enhancing spring habitats for snails, Shoshone sculpin, and for rainbow trout spawning in the Upper Salmon Falls, Lower Salmon Falls, and Bliss Project areas. P-ER 535, 1224.

2. FPA § 10(j) Recommendations

Among other things, the U.S. Fish and Wildlife Service (“FWS”) and the Idaho Department of Fish and Game (“IDFG”) recommended that FERC require Idaho Power to implement seasonal run-of-river operations at the Lower Salmon Falls, Bliss, and C.J. Strike Projects from approximately March 1 through July 31 of each year to enhance white sturgeon spawning and early life-stage habitat, and for the remainder of the year to protect rearing sturgeon, rainbow trout, mountain whitefish, riparian habitat and aquatic invertebrates. P-ER 108-09, 141-43, 224-28, 245, 542, 1228.

Idaho Power opposed the run-of-river recommendations, explaining that, while there would be limited environmental benefits to implementing run-of-river operations at the Lower Salmon Falls, Bliss, and C.J. Strike Projects (as studies showed that project impacts on the species at issue were minimal), the economic impacts would be great. *See, e.g.*, F-ER 1-2, 4-6. Ceasing load following would cause the loss of millions of dollars in lost dependable capacity, *i.e.*, reserves, for emergency situations, and would require Idaho Power to expend millions of dollars to construct additional generation capacity. F-ER 5-7. Additionally, Idaho Power

noted that its proposed White Sturgeon Conservation Plan was already being developed in cooperation with state and federal agencies (the White Sturgeon Technical Advisory Committee),¹ and would provide specific white sturgeon protection, mitigation, and enhancement measures to be implemented as license requirements. F-ER 3.

¹ The White Sturgeon Conservation Plan for the projects was submitted to FERC on August 1, 2005.

3. FERC's Environmental Impact Statements and Preliminary Determination

In January and May 2002, FERC issued draft Environmental Impact Statements (“draft EISs”) on the Mid-Snake and C.J. Strike Projects, respectively. Based on the draft EISs and parties’ comments, the Commission preliminarily determined that FWS’ and IDFG’s FPA § 10(j) run-of-river recommendations may be inconsistent with the comprehensive planning standard of FPA § 10(a) and the public interest standard of FPA § 4(e). P-ER 302-05, 310-15, 346-49, 353-55.

As the Commission explained:

Seasonal [run-of-river] operation at the Lower Salmon Falls Project would provide limited benefit to the sturgeon population because of a scarcity of adult sturgeon in this reach, a high incidence of larval export from the reach, and a lack of suitable habitat for juvenile and adult sturgeon. Seasonal [run-of-river] operation at the Bliss Project offers greater potential for improvement because of more favorable river channel conditions, but the reach already supports a stable, self-reproducing population. We conclude that the gains from seasonal [run-of-river] operation would be primarily limited to reduced sturgeon egg predation and to increased sturgeon spawning success in those years when flows during the March 15-June 15 period were between 8,000 and 15,000 cfs.

P-ER 311. Similarly, FERC concluded that run-of-river operations at the C.J. Strike Project “would not likely improve the recruitment of sturgeon,” and “would provide only modest benefits to white sturgeon rearing life stages.” P-ER 347, 354.

At the same time, seasonal run-of-river operation would prevent Idaho

Power from shaping river flows to match daily fluctuations in system loads, requiring Idaho Power to respond to power demand fluctuations to other generating or load management resources. P-ER 311. Thus, dependable capacity at the Lower Salmon Falls, Bliss, and C.J. Strike Projects during seasonal run-of-river operation would decrease substantially, requiring Idaho Power to spend millions of dollars purchasing replacement on-peak power from other sources, and reducing the annual power benefits of each project substantially. P-ER 311-12, 347, 354.

Year-round run-of-river operation appeared inconsistent with the comprehensive planning standard of FPA § 10(a) and the public interest standard of FPA § 4(e) as well. Although year-round run-of-river operation at the projects “has the potential to provide some improvement in habitat for aquatic invertebrates, white sturgeon, and other native fish species, and would benefit riparian and wetland communities that are adversely affected by ongoing daily flow fluctuations,” the Commission concluded that these potential gains “are not worth the cost in terms of the projects’ loss of operational flexibility to match fluctuating power demands and the associated loss of dependable capacity.” P-ER 302, *see also* P-ER 303-05, 312-15, 347-49, 354-55. Implementing this recommendation would have reduced substantially the annual power benefits of the Lower Salmon Falls, Bliss, and C.J. Strike Projects. P-ER 305, 315, 349, 355.

4. Formal ESA § 7 Consultation And Settlement

Because the Draft EISs concluded that relicensing the Lower Salmon Falls, Bliss, and C.J. Strike Projects was likely to adversely affect certain endangered or threatened snails occurring in those project areas, on January 16 and May 21, 2002, the Commission requested formal consultation, under the ESA, with FWS. *See* P-ER 2015 ¶¶ 15-17, 2223 ¶¶ 16-17.

After formal consultation began, FWS and Idaho Power initiated efforts to cooperatively resolve outstanding ESA issues in the relicensing proceedings. F-ER 8-11. Specifically, FWS and Idaho Power assembled technical and management teams to review current information on ESA listed species in the project areas and the projects' effects, if any, on them, and to identify and make plans to implement any necessary studies, and explore options for adaptive management of the projects. F-ER 8, 10. To allow for this cooperative effort to proceed, the Commission agreed not to act on the license applications for 90 days. F-ER 9, 9A.

Toward the end of that period, Idaho Power filed a status report explaining that Idaho Power and FWS had “reached tentative agreement on interim operation plans and a suite of technical studies intended to provide sufficient protection to the listed species during an interim period and sufficient data and information, at the conclusion of that interim period, for developing conservation measures and operational parameters at the projects for the balance of the license terms.” F-ER 12-13. Idaho Power noted that “[t]he interim operation plans would include both

run-of-river and [load-following] components,” and that the parties were “refining the specifics of the plans and studies, including projected costs, in an effort to reach final agreement.” F-ER 13.

On February 12, 2004, Idaho Power filed the proposed settlement agreement. P-ER 1785-1857. Idaho Power explained that it had been engaged in discussions with FWS:

relating to the extent to which existing scientific evidence demonstrates effects of the operation of the projects on the listed snail species. The specific area of disagreement concerns whether and how the load following operations at the Lower Salmon Falls, Bliss, and C.J. Strike projects affect the listed species. The resolution of this issue is important because of the significant loss of power and economic benefits that would occur if the projects operated in a year-round run-of-river (“ROR”) mode instead of the existing load following mode. . . . The [final EIS] concluded that a change in operations would not be in the public interest without some level of scientific certainty that such changes will benefit the listed species.

P-ER 1791.

Thus, FWS and Idaho Power “agreed that additional studies and analyses are desirable in order to more accurately assess the effect, if any, that the Mid-Snake and C.J. Strike projects may have on one or more of the listed snail species. The parties have agreed upon an operational regime for the five projects that will both permit six years of studies and analyses of various project operations on the listed snail species, and provide interim protection of the listed species.” *Id.*; P-ER 2227 Article 3.1; *see also id.* (“The parties agree that implementation of this Settlement Agreement will provide for the protection of the listed species during its term”).

