140 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Turlock Irrigation District and
Modesto Irrigation District

Project No. 2299-077

ORDER DENYING REHEARING

(Issued September 20, 2012)

1. On May 21, 2012, the National Marine Fisheries Service (NMFS) filed a request for rehearing of our Order Clarifying Proceeding on Interim Conditions, which we issued in this proceeding for the Don Pedro Hydroelectric Project No. 2299 on April 19, 2012.[1] The project is located on the main stem of the Tuolumne River in Tuolumne County in the Central Valley of California, about 115 miles east of San Francisco. The current license expires in 2016, and the relicensing process is underway.

2. For the reasons discussed below, we affirm our findings in our April 19, 2012 order. Specifically, we affirm that, because the Commission previously found that interim conditions are not warranted and the proceeding on interim conditions ended without either an agreement among the parties or a recommendation for Commission action, no further action is required with respect to that proceeding. We also affirm that, because some required studies are not yet complete and relicensing is now underway, it is not feasible to begin a new proceeding to reopen the license and determine whether to impose interim measures pending relicensing. We therefore deny rehearing.

[1] *Turlock and Modesto Irrigation Districts*, 139 FERC ¶ 61,045 (2012).

Background

3. A more detailed procedural history appears in our April 19, 2012 order,[2] as well as in our July 16, 2009 order directing the appointment of a presiding judge for a non-adversarial fact-finding proceeding on possible interim measures pending relicensing.[3] Briefly, the Commission issued an original license for the 161-megawatt Don Pedro Project in 1964, with specified minimum flow releases for the first 20 years of operation followed by the possibility of changes to those minimum flows, and a requirement to study the Tuolumne River fishery and how it could be feasibly sustained.[4] In 1996, after the parties reached a settlement on proposed changes to minimum flows, the Commission amended the license to implement the minimum flows and fishery monitoring studies provided for in the settlement agreement.[5] As amended, Article 37 of the license required revised minimum flows to benefit fishery resources, and allowed some changes to those flows by agreement among the Districts, California Department of Fish and Game (California DFG), and U.S. Fish and Wildlife Service (FWS). Article 58 required the Districts, after consulting with California DFG and FWS, to implement a monitoring plan to identify benefits to the Chinook salmon fishery resulting from improved environmental conditions, and to file the results of fisheries monitoring studies in 2005.

4. In 1998 while the studies were underway, NMFS listed Central Valley steelhead as threatened under the Endangered Species Act (ESA). Four years later in 2002, NMFS requested that the Commission initiate formal consultation under the ESA to consider the effects of the Don Pedro Project on Central Valley Steelhead. In 2003, NMFS filed a petition requesting that the Commission amend the license to require interim minimum flows pending relicensing to benefit steelhead as well as Chinook salmon, and also requesting that the Commission initiate formal ESA consultation on the effects of the Don Pedro Project on steelhead. The Commission deferred action on the petition because the parties were consulting informally on the possible need for changes in minimum flows, with the Districts acting as the Commission's non-federal representative.[6]

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[2] *Id*. PP 2 - 25.

[3] *Turlock and Modesto Irrigation Districts*, 128 FERC ¶ 61,035 at PP 2-27 (2009) (July 2009 Order).

[4] *Turlock and Modesto Irrigation Districts*, 31 FPC 510 (1964), *aff'd sub nom. California v. FPC*, 345 F.2d 917 (9th Cir. 1965).

[5] *Turlock and Modesto Irrigation Districts*, 76 FERC ¶ 61,117 (1996).

[6] *Turlock and Modesto Irrigation Districts*, 105 FERC ¶ 61,332 (2003).

