

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Idaho Power Company

Project Nos. 1975-019, 2055-014,
2061-010, 2777-013, and 2778-014

ORDER ON REHEARING

(Issued March 4, 2005)

1. On August 4, 2004, the Commission issued new licenses to Idaho Power Company (Idaho Power) for five projects located on the Snake River.¹ This order denies the requests for rehearing filed by Idaho Rivers United and American Rivers (jointly, Conservation Groups). This order is in the public interest because it more fully explains how the new licenses will protect and enhance the fish and wildlife resources of the Snake River while continuing to provide a reliable source of electricity for the region.

A. Background

2. The projects are located on the Snake River in Idaho. From upstream to downstream they are: 12.5-megawatt (MW) Shoshone Falls Project No. 2778, at river mile (RM) 615; 34.5-MW Upper Salmon Falls Project No. 2777 (RM 580); 60-MW Lower Salmon Falls Project No. 2061 (RM 573); 75-MW Bliss Project No. 1975 (RM 560); and 82.8-MW C.J. Strike Project No. 2055 (RM 494-518).

¹ The license orders are: *Idaho Power Company*, 108 FERC ¶ 61,129 (2004) (C.J. Strike); 108 FERC ¶ 61,125 (Shoshone Falls); 108 FERC ¶ 61,126 (Upper Salmon Falls); 108 FERC ¶ 61,127 (Lower Salmon Falls); and 108 FERC ¶ 61,128 (Bliss).

3. The uppermost four projects are known collectively as the Mid-Snake projects. An environmental impact statement (EIS) analyzing the license applications for those projects was issued in July 2002.² A separate EIS for the C.J. Strike application was issued in October 2002.
4. Under the original licenses, Shoshone Falls and Upper Salmon Falls were operated in a run-of-river mode. They are also required to do so under the new licenses.
5. Lower Salmon Falls and Bliss were operated in an hourly load-following mode under the original licenses. C.J. Strike was block-loaded to meet daily system demands (*i.e.*, one, two, or three units were brought on-and-off-line as demand and water availability dictate) and in conjunction with the Lower Salmon Falls and Bliss to meet hourly demands.
6. Load following operation has resulted in substantial reservoir and tailwater level fluctuations. A major issue in these proceedings has been the impact of load-following operations on aquatic life, including various species of snails that are federally listed as threatened or endangered, and white sturgeon, which Idaho lists as a species of special concern.
7. 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.

² Final Environmental Impact Statement, Four Mid-Snake River Projects, FERC/FEIS-0141F (July 2002).

8. The license orders also approve an offer of settlement filed by Idaho Power on behalf of itself and the U.S. Fish and Wildlife Service (FWS) with respect to the relicensing of these five projects. The settlement contains provisions relating to the protection of specific federally-listed snails, and the licenses include requirements for studies and a snail conservation plan consistent with the terms of the settlement.³

9. The Conservation Groups timely filed separate requests for rehearing of the Mid-Snake and C.J. Strike license orders. These requests are nearly identical. We are therefore considering both rehearing requests in one order, and will indicate where the discussion applies to a specific project or projects.

B. Discussion

1. Comprehensive Development/Public Interest

10. FPA sections 10(a)(1)⁴ and 4(e)⁵ require the Commission to balance all public interest considerations relative to the comprehensive development of the waterway when determining whether and under what conditions to issue a license. This is known as the public interest/comprehensive development standard, or simply, the public interest standard. The Conservation Groups allege various deficiencies in this regard.⁶

11. The Conservation Groups assert that these same alleged deficiencies also violate: (1) the requirement of FPA section 4(e) that the Commission, in deciding whether to issue a license, give equal consideration to power development and to various specified purposes, including recreation and the protection, mitigation of damage to, and enhancement of, fish and wildlife;⁷ and (2) the requirement FPA section 313(b)⁸ for

³ The settlement agreement is Appendix B to the new license for Bliss. 108 FERC at 61,713-47.

⁴ 16 U.S.C. § 803(a)(1).

⁵ 16 U.S.C. § 797(e).

⁶ C.J. Strike rehearing request at 6-15, 21-26, 25-30; Mid-Snake rehearing request at 5-10, 15, 21, 25, 26-31, 34-35.

⁷ C.J. Strike rehearing request at 7, 11-12, 15-25, 28, 56; Mid-Snake rehearing request at 7, 10-11, 15-26, 28, 62, 63.

⁸ 16 U.S.C. §8251(b).

(continued...)

Commission decisions to be supported by substantial evidence.⁹ Our responses to the alleged deficiencies in the context of the public interest standard also respond to the Conservation Groups' assertions with regard to equal consideration and substantial evidence.

a. Post-License Plans

12. First, the Conservation Groups argue that the licenses do not satisfy the public interest/comprehensive development standard because the details of specific mitigation and enhancement measures for fish and wildlife and for recreation will be established in the context of plans submitted to the Commission for approval following consultation with resource agencies and tribes and, in some cases, following the completion of additional studies.¹⁰

⁹ C.J. Strike rehearing request at 4-6, 8, 11, 15-16, 21-25, 38-42, 53-56; Mid-Snake rehearing request at 4-6, 15-20, 24-25, 28, 34-35, 41-42, 53-56, 60-62.

The substantial evidence test is the application of the arbitrary and capricious standard to findings of fact. *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659, 663, n.3 (D.C., Cir. 1996); *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554 (2nd Cir. 1992) (*Ompompanoosuc*); *Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 114, n.5 (D.C. Cir. 1989). Substantial evidence has been defined to mean "such relevant evidence as a reasonable mind might find adequate to support a conclusion." *Allegheny Electric Coop. v. FERC*, 922 F.2d 73, 80 (2nd Cir. 1990).

¹⁰ C.J. Strike rehearing request at 6-15; Mid-Snake Rehearing at 6-10. Specifically, the Conservation Groups state that the license orders do not finalize mitigation measures for white sturgeon, threatened and endangered snails, fish stocking, riparian habitat acquisition, management of the C.J. Strike Wildlife Management Area, visual resources, land management, recreation, allocation of funding required by water quality certifications, aquatic vegetation removal, dissolved oxygen and temperature monitoring, and fish passage. Additional studies are required with regard to snails (*e.g.*, C.J. Strike Article 410).

13. In support, they cite *Confederated Tribes and Band of the Yakima Nation v. FERC (Yakima)*.¹¹ There, the court held that the Commission must consider fisheries issues prior to issuing a license.¹² The Conservation Groups assert that the courts have upheld license orders that did not finally resolve fish and wildlife issues only where the license contained mitigation measures, but included reopener provisions to allow for adjustment of those measures based on post-licensing studies.¹³

14. The Conservation Groups cite two cases in the latter regard. In *U.S. Dept. of the Interior v. FERC*,¹⁴ the principle environmental issue was project impacts to water quality. The Commission adopted a specific dissolved oxygen level requirement to protect the fishery. It also required the licensees to join a water quality management group with federal and state agencies to consider the need for future modifications, and included the standard form license article reserving authority to require modifications to project structures and operations to protect fish and wildlife resources.¹⁵ The license in *LaFlamme v. FERC*¹⁶ included numerous mitigation measures, but also required post-license monitoring as to some of those measures and, like the licenses in *Interior v. FERC*, included the standard form fish and wildlife reopener.

15. There 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.

¹¹ 746 F.2d 466 (9th Cir. 1984).

¹² *Id.* at 470-73.

¹³ C.J. Strike rehearing request at 8-9; Mid-Snake rehearing request at 8-9.

¹⁴ 952 F.2d 538 (D.C. Cir. 1992).

¹⁵ *Interior v. FERC*, 952 F.2d at 540-43.

¹⁶ 945 F.2d 1124 (9th Cir. 1991).

16. Here, the Commission prepared a thorough analysis of all relevant public interest 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. For example, the C.J. Strike license conditions include: daily drawdown limits on the reservoir; minimum flows; daily and hourly ramping rates; a compliance monitoring plan to ensure that these requirements are met; water quality monitoring to ensure that Idaho's water temperature, dissolved oxygen, and total dissolved gas standards are met; plans for sturgeon conservation and riparian habitat acquisition; and a management agreement with the Idaho Department of Fish and Game (IDFG) for the wildlife management area. There may also be additional requirements to protect listed snails, depending on the outcome of the studies to be conducted pursuant to the settlement agreement.

17. The Conservation Groups also mischaracterize the degree to which mitigation requirements are deferred to post-license plans. For instance, they assert with regard to the C.J. Strike license that decisions have been deferred on, among others, recreation requirements, fish stocking, and management of the wildlife management area.¹⁷ On the contrary, the license includes specific requirements on these matters, leaving only the details for development in consultation with resource agencies, Indian tribes, and others. The recreation plan article (Article 417) requires specific improvements at nine different recreation sites, encompassing roads and parking, camping areas, footpaths, boat docks and mooring sites, navigation, waste disposal and sanitation.¹⁸ The Fish Stocking Plan (Article 409) specifically identifies the species, numbers, and size of the fish to be stocked, as well as the timing and location of the stocking.¹⁹ The wildlife management area agreement article establishes a specific funding requirement, identifies the purposes for which the funds are to be expended, requires the establishment of an advisory committee, identifies the entities to be offered membership, and includes requirements for ensuring water supplies, incorporating specified lands, and operating and maintaining buildings and machinery.²⁰ There is ample specificity to evaluate these plans, notwithstanding that various details are to be settled in consultation with agencies and Indian tribes.

¹⁷ C.J. Strike rehearing request at 7.

¹⁸ *See* 108 FERC at 61,767

¹⁹ *See* 108 FERC at 61,763.

²⁰ *See* 108 FERC at 61,764-765.

