

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Georgia Power Company

Project No. 2237-014

ORDER DENYING REHEARING

(Issued June 20, 2005)

1. The U.S. Department of the Interior has filed a request for rehearing of a study dispute resolution in which the Director, Office of Energy Projects (Director), denied a request by Interior's U.S. Fish and Wildlife Service (FWS) that Georgia Power Company be required to perform a sediment contaminant study in connection with the relicensing of Georgia Power's Morgan Falls Hydroelectric Project No. 2237. This order, which affirms the Director's decision, is in the public interest because it clarifies the study dispute resolution process and the standards by which we will review disputed studies.

Background

2. The 16.8-megawatt Morgan Falls Project is located on the Chattahoochee River, in Fulton and Cobb Counties, Georgia, in metropolitan Atlanta. The project includes a 1,031-foot-long, 56-foot-high concrete dam, a 673-acre impoundment with 2,450 acre-feet of storage capacity (Bull Sluice Lake), and a powerhouse with seven turbine generators. Georgia Power operates the project primarily for power generation and, to some extent, to re-regulate peaking flows from the U.S. Army Corps of Engineers' Buford Dam -- located 36 miles upstream -- to ensure that adequate flows are available to Atlanta for water supply and wastewater treatment needs. The project's current license will expire on February 28, 2009.

3. On January 15, 2004, Georgia Power filed with the Commission a notification of intent to apply for a new license for the Morgan Falls Project, pursuant to the integrated licensing process,¹ as well as a pre-application document.² In the pre-application document, Georgia Power noted that “[s]ubstantial sediment deposition has occurred in the Morgan Falls impoundment over the 100-year operational history of the project. . . . Sediment deposition now appears to be peaking or [to] have reached equilibrium . . .”³ Georgia Power stated that 1980 tests by the Corps in the Morgan Falls impoundment found no evidence of any potentially harmful pollutants in the sediments, and that the company was not aware of any more recent sediment quality data.⁴

4. In the pre-application document’s preliminary issues and study list, Georgia Power included “[s]edimentation originating from upstream non-point sources” and “[e]ffects of sedimentation on reservoir fisheries habitat.”⁵ The company did not propose to test sediment quality, although it did suggest a “[s]tudy report incorporating reconnaissance findings and providing literature-based analysis of erosion and sedimentation, including feasibility, efficacy, and cost of dredging.”⁶ (Dredging has been proposed as a means to increase Bull Sluice Lake’s capacity and thus provide additional re-regulation of flows for water supply, although Georgia Power considers this to be prohibitively costly).⁷

¹ The integrated licensing process was established by the Commission with the goal of creating efficiencies by integrating a potential license applicant’s pre-filing consultation with the activities of the Commission and other agencies pursuant to the Federal Power Act, the National Environmental Policy Act, and other applicable legislation. *See Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 FR 51121, Aug. 25, 2003, FERC Stats. & Regs. ¶ 31,150 (2003). The Morgan Falls relicensing is one of the first proceedings using this process.

² *See* 18 C.F.R. § 5.6 (2004) (requiring filing of pre-application document).

³ Pre-application document at 22-23.

⁴ *Id.* at 31 and Table 3.

⁵ *Id.* at 99. The summary of contacts included in the pre-application document stated that both American Rivers and the Upper Chattahoochee Riverkeeper expressed concern about the impact of sediment quality on the fishery in the project area.

⁶ *Id.* at 102.

⁷ *Id.* at 25. It has also been suggested that sedimentation in the impoundment has had an adverse impact on recreation. *See* Transcript of April 14, 2004 Scoping Meeting at 63; 66 (comments of Skelly Holmbeck-Pelham (Upper Chattahoochee Riverkeeper)).

5. On March 11, 2004, Commission staff issued a scoping document, for the purpose of obtaining public comment on its initial determination of the issues to be studied in the proposed environmental assessment in the relicensing proceeding. The scoping document did not identify sediment contamination as an issue.

6. On May 14, 2004, FWS filed comments and recommendations on the pre-application document and scoping document. Among other things, FWS requested that eight studies be performed, including a sediment contaminants study within the project boundary. With respect to that study, FWS stated

[t]he overall goal of the study is to determine the presence/absence, levels, and distribution of contaminants in the surface sediments within the project boundary. Sediments should be analyzed for TOC (total organic carbon), grain size, organochlorines (including PCBs – polychlorinated biphenyls – and pesticides), metals (including mercury, copper, lead), and PAHs (polyaromatic hydrocarbons). The resulting data will aid in the understanding of the presence/absence of contaminants, threats to the aquatic community, and hence possibly the source, of the contaminants.