5. After the Districts filed their report on fisheries studies in 2005, Commission staff approved the report in 2008 and required additional reports and monitoring, with a report due in 2010.[7] Several parties sought rehearing. In our July 2009 Order, we granted in part and denied in part the requests for rehearing. We denied the NMFS petition to amend the license and to initiate formal ESA consultation.[8] We denied the requests of NMFS, FWS, and Conservation Groups to amend the license to require the agencies' recommended flow schedule on an interim basis pending relicensing.[9] We required further studies and amended the license to add NMFS as an agency to be consulted on the studies and on any authorized changes to the minimum flow release schedule.[10] Finally, we directed the appointment of an administrative law judge to conduct a non-adversarial fact-finding proceeding to assist the parties in assessing the need for and feasibility of possible interim measures to benefit Central Valley steelhead and fall-run Chinook salmon pending relicensing.[11]

6. In 2009, the presiding judge held a site visit and hearings, and provided a preliminary and a final report. The preliminary report discussed measures that the Districts were willing to implement voluntarily, but with which the other parties disagreed or did not consider adequate.[12] The final report summarized the conflicting testimony of the various witnesses and made some limited findings concerning project effects and the agency-recommended flows.[13] However, the report did not suggest any possible basis for agreement among the parties, and the judge did not recommend any specific interim measures that could be implemented pending relicensing.[14] The parties filed comments on the report in January 2010. Later that year, Commission staff issued

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[7] *Turlock and Modesto Irrigation Districts*, 123 FERC ¶ 62,012 (2008).

[8] July 2009 Order, 128 FERC ¶ 61,035 at PP 40, 47.

[9] *Id*. PP 51-52, 85, and Ordering Paragraph (E).

[10] *Id*. PP 92-93, 97-98.

[11] *Id*. P 99.

[12] *See Preliminary Report* at 1-4, 5 (issued Aug. 27, 2009).

[13] *See Final Report of the Presiding Judge on Interim Measures*, 129 FERC ¶ 63,095, at PP 270-292 (2009) (issued Nov. 20, 2009).

[14] *Id*. P 291-292.

several orders modifying and approving the Districts' fisheries monitoring reports and study plans.[15]

7. On December 28, 2010, Conservation Groups filed a request for final action on the proceeding on interim measures pending relicensing. On April 8, 2011, staff issued notice of the beginning of the pre-filing process and environmental scoping for relicensing the Don Pedro Project. On April 19, 2012, we issued our Order Clarifying Proceeding on Interim Conditions, finding that no final action was required with respect to that proceeding and that, because relicensing is now underway, it is not feasible to begin a new proceeding to determine whether to impose interim measures pending relicensing.[16] NMFS seeks rehearing of that order.[17]

Discussion

8. On rehearing, NMFS raises a number of arguments, some of which we addressed previously in our July 2009 Order. To the extent that NMFS failed to seek rehearing of any final actions that we took in that or previous orders, the deadline to seek rehearing of those actions has long passed, and NMFS may not seek rehearing of them now by including them in a request for rehearing of our April 19, 2012 order.[18] Specifically, as discussed in more detail below, NMFS may not now argue that orders issued in 2008 and 2009 required the Commission to initiate formal ESA consultation or violated

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[15] *See Turlock and Modesto Irrigation Districts*, 139 FERC ¶ 61,045 at PP 17-20.

[16] *Id*. P 1.

[17] Together with its request for rehearing, NMFS filed a motion to intervene, noting that it had timely intervened in these proceedings on July 25, 2005 (in response to Commission staff's notice of the Districts' fisheries report), and had actively participated as a party, including full participation in the non-adversarial fact-finding proceeding on interim measures that was the subject of Conservation Groups' request for final action and the Commission's April 19, 2012 order. NMFS states that it filed its motion to intervene "out of an abundance of caution." NMFS Request for Rehearing at 2. We confirm that NMFS was already a party to the proceeding and did not need to file a new motion to intervene.

[18] *See* 18 C.F.R. § 385.713(b) (2012), which provides that a party must file a request for rehearing "not later than 30 days after issuance of any final decision or other final order in a proceeding." Under section 313 of the FPA, 16 U.S.C. § 825*l*(a) (2006), a party aggrieved by a Commission order must first seek rehearing before the Commission as a prerequisite to filing a request for judicial review, and the latter request must be filed within 60 days after the Commission's order on rehearing.

section 7(a)(1) of the ESA, or that the July 2009 Order failed to properly balance developmental and environmental values in the public interest under section 4(e) of the Federal Power Act (FPA).

