

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, DC 20426

March 9, 2012

OFFICE OF ENERGY PROJECTS

Project No. 2299-075--California  
Don Pedro Hydroelectric Project  
Turlock Irrigation District  
Modesto Irrigation District

Mr. Robert Nees  
Director of Water Resources  
Turlock Irrigation District  
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Mr. Daniel Welsh  
Assistant Field Supervisor  
U. S. Fish and Wildlife Service  
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Mr. Greg Dias  
Project Manager  
Modesto Irrigation District  
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Modesto, CA 95352

Mr. Thomas Howard  
Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812

Mr. Richard Wantuck  
Hydropower Program Supervisor  
National Marine Fisheries Service  
777 Sonoma Avenue, Room 325  
Santa Rosa, CA 95404

**Reference: Request to Reject Study Disputes**

Dear Messrs. Nees, Dias, Wantuck, Welsh, and Howard:

By letter dated February 21, 2012, Modesto and Turlock Irrigation Districts (Districts) responded to the January 11, 2012 Notices of Study Dispute by the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (FWS), and the State Water Resources Control Board (Water Board) for the Don Pedro Hydroelectric Project (Don Pedro Project) No. 2299 study dispute.

### The Districts' Request

The Districts requested that we reject as improper, under the Integrated Licensing Process (ILP) regulations, the following study disputes:

- (1) For NMFS, NMFS-1 (elements 3 through 6), and all elements of NMFS-3, -7, and -9;
- (2) For FWS, all elements of NMFS-3 (as endorsed by FWS), California Department of Fish and Game (CDFG)-3 (as endorsed by FWS), and CDFG-7 (as endorsed by FWS); and
- (3) For the Water Board, CDFG-3 (as endorsed by the Water Board).

Concerning the four NMFS study disputes and the FWS study dispute request for NMFS-3 (as endorsed by FWS), the Districts say that the requests are not directly related to the agencies' mandatory conditioning authority to prescribe fishways under section 18 of the Federal Power Act (FPA), and therefore must not be considered under the study dispute process. The Districts state that the NMFS study disputes for NMFS-1 (elements 3 through 6), -3, and -9, do not pertain to the effects of the Don Pedro Project, and therefore must be rejected under the ILP regulations and Commission policy. The Districts further state that all four NMFS study dispute requests must be rejected because the Commission has no statutory obligation to provide a record to support other agencies' decision making, as NMFS implied in its dispute regarding NMFS-1 (elements 3 through 6), -3, -7, and -9. The Districts believe that NMFS is raising policy and legal issues beyond the scope of the technical dispute panel process.

The Districts also state that the two FWS study disputes for CDFG-3 and -7 (as endorsed by FWS), and the Water Board study dispute for CDFG-3 (as endorsed by the Water Board), must be rejected because a disputing agency can only dispute a study request that it has made itself. The Districts state that one agency cannot act as a proxy for another agency. The Districts point out that CDFG does not possess mandatory conditioning authority under the FPA to dispute study requests, and it cannot be allowed to do so through another agency. The Districts state that the ability to file a dispute must be directly related to an agency's mandatory conditioning authority and confined to study requests actually filed by the agency itself.

## Discussion

Commission staff uses the seven study criteria to address study disputes under section 5.9(b) of the Commission's regulations. In the Don Pedro Project study determination issued December 22, 2011, element 1 (d and e) and elements 3 through 6 of NMFS-1, and all elements of NMFS-3, -7, and -9 were not approved, either because existing information was adequate or there was no nexus to project effects. Therefore, the Districts' reasoning for its study dispute rejection request is at the heart of the dispute itself. At this point in the ILP process, it would be improper for the Commission staff to reject an agency study dispute based solely on the nature of the dispute. Instead, the study dispute panel should consider the merits of these study requests and determine whether to reject or accept all or parts of them.

Concerning the remaining FWS and Water Board disputes regarding studies that those agencies did not themselves request [CDFG-3 (as endorsed by FWS and the Water Board) and CDFG-7 (as endorsed by FWS)], we find that these disputes should not be referred to the study dispute panel. The ILP regulations at section 5.14(a) provide that an agency with authority to provide mandatory conditions under the FPA or issue water quality certification under the Clean Water Act may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities. Section 5.14(b) requires that the notice explain how the disputing agency's study request satisfies the criteria in section 5.9(b).

The Commission's guidance on this matter is clear and supports the Districts' contention that a disputing agency can only dispute its own study request. In a recent case involving this issue, the Commission stated: "It is important the Commission and other stakeholders know, as study requests are presented, on whose behalf they are being made and what, if any, statutory interest they are intended to further. This is necessary so that entities involved in study development can evaluate the need for particular studies." *Exelon Generation Co.*, 131 FERC ¶ 61,167 at P 17 (2010). The Commission added: "On an ongoing and forward basis, we expect agencies to make clear what, if any, mandatory conditioning authority they are representing and how the *studies they are requesting* inform that mandatory authority." *Id.* at P 18 (emphasis added). In addition, we note that commenters raised this issue in the ILP rulemaking, and the Commission clarified its intent that agencies may file a notice of study dispute "only with respect to *their study requests* related directly to the exercise of their mandatory conditioning authority." *See Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, 104 FERC ¶ 61,109 at P 143 (2003) (emphasis added).

Conclusion

For the reasons noted above, I am referring NMFS-1 (elements 3 through 6) and all elements of NMFS-3, -7, and -9 to the study dispute panel, but I am not referring CDFG-3 (as endorsed by FWS and the Water Board) and CDFG-7 (as endorsed by FWS) to the study dispute panel.

If you have any questions, please contact Jim Hastreiter at (503) 552-2760.

Sincerely,

Jeff C. Wright  
Director  
Office of Energy Projects

cc: Mailing List  
Public Files

Document Content(s)

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