18. In sum, the conditions in these licenses are, both typical and fully appropriate in the context of the facts of this case. The U.S. Fish and Wildlife Service has determined that operation of the projects during the snail studies will not jeopardize the snails, and we see no reasonable alternative to approval of the settlement agreement that provides for them.

b. Consideration of Non-Power Benefits

19. The Conservation Groups acknowledge that the Commission has identified benefits from run-of-river operation,²¹ but assert that the Commission should also have quantified, or at least considered, the existence, ecological, and recreational values of improved biological conditions attributable to that mode of operation. In support, they cite the high value society places on environmental protection, particularly as reflected in the Endangered Species Act,²² high levels of participation by Idahoans in water recreation activities, and findings by IDFG in its Fisheries Management Plan that wild trout have ecological, biological, economic, and recreational value and cost less to support than hatchery trout, and that white sturgeon are valued as a game fish.²³

20. The EISs discuss in great detail the biological impacts that load following operations have on aquatic and terrestrial resources²⁴ and, in that manner, make clear the benefits that run-of-river operation would have for the affected species. The EISs also discuss the effects run-of-river operation would have on recreation.²⁵

21. The Conservation Groups similarly claim that in weighing the recommendations of federal and state fish and wildlife agencies pursuant to FPA section 10(j) for C.J. Strike, we rejected certain recommendations on the ground that their costs to Idaho

²¹ See Mid-Snake EIS at 178-37, 278-80; C.J. Strike EIS at 222-26.

²² 16 U.S.C. §§ 1531-43.

²³ C.J. Strike rehearing request at 12-14; Mid-Snake rehearing request at 11-15.

²⁴ C.J. Strike EIS at 90-174; Mid-Snake EIS at 178-237, 278-80.

²⁵ C.J. Strike EIS at 198; Mid-Snake EIS at 351, 392.

Power would outweigh their benefits, but made no effort to weigh those costs against the non-power benefits of the recommendations.²⁶ This claim misrepresents the license order.

22. We rejected recommendations to end load following operations, to use the project's active storage for salmon flow augmentation, and for multiple permanent water quality monitoring stations. These measures were rejected not only because of their costs, but for other good reasons: the issue of whether to eliminate all load following operations was effectively resolved by the settlement, and the use of the project's active storage for salmon flow augmentation was rejected because the reservoir drawdown made associated with it would have negative effects on other resources.²⁷

23. We rejected the recommendation for multiple permanent water quality monitoring stations for the term of the license because it is premature until Idaho establishes total maximum daily loads (TMDL) for pollutants in the project reach.²⁸ Where standards exist (temperature, dissolved oxygen, and total dissolved gases), we require Idaho Power to conduct monitoring.²⁹ The C.J. Strike license also requires Idaho Power to assist the state in the development of the TMDL standards.³⁰

24. The Conservation Groups also contend that the record is insufficient because we did not quantify economic benefits of improved biological health of the Snake River from run-of-river operation. In this regard, they stress that recreation and tourism, including sport fishing, is the third largest industry in Idaho's economy, and suggest in particular that there would be great economic value to Idaho in a white sturgeon fishery restored to historic condition.³¹

²⁶ C.J. Strike rehearing request at 14; Mid-Snake rehearing request at 15.

²⁷ 108 FERC at 61,752.

²⁸ 108 FERC at 61,752.

²⁹ C.J. Strike Articles 405 and 406, 108 FERC at 68,751-52.

³⁰ *See* C. J. Strike Appendix A, Water Quality Certification, 108 FERC at 61,769.

³¹ C.J. Strike rehearing request at 15-21; Mid-Snake rehearing request at 15-20.

25. The EISs identify fishing as an important recreational opportunity in the project area,³² and the licenses include conditions to foster both the fishery and recreation resources.³³ Nothing in the FPA, however, requires the Commission to place a dollar value on nonpower benefits, and the fact that the Commission assigned dollar figures to the licensee's costs does not require it to do likewise for nonpower benefits.³⁴ Nor are we required to make decisions on the basis of a cost-benefit analysis articulated in purely economic terms.³⁵

26. We used the same approach to valuation of non-power benefits in this proceeding that we have 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. Similarly, our practice is to consider any credible evidence in the record regarding the potential economic benefits of environmental mitigation measures.³⁶

³² C.J. Strike EIS at 68-73; Mid-Snake EIS at 149-152.

³³ These include run-of-river operation, minimum flows, ramping and reservoir fluctuation restrictions, the White Sturgeon Conservation Plan, Mid-Snake Land Management Plan, spring habitat protection, fish stocking, and recreation plan improvements to boating access and facilities.

³⁴ *Conservation Law Foundation v. FERC*, 216 F.3d 41, 46-47 (D.C. Cir. 2000) (CLF).

³⁵ *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) (*Great Northern*), *aff'd*, *CLF*, *citing City of Tacoma, WA*, 84 FERC ¶61,107 at 61,571-72 (1998), *order on reh'g*, 86 FERC ¶61,311 (1999) (*Tacoma*); *Namekegon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954) (*Namekegon*) (when unique recreational or other environmental values are present, the public interest cannot be evaluated adequately only by dollars and cents).

³⁶ *See, e.g.*, the EIS prepared for relicensing of the Clyde River Project No. 2306, issued June 30, 1996, at 4-60, 4-78, 4-94, stating estimated economic value to the project area of restoring an anadromous sport fishery and establishing whitewater recreation opportunities by removal of a project dam. The credibility of such evidence is frequently
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27. Finally, the Conservation Groups cite as evidence of Commission bias in favor of Idaho Power the fact that the public notice of the settlement agreement states that resolution of how load-following operations affect listed snails is important because significant loss of power and economic benefits would occur if project operations changed to run-of-river.³⁷ They suggest that the notice should have identified impacts to listed snails as the most important issue.³⁸ The only purposes of the public notice were to alert the public to the filing of the settlement and to solicit comments. A single sentence in a brief notice included to provide context cannot reasonably be construed as a predetermination of the Commission's public interest analysis.

c. Weight Accorded to Power Generation

28. The Conservation Groups contend that the EISs and license orders largely reflect Idaho Power's economic interests and therefore do not give equal consideration to other public interest considerations. We disagree. The equal consideration requirement of FPA section 4(e) is not an "equal treatment" requirement. Rather, it is satisfied when the Commission thoroughly considers the impacts of the project proposal and action alternatives on all affected developmental and non-developmental resources.³⁹ Here, the great majority of the EISs are devoted to consideration of non-developmental resources, recommendations to protect and enhance those resources, and the impacts to those resources of the action alternatives.

questionable, however, as it is necessarily speculative and values may be calculated using any number of reasonably disputable assumptions and methods.

³⁷ See 69 Fed. Reg. at 8401 (Feb. 24, 2004).

³⁸ C.J. Strike rehearing request at 11-12; Mid-Snake rehearing request at 11.

³⁹ *California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992) (*California*).

29. The Conservation Groups allege specifically that we gave undue weight to power generation by ignoring that, even under run-of-river conditions, the projects would show a positive annual power benefit of \$13.7 million for C.J. Strike⁴⁰ and about \$42 million for the Mid-Snake projects.⁴¹ This, they suggest, shows that Idaho Power can afford to operate the projects in run-of-river mode.

30. Whether an action alternative has a positive or negative 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.⁴² If, in the final analysis, we thoroughly consider all public interest issues, give equal consideration to the non-developmental values affected by the project, and craft license conditions based on that consideration, we have satisfied the FPA.

31. Commission staff summarized the benefits and costs of operating the C.J. Strike project in a run-of-river mode in the EIS⁴³ 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, DO, 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. In this case, the marginal environmental gains would not be worth the loss in project generation and dependable capacity and the costs associated therewith.

⁴⁰ C.J. Strike rehearing request at 24, citing C.J. Strike EIS at 215.

⁴¹ Mid-Snake rehearing request at 24; citing Mid-Snake EIS at xliii.

⁴² *Great Northern, Tacoma, Namekegon, supra.*

⁴³ C.J. Strike EIS at 222-226.

d. Need for Power

32. In support of their request for run-of-river operation during the spring, the Conservation Groups contend that there would be no need for Idaho Power to purchase replacement power at that time because it typically has surplus power, much of which it sells to other utilities. They conclude that the only impact to Idaho Power of changing to run-of-river during the spring would be a small decrease in revenues from power sales.⁴⁴ The Conservation Groups are correct that in favorable water years and load conditions Idaho Power has surplus energy in the spring which can be sold or exchanged to offset the costs of energy that must be purchased to meet short-term deficiencies in dry years. However, the economic effects of project operations are, as explained above, just one component of the overall public interest analysis.

e. Economic Analysis

i. Loss of Dependable Capacity

33. The C.J. Strike EIS estimated that changing to run-of-river operation would reduce the amount of dependable capacity generated by the project from 86.6 MW to 33.2 MW, a loss of 53.4 MW.⁴⁵ The Conservation Groups assert that this figure is exaggerated. In support, they note that the figure for dependable capacity changed from 64.9 MW in the draft EIS to 86.6 in the final EIS, causing the estimated loss of capacity to increase from 31.7 MW to 53.4 MW. They claim there is no explanation for this change.⁴⁶ The Conservation Groups make similar assertions regarding loss of capacity at the Mid-Snake projects.⁴⁷

⁴⁴ C.J. Strike rehearing request at 24-25; Mid-Snake rehearing request at 24. The Conservation Groups note that Idaho Power's July 2004 Integrated Resource Plan (2004 IRP) projects large spring surpluses through the planning period (through 2011) under median water and load conditions. *See* 2004 IRP at 41-45.

⁴⁵ C.J. Strike EIS at 210. The total economic losses associated with changing to run-of-river operation consist of: (1) a reduction in the amount, and therefore the value, of energy generated by the Project; and (2) the cost of replacing lost dependable capacity. *See* EIS Table 5-3 at 208.

⁴⁶ C.J. Strike rehearing request at 22.

⁴⁷ Mid-Snake rehearing request at 21-23.

34. The 69.4-MW figure in the C.J. Strike draft EIS was based on Idaho Power releasing the total daily inflow for its design low flow condition over a peak demand period of five hours.⁴⁸ In its comments on the draft EIS, Idaho Power stated that a one-hour peak demand period during the low flow condition is the appropriate basis for calculating dependable capacity.⁴⁹ Staff agreed with this proposed correction, resulting in a dependable capacity of 86.6 MW.⁵⁰ The same correction was made in the Mid-Snake EIS.

35. The Conservation Groups also charge that the economic analyses exaggerate the value of Idaho Power's dependable capacity and, therefore, the significance of its loss. In this regard, they cite information from Idaho Power indicating that changing from load following to run-of-river operation will have a minor impact on power values. The figures on which they rely are, however, based on an average water year, while the economic impact figures in the EIS are, as explained below, based on Idaho Power's critical low flow period, resulting in a much greater loss of dependable capacity.⁵¹ The

⁴⁸ C.J. Strike Draft EIS at 203.