9. NMFS states that it "incorporates by reference and reasserts every allegation of fact and law set forth in its previous filings in this matter."[19] NMFS further states that, "[t]o the extent consistent with NMFS' interests in these proceedings, NMFS also incorporates by reference, adopts, and reasserts every allegation of fact and law set forth in the Conservation Groups' December 2010 Request for Final Action."[20] We reject these statements. Under our regulations, parties seeking rehearing must include a separate section entitled "Statement of Issues, listing each issue in a separate paragraph that includes representative Commission and court precedent, and any issue not so listed will be deemed waived.[21] Parties cannot expect the Commission to review their past filings or the filings of other parties in order to attempt to discern what issues they might be raising or what arguments they might be seeking to make on those issues.[22]

10. NMFS argues that the Commission's failure to issue a timely decision on the need for interim measures violates section 706(1) of the Administrative Procedure Act (APA).[23] NMFS further argues that our determination in the April 19, 2012 order that a decision was not warranted is erroneous and not supported by the record.

11. In our April 19, 2012 order, we addressed Conservation Groups' similar argument that the Commission had unreasonably delayed a final order on the need for interim measures. We explained that our July 2009 Order had previously found that interim measures were not warranted, and the interim conditions proceeding ended without either an agreement among the parties or a judge's recommendation that specific interim measures could feasibly be implemented pending relicensing. As a result, neither the proceeding nor the judge's final report provided a basis for changing our July 2009

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[19] NMFS Request for Rehearing at 4.

[20] *Id*.

[21] 18 C.F.R. § 385.714(c)(2) (2012).

[22] *See* FPA section 313(a), 16 U.S.C. § 825*l*(a) (2006) (application for agency rehearing must "set forth specifically the ground or grounds upon which such application is based"); *see also Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (rejecting petitioner's arguments raised on rehearing merely by incorporating by reference sections of its prior pleading).

[23] 5 U.S.C. § 706(1) (2006).

findings. We noted that section 706(1) of the APA concerns judicial review, and provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."[24] We added that, under section 555(b) of the APA, agencies must conclude matters presented to them "within a reasonable time."[25] We explained that a decision was not unreasonably delayed because no action was called for in these circumstances.[26]

12. NMFS argues that our July 2009 Order was not a final decision on the need for interim conditions, because the order "is replete with reference to the Commissions' acknowledged need and intent to further consider the need for interim measures pending relicensing of the Don Pedro Project."[27] In support, NMFS includes numerous quotes from the July 2009 Order, stating that "interim conditions may be needed"[28] and that "additional procedures will be necessary to assist in determining whether interim measures should be required pending relicensing, and, if so, what measures are feasible."[29] NMFS argues that the July 2009 Order clearly required the Commission to take final action on the proceeding on interim measures, and our failure to do so in a reasonable time violates the APA.

13. NMFS misunderstands the nature of the proceeding on interim conditions. The non-adversarial fact finding proceeding before a settlement judge was not a proceeding to reopen the license. Rather, it was intended to assist the parties in determining whether there might be some basis for agreement on interim conditions and, if not, whether the presiding judge could recommend any measures that might feasibly be implemented pending relicensing. It was our hope that the parties might reach agreement on interim

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[24] *Id*.

[25] *Id*. § 555(b).

[26] NMFS does not brief its argument that our failure to take final action on the proceeding on interim measures within a reasonable period of time violates section 706(1) of the APA. Instead, NMFS states in a footnote that "we incorporate by reference and adopt the argument and citation contained in the Conservation Groups' Request for Final Action on this point." As explained earlier, this argument is waived for failure to meet the requirements of our rehearing rule. In any event, as discussed above, we addressed Conservation Groups' arguments on this point in our April 19, 2012 order.

[27] NMFS Request for Rehearing at 5.

[28] July 2009 Order, 128 FERC ¶ 61,035 at P 52.