In designing an appropriate study plan and project operations during the study period, FWS and Idaho Power noted, among other things, that: (1) “[h]ydroelectric operations are believed to be only one of numerous causes in the decline and subsequent listing of the listed Snake River Snails (U.S. Fish and Wildlife Service 1995);” (2) Idaho Power has operated, and proposed to continue to operate the Upper Salmon Falls and Shoshone Falls Projects in run-of-river mode; and (3) of the three projects at issue that have been operated in load-following mode (the Lower Salmon Falls, Bliss, and C.J. Strike Projects), only the Lower Salmon Falls and Bliss Projects

“influence a significant portion of the recovery area of the three affected snail species.”² P-ER 2292.

Thus, “[f]or the purpose of conducting studies on the effect of project operations on the species of snails inhabiting the project area that have been listed as threatened or endangered pursuant to the Endangered Species Act, and protecting such species until the studies are completed and the study results analyzed and reported to the Commission,” P-ER 2279, the Settlement provides for a six year study period and the following project operations:

- Upper Salmon Falls and Shoshone Falls Projects: continued operation in run-of-river mode;
- C.J. Strike Project: continued operation in load-following mode;

² The Settlement explains that:

Lower Salmon Falls affects approximately 10% (12.8 kilometers (km)) of the habitable river (i.e. unimpounded) recovery area of the Snake River Physa and 35% (12.8 km) of that of the Bliss Rapids snail, while operations of the Bliss facility affects 92% (54.4 km) of the habitable river recovery area of the Idaho springsnail, 45% (54.4 km) of the Snake River Physa, and 56% (20.8 km) of the Bliss Rapids snail. C.J. Strike Reservoir affects approximately 8% (4.8 km) of the recovery area of the Idaho springsnail, but does not affect the recovery areas of the other two species.

P-ER 2292.

- Lower Salmon Falls and Bliss Projects:
 - (1) During the first five years of the study period, the Lower Salmon Falls and Bliss Projects will be operated in run-of-river mode for two years and load-following mode for two years; in the remaining year the projects will be operated in run-of-river mode “unless a mutually agreed upon load following operation is necessary to collect required information and hydrologic conditions allow.”
 - (2) Operations for the sixth year will be determined by the Mid-Snake Technical Work Group as necessary to further the objectives of the Settlement Agreement; if the Group declines to establish, or cannot reach consensus on an operating regime, the projects will be operated in run-of-river mode.
 - (3) Pending FERC approval of the Snail Protection Plan, which will be submitted to FERC no later than the last day of the sixth study year, the projects will be operated in run-of-river mode.
 - (4) The Settlement further provides that the load-following operations will be constrained by the limits proposed in the license applications. Accordingly, the Lower Salmon Falls and Bliss Projects will have greater minimum flow, tailwater ramp rate and headwater fluctuation constraints than those imposed in the original licenses.

P-ER 2277, 2279, 2281, 2329, 2331-32.

FWS recommended that FERC incorporate the Settlement Agreement into the licenses. F-ER 14. IDFG supported the settlement as well:

Despite our recommendations that [Idaho Power] cease load following operations and implement run-of-river operations at Bliss and C.J. Strike, the IDFG is supportive of the settlement agreement between [Idaho Power] and FWS and the concept of collecting additional scientific information on listed snails to assess the impacts of load following. While the flow regimes proposed over the course of six years under this agreement conflict with the IDFG

recommendation for continuous run-of-river mode, the IDFG is willing to temporarily **put our recommendation aside** during the course of the proposed studies.

P-ER 1861 (emphasis added).

5. FWS' Biological Opinion

FWS issued its Biological Opinion on May 14, 2004, concluding that, while it “anticipate[d] adverse effects from the proposed action on three species of Snake River Snails, the Idaho springsnail, Utah valvata, and Bliss Rapids snail,” relicensing the projects “is not likely to jeopardize the continued existence of these three species.” P-ER 1864, 1966-69. “None of the individual projects would reduce the reproduction, status, or distribution of any of the species to a point where the likelihood of their survival and recovery is appreciably reduced.” P-ER 1966. Moreover, FWS found “the projects in combination do not jeopardize the species.” *Id.*

FWS added that:

[Its] conclusions are based on the best available scientific and commercial information available. The Settlement Agreement between [FWS] and [Idaho Power] modifies the proposed action as proposed by the Commission. Under the terms of the Agreement, studies will be undertaken during the first five years of the new licenses for the projects considered in this Opinion. The [FWS] anticipates that the information gathered will refine our understanding of how operating the projects affects listed snails, enabling us to address some of the uncertainties about the species' status and distribution and their responses to the proposed action. When those data have been gathered and interpreted, it may be necessary to revisit the conclusions drawn in this Opinion. If that is the case, [FWS]

would advise the Commission to reinitiate consultation at that time. It is our position, based on current knowledge and our analysis of the effects of the action as proposed, that in the first five years of the license none of the species will have declined irretrievably. Any new information can be considered under section 7 of the Act in sufficient time to consider alternative actions, and the species would still be viable at that time.

P-ER 1966.

C. The Challenged Orders

1. The Licensing Orders

On August, 2004, the Commission issued orders granting a new license for each project. P-ER 2010-2343. Each license order addressed the matters at issue in the license proceedings, and provided a number of measures to protect, mitigate, and enhance, among other things, fish and wildlife resources.

a. Need for Project Power

In determining whether, and under what conditions, to relicense Idaho Power's projects, the Commission found that there is a need for the power generated by the projects. P-ER 2029 ¶¶ 56-58, 2080-81 ¶¶ 56-58, 2135-36 ¶¶ 55-57, 2186-87 ¶¶ 54-56, 2237-38 ¶¶ 56-58. Idaho Power's 17 hydroelectric facilities provide about 60 percent of its total system requirements under median water conditions. The balance of Idaho Power's firm generation resources is coal-fired thermal purchases from independent power producers, and seasonal power exchanges. *E.g.* P-ER 2237-38 ¶ 56. FERC further determined that:

present and future use of the project[s'] power, its low cost, its displacement of nonrenewable fossil-fired generation, and its contribution to a diversified generation mix support a finding that the power from the [projects] will help meet a need for power in the northwest and throughout the entire . . . region in both the short and long term.

P-ER 2029 ¶ 58, 2081 ¶ 58, 2136 ¶ 57, 2187 ¶ 56, 2238 ¶ 58.

b. The Settlement

Additionally, after considering a number of relicensing alternatives for the projects³ the Commission concluded that the offer of settlement, incorporated into Idaho Power's relicensing proposals, is in the public interest. P-ER 2032 ¶ 68, 2084 ¶ 68, 2139 ¶ 66, 2190 ¶ 65, 2241 ¶ 68. The Commission further found that operation of the projects as proposed, with additional enhancement measures recommended by FERC staff, will be best adapted to a comprehensive plan for the use, conservation, and development of the Snake River and its tributaries for beneficial public purposes. P-ER 2032 ¶ 68, 2084 ¶ 68, 2139 ¶ 66, 2190 ¶ 65, 2241 ¶ 68.

Based on the currently available scientific evidence, we believe that the [Projects] should be operated in accordance with the provisions of the [settlement]. Such operation will protect listed snail species, as well as other fish and wildlife resources, pending the development of information that may lead to additional protective measures, in the form of a snail protection plan, based on a more refined empirical

³ These included: (1) no action, *i.e.*, load-following or run-of-river operations as originally licensed; (2) load-following or run-of-river with certain enhancements; (3) seasonal run-of-river; and (4) year-round run-of-river. P-ER 2025 ¶ 47, 2077 ¶ 46, 2132 ¶ 45, 2182 ¶ 44, 2223 ¶ 46; *see also* P-ER 544-49, 1230-32.

understanding of the effect on listed snail species of different modes of project operation.

P-ER 2032 ¶ 66, 2084 ¶ 66, 2241 ¶ 66.