⁴⁹ *See* C.J. Strike EIS, Appendix A, at A-14 (Comment Idaho Power-6). The Conservation Groups also state that that Idaho Power indicates five hours of daily peaking operation is an appropriate figure for C.J. Strike. C.J. Strike request for rehearing at 23, *citing* Idaho Power comments on Mid-Snake Draft EIS at A-9. They misconstrue 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.

⁵⁰ This is consistent with the dependable capacity of 85 MW used by Idaho Power for resource planning under the original C.J. Strike license. The difference between that figure and the 86.6 MW is based on the use of the higher reservoir operating elevation required by the Commission in the new license.

⁵¹ C.J. Strike EIS at A-13.

full annual cost of operating C.J. Strike in run-of-river mode is \$6,495,000, consisting of the costs of replacing lost energy and dependable capacity.⁵² Likewise, full cost of run-of-river at Bliss and Lower Salmon Falls is \$8,414,000.⁵³

36. The Conservation Groups also claim that the EIS improperly calculated loss of dependable capacity from run-of-river operation by using July 1988, a year of extreme hydrologic conditions, as the critical water year.⁵⁴ They state that a more realistic dependable capacity loss of 10.7 MW results from using water conditions likely to occur in one of every four years.⁵⁵ The 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. For this reason, we think it is most appropriate to base our determination of dependable capacity on the method used by Idaho Power in the ordinary course of business.

ii. Value of Dependable Capacity

37. The Conservation Groups assert that the EISs exaggerate the cost of replacement capacity. Specifically, the EISs use a value of \$114/kilowatt-year (kW-yr.), based on the cost of constructing and operating a gas-fired, combined-cycle facility, even though staff estimated that a single-cycle combustion turbine would cost only \$81/kW-yr. They also claim that the EISs ignore the possibility of replacing lost capacity with open market purchases of capacity and efficiency or conservation improvements, which they state could cost less than newly constructed capacity.⁵⁶

⁵² C.J. Strike EIS at 208.

⁵³ Mid-Snake EIS at 366.

⁵⁴ *See* C.J. Strike EIS at 207.

⁵⁵ C.J. Strike rehearing request at 23.

⁵⁶ C.J. Strike rehearing request at 24; Mid-Snake rehearing request at 24. More specific assertions with regard to conservation measures are considered below in section B.6.f.

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.⁵⁷ As to conservation, Idaho Power has programs to promote cost-effective generation and load management for residential, commercial, industrial, and agricultural customers.⁵⁸ The Conservation Groups' assertion that additional conservation or efficiency improvements could reduce the need to replace lost capacity is simply speculation.

iii. Consistency of Figures

39. The Conservation Groups charge that the economic analyses are unclear because they use different terms for what are seemingly the same things and do not explain the terminology or why the numbers associated with each term are different. They state, for instance, that the C.J. Strike EIS estimates that, compared to the no action alternative, "net annual benefits" under the run-of-river alternative would be reduced by \$7,292,000, but the "annual cost" would be \$6,495,000.⁵⁹ The same allegation is made concerning figures for the Mid-Snake projects.⁶⁰

40. There is no inconsistency. The comparison of licensing alternatives includes three economic values for operating alternatives under each licensing alternative: (1) annual cost, which is the annualized total cost to operate the project; (2) annual power benefit, which is the total value of the project's capacity and average energy generation; and (3) net annual benefit, which is simply the numeric difference between the annual cost and the annual power benefit.⁶¹ For example, the effect of changing to run-of-river operation at C.J. Strike would be to increase Idaho Power's annual cost by about \$6,495,000. The reduction in net annual benefits for the run-of-river alternative exceeds

⁵⁷ 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.

⁵⁸ *See, e.g.*, C.J. Strike order, 108 FERC at 61,755.

⁵⁹ C.J. Strike rehearing request at 22.

⁶⁰ Mid-Snake rehearing request at 23.

⁶¹ *See* C.J. Strike EIS at 216.

that amount (*i.e.*, is \$7,292,000) because it also includes the costs of all of the staff-recommended non-operational environmental protection and enhancement measures discussed above.

f. Fish Passage

41. Consistent with our long-standing policy, the licenses include at the request of FWS a reservation of authority for the Secretary of the Interior or the Secretary of Commerce to prescribe fishways during the license term.⁶² The Conservation Groups assert that the public interest requires fish passage at C.J. Strike now because Idaho law requires fishways and fish screens at all dams.⁶³ While the provisions of state law may inform the Commission's judgment regarding what is in the public interest, licenses are issued pursuant to the requirements of the FPA, under which the federal government occupies the field of licensing and regulation of jurisdictional hydropower projects.⁶⁴ We further note that IDFG did not request immediate fish passage, but requested that it be considered in the context of the White Sturgeon Conservation Plan, and supports the FWS reservation of authority.⁶⁵

2. Settlement Agreement

42. The Commission's regulations provide that it may approve an offer of settlement "if the settlement appears to be fair and reasonable and in the public interest."⁶⁶ We must for this purpose also determine whether there is substantial evidence in the record on which to base a reasoned decision.⁶⁷

⁶² *E.g.*, C.J. Strike Article 418, 108 FERC at 61,767.

⁶³ C.J. Strike rehearing request at 29, *citing* Idaho Code section 36-906.

⁶⁴ *California v. FERC*, 495 U.S. 490 (1990).

⁶⁵ IDFG Recommendations at 58-61.

⁶⁶ 18 C.F.R. § 385.602(g)(3).

⁶⁷ 18 C.F.R. § 385.602(h).

43. The Conservation Groups charge that the discussion of the settlement agreement in the license orders is too cursory to support our conclusion that the settlement is in the public interest, in violation of our regulations and the requirement of the Administrative Procedures Act that all decisions be supported by substantial evidence on the record.⁶⁸ We disagree. The license orders discuss the settlement agreement provisions and the Biological Opinion, and rest as well on the evidence concerning the impacts of project operations on the listed snails found in the EISs.⁶⁹ Our conclusion is therefore based on substantial evidence.

44. Finally, the Conservation Groups charge that the snail studies required by the settlement agreement seem to be designed to conclude that load following does not adversely affect the listed snails. They base their charge on the fact that the studies allow a minimum period of two years for run-of-river operation during testing. This, they suggest, is not long enough for a biological response to occur.⁷⁰ On average, however, the listed snail species have a life span of only about one year,⁷¹ so two consecutive years of run-of-river or load-following would, on average, span two generations of listed snails, and the entire study would span five generations of snails. We conclude that this is adequate to elicit and observe the response of the snail populations to different operating modes.

3. Fish and Wildlife Agency Recommendations

45. Section 10(j)(1) of the FPA⁷² requires the Commission, when issuing a license, to include conditions based on recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,⁷³ to “adequately

⁶⁸ Mid-Snake rehearing request at 60, C.J. Strike rehearing request at 54.

⁶⁹ See C.J. Strike license order, 108 FERC at 61,749-50 and EIS at 41-42, 64-65, and 174-91; Bliss license order, 108 FERC at 61,690-691 and Mid-Snake EIS at 73-77, 117-20, 278-84.

⁷⁰ C.J. Strike rehearing request at 54-55; Mid-Snake rehearing request at 61.

⁷¹ Biological Opinion at 26, 29, 30, 32.

⁷² 16 U.S.C. § 803(j)(1).

⁷³ 16 U.S.C. §§ 661, *et seq.*

and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by a project. If the Commission believes that any such recommendation may be inconsistent with the purposes and requirements Part I of the FPA, or other applicable law, section 10(j)(2)⁷⁴ requires the Commission and the agencies to attempt to resolve such inconsistencies, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If the Commission does not adopt a recommendation, it must explain how the recommendation is inconsistent with Part I of the FPA or other applicable law and how the conditions imposed by the Commission adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources.

46. The Conservation Groups contend that the Commission violated section 10(j) because it did not give significant deference to the 10(j) recommendations or overcome a “presumption” that it will adopt such recommendations.⁷⁵ First, we question whether the Conservation Groups, which have no authority or responsibilities pursuant to section 10(j), have standing to raise these issues. In any event, there is no presumption that the Commission will adopt 10(j) recommendations. Rather, as the court explained in *American Rivers*, the Commission’s deference to resource agency recommendations “must yield to the Commission’s reasoned judgment in those instances where the parties disagree.”⁷⁶ Moreover, the agencies which made the section 10(j) recommendations did not seek rehearing of the license orders.

a. Reopener to Address ESA Issues

47. Interior recommended that the C.J. Strike license include a specific condition reserving the Commission’s authority to amend the license as necessary in order to comply with the ESA. The Conservation Groups state that we did not explain our failure

⁷⁴ 16 U.S.C. § 803(j)(2).

⁷⁵ C.J. Strike rehearing request at 32; Mid-Snake rehearing request at 34, citing *American Rivers v. FERC*, 201 F.3d 1186, 1205 (9th Cir. 2000) (*American Rivers*) and *California*, 966 F.2d at 1549-50.

⁷⁶ 201 F.3d at 1205.

to adopt this recommendation and, even if we conclude that the settlement agreement is sufficient to address this recommendation, there does not appear to be any retained authority to initiate consultation regarding any other ESA-related issues that may arise.⁷⁷

48. The standard fish and wildlife reopener reserves our authority, on our own motion or at the request of the Department of the Interior or state fish and wildlife agencies, to require modifications to project fish and wildlife resources. This article provides all of the authority required to require re-initiation of ESA consultation or take any other action needed to protect listed species.

b. Run-of-River Operation

49. Prior to the settlement agreement, IDFG and FWS recommended that Lower Salmon Falls, Bliss, and C.J. Strike be operated year-round in run-of-river mode on a permanent basis to prevent effects of load-following operation on listed snails and other fish and wildlife and their habitat, particularly white sturgeon.

50. The Bliss and Lower Salmon Falls licenses both require run-of-river, with the exception that these projects, consistent with the settlement agreement, can be operated in load-following mode for the purpose of conducting studies regarding listed snails.⁷⁸ In the Mid-Snake rehearing request, the Conservation Groups complain that the settlement agreement calls for only two to four years of run-of-river operation, with the mode of operation following the completion of the snail studies to be determined in the context of the snail protection plan.⁷⁹

51. The Conservation Groups appear to misconstrue the import of the settlement agreement and its implementing license articles. The mode of operation for Lower Salmon Falls and Bliss could be changed from run-of-river in the context of the snail protection plan, but that would require a license amendment proceeding. The Conservation Groups will have the opportunity to intervene and participate in any such proceeding.