[29] *Id*. P 86.

measures, and, if they were unable to do so, that the presiding judge might recommend some interim measures that we could feasibly require. Without an agreement, however, we would still be required to begin a proceeding to reopen the license before we could require any interim measures. As we noted in the July 2009 Order, we would also likely be required to prepare a full environmental review of the proposed measures and any alternatives. Moreover, the fact that the Commission suggested the possibility that interim measures may be needed in the future does not bind the Commission to imposing any measures.[30]

14. In a similar case involving the Cushman Hydroelectric Project (cited in our July 2009 Order),[31] although the parties did not reach agreement the presiding judge made a clear recommendation for an interim minimum flow, together with evidence and reasons in support of the recommendation.[32] In those circumstances, we determined that the appropriate course of action was to partially lift a stay of the new license for the project to require the release of the recommended minimum flows.[33] In this case, the proceeding on interim conditions produced neither an agreement among the parties nor a recommendation from the presiding judge on interim measures that could feasibly be implemented pending relicensing. Therefore, there was no basis for taking any final action on interim measures, other than perhaps to acknowledge that the proceeding concluded without providing any clear path for moving forward with interim measures, as we did in our April 19, 2012 clarification order.

15. NMFS argues that we erred in determining that the need for interim measures was finally decided in the July 2009 Order, and is not now subject to challenge. NMFS adds that the record does not support this determination. NMFS contends that in the April 19, 2012 clarification order, the Commission "not only attempts to rewrite history, it also

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[30] *See Council of the City of New Orleans v. FERC*, 2012 U.S. App. LEXIS 16923, 8-9 (D.C. Cir. Aug. 14, 2012) (*citing Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

[31] *See* July 2009 Order, 128 FERC ¶ 61,035 at P 87 n.83 and P 99 n.91.

[32] *See City of Tacoma, Washington*, 104 FERC ¶ 61,324 (2003) (directing appointment of a settlement judge for a proceeding on interim conditions).

[33] *See City of Tacoma, Washington*, 107 FERC ¶ 61,288 (2004), *on reh'g*, 110 FERC ¶ 61,140 (2005), *reh'g denied*, 110 FERC ¶ 61,239 (2005). The court subsequently issued its own stay pending judicial review. *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 62 (D.C. Cir. 2006). Because of the need to design and install a flow release valve, the licensee did not begin releasing the minimum flows until 2008.

denies the parties to this proceeding due process."[34] In support, NMFS points out that, in the July 2009 Order, the Commission stated: "We do not currently have sufficient information to conclude that the agency-recommended flows should be required on an interim basis."[35] From this statement, NMFS concludes that "neither did the Commission have sufficient information to conclude that the agency-recommended conditions should *not* be required."[36] NMFS further concludes that the purpose of the interim conditions proceeding was "to develop the record sufficiently enough to make a final determination on whether interim conditions were warranted."[37]

16. NMFS' conclusion is incorrect. Given that the FPA requires that our decisions be supported by substantial evidence,[38] the absence of sufficient information to support a conclusion that the agency-recommended flows be required precluded us as a matter of law from imposing them. Moreover, NMFS overlooks our stated concern in the July 2009 Order that we lacked sufficient information regarding the effects of these flows and reasonable alternatives on the full range of interests that would be affected, including not only fishery resources, but also power generation, irrigation, flood control, and water supply.[39] We added that, because of the potential for significant impacts on municipal, agricultural, and industrial water use, we would likely need to prepare an environmental review document before we could recommend amending the license to require these flows.[40] The proceeding on interim measures did not produce this needed information.

17. Moreover, under section 6 of the FPA, licenses may be altered "only upon mutual agreement between the licensee and the Commission after thirty days' public notice."[41] The Commission may begin a proceeding to reopen and amend a license only if it has included in the license a reservation of its authority to do so.[42] In this case, Article 37 of

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[34] NMFS Request for Rehearing at 8. NMFS does not brief or otherwise explain its due process argument, so this argument is waived.