Moreover, the Commission found, as the C.J. Strike Project will continue to be operated in load-following mode, although within the constraints of environmental flow requirements, it will continue to provide a broad range of ancillary service benefits to the region. For example, the useable water storage provided by load-following operations provide “almost instantaneous load-following response to dampen voltage and frequency instability on the transmission system, system-power-factor-correction through condensing operations, and a source of power available to step in quickly putting fossil-fuel based generating stations back on line following a major utility system or regional blackout.” P-ER 2032 ¶ 67. The Lower Salmon Falls and Bliss Projects will retain many of these ancillary capabilities, as they will be operated in load-following mode for specified times during the study period. P-ER 2084 ¶ 67, 2241 ¶ 67.

Furthermore, “the electricity generated by the [projects] will be beneficial, because it will continue to reduce the use of fossil-fueled, steam-generating electric generating plants, thereby conserving nonrenewable energy resources and reducing atmospheric pollution.” P-ER 2032 ¶ 68, 2084 ¶ 68, 2139 ¶ 66, 2190 ¶ 65, 2241 ¶ 68.

There was no merit to Petitioners’ contention that, under *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984) (“*Yakima*”), conditioning the licenses in accordance with the settlement agreement would improperly defer consideration and development of fishery protection measures until after relicensing.⁴ P-ER , 2023-24 ¶¶ 40-42, 2074-75 ¶¶ 39-41, 2231-32 ¶¶ 39-41. In *Yakima*, the Commission had deferred **all** fish and wildlife measures until after licensing. By contrast, the license orders here require “measures that will protect listed snail species and other fish and wildlife over the entire license term.” P-ER 2023-24 ¶¶ 41-42, 2074-75 ¶¶ 40-41, 2231-32 ¶¶ 40-41.

For instance, the Commission explained:

In the case of the [Lower Salmon Falls and Bliss Projects], load-following operations will occur during only part of the six-year study period. Moreover, the new license contains measures that will protect listed snail species and other fish and wildlife over the entire license term. Article 401 [P-ER 2090-92, 2248-51] requires year-round run-of-river operations for the protection of federally listed snail species, except for the limited purpose of conducting additional studies (Article 402) [P-ER 2093, 2251] on the effects of load-following operations on the listed snails in accordance with the

⁴ The Commission found this contention irrelevant to the Shoshone Falls and Upper Salmon Falls Projects, as they will continue to be operated in run-of-river mode, and the settlement agreement does not contemplate any change in their operations. P-ER 2131 ¶ 40, 2181 ¶ 39. In any event, the Commission pointed out that the licenses for these projects contain measures to protect listed snail species and other fish and wildlife over the entire license term, including, among other things, run-of-river operations, water quality monitoring, a white sturgeon conservation plan, and spring habitat management and protection. P-ER 2131 ¶ 40, 2181 ¶ 39.

agreement. Absent findings of the settlement agreement work group based on the above studies and subsequent acceptance by the Commission of a recommendation for a different mode of operations, the [Lower Salmon Falls and Bliss Projects] will continue to operate in a year-round run-of-river mode.⁵ Article 409 [P-ER 2098-99, 2256-57] requires measures that will improve riparian, wetland, and spring habitats of value to listed snail species and other fish and wildlife. Article 407 [P-ER 2096-97, 2254-55] requires development of a white sturgeon conservation plan.

P-ER 2075 ¶ 41, 2232 ¶ 41.

Similarly:

In the case of the C.J. Strike Project, although the project will continue load-following operations during the study period, the new license contains measures that will protect listed snail species and other fish and wildlife over the entire license term. Article 401 [P-ER 2039-40] restricts load-following operations, minimizing reservoir fluctuations and potential exposure and desiccation of snails. Similarly, Articles 402 and 403 [P-ER 2040] will maintain habitat conditions for snails and other fish and wildlife below the project by providing minimum instream flows and limiting daily and hourly river stage changes. Articles 412, 413, and 416 [P-ER 2047-52] require measures that will improve riparian, wetland, and spring habitats of value to snail species and other fish and wildlife. Article 408 [P-ER 2044] requires development of a white sturgeon conservation plan.

P-ER 2024 ¶ 42.

Moreover, the Commission added, “[t]hat additional operational or other measures may be found appropriate after the snail studies are concluded represents not a deferral of environmental protection but the possibility of additional

⁵ “In accordance with the settlement agreement, the licensee will develop a snail protection plan (Article 403) [P-ER 2093-94, 2251-52] based on the results of the snail studies and will propose, in that plan, a future operational mode for the [Lower Salmon Falls and Bliss Projects].”

protection based on information not now available.” P-ER 2025 ¶ 45, 2076 ¶ 44, 2131-32 ¶ 43, 2182 ¶ 42, 2233 ¶ 44.

Conditioning the licenses in accordance with the settlement agreement satisfied the ESA requirement that the best available scientific evidence be used to ensure that a license does not jeopardize threatened and endangered species. Each license includes “measures, which apply over the entire term of the license, for the protection of aquatic resources, including listed snail species, based on currently available scientific information,” and the biological opinion concludes, on the basis of this evidence, that with these measures, the listed snail species will not be jeopardized. P-ER 2025 ¶ 44, 2076 ¶ 43, 2131 ¶ 42, 2182 ¶ 41, 2233 ¶ 43.

c. FPA § 10(j) Recommendations

The Commission also included in each license conditions consistent with all FPA § 10(j) recommendations by FWS and IDFG that were not superseded by the Settlement Agreement. P-ER 2020 ¶ 31, 2072 ¶ 33, 2127 ¶ 32, 2178 ¶ 31, 2228 ¶ 33. For example, for the Bliss Project, Idaho Power is required to:

- (a) operate the Bliss Project in a run-of-river mode (Article 401), except for the purpose of conducting additional studies (Article 402) on the effects of load-following operations on the listed snails in accordance with the settlement agreement;
- (b) monitor temperature and dissolved oxygen (Article 405);
- (c) develop a white sturgeon conservation plan that includes an evaluation of the feasibility of providing fish passage at the project (Article 407);
- (d) annually stock 4,000 pounds of rainbow trout downstream of the project (Article 408);
- (e) develop habitat management plans for the Bancroft Springs and Tuana Gulch parcels and include them in the license (Article

410); (f) implement a spring habitat protection plan that includes monitoring of Shoshone sculpin on project lands (Article 409); (g) develop a land management plan for the protection of upland, riparian, and wetland habitats that includes noxious weed control, grazing management, and vegetation restoration for project lands (Article 413); (h) use adaptive management to evaluate the success of the various enhancement plans (Article 411); and (i) maintain instream flows at project springs (Article 409).

P-ER 2228-29 ¶ 33 (footnotes omitted). *See also* P-ER 2020 ¶ 31 (FPA § 10(j) license conditions included in the C.J. Strike Project); P-ER 2072 ¶ 33 (FPA § 10(j) license conditions included in the Lower Salmon Falls Project); P-ER 2127-28 ¶ 32 (FPA § 10(j) license conditions included in the Upper Salmon Falls Project); P-ER 2178-79 ¶ 31 (FPA § 10(j) license conditions included in the Shoshone Falls Project).

Petitioners were the only parties to petition for rehearing of the licensing orders. F-ER 16-164.