⁷⁷ C.J. Strike rehearing request at 32-33.

⁷⁸ See 108 FERC at 61,677 (Lower Salmon Falls Article 401) and at 61,701 (Bliss Article 401).

⁷⁹ C.J. Strike rehearing request at 33-34; Mid-Snake rehearing request at 35-41.

52. We did not adopt run-of-river for C.J. Strike. In the C.J. Strike rehearing request, the Conservation Groups continue to assert that the record shows that load-following has severe impacts on sturgeon and other aquatic species, the EIS exaggerated the costs and downplayed the benefits of run-of-river operation and was not supported by substantial evidence, and the Commission failed to make specific findings as to why run-of-river operation is inconsistent with the FPA and the measures adopted are adequate to protect fish and wildlife.⁸⁰ We have addressed these assertions elsewhere in this order.

c. White Sturgeon Protection Plan

53. As noted, all of the licenses include the same requirement for Idaho Power to develop a White Sturgeon Conservation Plan.⁸¹ The license article directs Idaho Power, after appropriate consultation, to submit the plan to the Commission for approval within one year from license issuance. The Conservation Groups submit that the article is not in compliance with section 10(j) because it does not include, and the Commission did not explain its failure to adopt, certain components of IDFG's and FWS' recommendations; including immediate implementation of conservation measures, a provision authorizing any party to the license proceeding to submit proposed mitigation measures if deadlines for development of the plan are not met, a requirement that the fish passage component of the plan address the needs of all aquatic species, and various specific technical components.⁸²

54. Immediate 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. The requirements with regard to water quality will improve habitat for sturgeon and other aquatic species.⁸³

⁸⁰ C.J. Strike rehearing request at 33-34.

⁸¹ *E.g.*, Shoshone Falls Article 405, 108 FERC at 61,633.

⁸² C.J. Strike rehearing request at 34-35; Mid-Snake rehearing request at 41-42.

⁸³ For instance, the water quality certifications for the projects require Idaho Power to assist in the development of, and to comply with, standards for total maximum daily loads of pollutants (*e.g.*, C.J. Strike license Appendix A, 108 FERC at 61,769). Other water quality improvement measures required by the water quality certifications include water quality monitoring, removal of aquatic vegetation, minimum flows, acquisition of springs, and the construction of artificial wetlands, settling ponds or other systems or
(continued...)

A one-year period to develop the specific conservation plan is entirely reasonable in light of the complexity of the issues and the need for Idaho Power to consult with ten federal and state agencies and Indian tribes. There is no need to include a specific provision authorizing consulted entities to propose immediate protection measures if submission or approval of the conservation plan is delayed. Such proposals may be made in the context of the standard fish and wildlife reopener provision. The record does not support a finding that the passage feasibility evaluation for white sturgeon and rainbow trout needs to address the needs of every aquatic species. Finally, the Conservation Groups suggest that various specific plan components recommended by IDFG were omitted from the plan without explanation.⁸⁴ In fact, none of these recommended components have been excluded. We expect them to be considered during consultation with the agencies and tribes.

d. Land and Water Management Program

55. FWS recommended that Idaho Power be required to establish and fund a habitat acquisition and restoration program at the Mid-Snake and C.J. Strike Projects.⁸⁵ C.J. Strike Article 412 requires Idaho Power to develop a Riparian Habitat Acquisition Plan for Commission approval. The Conservation Groups state generally that the plan required by Article 412 is less comprehensive than the plan recommended by FWS, and that the license order fails to explain why all components of the plan recommended by FWS was not adopted.⁸⁶

facilities to prevent or reduce the nutrients and sediments entering the Snake River (*e.g.*, Bliss license Appendix A, 108 FERC at 61,711).

⁸⁴ Mid-Snake rehearing request at 42. These include information on the status of white sturgeon populations from Shoshone Falls to below the Hells Canyon complex; an analysis of factors affecting the various populations, including entrainment and turbine mortality; proposed measures for each reach of the river, including fish passage and reduced entrainment; monitoring and evaluation, and an implementation schedule.

⁸⁵ Letter from Interior, filed March 9, 2001 (Interior C.J. Strike recommendations) at 12.

⁸⁶ C.J. Strike rehearing request at 35-36.

56. Idaho Power proposed to acquire approximately 61 acres of riparian habitat to mitigate for project impacts. Article 412 requires it to acquire 170 acres of riparian, wetland, or spring habitat and develop a site-specific management plan which includes monitoring and maintenance measures and a provision for revising the plan as needed. We did not adopt FWS' recommendation that Idaho Power be required to acquire approximately 200 acres of wetlands between C.J. Strike and the downstream Swan Falls Project because the data do not indicate that the project affects 200 acres of wetlands.⁸⁷ We also did not adopt recommendations to establish a land and water trust to oversee land acquisition and management, since the plan is to be developed in consultation with various federal and state agencies.⁸⁸

e. **Native Resident Salmonid Restoration Fund**

57. IDFG recommended that the C.J. Strike license require Idaho Power to establish a fund to improve aquatic and riparian wetland habitat conditions in the Bruneau River drainage and other Snake River tributaries, said fund to be administered by a state-established native fish watershed advisory group.⁸⁹ The license order found this recommendation to be unreasonable because of its broad scope.⁹⁰ The Conservation Groups assert that the proposal is no greater in scope than other mitigation measures adopted by the Commission, and that the Commission should have considered requiring development of a program of smaller scope to be developed in consultation with IDFG.⁹¹

58. The conditions we include in the license are designed to provide mitigation and enhancement for project impacts and to bear a reasonable relation to the geographic scope of those impacts. The geographic scope of IDFG's proposed salmonid restoration fund is very broad and it is nearly devoid of details regarding goals and objectives, types

⁸⁷ C.J. Strike EIS at 164.

⁸⁸ *Id.*

⁸⁹ IDFG C.J. Strike recommendations at 62. The Bruneau River watershed lies to the south of the Snake River and that river enters the C.J. Strike reservoir a few miles above the dam.

⁹⁰ 108 FERC at 61,753.

⁹¹ C.J. Strike rehearing request at 36.

of measures to be implemented, when they would be applied, and which parties would be responsible for implementation.⁹² The Commission also cannot, as proposed, require an entity other than the licensee to administer such a program. We also see no need for the Commission to require Idaho Power to develop a smaller-scale version of IDFG's proposal because the mitigation and enhancement measures already required are adequate.

f. Fish and Wildlife Monitoring Program

59. FWS proposed that the C.J. Strike license require Idaho Power to establish a long-term monitoring program to establish a record of trend data for fish and wildlife in the C.J. Strike reach of the Snake River and all lands associated with the project.⁹³ The Conservation Groups state that this recommendation was not adopted, but the license order includes no related discussion.⁹⁴ The license order reflects the recommendations in this regard made in the EIS. The EIS recommended against this proposal because it was so broad that it would not likely produce results directly applicable to effects of the project, was not tied to any specific license requirement, and is more appropriately the responsibility of a resource management agency. The EIS further noted that determining cause and effect trends at the population level are often difficult, particularly for migratory species, and that wildlife populations in the project area are affected by many factors within and without the project area.⁹⁵

g. Livestock Grazing Management Plan

60. Interior recommended that Idaho Power be required to develop a livestock grazing management plan to protect riparian habitat on project lands and on other Idaho Power-owned lands.⁹⁶ The Conservation Groups state that this recommendation was not

⁹² C.J. Strike EIS at 146.

⁹³ Interior Mid-Snake recommendations at 15; Interior C.J. Strike recommendations at 13. *See also* Mid-Snake EIS at 273-75, C.J. Strike EIS at 167-68.

⁹⁴ C.J. Strike rehearing request at 36.

⁹⁵ C.J. Strike EIS at 172-173.

⁹⁶ Interior C.J. Strike recommendations at 13. *See also* C.J. Strike EIS at 167-68.

adopted, but that the C.J. Strike license order includes no discussion of it.⁹⁷ Although the license order does not discuss this issue, the EIS does, and it recommends measures to protect riparian and wetland habitat from destructive grazing.⁹⁸ This discussion is reflected in Article 413, which requires establishment of a management plan for the C.J. Strike Wildlife Management Area (WMA). The management plan is to include funding for, among other things, grazing management on licensee-owned lands within the WMA.⁹⁹ Likewise, Article 416 requires the establishment of an overall plan for management of all project lands, including detailed provisions for grazing management.¹⁰⁰ The EIS does not recommend, and the license does not require, extending these requirements to other Idaho Power-owned lands because of the lack of a nexus between project impacts and those lands.

h. Water Quality Funding

61. The water quality certification for C.J. Strike issued by the Idaho Department of Environmental Quality (IDEQ) requires Idaho Power to pay Idaho DEQ \$50,000 annually to assist in the development of total maximum daily load standards for pollutants for the reach of the river in which the project is located.¹⁰¹ As required by section 401(d) of the Clean Water Act,¹⁰² this requirement is a condition of the license.¹⁰³

⁹⁷ C.J. Strike rehearing request at 36-37.

⁹⁸ C.J. Strike EIS at 167-72.

⁹⁹ 108 FERC at 61,765.

¹⁰⁰ 108 FERC at 61,766. The Mid-Snake licenses similarly require Idaho Power to include grazing management provisions in its Mid-Snake River Land Management Program. *See, e.g.*, Shoshone Falls Article 409, 108 FERC at 61,635.

¹⁰¹ *See* 108 FERC at 61,751.

¹⁰² 33 U.S.C. § 1341(d).

¹⁰³ *See* 108 FERC at 61,751.