[35] July 2009 Order, 128 FERC ¶ 61,035 at P 85.

[36] NMFS Request for Rehearing at 8 (emphasis added).

[37] *Id*.

[38] *See* FPA section 313(b), 16 U.S.C. § 825*l*(b) (2006).

[39] July 2009 Order, 128 FERC ¶ 61,035 at P 85.

[40] *Id*.

[41] 16 U.S.C. § 799 (2006).

[42] *See Pacific Gas & Electric Co. v. FPC*, 720 F.2d 78 (D.C. Cir. 1983);

(continued)

the project license reserves the Commission's authority to prescribe minimum flows "after notice and opportunity for hearing . . . ."[43] Thus, absent an agreement among the parties, we could not act unilaterally to amend the license to require interim measures without first determining that the license should be reopened, and providing notice and an opportunity for a hearing. For this reason, we hoped that the proceeding on interim conditions would provide us with a way to move forward with measures that could feasibly be implemented pending relicensing.

18. NMFS also argues that it "cannot now fathom how it could have known to request rehearing of what appeared at the time to be a favorable result."[44] NMFS points out that the July 2009 Order granted in part NMFS' July 2008 request for rehearing by directing the appointment of a presiding judge for an expedited proceeding on possible interim measures to benefit Central Valley steelhead and fall-run Chinook salmon pending relicensing, and to claim now that the Commission had already reached a final decision on the need for interim measures in July 2009 is not supportable in the record.

19. The interim measures proceeding did hold out the possibility that some measures might later be required pending relicensing. As a result, the discrete portion of the July 2009 Order that established the proceeding was arguably non-final, as well as interlocutory, and thus not subject to rehearing and judicial review. However, other aspects of the order were clearly final. Specifically, we denied NMFS's request for rehearing of Commission staff's April 3, 2008 order determining that no change to the license was required and that, as a result, there was no need to reopen and amend the existing license.[45] We also denied NMFS' petition to modify project structures and operations, as well as its request to initiate consultation pursuant to section 7(a)(2) of the

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California v. FPC, 345 F.2d 917 (9th Cir. 1965).

[43] *See California v. FPC*, 345 F.2d at 922 (quoting in part Article 37 of the Don Pedro Project license); *see also* 31 FPC 510, 526 (Article 37 of the 1964 license), *Turlock and Modesto Irrigation Districts*, 76 FERC ¶ 61,117 at 61,611, Ordering Paragraph (D) (Article 37 as amended in 1966), and *Turlock and Modesto Irrigation Districts*, 128 FERC ¶ 61,035 at 61,159, Ordering Paragraph (G) (amending Article 37 to add NMFS as an agency to be consulted on any changes to the minimum flow release schedule for the project).

[44] NMFS Request for Rehearing at 8.

[45] July 2009 Order, 128 FERC ¶ 61,035 at P 37 and Ordering Paragraph (A).

ESA.[46] NMFS's decision not to litigate these matters further after the July 2009 Order issued bars it from doing so now.

20. NMFS reiterates its argument that the Commission must initiate formal consultation under section 7(a)(2) of the ESA for actions taken in its orders involving the Don Pedro Project. Specifically, NMFS argues that three orders involving the Don Pedro Project represent federal actions requiring the Commission to initiate formal consultation: Commission staff's April 3, 2008 order on the Districts' fishery report,[47] the July 2009 Order,[48] and the April 19, 2012 order clarifying the proceeding on interim conditions.[49] Of these three, only the April 19, 2012 order is subject to rehearing at this point. We rejected NMFS' arguments about the April 3, 2008 order in our July 2009 Order, and NMFS did not seek rehearing of that order. To the extent that NMFS now seeks to make arguments regarding the July 2009 Order, NMFS is statutorily barred from doing so. Thus, we need not address those arguments.[50]

21. Although it includes our April 19, 2012 order as one which it believes would require the Commission to initiate formal consultation, NMFS makes no specific arguments regarding that order. All of its arguments are directed to the two previous orders that are not now subject to rehearing. Therefore, the argument that formal consultation was required in connection with the April 19, 2012 order is waived. In any event, our April 19, 2012 order clarifying the proceeding did not take any action that would affect Central Valley steelhead or their critical habitat. Rather, it clarified that no federal action on interim measures is required at this time.[51] It also found that, because some needed studies are not yet complete and relicensing is now underway, it is not feasible to begin a new proceeding to reopen the license and determine whether to impose interim measures pending relicensing.[52]

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[46] *Id*. P 47 and Ordering Paragraph (E).