The results of the sediment contaminants study will enable the resource agencies to make the best management decisions for protecting the aquatic community in the project boundary. These contaminants can cause carcinogenesis, bioaccumulation through the food chain, energy loss associated with detoxification, and reproductive and neurological effects. Additionally, the accumulated sediment in the reservoir is a concern for multiple resource agencies and environmental groups. Therefore, the presence/absence, levels, and distribution of contaminants associated with these sediments need to be understood, as they factor into the decision-making process. [⁸]

7. FWS also stated that the pre-application document had indicated that the last sediment analysis within the project boundary had been performed by the U.S. Army Corps of Engineers (Corps) in 1980. The agency asserted that laboratory techniques have changed since that time, that Georgia Power proposed to conduct water quality sampling within the water column, but not to sample surface sediments, that there has been significant population growth and attendant development since 1980 in counties that

⁸ FWS' May 24, 2004 comments at 3-4.

drain, at least in part, into the Chattahoochee River, and that the project is causing sediment to settle out of the water column and accumulate in the impoundment.⁹

8. On June 28, 2004, Georgia Power filed a proposed study plan. In the plan, the company proposed to respond to FWS' request by compiling and evaluating existing sediment quality data for the Chattahoochee River and Morgan Falls impoundment from the Corps, Atlanta Sand and Supply Company (which had in the 1990s investigated the possibility of commercially dredging the Morgan Falls impoundment), the U.S. Geological Survey (USGS), and the Environmental Protection Agency.

9. Georgia Power stated that it was not proposing to conduct new field sampling of surface sediments in the impoundment because: (1) the State of Georgia protects aquatic life from contaminants through water quality criteria and fish tissue sampling, rather than by sediment criteria, and existing water quality and fish tissue information does not indicate a need for further information; (2) 1998 USGS sediment quality monitoring data from the Chattahoochee River upstream and downstream of Atlanta is adequate to characterize sediment quality in the project area; (3) there are no sediment quality standards in Georgia, so that data from sediment sampling would not provide useful information for developing license requirements; (4) there is no nexus between relicensing the Morgan Falls Project and sediment contamination, because the project does not cause or contribute to contamination, and there are no operational alternatives that could affect sediment contamination; and (5) the Chattahoochee River is managed by state and federal agencies with authority over activities that affect pollutants in river sediments, and the project is not such an activity.

10. On September 23, 2004, FWS filed comments on the proposed study plan, noting the absence of a sediment contaminant study. The agency noted the proposed studies of water quality in the water column, but stated that contaminants that tend to bioaccumulate are often more highly concentrated in sediment, and, further, that fish tissue sampling is designed to protect human health and does not examine portions of the fish (such as the liver) where there may be a high concentration of contaminants. FWS asserted that there is a nexus between relicensing the Morgan Falls Project and sediment contamination in that the long-term deposition and concentration of any contaminants in

⁹ In comments filed on May 12, 2004, Interior's National Park Service expressed support for FWS' request for a study of sediment contaminants. *See* National Park Service comments at 7 and 28 (previous sampling not sufficient to characterize potential buried sediment contamination in impoundment). The Upper Chattahoochee Riverkeeper also suggested reservoir sedimentation studies, to determine the effect of contaminated sediments on fish and wildlife. Upper Chattahoochee Riverkeeper comments at 6 (filed May 14, 2004).

the reservoir is directly related to the project's presence.¹⁰ FWS stated that data from a sediment study "will aid in the understanding of the presence/absence of contaminants, threats to the aquatic community within the project boundary, and the distribution, and hence possibly the source, of the contaminants."¹¹ FWS estimated that fieldwork for the study would require a team of two people for one day, and the cost of analyzing the ten samples it considered necessary would be approximately \$6,000-\$7,000.¹² FWS reiterated its earlier statements that a sediment study would enable the resource agencies to make management decisions regarding aquatic resources.¹³ The National Park Service and, jointly, the Upper Chattahoochee Riverkeeper and American Rivers expressed their support for a sediment contaminant study.¹⁴

11. On October 26, 2004, Georgia Power filed its revised study plan. Repeating its reasoning from the proposed study plan, the company continued to take the position that it would conduct no new field sampling of sediments within the impoundment, but that it would compile and evaluate existing data, including recently-obtained data collected by Atlanta Sand and Supply Company in the impoundment in 1989.¹⁵

12. On November 10, 2003, Interior, on behalf of FWS and the National Park Service, filed comments on the revised plan. Among other things, Interior renewed its request for a sediment contamination study "to determine ongoing and cumulative effects associated with sediment contaminants and to evaluate potential mitigation measures."¹⁶

¹⁰ FWS September 23, 2004, comments at 3-5.

¹¹ *Id.* at 3.

¹² FWS did not estimate the cost of the fieldwork, or of the preparation of a study report, but did suggest that the cost of transporting the samples might cost \$100. *Id.* at 5.