62. IDFG expressed concern that this amount may be inadequate for the purpose, and stated that water quality mitigation measures should be based on the nature and extent of project impacts and reasonable costs of mitigation and enhancement, rather than a predetermined funding level.¹⁰⁴ The Conservation Groups fault the Commission for not adopting water quality mitigation measures based on IDFG's comment, and for not discussing its decision in the license order. They point out that the Commission is not prevented from requiring water quality mitigation measures that exceed those required by a state water quality certification.¹⁰⁵

63. IDFG's observations about funding levels for water quality were general in nature. IDFG's specific recommendation was that Idaho Power be required to participate in the development and implementation of a TMDL for the Mid-Snake River and C.J. Strike Reservoir, and "fund watershed improvement projects commensurate with its responsibility" for water quality problems.¹⁰⁶ The recommendation with regard to the TMDL is reflected in the water quality certification incorporated into the C.J. Strike license. Moreover, the \$50,000 amount is for development of the TMDL. There is no dollar limit on Idaho Power's funding responsibility to implement the standard once it is established.¹⁰⁷

4. Federal and State Comprehensive Plans

64. FPA section 10(a)(2) requires the Commission to consider the extent to which a project proposal is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project. A licensed project need not, however, be consistent with such plans. If there are inconsistencies, the Commission is required only to explain the reasons why the inconsistent provisions were adopted.¹⁰⁸

¹⁰⁴ IDFG recommendations, March 2, 2001, at 56.

¹⁰⁵ C.J. Strike rehearing request at 36-37.

¹⁰⁶ IDFG recommendations, March 6, 2001, at 62.

¹⁰⁷ C.J. Strike license Appendix A, 108 FERC at 61,769.

¹⁰⁸ *Ompompanoosuc*, 968 F.2d at 1554 (Although the Commission must consider inconsistencies with state plans, a license need not be denied merely because a state agency opposes a particular project.); *FPL Energy Maine Hydro, LLC*, 95 FERC ¶61,016 (2001); *Rumford Falls Power Co.*, 69 FERC ¶61,063 (1994).

(continued...)

65. The license orders state that the Commission identified eleven comprehensive plans applicable to the projects and found no conflicts.¹⁰⁹ Conservation Groups assert that the projects as licensed are inconsistent with four of these plans.

a. **IDFG Fisheries Management Plan**

66. The Conservation Groups state that IDFG's Fisheries Management Plan¹¹⁰ includes the goals of reducing fragmentation of white sturgeon populations in the Mid-Snake River and protecting remaining sturgeon habitat.¹¹¹ They aver that the licenses are inconsistent with these goals because the date for implementing white sturgeon mitigation measures is not settled, because C.J. Strike will not be required to operate in run-of-river mode, and because load-following will be allowed at Bliss and Lower Salmon Falls during the snail studies.¹¹²

¹⁰⁹ 108 FERC at 61,754-55 (C.J. Strike); at 61,627 (Shoshone Falls); at 61,648-49 (Upper Salmon); at 61,671 (Lower Salmon); and at 61,695 (Bliss).

¹¹⁰ Idaho Fisheries Management Plan -- 2001-2006, 2001, Idaho Department of Fish and Game, Boise, Idaho (Fisheries Management Plan).

¹¹¹ C.J. Strike rehearing request at 39. More specifically, the state-wide goals for white sturgeon are to: (1) determine and monitor the status and factors affecting the species; (2) regulate sport fishing; (3) oppose habitat loss or degradation and promote measures to improve the species; (4) restrict importation of non-native sturgeon; and (5) restock native sturgeon where necessary. Fisheries Management Plan at 34-35. The objective specific to the reach where the Mid-Snake projects and C.J. Strike are located is to "[i]ncrease connectivity between isolated white sturgeon populations to increase viability of wild populations" by "working with Idaho Power and FERC to see if upstream passage facilities or sturgeon transporting operations are feasible to reestablish connectivity..." *Id.* at 211.

¹¹² C.J. Strike rehearing request at 39-40; Mid-Snake rehearing request at 44.

67. We note as an initial matter that IDFG has not asserted that there is an inconsistency between the licenses and the state's plan. In fact, there is no inconsistency. IDFG's goals for white sturgeon are broadly stated and do not include schedules. Nothing in the requirement to submit a plan for the conservation of white sturgeon precludes measures to reduce fragmentation or to protect existing habitat and such measures are certain to be considered by Idaho Power and the federal and state agencies and Indian tribes as they develop the plan. To the extent that load-following at Bliss and Lower Salmon Falls during the snail studies may be considered inconsistent with protection of white sturgeon habitat, we have explained elsewhere in this order that it is necessary to ensure that federally-listed listed snails receive appropriate protection.

68. The Conservation Groups also argue that the licenses are inconsistent with the Fisheries Management Plan goal to increase fishing opportunities in the Magic Valley (*i.e.*, the area of southern Idaho encompassing the Snake River valley), on the ground that they do not do enough to restore sturgeon or redband trout populations.¹¹³ We expect the White Sturgeon Conservation Plan, in which FWS and IDFG will be active participants, to benefit the sturgeon fishery.

69. Shoshone sculpin and redband trout are also state species of special concern. Shoshone sculpin are found only in south-central Idaho in or near spring systems, including springs on Idaho Power lands and in the Lower and Upper Salmon Falls and Bliss reservoirs.¹¹⁴ Although the Mid-Snake EIS finds that the projects appear to have minimal impacts on these species,¹¹⁵ the licenses for these projects require Idaho Power to develop a Spring Habitat Management Plan with provisions to protect and restore spring habitat for shoshone sculpin and redband trout spawning and to monitor Shoshone sculpin populations on project lands.¹¹⁶ In addition, the Upper Salmon Falls license

¹¹³ C.J. Strike rehearing request at 39-40; Mid-Snake rehearing request at 44. Redband trout are the native rainbow trout in southwest and south central Idaho, including the Snake River Basin upstream through Shoshone Falls.

¹¹⁴ Mid-Snake EIS at 72-73, 96.

¹¹⁵ Mid-Snake EIS at 247-48.

¹¹⁶ Article 409 in Upper Salmon Falls (108 FERC at 61,656), Lower Salmon Falls (at 61,680), and Bliss (at 61,705). The Shoshone Falls and C.J. Strike licenses do not contain similar requirements because there are no springs associated with these projects.

includes a minimum flow requirement in the Dolman Rapids reach for the protection and enhancement of trout.¹¹⁷

70. The Conservation Groups nonetheless assert generally that the licenses are inconsistent with the state plan because, in their view, only minor amounts of spring habitat will be protected.¹¹⁸ We reject this assertion. The objective of the Fisheries Management Plan with regard to spring habitat is to “[m]aintain existing and recover lost spring habitat along the Snake River in the Snake River aquifer area for Shoshone sculpin and redband trout spawning and rearing habitat” by “continu[ing] strong efforts to preserve undeveloped natural springs with significant fishery values” and “work[ing] with Idaho Power and other private developers to reestablish natural spring habitat at Banbury Springs and other sites [as] the opportunity arises.”¹¹⁹ The above-mentioned Spring Habitat Management Plan is fully consistent with Idaho’s objectives. In this regard, there are 40 spring systems in the area of the Lower and Upper Salmon Falls projects, many of which have stable Shoshone sculpin populations and some of which will be covered by the plan.

71. The Conservation Groups also fault the licenses for lacking details of the fish stocking plans to be submitted by Idaho Power.¹²⁰ The C.J. Strike plan, however, requires Idaho Power to annually stock specific numbers¹²¹ of rainbow trout and catfish, and specifies the size of those fish, as well as the timing and location of the stocking.¹²² The other licenses with fish stocking requirements all require the plan to be filed within

¹¹⁷ Upper Salmon Falls Article 402, 108 FERC at 61,654.

¹¹⁸ Mid-Snake rehearing request at 44.

¹¹⁹ Fisheries Management Plan at 211.

¹²⁰ C.J. Strike rehearing request at 39; Mid-Snake rehearing request at 44.

¹²¹ 75,000 catchable size rainbow trout and 7,500 8-inch channel catfish. *See* 108 FERC at 61,763.

¹²² *See* 108 FERC at 61,763.

one year, to specify the amount of rainbow trout to be stocked, and to specifically identify the stocking locations, timing, numbers and sizes of fish to be stocked.¹²³ These programs are certain to increase fishing opportunities.

b. NPPC Fish and Wildlife Program

72. The Conservation Groups claim that the licenses are inconsistent with the Northwest Power Planning Council's (NPPC) Columbia River Basin Fish and Wildlife Program (Program).¹²⁴ They assert that the Program establishes standards for Commission-licensed projects, including that they provide the best available means for aiding downstream and upstream passage of anadromous and resident fish, but the licenses include no fish passage provisions. They add that the Program mandates that all fish protection measures be fully operational when a project begins operation, and requires Commission licenses to compensate for losses of fish or their habitat through habitat restoration or replacement, propagation, or similar measures¹²⁵ Finally, the Conservation Groups state that the Program requires the Commission to explain in detail how the Program's provisions will be accomplished or why they cannot.¹²⁶

73. First, what the Conservation Groups describe as "requirements" and "standards" are in fact recommendations as to the Commission. As discussed more fully below,¹²⁷ the Northwest Electric Power Planning and Conservation Act (Northwest Power Act)¹²⁸

¹²³ See 108 FERC at 61,656 (Upper Salmon), at 61,680 (Lower Salmon), and at 61,704 (Bliss).

¹²⁴ 2000 Columbia River Basin Fish and Wildlife Program, 2000 (Revised), Northwest Power Planning Council, Portland, Oregon. Appendix B to the Program, from which Conservation Groups take the following quotes, is posted on the NPPC's website. <http://www.nwcouncil.org/library/2000/2000-19/AppendixB.htm>.

¹²⁵ C.J. Strike rehearing request at 8, 40-41.

¹²⁶ C.J. Strike rehearing request at 41; Mid-Snake rehearing request at 45-46.

¹²⁷ See section B.7. -- Northwest Power Act.

¹²⁸ 16 U.S.C. §§ 939, *et seq.*

requires the Commission to take the NPPC's Program into account "to the fullest extent practicable"¹²⁹ We have taken the Program into account by consulting all of the applicable agencies and Indian tribes, including the NPPC, and by requiring continuing consultation with agencies and tribes during the license term as appropriate. We have also addressed the Program matters referenced by the Conservation Groups, and have explained the evidence and reasoning supporting our decisions.

c. Statewide Outdoor Recreation Plan

74. Among the goals of Idaho's Statewide Comprehensive Outdoor Recreation Plan (SCORP)¹³⁰ is the promotion of "a variety of wildlife-dependent recreational opportunities and scientific and educational uses."¹³¹ The Conservation Groups aver that the licenses are inconsistent with this goal because they do not adequately protect the fish and wildlife resources of the Magic Valley.¹³² Initially, we note that Idaho has not made this assertion. We conclude moreover that the operational and monitoring requirements, the plans for mitigation and enhancement with respect to sturgeon, riparian habitat, land management, recreation, wetlands, aquatic vegetation removal, spring and creek habitat, and operation and maintenance of the C.J. Strike Wildlife Management Area will adequately enhance wildlife-dependent recreational opportunities associated with these projects.