2. The Rehearing Order

a. The Commission Appropriately Considered All Fisheries Issues

On rehearing, the Commission again rejected petitioners' claim that, like in *Yakima*, 746 F.2d 466, the license orders here deferred all consideration of fisheries issues. P-ER 2347-50 ¶¶ 12-18. In the instant case, unlike in *Yakima*, “the Commission prepared a thorough analysis of all relevant public interest considerations in the [Mid-Snake and C.J. Strike] EISs and each license contains

several conditions to protect fish and wildlife, in addition to the standard fish and wildlife reopener.” P-ER 2349 ¶ 16. In addition to requiring run-of-river instead of load-following operations at the Lower Salmon Falls and Bliss Projects, except as needed during the six year study period,

The new licenses contain a variety of conditions to protect and enhance fish and wildlife resources. These include minimum flows; reservoir drawdown limits; ramping rates; operational compliance monitoring; water temperature, dissolved oxygen, and total dissolved gas monitoring; a white sturgeon conservation plan applicable to all of the licenses; wetlands construction; land management plans; aquatic vegetation removal; spring habitat protection; run-of-river operation at Lower Salmon Falls and Bliss; studies of project impacts of snails and snail protection plans for Lower Salmon Falls, Bliss, and C.J. Strike; riparian habitat acquisition; and provisions for management of wildlife areas.

P-ER 2345 ¶ 7, 2326 ¶ 51; *see also* P-ER 2349 ¶ 16 (listing fish and wildlife protection conditions included in the C.J. Strike license). “In sum, the conditions in these licenses are both typical and fully appropriate in the context of the facts of this case.” P-ER 2350 ¶ 18.

b. FPA § 10(j) Recommendations

The Commission also explained that FWS’ and IDFG’s pre-Settlement Agreement FPA § 10(j) recommendations (that all load-following operations at the projects be replaced by run-of-river operations) were effectively withdrawn when FWS entered into, and IDFG supported approval of, the Settlement Agreement providing for load-following operations at the Lower Salmon Falls and Bliss

Projects during portions of the study period, and at the C.J. Strike Project throughout the license term. P-ER 2351 ¶ 22, 2362 ¶¶ 49-50; *see also* P-ER 2361 ¶ 46 (noting that “the agencies which made the section 10(j) recommendations did not seek rehearing of the license orders.”).

Nonetheless, the instant licenses provide for far greater run-of-river operations at the projects than existed under the original licenses. In accordance with FWS’ and IDFG’s post-Settlement recommendations, the Lower Salmon Falls and Bliss licenses mandate run-of-river operation at those projects except when, consistent with the Settlement Agreement, load-following operation is required to conduct snail studies. P-ER 2362 ¶ 50. Even if the snail protection plan submitted after the study period hypothetically were to propose load-following operations for those projects, such operations could take effect only after completion of a license amendment proceeding, in which interested parties, including petitioners, would have the opportunity to intervene and participate. P-ER 2362 ¶ 51; *see also* P-ER 2389 ¶ 109 (FWS can submit comments on the proposed snail protection plan, and can recommend that the Commission reinstate ESA section 7 consultation; the Commission can modify the proposed plan as required by the public interest).

Moreover, consistent with the agencies’ recommendations, each license requires Idaho Power to submit for Commission approval, within one year of

license issuance, a White Sturgeon Conservation Plan developed in consultation with specified entities. P-ER 2363 ¶ 53. The Commission found, however, that “[i]mmediate implementation of mitigation measures specific to white sturgeon is not necessary,” as “[t]he species is neither endangered nor threatened and operating requirements of the licenses will maintain current levels of protection.” P-ER 2363 ¶ 54.

In any event, the Commission pointed out, the “requirements with regard to water quality will improve habitat for sturgeon and other aquatic species.” *Id.*; *see also* P-ER 2363 n.83 (setting out water quality improvement measures included in the licenses). Additionally, “[t]o the extent that load-following at Bliss and Lower Salmon Falls during the snail studies may be inconsistent with protection of white sturgeon habitat,⁶ . . . it is necessary to ensure that federally-listed snails receive appropriate protection.” P-ER 2370 ¶ 67.

Finally, despite petitioners’ suggestion to the contrary, none of the components recommended by IDFG for inclusion in the White Sturgeon Conservation Plan was excluded from the required plan. P-ER 2364 ¶ 54. Rather,

⁶ The record showed that many factors may be contributing to the decline of the white sturgeon. P-ER 2382 ¶ 94 (citing P-ER 577-85, 612-20, 705-15, 1256-57, 1321-49). “Factors contributing to the decline may include reach fragmentation, genetic isolation, altered hydrograph, effects of load-following, poor water quality, historical over-harvest, entrainment, and changes in sediment transport, channel morphology, and food availability.” P-ER 2382 ¶ 94.

the Commission “expect[ed] them to be considered during consultation with the agencies and tribes.” *Id.*

c. Quantification of Benefits from Run-of-River Operation

The Commission also found no merit to petitioners’ complaint that it did not adequately quantify the economic benefits of run-of-river operations. P-ER 2350-52 ¶¶ 19-26. First, as discussed above, by the time the Commission made its licensing determinations, FWS and IDFG had effectively withdrawn their FPA § 10(j) recommendations to eliminate all load-following operations. Thus, “the issue of whether to eliminate all load following operations was effectively resolved by the settlement,” not simply by cost considerations. P-ER 2351 ¶ 22.

In addition, the Commission pointed out, in detailing the biological impacts that load-following operations have on aquatic and terrestrial resources, the EISs identified the benefits run-of-river operations would have on the affected species. P-ER 2350 ¶ 20 (citing P-ER 695-754, 795-97, 1302-86). The EISs also specifically discussed the effects run-of-river operations would have on recreation, P-ER 2350 ¶ 20 (citing P-ER 868, 909, 1410), and identified fishing as an important recreational opportunity in the project areas, P-ER 2352 ¶ 25 (citing P-ER 666-69, 1280-85). Moreover, the licenses include conditions to foster both fishery and recreation resources, including run-of-river operation, minimum flows, ramping and reservoir fluctuation restrictions, the White Sturgeon Conservation

Plan, the Mid-Snake Land Management Plan, spring habitat protection, fish stocking, and recreation plan improvements to boating access and facilities. P-ER 2352 ¶ 25 and n. 33.

Furthermore, the Commission added, the FPA does not require the Commission to place a dollar value on nonpower benefits. P-ER 2352 ¶ 25 (citing *Conservation Law Foundation v. FERC*, 216 F.3d 41, 46-47 (D.C. Cir. 2000)).⁷ Nor is the Commission “required to make decisions on the basis of a cost-benefit analysis articulated in purely economic terms.” P-ER 2352 ¶ 25.⁸

⁷ In rejecting the argument that “the Commission did not give ‘equal consideration’ to nonpower values because it refused to assess in economic terms the nonpower benefits,” the court found that:

Certainly, nothing in the statute requires the Commission to place a dollar value on nonpower benefits. Nor does the fact that the Commission assigned dollar figures to [the licensee’s] economic costs require that the Commission do the same for nonpower benefits: “‘Equal consideration’ is not the same as ‘equal treatment.’”

Conservation Law Foundation, 216 F.3d at 46-47 (quoting *California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992)).

⁸ Citing *Eugene Water & Electric Board*, 81 FERC ¶ 61,270 at 62,333 (1997) (rejecting request for economic valuation of environmental resources that were the subject of resource agency recommendations), *aff’d on other grounds*, *American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999); *Great Northern Paper, Inc.*, 85 FERC ¶ 61,316 at 62,245 (1998) (rejecting request for dollar valuation of enhancements to non-power resources) *reconsideration denied*, 86 FERC ¶ 61,184 (1999), *aff’d*, *Conservation Law Foundation*, 216 F.3d 41 (citing *City of Tacoma, WA*, 84 FERC ¶ 61,107 at 61,571-72 (1998), *order on reh’g*, 86 FERC ¶ 61,311 (1999)); *Namekegon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954) (when unique recreational or other environmental values are present, the public interest cannot be evaluated adequately only by dollars and cents).