[47] *Turlock and Modesto Irrigation* Districts, 123 FERC ¶ 62,012 (2008).

[48] July 2009 Order, 128 FERC ¶ 61,035 (2009).

[49] *Turlock and Modesto Irrigation Districts,* 139 FERC ¶ 61,045 (2012).

[50] In any event, as we found in that order, the July 2009 Order did not take any action that would have required the initiation of formal consultation. *See* July 2009 Order, 128 FERC ¶ 61,035 at P 47 and n.90. NMFS did not seek rehearing of that determination.

[51] *Turlock and Modesto Irrigation Districts,*139 FERC ¶ 61,045 at PP 71,74-75.

[52] *Id*. PP 76-77.

22. As we explained in our July 2009 Order, a decision not to act is fundamentally different from a decision to take action to reopen and amend an existing license in order to require necessary changes.[53] There is currently no federal action that the Commission is proposing to take in the April 19, 2012 order that would trigger the requirement to initiate formal consultation. Thus, this case falls squarely within the holding of *California Sportfishing*,[54] that the ESA mandates consultation only before an agency takes some affirmative action, such as issuing or amending a license. Ongoing operation of a licensed hydroelectric project is private, not federal agency action, and cannot trigger ESA consultation even if the project may affect listed species or critical habitat.[55] The existence of a reopener provision, without more, does not constitute discretionary federal involvement or control that can be used as a basis to mandate consultation.[56] The Commission must affirmatively exercise its discretion to require changes in project operation in order to trigger the consultation requirement. In short, as the court explained, "section 7(a)(2) consultation stems only from "affirmative actions' of an agency."[57] An order determining that no action is required or that action is not feasible, as we found in our April 19, 2012 order, is not an affirmative agency action. It if were, entities could constantly force the Commission to begin consultation simply by asking that licenses be reopened.

23. NMFS argues that the Commission's failure to take action violates its responsibilities under section 7(a)(1) of the ESA. NMFS maintains that section 7(a)(1) requires the Commission "to act on behalf of species conservation independent of its other primary mission programs."[58] However, NMFS again confines its arguments to staff's April 3, 2008 order on the Districts' fisheries report and our July 2009 Order, both of which are not now subject to rehearing. Because NMFS makes no specific arguments concerning our April 19, 2012 order clarifying the proceeding, this argument is waived.

24. In any event, as we noted in our July 2009 Order, section 7(a)(1) requires federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by

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[53] July 2009 Order, 128 FERC ¶ 61,035 at P 40.

[54] *California Sportfishing Alliance v. FERC*, 472 F.3d 593, 595 (9th Cir. 2006) (*California Sportfishing*).

[55] *Id*. at 598.

[56] *Id*. at 599.

[57] *Id*. at 598.

[58] NMFS Request for Rehearing at 14.

carrying out programs for the conservation of endangered and threatened species listed pursuant to [section 4 of the ESA]."[59] It does not expand the authority conferred on an agency by its enabling act, or provide any independent grounds for agency action not otherwise authorized or required.[60] Therefore, ESA section 7(a)(1) would not provide a basis for compelling us to take an action that is not otherwise required by the FPA or ESA section 7(a)(2).