75. The Conservation Groups also assert generally that the SCORP goals include protecting streamflow-related recreational opportunities and water quality, but that the licenses fail to do so.¹³³ On the contrary, each license includes a recreation plan

¹²⁹ 16 U.S.C. § 839b(h)(11)(A).

¹³⁰ 1997 Idaho Comprehensive Outdoor Recreation and Tourism Plan, May 1997, Idaho Department of Parks and Recreation, Boise, Idaho (R&T Plan).

¹³¹ C.J. Strike rehearing request at 41, *citing* R&T Plan at 180.

¹³² C.J. Strike rehearing request at 41; Mid-Snake rehearing request at 46, *citing* R&T Plan at 183.

¹³³ C.J. Strike rehearing request at 41; Mid-Snake rehearing request at 46.

requirement. These plans include many provisions for enhancement of all manner of recreational activities on and in proximity to the project reservoirs and riverine areas.¹³⁴ In addition, they include measures to protect water quality by dispersing use, improving sanitation, using vegetation to control bank stability, and providing information to users about ways to reduce the ecological impacts of recreational use.¹³⁵ Finally, the projects are also subject to Idaho's water quality standards and the licenses include monitoring requirements to ensure compliance.

d. State Water Plan

76. The Conservation Groups state that the Snake River in the project area has been designated by the Idaho Water Resources Board (IWRB) as a state protected river, which constitutes a determination that protection of natural, recreational, and scenic values in the area "should be top priorities, while continuing to allow existing uses."¹³⁶ They contend that the license is inconsistent with this designation because it is weighted too heavily in favor of power production and Idaho Power's financial interests.¹³⁷ Assuming the effect of a protected river designation by the IWRB is as Conservation Groups state, their assertion of inconsistency in this regard is too vague to permit a detailed response. We note, however, that the licenses contain significant enhancements to natural, recreational, and scenic values, described above and in the license orders.

¹³⁴ The C.J. Strike license, for instance, requires improvements at nine different recreation sites encompassing roads and parking, camping areas, footpaths, boat docks and mooring sites, navigation, waste disposal and sanitation. *See* 108 FERC at 61,767. *See also* 108 FERC at 61,536 (Shoshone Falls), at 61,658 (Upper Salmon Falls), at 61,682 (Lower Salmon Falls), and at 61,707 (Bliss).

¹³⁵ *Id.*

¹³⁶ C.J. Strike rehearing request at 42; Mid-Snake rehearing request at 46-47, *citing* State Water Plan, 1992 (Revised), Idaho Water Resources Board, Boise at 20.

¹³⁷ *Id.*

5. Fossil Beds

77. Interior recommended run-of-river operation at Bliss and Lower Salmon Falls to, among other things, protect fossil beds at the Hagerman Fossil Beds National Monument.¹³⁸ The Conservation Groups state that this recommendation was rejected without discussion in the license orders.¹³⁹

78. The Mid-Snake EIS discusses this issue. It finds that run-of-river operation would not reduce shoreline slope failures or threats to fossil-bearing formations of the Hagerman National Monument because those problems are caused by groundwater seepage high above the canyon floor and overflow at the canyon rim.¹⁴⁰ We agree with this conclusion.

6. Environmental Impact Statements

79. The Conservation Groups claim that the EISs violate the National Environmental Policy Act of 1969 (NEPA)¹⁴¹ and the Council of Environmental Quality's (CEQ) implementing regulations¹⁴² in several respects.

a. Alternatives Considered

80. Section 102(2)(E) of NEPA¹⁴³ requires action agencies to consider reasonable alternatives to proposed actions. The range of alternatives that must be discussed is a matter within an agency's discretion.¹⁴⁴ The discussion of alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives.¹⁴⁵

¹³⁸ Interior recommendations filed November 17, 2000 at 17.

¹³⁹ Mid-Snake rehearing request at 47.

¹⁴⁰ Mid-Snake EIS at 146-47, 318-19.

¹⁴¹ 42 U.S.C. §§ 4231, *et seq.*

¹⁴² 40 C.F.R. §§ 1500 *et seq.*

¹⁴³ 42 U.S.C. § 4332(2)(E).

81. The Mid-Snake EIS considered four alternative project operation scenarios: (1) load-following as originally licensed;¹⁴⁶ (2) load following with certain enhancements; (3) seasonal run-of-river; and (4) year-round river-of-river. The C.J. Strike EIS also considered four alternative project operation scenarios: (1) load following as originally proposed by Idaho Power; (2) load following with certain environmental enhancements proposed by Idaho Power; (3) load following with additional environmental measures proposed by Commission staff or intervenors, including seasonal run-of-river operation; and (4) year-round run-of-river.

82. The Conservation Groups maintained prior to license issuance that these alternatives are inadequate because the Commission should have considered additional mitigation measures, including resident fish passage, higher minimum flows, spawning gravel enhancements, devices to prevent entrainment of fish in turbines, and flow augmentation to benefit anadromous fish. The Mid-Snake license orders point out that the EIS did consider these recommendations and the licenses include mitigation measures encompassing some of them.¹⁴⁷

83. The Conservation Groups renew their assertions in this connection, and expand the list of potential mitigation measures that they believe should have been included in each of the action alternatives. These additional measures (more restrictive ramping rates, acquisition of more mitigation lands, standards and deadlines for the snail and white sturgeon conservation plans and interim protection measures until they are implemented,

¹⁴⁴ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-52 (1976).

¹⁴⁵ *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976), *citing NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

¹⁴⁶ Except Shoshone Falls, which is operated as a run-of-river facility under all flow conditions. Mid-Snake EIS at 9.

¹⁴⁷ 108 FERC at 61,754 (C.J. Strike), at 61,627 (Shoshone Falls), at 61,648 (Upper Salmon Falls), 61,671 (Lower Salmon Falls), and at 61,695 (Bliss).

more funds for snail conservation, and decommissioning of another Idaho Power project to benefit listed snails)¹⁴⁸ were also appropriately considered or found not to warrant detailed consideration in the EIS, or otherwise rejected for good reason.¹⁴⁹

84. The Conservation Groups also advance a new argument that the EISs consideration of alternatives was inadequate. They appear to contend that a separate alternative or alternatives must be examined with respect to each proposed mitigation or enhancement measure. For example, the C.J. Strike EIS considered ramping rates, which can affect various aquatic species, in the context of the alternatives identified above. The Conservation Groups would evidently have us develop a new set of alternatives based on different ramping rates, another set based on acquisition of varying amounts of additional mitigation lands, another set based on various funding levels for snail conservation, and so forth.¹⁵⁰ Carried to its logical extreme, this approach could result in an EIS that examines dozens of alternatives and sub-alternatives. That would be unduly expensive and time-consuming. Instead, as is our practice, we have grouped individual recommendations into general alternatives for purposes of our analyses.

85. The Conservation Groups do not explain how the EIS analyses would be materially improved by implementing their preferred approach, except to assert generally that more alternatives are better. We conclude that the analytical approach we have taken here, which is the same approach the Commission has employed for decades, provides consideration of a sufficient number of reasonable alternatives and enables us to make an informed decision.

¹⁴⁸ C.J. Strike rehearing request at 45-46; Mid-Snake rehearing request at 51.

¹⁴⁹ Mid-Snake EIS at 243 (interim white sturgeon protection), at 289-90 (mitigation lands), at 211-35 (ramping rates), and at 277 (snail conservation funding).

¹⁵⁰ C.J. Strike rehearing request at 44-45; Mid-Snake rehearing request at 52-53.

b. Comparison of Alternatives

86. The Conservation Groups claim that the EISs comparatively evaluate the alternatives only with respect to economic impacts on Idaho Power and provide an inadequate comparison of the alternatives in terms of environmental costs and benefits.¹⁵¹ To the extent that the Conservation Groups are contending that an EIS needs to present each alternative as a complete package for analytical purposes, we reject that contention. Many proposed mitigation measures would apply to some or all of the operating regime alternatives and have the same effect, regardless of the particular alternative under consideration. For instance, the costs and benefits of the white sturgeon conservation plan and the C. J Strike habitat acquisition requirement are not materially different under any alternative. We think the EIS adequately explains the difference in environmental costs and benefits between the run-of-river and load-following alternatives.

c. Depth of Analysis

87. The Conservation Groups, citing *Robertson v. Methow Valley Citizens Council*, (*Robertson*)¹⁵² assert that NEPA requires mitigation measures, including those not adopted, to be spelled out in detail before the environmental consequences of a proposed action can be adequately evaluated.¹⁵³ They contend that the EIS' fail in this regard because some proposed mitigation measures received minimal discussion¹⁵⁴ and the

¹⁵¹ C.J. Strike rehearing request at 47-48; Mid-Snake rehearing request at 52-54. The Conservation Groups quote CEQ's regulations (40 C.F.R. §1500.8(a)(4)) as stating that an environmental document should include a "comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative." We agree that the environmental document must compare the reasonable alternatives, but are unable to find the cited section or the language quoted by Conservation Groups.

¹⁵² 490 U.S. 332 (1989).

¹⁵³ C.J. Strike rehearing request at 10-11; Mid-Snake rehearing request at 10-11, *citing* 490 U.S. at 352.

¹⁵⁴ The Conservation Groups identify the following potential measures in this regard; load following regimes, salmon flow augmentation, minimum flows, spring flushing flows and other actions to improve spawning gravels, fish passage,
(continued...)

details of the measures required by the license are to be developed in the context of post-license plans developed in consultation with agencies, tribes, and other interested parties.¹⁵⁵

88. The adequacy of an EIS is, however, determined by a rule of reason which requires only a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.”¹⁵⁶ 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. [and] . . . it 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.¹⁵⁷

The environmental analysis contained in the EIS and the license orders is quite detailed and contains enough information for us to take the requisite hard look at the environmental impacts of our orders.

reintroduction of native fishes, funding of land acquisition, and a dam decommissioning fund. C.J. Strike rehearing request at 50; Mid-Snake rehearing request at 55-56.