In fact, the Commission “used the same approach to valuation of non-power benefits in this proceeding that [it] ha[s] used in every license proceeding for many years. Where the dollar cost of enhancement measures can be reasonably ascertained on a current basis, we will do so.” P-ER 2352 ¶ 26. Likewise, while the Commission “considers any credible evidence in the record regarding the potential economic benefits of environmental mitigation measures,” the “credibility of such evidence is frequently questionable, however, as it is necessarily speculative and values may be calculated using any number of reasonably disputable assumptions and methods.” P-ER 2352-53 ¶ 26 and n. 36.

d. FPA § 4(e) Equal Consideration

The Commission gave equal consideration to all relevant public interest considerations. P-ER 2353-2354 ¶¶ 28-31. The equal consideration requirement is satisfied where, as here, “the Commission thoroughly considers the impacts of the project proposal and action alternatives on all affected developmental and non-developmental resources.” P-ER 2353 ¶ 28 (citing *California*, 966 F.2d at 1550).

The “great majority of the EISs [is] devoted to consideration of non-developmental resources, recommendations to protect and enhance those resources, and the impacts to those resources of the action alternatives.” P-ER 2353 ¶ 28. For example, the C.J. Strike EIS summarized the benefits and costs of operating that project in a run-of-river mode, determining that:

Run-of-river operations would provide some benefits for recreation and would protect invertebrates as well as increase riparian species richness and diversity. It would, however, have little effect on temperature, [dissolved oxygen], or other elements of water quality, and effects on cultural resources would be inconsequential. Further, run-of-river likely would not improve the recruitment of sturgeon in the C.J. Strike reach, and would provide limited benefits to habitat for conservation rearing and the coldwater fishes inhabiting the reach. Adoption of run-of-river would result in a substantial decrease in dependable capacity.

P-ER 2354 ¶ 31. Thus, the Commission concluded, “the marginal environmental gains would not be worth the loss in project generation and dependable capacity and the costs associated therewith.” *Id.*

e. The Commission Appropriately Conducted Its Economic Analysis

The Commission determined that reducing or ending load-following at the projects would reduce dependable capacity, and that the most likely source of replacement capacity would be fossil-fueled generation. P-ER 2383 ¶ 97. Petitioners made several arguments that the Commission’s economic analyses regarding dependable capacity were based on exaggerated values, but none had merit.

The Commission reasonably explained why the amount of dependable capacity generated by the projects in the final EISs increased over that in the draft EISs. The draft EISs’ dependable capacity figures were determined based on Idaho Power releasing the total daily inflow for its design low flow condition over

a peak demand period of five hours, but should have been determined over a peak demand period of one hour, as occurred in the Final EISs. P-ER 2356 ¶ 34. The contention that Idaho Power had indicated that a five-hour period should be used to calculate C.J. Strike's dependable capacity "misconstrue[d] Idaho Power's comments. The five-hour period in Idaho Power's comments refers to a period during which Idaho Power, on a typical day, shapes the inflow to help meet daily peaks. It is not used for determining dependable capacity." P-ER 2356 n. 49.

Likewise, the Commission appropriately based the value of the projects' dependable capacity on Idaho Power's critical low flow period rather than on an average water year. P-ER 2356-57 ¶¶ 35-36. Because "[t]he method of determining dependable capacity has significance not only for deciding what is in the public interest in licensing proceedings, but in the context of contractual relations between wholesale generators and their customers and the generator's obligations and entitlements under power pooling and regional reliability agreements" as well, the Commission concluded that "it is most appropriate to base [its] determination of dependable capacity on the method used by Idaho Power in the ordinary course of business." P-ER 2357 ¶ 36.

Moreover, the Commission appropriately determined the cost of capacity to replace lost dependable capacity. P-ER 2358 ¶ 38. "The EISs used a combined-cycle facility to estimate the cost of replacement capacity because that is the

predominant form of newly-constructed generation in the region.” *Id.* and n. 57 (noting that the “Western Systems Coordinating Council’s 10-Year Coordinated Plan Summary states at page 2 that 96.4% of planned generation additions in the region for the period 2004-2013 (23,113 MW) is combined cycle facilities.”).

f. NEPA

The Commission further found that its environmental analysis satisfied NEPA requirements. After noting that the adequacy of an EIS is determined by a rule of reason requiring only a “reasonably thorough discussion of the significant aspects of the probable environmental consequences,” the Commission concluded that the detailed environmental analysis in the EISs and license orders allowed the Commission to take a hard look at the environmental impact of the approved project licenses. P-ER 2379 ¶ 88 (quoting *Columbia Land Basin Protection Ass’n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) and *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)).

g. NPA

Petitioners’ claim that the Commission did not satisfy its NPA obligation to provide “equitable treatment” to fish and wildlife, *i.e.*, to treat fish and wildlife “on par with power,” was baseless as well. P-ER 2385-86 ¶¶ 102-103 (citing *Confederated Tribes*, 342 F.3d at 931). Petitioners could not show that, overall, FERC treats fish second to power, particularly as the “licenses strike an

appropriate balance between developmental values and the protection and enhancement of fish and wildlife resources.” P-ER 2385-86 ¶¶ 102-103.

The petition for review followed.

SUMMARY OF ARGUMENT

Petitioners’ contentions regarding FWS’ and IDFG’s pre-Settlement recommendations to end all load-following operations at the projects are moot, as those recommendations were superseded by the resource agencies’ subsequent recommendations that the Commission adopt the operational modes contained in the Settlement and ultimately reflected in the licenses. In any event, FERC did not exaggerate the costs, or ignore the benefits, of run-of-river operations at the projects.

Furthermore, FERC appropriately complied with FPA § 10(j). FERC explained that it would not adopt the resource agency recommendation for immediate implementation of mitigation measures specific to white sturgeon because it was unnecessary to do so. The species is neither endangered nor threatened, the licenses’ operating requirements will maintain current levels of protection and, in fact, mitigation measures ordered elsewhere in the licenses would benefit sturgeon and other aquatic species.

On the other hand, none of the components recommended by IDFG for inclusion in the White Sturgeon Conservation Plan was excluded from the required

plan. The Commission expected all recommended components to be considered during consultation with the agencies and tribes.

The Commission's requirement, in accordance with the resource agencies' recommendation, that Idaho Power develop a White Sturgeon Conservation Plan in consultation with specified entities, did not violate this Court's *Yakima* decision. Unlike in *Yakima*, the license orders here require myriad measures that will protect listed snail species and other fish and wildlife over the entire license term.

NEPA was satisfied as well, as the EISs and the license orders were quite detailed and contained enough information for FERC to take the requisite hard look at the environmental impacts of its orders.

Finally, FERC appropriately relied on FWS' Biological Opinion. An agency's reliance on a Biological Opinion is not arbitrary and capricious where, as here, no information or data "undermines seriously" the Biological Opinion.

ARGUMENT

I. STANDARD OF REVIEW

Assuming jurisdiction, the Court reviews FERC licensing orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (citing Administrative Procedure Act, 5 U.S.C. § 706(2)). The Court "grants conclusive effect to the Commission's findings of fact if such

findings are supported by substantial evidence.” *American Rivers v. FERC*, 201 F.3d at 1194.