25. NMFS makes one argument that could conceivably relate to the April 19, 2012 order. NMFS argues that "the presiding [judge] in the interim conditions proceeding found that the Don Pedro project impedes Tuolumne River flows in ways that negatively impact [Chinook salmon and steelhead]."[61] NMFS further maintains that "the Commission cannot simply wait years for this project to be relicensed to take action to conserve these fishery resources."[62] NMFS asserts that the Commission does not need expanded authority to take the action required under ESA section 7(a)(1), because "the Commission has adequate existing authority under the FPA to reopen the Don Pedro license and implement the flow regime that NMFS has requested and it should do so immediately."[63]

26. NMFS overlooks the fact that we could not act under the FPA to reopen the license without notice and an opportunity for a hearing, and we could not require the requested flow regime without first conducting a full environmental review of the

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[59] 16 U.S.C. § 1536(a)(1) (2006).

[60] *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34, *reh'g denied*, 972 F.2d 1362 (D.C. Cir. 1992); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995).

[61] NMFS Request for Rehearing at 15. In support, NMFS cites without any discussion the July 2009 Order, 128 FERC ¶ 61,135 at PP 32-38. We assume this must be a mistake, because we addressed the presiding judge's finding somewhat generally in paragraphs 32-38 of our April 19, 2012 order, and the July 2009 Order predated the proceeding on interim conditions. As discussed in the April 19, 2012 order, although the presiding judge found that the Don Pedro Project impedes Tuolumne River flows released from upstream reservoirs by reducing their amount and changing the times of the year when they peak, she did not make specific findings regarding effects on fish or recommend any interim measures. 139 FERC ¶ 61,045 at P 32-33.

[62] NMFS Request for Rehearing at 15. NMFS does not elaborate on this argument or provide any specific support for it.

[63] *Id*.

impacts of the flows and any alternatives. Thus, contrary to NMFS's suggestion, we lack the authority to take immediate action in this case. Moreover, as we found in out April 19, 2012 order, because some needed studies are not yet complete and relicensing is now underway, it is not feasible to begin a new proceeding to reopen the license and determine whether to impose interim measures pending relicensing.

27. NMFS argues, without elaboration, that the Commission's failure to implement the agencies' recommended interim flows will put existing salmon and steelhead stocks at risk. NMFS asserts that there is adequate information to prescribe minimum flows, and that its proposed interim measures are likely to improve the condition of the steelhead and salmon fisheries prior to relicensing. In support, NMFS cites, without any discussion, page 6 of its filing of findings of fact with the presiding judge, and does not otherwise brief or explain its arguments. This is nothing more than a bald assertion that interim measures are needed, and is waived for lack of specificity.

28. NMFS argues that our April 19, 2012 order contradicts the plain language and intent of the original license and invalidates the Commission's statutory balancing that occurred under section 4(e) of the FPA when the Commission issued the original license. In support, NMFS states that it "feels compelled to reiterate the positions that it has previously raised regarding balancing of developmental and environmental values in the public interest under 4(e) of the FPA so that this Request for Rehearing is not interpreted as implicitly waiving any arguments previously raised."[64] NMFS adds that it recognizes that the Commission addressed these arguments in its July 2009 Order, but states that it disagrees with the rationales and arguments put forth in that order. As noted, the July 2009 Order is not now subject to rehearing. NMFS makes no specific arguments concerning our April 19, 2012 order, other than to assert, without elaboration, that "the Commission continues to fail to properly balance power and not power values in the public interest."[65] This argument is waived for lack of specificity.[66]

29. Finally, NMFS includes a request for relief that states, without elaboration or citation to specific authority, that our April 19, 2012 order "fails to show necessary deference to NMFS, the Federal entity charged with management of salmon and steelhead under the [Magnuson-Stevens Act] and the ESA."[67] This argument is waived for lack of specificity. NMFS also requests, again without elaboration, that the

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[64] *Id*.

[65] *Id*. at 16.

[66] *See* FPA section 313(a), 16 U.S.C. § 825*l*(a) (2006).

[67] *Id*.

Commission implement the agency-recommended interim measures put forth in the interim measures proceeding, and initiate consultation under section 7(a)(2) of the ESA. For the reasons discussed above, we deny this request.

The Commission orders:

The request for rehearing filed by the National Marine Fisheries Service in this proceeding on May 21, 2012, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.