¹⁵⁵ *Id.* They also assert that NEPA section 102 requires all environmental issues pertaining to a proposed action to be considered in a single environmental document, and that this requirement was not met because of the deferral of final mitigation measures on snails until studies are complete and the fact that details of other mitigation measures will be resolved in the context of post-license plans. C.J. Strike rehearing request at 7; Mid-Snake rehearing request at 7. As discussed above, the Conservation Groups have mischaracterized the license requirements in this regard.

¹⁵⁶ *Columbia Land Basin Protection Ass’n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981), quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

¹⁵⁷ 490 U.S. at 352-53.

d. Cumulative Impacts

89. NEPA requires federal agencies to analyze the potential cumulative environmental impacts of separate, but environmentally interrelated, proposals.¹⁵⁸ The Council on Environmental Quality's regulations define "cumulative impact" as the impact on the environment which results from the incremental impact of the action when added to other "past, present, and reasonably foreseeable future actions," regardless of what agency or person undertakes such actions.¹⁵⁹

90. The Mid-Snake EIS considers the cumulative impacts of federal and non-federal water development and land use activities throughout the Snake River Basin. The cumulative effects analysis zone of effects extends from Milner Dam above Shoshone Falls to Lower Granite Dam below Hells Canyon, a distance of nearly 500 miles. The analysis identifies and discusses in detail cumulative impacts to water quality, sediment transport, resident fish, aquatic mollusks, riparian/wetland habitat, bald eagles and peregrine falcons, native grasslands and shrublands, and recreation.¹⁶⁰ The analysis in the Mid-Snake EIS is cross-referenced in the C.J. Strike EIS.¹⁶¹

91. The Conservation Groups assert that this analysis is inadequate, stating that there is no discussion of significant factors that may contribute to cumulative impacts to the Mid-Snake River. Specifically, they identify the lack of discussion of Idaho Power's existing, unlicensed, Thousand Springs hydropower project, anadromous fish, and the White Sturgeon Conservation Plan.¹⁶²

¹⁵⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 409-410 (1976); *Sierra Club v. Penfold*, 857 F.2d 1307, 1320-21 (9th Cir. 1988).

¹⁵⁹ 40 C.F.R. § 1508.7.

¹⁶⁰ Mid-Snake EIS at 37-80 and 335-57.

¹⁶¹ C.J. Strike EIS section 5, at 234-36.

¹⁶² C.J. Strike rehearing request at 52-53; Mid-Snake rehearing request at 57-58.

92. Thousand Springs is an 8.8-MW plant located at river mile 584.7 of the Snake River, between Upper Salmon Falls and Shoshone Falls. This project does not draw water from the Snake River, but intercepts spring flow emanating from the surrounding cliffs and channels that water to the Thousand Springs powerhouse via a canal, from whence it is released into the Snake River. Although this small, off-river project is mentioned in the EIS,¹⁶³ it does not warrant prominent discussion in the context of the geographically and topically wide-ranging cumulative impacts analysis.¹⁶⁴

93. The cumulative effects discussion does not discuss anadromous fish specifically because upstream migration of anadromous fish has been limited for many years to the base of Hells Canyon dam, which is about 250 miles below C.J. Strike and about 300 miles below the first of the Mid-Snake projects.¹⁶⁵ The Mid-Snake EIS also discusses in some detail the various efforts being made by federal and state resource agencies and others to modify the quantity, seasonal distribution, and quality of river flows from the upper Snake River Basin to restore threatened and endangered salmonids throughout the Columbia-Snake River basin.¹⁶⁶ In addition, the cumulative effects discussion identifies factors attributable to hydroelectric projects which contribute to current conditions for

¹⁶³ See Mid-Snake EIS at 45, 127, 157, A-57, and A-172.

¹⁶⁴ Flows and resources in the Thousand Springs project are discussed in the Mid-Snake EIS at 51, 69, 75-77, 96, 105, 109, 111, 114, 120, and 154.

See also *Allegheny Electric Cooperative*, 48 FERC ¶61,363 at 62,388-90 (1989), *reh'g. denied*, 51 FERC ¶61,268 (1990) (Commission's EISs are not required to examine the potential cumulative impacts of every licensed, exempted, proposed, and reasonably potential hydropower project in a river basin), *aff'd on other grounds sub nom.*, *U.S. Dept. of Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992)

¹⁶⁵ See Mid-Snake EIS, Figure 1-1 at 5.

¹⁶⁶ Mid-Snake EIS at 45-51. As noted, the C.J. Strike EIS cross-references this discussion.

resident fish and reasonably foreseeable conditions. The impacts identified in this discussion are largely the same for resident fish as for anadromous fish.¹⁶⁷ The Mid-Snake EIS also discusses the impacts of salmon augmentation flows.¹⁶⁸

94. The Conservation Groups' assertion that the cumulative effects discussion should have included effects of the White Sturgeon Conservation Plan ignores the record, which shows that many factors may be contributing to the decline of this species.¹⁶⁹ In such a complex situation, the impacts of the conservation plan measures, cumulative and otherwise, will only be known after they have been developed and implemented, and data has been collected in order to determine how well the plan goals and objectives are being met. If those goals and objectives are not being met, we have retained authority in the fish and wildlife reopeners to require any necessary modifications.

95. Finally, the Conservation Groups charge that the cumulative impacts analysis is too general, apparently because it does not explain in detail how each action alternative would interact with each factor contributing to cumulative impacts.¹⁷⁰ NEPA does not require such precision. As noted above, NEPA requires only a reasonably thorough discussion of the significant aspects of the probable environmental consequences. We believe that standard has been met.

¹⁶⁷ *I.e.*, inundation of riverine habitat, blockage of migration, entrainment and turbine mortality, flow fluctuations associated with load following, and reduced flows in the bypassed reaches at some projects. Mid-Snake EIS at 340.

¹⁶⁸ Mid-Snake EIS at 352-53.

¹⁶⁹ C.J. Strike EIS at 44-45, 109-137; Mid-Snake EIS at 60-68, 95-103, 188-98. Factors contributing to the decline of this species 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.

¹⁷⁰ C.J. Strike rehearing request at 51; Mid-Snake rehearing request at 57.

e. **Preferred Alternative**

96. The Conservation Groups state that CEQ's regulations require a final EIS to identify a preferred alternative, unless that is prohibited by another law, but that the C.J. Strike EIS fails to do so.¹⁷¹ In the license orders, we chose a preferred alternative by issuing the licenses under the terms and conditions we have selected. While Commission staff prepares our environmental documents, it is our orders which represent the final decisions on the environmental and other aspects of the proceedings before us.¹⁷² Thus, our selection of a preferred alternative in the license orders was consistent with CEQ regulations. Moreover, the Conservation Groups have not alleged any harm to them from the absence of a preferred alternative in the EISs. Because we selected a preferred alternative in the licensing orders, the Conservation Groups have had, and have availed themselves of, an opportunity to comment on the complete environmental record.

f. **Energy Sources and Conservation**

97. The Mid-Snake EIS finds that conversion of the projects from load-following operation to seasonal or year-round run-of-river would reduce dependable capacity, and that the most likely source of replacement capacity is fossil-fueled generation.¹⁷³

¹⁷¹ C.J. Strike rehearing request at 46; Mid-Snake rehearing request at 52, *citing* 40 C.F.R. § 1502.14(e). This provision states, in relevant part, that the action agency:

shall: . . . (e) identify the agency's preferred alternative or alternatives, if one or more exists, in the draft document and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

¹⁷² *See, e.g.*, Mead Corporation, 76 FERC ¶ 61,352 at 62,661 (1996).

¹⁷³ For instance, implementing year-round run-of-river at Lower Salmon Falls would cause a 14,091-MWh decrease in on-peak generation and a 34.7-MW decrease in dependable capacity. The equivalent figures for Bliss are 14,791-MWh and 38 MW. Mid-Snake EIS at 392. Changing to year-round run-of-river at C.J. Strike would reduce dependable capacity by 53.4 MW. C.J. Strike EIS at 210. Both EISs use a combined cycle gas combustion turbine to estimate the cost of replacement power for this dependable capacity. Mid-Snake EIS at 360; C.J. Strike EIS at 205.

98. The Conservation Groups state that the Mid-Snake EIS does not include any discussion of conservation as an alternative to the loss of generating capacity from changing project operations, contrary to CEQ's regulations.¹⁷⁴ They assert that there is a great potential for energy conservation¹⁷⁵ They add that Idaho Power is preparing to solicit proposals for wind and geothermal power, and that solar energy is also rapidly gaining ground in the region.¹⁷⁶ Thus, they suggest, there may be no need to replace dependable capacity lost from changing to run-of-river and, if there is, that need can be met with non-fossil fuel sources that do not cause harmful air emissions.

99. Idaho Power has programs to promote cost-effective conservation and load management for its residential, commercial, industrial, and agricultural customers,¹⁷⁷ and expects to add substantial additional load management and efficiency programs.¹⁷⁸ Idaho Power has, however demonstrated a need for additional sources of power over the long-term, even taking into account its plans to solicit non-fossil generation sources.¹⁷⁹ Thus, we have sufficiently addressed this issue.

7. Columbia River Basin Fish and Wildlife Program

100. The Northwest Electric Power Planning and Conservation Act (Northwest Power Act)¹⁸⁰ was enacted to assure the Pacific Northwest of adequate and economical power supply and to protect and enhance the fish and wildlife resources, particularly

¹⁷⁴ 40 C.F.R. § 1502.16(e) provides that an environmental document is to include a discussion of "energy requirements and conservation potential of various alternatives and mitigation measures."

¹⁷⁵ Mid-Snake rehearing request at 59.

¹⁷⁶ *Id.*

¹⁷⁷ *See e.g.*, 108 FERC at 61,627 (Shoshone Falls) and license application Exhibit H.

¹⁷⁸ Mid-Snake rehearing request at 59.

¹⁷⁹ Mid-Snake EIS at 2; C.J. Strike EIS at 2.

¹⁸⁰ 16 U.S.C. § 839, *et seq.*

anadromous fish, of the Columbia River and its tributaries. The Northwest Power Act establishes the NPPC and charges it with developing the Program referenced above, which consists of measures to protect and enhance fish and wildlife affected by the development of hydroelectric projects in the region while assuring that the Pacific Northwest has an adequate and economical power supply.