The Court’s task under NEPA is limited to ensuring that FERC “has adequately considered and disclosed the environmental impact” of its decision. *Id.* at 1194-95. Thus, once the Court is “satisfied that [FERC] has taken a ‘hard’ look’ at a decision’s environmental consequences, [its] review is at an end.” *Id.* at 1195.

To sustain a claim that FERC violated its obligation under the NPA to provide “equitable treatment” for fish and wildlife, a petitioner must show not only that the challenged decision disadvantages fish and wildlife, but also “that, overall, [FERC] treats fish and wildlife second to power.” *Confederated Tribes*, 342 F.3d at 931 (citing *Northwest Env’tl. Defense Ctr.*, 117 F.3d at 1533). FERC “may make some decisions that place power above fish, so long as on the whole, it treats fish on par with power.” *Id.* (citing *Northwest Env’tl. Defense Ctr.*, 117 F.3d at 1533-34).

As explained below, the Commission's licensing determinations were well-reasoned, supported by substantial evidence, and consistent with applicable law and precedent. Accordingly, the Commission’s orders should be upheld.

II. PETITIONERS’ CONTENTIONS REGARDING THE RESOURCE AGENCIES’ RECOMMENDATIONS TO END ALL LOAD-FOLLOWING OPERATIONS ARE MOOT

Petitioners' myriad contentions regarding FWS' and IDFG's FPA pre-Settlement Agreement § 10(j) recommendations to end all load-following operations at the Lower Salmon Falls, Bliss and C.J. Strike Projects are premised on the mistaken notion that FWS and IDFG persisted in those recommendations. *See, e.g.*, Br. 29-38 (arguing that FERC violated the FPA and the NPA by "using a deeply flawed cost/benefit analysis to reject the fisheries agencies' recommendations that it require run-of-river operations"); Br. 39-42 (arguing, in part, that FERC violated FPA § 10(j) because it neither adopted, nor explained its determination not to adopt, FWS' and IDFG's recommendations to end all load-following operations at the projects). As noted above, however, FWS and IDFG withdrew those recommendations so that studies regarding federally listed snails could be conducted at the projects. *See* F-ER 14 (FWS recommending that FERC incorporate the Settlement Agreement into the licenses); P-ER 1861 (IDFG recommending that FERC incorporate the Settlement Agreement into the licenses even though the flow regimes conflict with IDFG's original recommendations); P-ER 2351, 2362 ¶¶ 22, 49-50. Accordingly, Petitioners' contentions regarding the pre-Settlement load-following recommendations are moot.

III. FERC APPROPRIATELY DETERMINED AND CONSIDERED THE COSTS AND BENEFITS OF RUN-OF-RIVER OPERATIONS

As just explained, Petitioners' assertion (Br. 29-38) that FERC did not give equal consideration to FWS' and IDFG's recommendations that all load-following

operations be replaced by run-of-river operations because it exaggerated the costs, and ignored the benefits, of run-of-river operations is moot. FERC did not “reject[] the run-of-river recommendations based on its assessment that the environmental benefits of such operations would not be worth the potential costs to Idaho Power,” as Petitioners posit. Br. 29. Rather, by the time the Commission made its licensing determinations, FWS and IDFG had effectively withdrawn their FPA § 10(j) recommendations to eliminate all load-following operations. Thus, “the issue of whether to eliminate all load following operations was effectively resolved by the settlement,” not by cost considerations. P-ER 2351 ¶ 22.

A. FERC Did Not Exaggerate The Costs Of Run-of-River Operations

Even if Petitioners’ assertion were not moot, however, it lacks merit. FERC did not employ any unreasonable or inaccurate assumptions about the costs of lost dependable capacity from run-of-river operations. Br. 30-34. Rather, FERC appropriately based the value of the projects’ dependable capacity on Idaho Power’s critical low flow. P-ER 2356-57 ¶¶ 35-36. Because “[t]he method of determining dependable capacity has significance not only for deciding what is in the public interest in licensing proceedings, but in the context of contractual relations between wholesale generators and their customers and the generator’s obligations and entitlements under power pooling and regional reliability agreements” as well, the Commission concluded that “it is most appropriate to base

[its] determination of dependable capacity on the method used by Idaho Power in the ordinary course of business.” P-ER 2357 ¶ 36.

In addition, despite Petitioners’ claim to the contrary, Br. 31, the Commission reasonably determined the amount of dependable capacity generated by the projects based on a one-hour, rather than a five-hour, peak demand period. P-ER 2356 ¶ 34 and n. 49 (citing P-ER 1499). Although the draft EISs had based their dependable capacity calculations on a five-hour period, Idaho Powers’ comments on the draft EISs explained that that method was erroneous. P-ER 982, 1499-1500.

The projects’ dependable capacity is appropriately calculated based on a one-hour peak demand period because “[o]ne hour of dependable capacity . . . allows [Idaho Power] to absorb system disturbances while maintaining system stability and reliability until other resources, if available, are secured for the next hour.” P-ER 1499-1500, *see also* P-ER 982 (same); P-ER 2356 ¶ 34. Furthermore, calculating dependable capacity in this manner does not rely on emergency conditions, as the resultant dependable capacity amount “is available in the one hour duration period every day” P-ER 1500. Thus, the final EISs appropriately calculated the projects’ dependable capacity.

Moreover, FERC did not err in determining the cost of capacity to replace lost dependable capacity. Br. 32-33. “The EISs used a combined-cycle facility to

estimate the cost of replacement capacity because that is the predominant form of newly-constructed generation in the region.” P-ER 2358 ¶ 38 and n. 57 (noting that the “Western Systems Coordinating Council’s 10-Year Coordinated Plan Summary states at page 2 that 96.4% of planned generation additions in the region for the period 2004-2013 (23,113 MW) is combined cycle facilities.”). It was reasonable for the Commission to base the cost of replacement capacity on the type of capacity expected to be available, rather than on a less costly type of capacity that would not likely be available.

Next, Petitioners assert that the Commission “brushed aside its own analysis showing that run-of-river operations would **not** significantly reduce the total amount of power the projects would generate, nor cause them to become unprofitable to Idaho Power.” Br. 33-34. Again, Petitioners are wrong.

As the Commission explained:

Whether an action alternative has a positive or net benefit is but one of many considerations in the overall public interest balancing. Our public interest balancing of environmental and economic impacts cannot be done with mathematical precision or be reduced to a mere mathematical exercise in which we attempt to determine whether a project is profitable in order to decide how much environmental protection it can afford. If, in the final analysis, we thoroughly consider all public interest issues, give equal consideration to non-developmental values affected by the project, and craft license conditions based on that consideration, we have satisfied the FPA.

P-ER 2354 ¶ 30 (footnote with citations omitted); *see also* P-ER 2355 ¶ 32 (“the economic effects of project operations are . . . just one component of the overall

public interest analysis.”). “In this case,” the Commission found, “the marginal environmental gains [from run-of-river operations] would not be worth the loss in project generation and dependable capacity and the costs associated therewith.” P-ER 2354 ¶ 31.

B. FERC Did Not Ignore The Benefits Of Run-of-River Operations

Petitioners also err in claiming that FERC “fail[ed] to assess the ‘benefits’ side of the equation from run-of-river operations.” Br. 37. The final EISs extensively discussed the benefits run-of-river operations would have in the project areas. P-ER 2350 ¶¶ 19-20 (citing, *e.g.* P-ER 695-754, 795-97, 1302-86, 1434-38). And, as the licenses require substantially greater run-of-river operations than under the original licenses, many of those benefits should be achieved.

Petitioners’ complaint that “FERC’s NEPA documents and license orders contain scant consideration of the economics of the mid-Snake sturgeon fishery,” Br. 35, fails as well. The EISs specifically discussed the effects run-of-river operations would have on recreation, P-ER 2350 ¶ 20 (citing P-ER 868, 909, 1410), and identified fishing as an important recreational activity in the project areas, P-ER 2352 ¶ 25 (citing P-ER 666-69, 1280-85). The final EISs concluded, however, that there would be only “a modest increase in economic activity in the project areas associated with improved fishing and boating conditions” if run-of-river operations were imposed. *See, e.g.*, P-ER 909, 1281, 1410.

While Petitioners complain that FERC “made no effort to **quantify** the economic benefits that would result from the run-of-river operations and other mitigation measures recommended by IDFG and FWS for sturgeon and other fishery resources,” Br. 35-37, the Commission is not required to place a dollar value on nonpower benefits. P-ER 2352 ¶ 25 (citing *Conservation Law Foundation*, 216 F.3d at 46-47 (“Certainly, nothing in the statute requires the Commission to place a dollar value on nonpower benefits. Nor does the fact that the Commission assigned dollar figures to [the licensee’s] economic costs require that the Commission do the same for nonpower benefits”)); *see also California*, 966 F.2d at 1550. Nor is the Commission “required to make decisions on the basis of a cost-benefit analysis articulated in purely economic terms.” P-ER 2352 ¶ 25 (citing cases listed in n.8 *supra*).

The Commission’s analysis here was fully consistent with precedent. FERC “used the same approach to valuation of non-power benefits in this proceeding that [it] ha[s] used in every license proceeding for many years.” P-ER 2352 ¶ 26. While the Commission “considers any credible evidence in the record regarding the potential economic benefits of environmental mitigation measures,” the “credibility of such evidence is frequently questionable, . . . as it is necessarily speculative and values may be calculated using any number of reasonably disputable assumptions and methods.” P-ER 2352-53 ¶ 26 and n. 36. Petitioners’

proposed methodologies to assess the economic value of fisheries were not sufficiently credible or nonspeculative to appropriately apply here.

CI. FERC Took A “Hard Look” At Run-Of-River Benefits And Costs As Required By NEPA

Petitioners reassert all their cost and benefit allegations in support of their additional claim that FERC violated NEPA by not taking the required “hard look” at run-of-river benefits and costs. Br. 47-49. Petitioners’ baseless cost and benefit allegations, however, cannot sustain their NEPA claims either. FERC took a “hard look” at its decisions’ environmental consequences, thereby satisfying NEPA requirements. *American Rivers*, 201 F.3d at 1194-95; P-ER 2379 ¶ 88 (finding that the detailed environmental analysis in the EIS and license orders allowed the Commission to take a hard look at the environmental impacts of the approved project licenses).

IV. FERC COMPLIED WITH FPA § 10(j)

A. Recommendation to End Load-Following Operations

Petitioners contend that FERC violated FPA § 10(j) because it neither adopted, nor explained its determination not to adopt, FWS’ and IDFG’s recommendations to end all load-following operations at the projects Br. 39-42. As the Commission explained, however, “the issue of whether to eliminate all load-following operations was effectively resolved by the settlement” P-ER 2351 ¶ 22.

Contrary to Petitioners' assertion, Br. 41, the pre-Settlement Agreement FPA § 10(j) recommendations for load-following to protect sturgeon and other fisheries were withdrawn after the settlement as well. The resource agencies' pre-Settlement and post-Settlement load-following recommendations conflicted. Thus, the post-Settlement load-following recommendations superseded the earlier ones. *See* F-ER 14 (FWS recommending that FERC incorporate the Settlement Agreement into the licenses); P-ER 1861 (IDFG recommending that FERC incorporate the Settlement Agreement into the licenses even though the flow regimes conflict with IDFG's original recommendations); P-ER 2351, 2362 ¶¶ 22, 49-50. Moreover, as the Commission found, to the extent load-following operations may be considered inconsistent with the protection of white sturgeon, appropriate protection of the federally-listed threatened or endangered snails takes precedence. P-ER 2370 ¶ 67.

As part of this argument, Petitioners contend that, under the licenses, load-following operations at the Bliss and Lower Salmon Falls Projects are only temporarily suspended. Br. 41. Petitioners misconstrue the Settlement and the licenses' operational requirements. P-ER 2362 ¶ 51. The Lower Salmon Falls and Bliss licenses mandate run-of-river operation at all times during their 30-year terms except when, consistent with the Settlement Agreement, load-following operation is required to conduct snail studies during the study period. P-ER 2362 ¶ 50.

Thus, unless their licenses are amended in an administrative proceeding at FERC, the Lower Salmon Falls and Bliss Projects will be operated in run-of-river mode throughout the license period, except as required for study purposes. *Id.*

B. Recommendation that Licenses Include Specific Requirements for Sturgeon Protection

Petitioners’ assertion that FERC neither adopted, nor explained its determination not to adopt, resource agency recommendations for immediate implementation of mitigation measures specific to white sturgeon, Br. 39-42, also lacks merit. FERC explained that “[i]mmediate implementation of mitigation measures specific to white sturgeon is not necessary. The species is neither endangered nor threatened and the operating requirements of the licenses will maintain current levels of protection.” P-ER 2363 ¶ 54. In fact, the Commission pointed out, “[t]he requirements with regard to water quality will improve habitat for sturgeon and other aquatic species.” *Id.* and n. 83.

Likewise, despite petitioners’ suggestion to the contrary, Br. 39-42, none of the components recommended by IDFG for inclusion in the White Sturgeon Conservation Plan was excluded from the required plan. P-ER 2364 ¶ 54. Rather, the Commission “expect[ed] them to be considered during consultation with the agencies and tribes.” *Id.*

V. FERC APPROPRIATELY DIRECTED SUBMISSION OF A WHITE STURGEON CONSERVATION PLAN

Consistent with the resource agencies' recommendation, each license requires Idaho Power to submit for Commission approval, within one year of license issuance,⁹ a White Sturgeon Conservation Plan developed in

⁹ The White Sturgeon Conservation Plan was already being developed in cooperation with state and federal agencies when the licenses were issued. F-ER 3.

consultation with specified entities.¹⁰ P-ER 2363 ¶ 53. This requirement did not, as Petitioners posit (Br. 42-45), “violate the FPA and this Court’s *Yakima* decision,” Br. 42 (capitalization in heading altered).

In *Yakima*, 746 F.2d 466, the Commission had deferred all fish and wildlife measures until after licensing, thereby “completely fail[ing] to consider the license renewal’s potential impact on fish and wildlife.” *Northwest Env’tl. Defense Ctr.*, 117 F.3d at 1532; *see also* P-ER 2348 ¶ 15 (explaining that “[t]here is no commonality between these proceedings and *Yakima*. In *Yakima*, the Commission deferred all consideration of fisheries issues for one project in the Mid-Columbia River basin on the ground that the necessary analyses would take place in a separate proceeding involving fisheries issues for all of the Mid-Columbia projects. The sole provision pertaining to fisheries was the standard form fish and wildlife reopener, to be used depending on the outcome of the Mid-Columbia proceeding.”).