101. The Northwest Power Act imposes three obligations on the Commission:

In exercising its existing statutory responsibilities, the Commission must provide “equitable treatment” to fish and wildlife;

at each relevant stage of its decision-making processes, the Commission must take the Program into account “to the fullest extent practicable;” and

in carrying out the above two responsibilities, the Commission must consult with a variety of entities and, to the “greatest extent practicable,” coordinate its actions with other agencies and Indian tribes.¹⁸¹

102. The phrase “equitable treatment” is not defined in the Northwest Power Act, but has been construed in the context of BPA’s operation of the Federal Columbia River Power System to require federal agencies with such responsibilities to treat fish and wildlife “on par with power.”¹⁸² An entity challenging the actions of such agencies “must show that, overall, [the federal agency] treats fish second to power.”¹⁸³ The federal agency’s duty to comply with this mandate “matures only when [the federal agency] makes a final decision that significantly affects fish and wildlife.”¹⁸⁴

¹⁸¹ 16 U.S.C. § 839b(h)(11)(A) and (B).

¹⁸² *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Administration*, 342 F.3d 924, 931 (9th Cir. 2003).

¹⁸³ *Id.*, 342 F.3d at 931.

¹⁸⁴ *Id.* The court held that BPA had fulfilled the equitable treatment mandate through its efforts under the Program to implement a multi-species, long-term Basin-Wide Salmon Recovery Strategy. *Id.* at 931-32.

103. The Conservation Groups assert that the license order does not meet the equitable treatment standard because it gives more favorable treatment to power generation and Idaho Power's financial considerations than to fish and wildlife. In support, they refer to the post-license study and plan requirements for sturgeon and listed snails, the absence of fish passage, less habitat restoration acquisition than was recommended by FWS and IDFG, continuation of load-following, and our alleged failure to appropriately value the benefits of river restoration.¹⁸⁵ As discussed in the license orders and above, we conclude that the licenses strike an appropriate balance between developmental values and the protection and enhancement of fish and wildlife resources.

8. Endangered Species

104. The joint agency regulations implementing ESA section 7(a)(2)¹⁸⁶ state that the consultation process is complete when the ESA agency has issued a Biological Opinion.¹⁸⁷ FWS issued a Biological Opinion in May 2004. The Biological Opinion, which is based on the settlement, concludes that although load following operation is likely to adversely affect one listed species of snail, the project is not likely to jeopardize the continued existence of any of the listed snail species.¹⁸⁸

105. The joint agency regulations notwithstanding, the Conservation Groups claim that consultation is not complete because the settlement provides for additional studies of project operations on listed snails and the possibility of changes in project operations as a result of those studies.¹⁸⁹ We disagree. The regulations are plain and FWS has

¹⁸⁵ CJ Strike rehearing request at 42-43; Mid-Snake rehearing request at 47-48.

¹⁸⁶ 16 U.S.C. § 1536(a)(2).

¹⁸⁷ 50 C.F.R. § 402.14(l).

¹⁸⁸ 108 FERC at 61,750-51.

¹⁸⁹ C.J. Strike rehearing request at 57-59; Mid-Snake rehearing request at 63-66. The Conservation Groups position that consultation is incomplete also leads them to argue: (1) the possibility of post-license adjustments to the project's operating mode violates ESA section 7(a)(2)'s prohibition on irreversible or irretrievable commitments of resources with respect to the agency action prior to the completion of consultation (at 59); and (2) the settlement violates 40 C.F.R. § 402.14(e), which provides for formal consultation to conclude within 90 days unless it is extended. C.J. Strike rehearing
(continued...)

concluded that consultation is complete.¹⁹⁰ Moreover, mitigation measures are never carved in stone. Even if the snail protection plan was final today, there is no guarantee that it would not be modified in the future in light of experience.

106. The Conservation Groups also claim that the license and Biological Opinion violate the APA's requirement for agencies to act within a "reasonable time,"¹⁹¹ because the run-of-river requirements at Bliss and Lower Salmon Falls may be changed six or more years in the future as a result of the snail studies.¹⁹² The requirement for the federal agency to act on the matter before it in a reasonable time is procedural; it does not govern the content of the agency's action.¹⁹³ We completed consultation in a reasonable time. The fact that the results of that consultation, or future efforts to protect threatened or endangered species, may require actions at some point in the future does not in any way vitiate the validity of that process.

request at 60; Mid-Snake rehearing request at 66. Since we have concluded that consultation is complete, we need not address these assertions.

¹⁹⁰ FWS letter transmitting Biological Opinion, filed May 18, 2004, at 2. The Conservation Groups also argue that further consultation and a new Biological Opinion will be required at the end of the study period because conditions in the river will have changed and the Snail Protection Plan may propose changes in license terms and conditions that will constitute a new federal action. C.J. Strike rehearing request at 67-68. This argument is premature.

¹⁹¹ 5 U.S.C. § 555(b) provides, in pertinent part:

With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

¹⁹² C.J. Strike rehearing request at 60; Mid-Snake rehearing request at 66.

¹⁹³ See, e.g., *City of Virginia Beach v. FERC*, 42 F.3d 881 (4th Cir. 1994) (mandamus relief not warranted where EIS would not be completed until nearly four and one-half years after filing of license application).

107. ESA section 7(a)(2) requires federal agencies to “use the best scientific and commercial data available” in carrying out their responsibility, in consultation with FWS, to ensure that any actions they authorize are not likely to jeopardize the continued existence of any listed species.¹⁹⁴ The Conservation Groups claim that we have failed in this regard by deferring snail protection measures until the settlement studies are completed instead of using the existing evidence in the record regarding impacts to snails to require immediate protection measures.¹⁹⁵ In support, they cite various judicial holdings to the effect that agencies cannot always wait until conclusive data is available before acting to protect listed species¹⁹⁶ and that the benefit of any doubt must be given to the listed species.¹⁹⁷

108. The decisions cited by the Conservation Groups are not inconsistent with our decision to accept the settlement. FWS has determined in its Biological Opinion that project operations during the testing period will adversely impact the listed species, but will not jeopardize their continued existence.¹⁹⁸ Our independent review does not lead us to a different conclusion.¹⁹⁹ Also, as noted, the licenses contain immediately effective measures that will benefit the listed species.

¹⁹⁴ See 16 U.S.C. § 1536(a)(2).

¹⁹⁵ C.J. Strike rehearing request at 60-64; Mid-Snake rehearing request at 67-70. The Conservation Groups make the same allegation against FWS, which is not a matter for this Commission, but for a court with jurisdiction to review FWS’ Biological Opinion.

¹⁹⁶ Citing *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.DC 1997); *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1993).

¹⁹⁷ Citing *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *TVA v. Hill*, 437 U.S. 153, 180 (1978). See also Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under section 7 of the Endangered Species Act, U.S. Fish and Wildlife Service and National Marine Fisheries Service at 1-6.

¹⁹⁸ Biological Opinion at 89-92.

¹⁹⁹ See EIS at 176-78.

109. The Conservation Groups further allege that the settlement unlawfully delegates to Idaho Power the Commission's responsibility under the ESA section 7(a)(2) to ensure that its actions do not jeopardize listed species, on the ground that it requires- Idaho Power's agreement to the Snail Protection Plan.²⁰⁰ In fact, neither the settlement agreement nor the implementing license articles require Idaho Power's agreement. Rather, the settlement agreement provides for Idaho Power and FWS to attempt to jointly prepare a plan and, if they do not agree, for Idaho Power to file a plan for Commission approval. FWS would have the opportunity to comment on the proposed plan, and retains the right to recommend that the Commission reinstate ESA section 7 consultation.²⁰¹ The implementing license article similarly requires Idaho Power to submit a plan for Commission approval after consulting with FWS and IDFG, and we have reserved authority to modify the proposed plan as required by the public interest.²⁰²

110. Finally, the Conservation Groups state that the plan should be treated as a license amendment application, with a new environmental document and opportunity for public comment. The plan may include changes in project facilities or operations sufficient to require a license amendment application, but also may not,²⁰³ so it would be premature to make any determination in this regard.

²⁰⁰ C.J. Strike rehearing request at 65-66; Mid-Snake rehearing request at 71-72. The Conservation Groups also argue that FWS' agreement to additional studies violates FWS' ESA responsibilities in this regard. *Id.* As noted, allegations concerning FWS' compliance with the ESA are not properly brought before this Commission.

²⁰¹ Settlement Agreement section 4.4.1.

²⁰² *See, e.g.*, C.J. Strike Article 412, 108 FERC at 61,763.

²⁰³ While any change to a project or the terms of a license constitutes an amendment of the license, changes involving no substantial modification of the authorized general scheme of development do not require an amendment application pursuant to the requirements of 18 C.F.R. § 4.200. *Lester C. Reed v. Georgia Power Co.*, 94 FERC ¶61,404 at 62,511 (2001) (letter proposing change in method of estimating project inflows not a material change in scheme of development and did not require an amendment to the license); *Citizens Utility Co.*, 68 FERC ¶61,310 at 62,286 (1994) (modifications to spillway to restore project operation following failure of dam abutment under high flows did not require an amendment application).

9. Corrections

111. Ordering Paragraph (B)(1) of the license order for C.J. Strike Project No. 2055, which describes the project boundary, refers to Exhibit G, filed on November 24, 1998. On August 9, 1999, Idaho Power filed an updated Exhibit G, in which sheets 7 and 9 (drawing numbers 2055-1014 and 2-55-1016, respectively) contained corrected figures for the number of acres of federal land used for transmission lines. Accordingly, Ordering paragraph (B)(1) will be corrected.

112. Also on August 9, 1999, Idaho Power filed updated pages for Exhibit A to the C.J. Strike license application, listing the correct total number of acres of federal land used for transmission lines. Accordingly, Article 201 of the license will be corrected to change the reference from “391.04” acres to “376.63” acres.

The Commission orders:

(A) The requests for rehearing filed on September 2, 2004 by Idaho Rivers United and American Rivers are denied.

(B) Ordering Paragraph (B)(1) of the license order for the C.J. Strike Project No. 2055, 108 FERC at 61,758, is corrected to change “November 24, 1998” to “August 9, 1999.”

(C) Article 201 of the project license for C.J. Strike Project No. 2055, 108 FERC at 61,759, is corrected to change “391.04” to “376.63.”

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.