In stark contrast, the license orders here require myriad measures that will protect listed snail species and other fish and wildlife over the entire license term.” P-ER 2023-24 ¶¶ 41-42, 2074-75 ¶¶ 40-41, 2231-32 ¶¶ 40-41. Unlike in *Yakima*, here “the Commission prepared a thorough analysis of all relevant public interest

¹⁰ Thus there is no basis to Petitioners’ purported concern that “Idaho Power now has no incentive to develop a sturgeon plan that takes the steps needed to protect and restore that fishery.” Br. 44.

considerations in the two EISs and each license contains several conditions to protect fish and wildlife, in addition to the standard fish and wildlife reopener.” P-ER 2349 ¶ 16. Besides requiring run-of-river, rather than load-following, operations at the Lower Salmon Falls and Bliss Projects, except as needed during the six year study period:

The new licenses contain a variety of conditions to protect and enhance fish and wildlife resources. These include minimum flows; reservoir drawdown limits; ramping rates; operational compliance monitoring; water temperature, dissolved oxygen, and total dissolved gas monitoring; a white sturgeon conservation plan applicable to all of the licenses; wetlands construction; land management plans; aquatic vegetation removal; spring habitat protection; run-of-river operation at Lower Salmon Falls and Bliss; studies of project impacts of snails and snail protection plans for Lower Salmon Falls, Bliss, and C.J. Strike; riparian habitat acquisition; and provisions for management of wildlife areas.

P-ER 2345 ¶ 7, 2326 ¶ 51; *see also* P-ER 2349 ¶ 16; P-ER 2075 ¶ 41, P-ER 2232 ¶ 41; P-ER 2024 ¶ 42.

FERC also specifically found that “[i]mmediate implementation of mitigation measures specific to white sturgeon [was] not necessary,” as “[t]he species is neither endangered nor threatened and operating requirements of the licenses will maintain current levels of protection.” P-ER 2363 ¶ 54. In fact, FERC expected white sturgeon to benefit from some immediately-effective mitigation measures. *Id.* and n.83. In any event, “[t]o the extent that load-following at Bliss and Lower Salmon Falls during the snail studies may be

inconsistent with protection of white sturgeon habitat,^[11] . . . it is necessary to ensure that federally-listed snails receive appropriate protection.” P-ER 2370 ¶ 67.

Yakima does not require more. See, e.g., *Department of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (*Yakima* at most imposes upon the Commission the duty to consider and study the environmental issues before granting a license. *Yakima* does not . . . imply that all environmental concerns must be definitively resolved before a license is issued.”); *American Rivers*, 201 F.3d at 1199 (favorably citing *Department of Interior’s* interpretation of *Yakima*).

Petitioners further assert that directing submission of a sturgeon mitigation plan violated NEPA because, purportedly, “NEPA requires FERC to consider all environmental consequences, **and** means to mitigate those consequences, in a single EIS.” Br. 49-50. As the Commission explained, however, the adequacy of an EIS:

¹¹ The record showed that many factors may be contributing to the decline of the white sturgeon. P-ER 2382 ¶ 94 (citing P-ER 577-85, 612-20, 705-15, 1256-57, 1321-49). “Factors contributing to the decline may include reach fragmentation, genetic isolation, altered hydrograph, effects of load-following, poor water quality, historical over-harvest, entrainment, and changes in sediment transport, channel morphology, and food availability.” P-ER 2382 ¶ 94.

is determined by a rule of reason which requires only a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.”^[12] Moreover, as the court in *Robertson* stressed: “there is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA’s reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.”^[13]

P-ER 2379 ¶ 88. NEPA was satisfied here, as the “environmental analysis contained in the EIS and the license orders [was] quite detailed and contain[ed] enough information for [FERC] to take the requisite hard look at the environmental impacts of [its] orders.”¹⁴ *Id.*

¹² Citing *Columbia Land Basin*, 643 F.2d at 592 (quoting *Trout Unlimited*, 509 F.2d at 1283).

¹³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

¹⁴ Petitioners’ concern that “there is no assurance that [FERC] will even follow NEPA procedures in the future, after it receives Idaho Power’s Sturgeon Mitigation Plan and determines how to proceed on it,” Br. 50, is speculative. If Petitioners believe FERC’s future actions violate NEPA requirements, they will have the opportunity to challenge those actions at that time.

VI. FERC APPROPRIATELY RELIED ON FWS' BIOLOGICAL OPINION

While the Court has jurisdiction under FPA § 313(b), 16 U.S.C. § 825l(b) over FERC's reliance on FWS' Biological Opinion in making its licensing decisions, that jurisdiction does not extend to whether FWS complied with the ESA in issuing the biological opinion. *Aluminum Co. of America v. BPA* (“*Alcoa*”), 175 F.3d 1156, 1160 (9th Cir. 1999); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415-16 (9th Cir. 1990); *California Save our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989). FWS' actions or inaction in preparing the Biological Opinion are relevant only to the extent they shed light on whether the Commission's reliance on the biological opinion was arbitrary and capricious. *Alcoa*, 175 F.3d at 1160; *Pyramid Lake*, 898 F.2d at 1415-16. An agency's reliance on a Biological Opinion is not arbitrary and capricious where, as here, no information or data “undermines seriously” the Biological Opinion. *Id.*

The Biological Opinion concluded, “based on the best available scientific and commercial information available,” that, although FWS “anticipate[d] adverse effects from the proposed action on three species of Snake River Snails, the Idaho springsnail, Utah valvata, and Bliss Rapids snail,” relicensing the projects “is not likely to jeopardize the continued existence of these three species.” P-ER 1864, 1966-69. “None of the individual projects would reduce the reproduction, status,

or distribution of any of the species to a point where the likelihood of their survival and recovery is appreciably reduced.” P-ER 1966. Moreover, “the projects in combination do not jeopardize the species.” *Id.*

FERC’s “independent review [did] not lead [it] to a different conclusion.” P-ER 2388 ¶ 108 (citing P-ER 1388-90). As FERC noted, “the licenses contain immediately effective measures that will benefit these species.” P-ER 2388 ¶ 108.

Petitioners claim that, in contrast to the draft Biological Opinion, the Biological Opinion’s “no jeopardy conclusion” is arbitrary, capricious, and not based on the best scientific evidence. Br. 55-58. This ignores, among other things, the licenses’ immediately effective measures that will benefit the snails. For example, the Settlement Agreement, entered into after FWS prepared its draft Biological Opinion, requires the Lower Salmon Falls and Bliss Projects to be operated in run-of-river mode throughout the license terms, except when load-following operations are necessary for study purposes during the study period. Thus, FWS had a very different set of operational conditions to consider when it prepared its Biological Opinion than when it prepared its draft Biological Opinion.

Petitioners also incorrectly assert that the Biological Opinion’s “no jeopardy” determination applied only to the first five years of the license terms. Br. 53-55. The “no jeopardy” determination applied to the entire 30-year license periods, but the FWS reasonably “anticipate[d] that the information gathered

[during the study period] will refine our understanding of how operating the projects affects listed snails” P-ER 1966. Thus, FWS noted:

When those data have been gathered and interpreted, it may be necessary to revisit the conclusions drawn in this Opinion. If that is the case, [FWS] would advise the Commission to reinitiate consultation at that time. It is our position, based on current knowledge and our analysis of the effects of the action as proposed, that in the first five years of the license none of the species will have declined irretrievably. Any new information can be considered under section 7 of the Act in sufficient time to consider alternative actions, and the species would still be viable at that time.

P-ER 1966.

Finally, there is no merit to Petitioners’ claim that the Biological Opinion inadequately addressed the three snail species affected by the projects. Br. 58-63. The Biological Opinion’s analysis of the projects’ effects on each snail species was detailed and comprehensive. *See, e.g.*, P-ER 1966-69.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction if Petitioners do not establish their standing, or in the alternative, denied on its merits.

STATEMENT OF RELATED CASES

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

Respectfully submitted,

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