¹³ In response to Georgia Power's statement that Georgia does not have criteria for contaminated sediment, FWS expressed willingness to work with Georgia Power to develop such criteria based on scientific literature.

¹⁴ *See* National Park Service comments at 6 (filed September 24, 2004); Upper Chattahoochee Riverkeeper and American Rivers comments at 13-19 generally (filed September 27, 2004).

¹⁵ *See* Revised Study Plan, Tab 2 at 2-6; 20-22; 26-27.

¹⁶ Interior comments at 3. *See also* comments of Upper Chattahoochee Riverkeeper and American Rivers at 10 (filed November 10, 2004).

13. On November 16, 2004, Georgia Power filed a response to Interior's comments. Georgia Power asserted that there are only limited National Park Service lands within the boundary of the Morgan Falls Project, and that Interior therefore has authority under section 4(e) of the Federal Power Act (FPA) to impose mandatory license conditions only with respect to those lands.¹⁷

14. On November 26, 2004, Commission staff issued a study plan determination¹⁸ with respect to Georgia Power's revised study plan. On the issue of the sediment contaminant study, the determination stated

Staff does not recommend that Georgia Power modify its revised soils and geology resources study plan to conduct a sediment contaminants survey within the impoundment. Staff does not see a nexus between project operations and contaminat[ion] of sediments, and the FWS has not provided any information, analysis, or data to support their proposal that there is a nexus between project operations and sediment contaminants. Currently, the project waters meet state water quality standards that are enacted to protect aquatic life. Also[,] recent fish tissue samples taken by the [Georgia Department of Natural Resources] do not indicate a further need for additional contaminant studies. Georgia Power proposes to evaluate the over-all health of fish sampled[,] which will provide a general indication of the health of individuals collected during [the] fish sampling study.

15. On December 16, 2004, Interior filed a notice of a study dispute.¹⁹ Interior stated that it has authority to prescribe fishways at the Morgan Falls project pursuant to FPA

¹⁷ FPA section 4(e), 16 U.S.C. § 797(e), provides that licenses issued by the Commission within any reservation of the United States "shall be subject to and contain such conditions as the Secretary of the department under who supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." Section 3(2) of the FPA, 16 U.S.C. § 796(2) states that "reservation" means "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." The National Park Service lands in question here are part of a recreation area, not part of a national park.

¹⁸ See 18 C.F.R. § 5.13(c) (2004).

section 18,²⁰ and to provide mandatory conditions under FPA section 4(e), because of the location of the project within the Chattahoochee River National Recreation Area, (CRNRA) and the fact that two portions of the CRNRA – Vickery Creek and Island Ford – are located in part within the project boundary.²¹

16. Interior asserted that the impacts of the project include the trapping of sediments behind the Morgan Falls dam, thus altering natural substrate above the dam and depriving the downstream reach of sediments; shoreline erosion caused by project operations; and the alteration of upstream and downstream flows. While one way of mitigating these impacts would be to dredge the impoundment, thereby increasing operational flexibility, Interior said, it is necessary to study the extent, distribution, and quality of the sediments, as well as the potential for biotransfer of sediment-borne contaminants trapped by the dam.²² With respect to the sediment contamination study, Interior stated

Information from the sediment contaminants study [would] assist the FWS in determining the need for current or future fish restoration and fish passage at a Project, as one of the factors the FWS considers is the status of upstream habitat. Determining Project effects on aquatic habitat, and in turn the condition and safety of that habitat if re-opened to the downstream fishery, helps develop the management goals and objectives for fish passage in that particular river system. Therefore, evaluating sediment contamination concentrated behind a dam in one of the fastest growing, most highly developed areas of the United States, such as Morgan Falls, is critical in determining project effects on the safety of the current aquatic community, as well as any species that could be passed upstream.

¹⁹ As discussed below, the Commission's regulations provide for a dispute resolution process regarding studies. *See* 18 C.F.R. § 5.14 (2004). The study dispute initially concerned a number of studies in addition to the sediment contamination study. Consequently, Interior's and Georgia Power's pleadings during the study dispute process address matters beyond the sediment contaminant study, such as the need for, and feasibility of, dredging the impoundment. These other matters have been resolved and are not the subject of Interior's request for rehearing, and we do not address them here.

²⁰ 16 U.S.C. § 811.

²¹ Interior notice of study dispute at 3-5.

²² *Id.* at 7-8.

A sediment contaminants study would help the FWS determine whether the sediments settling out within Bull Sluice Lake are a source of contamination, are present at dangerous levels to bioaccumulate in the food chain, and cause cancer and reproductive and physiological effects to aquatic species. The study would identify the threats to the aquatic community that exist within the project boundary, the status of habitats upstream, and the quality or potential to restore habitats upstream. This information is appropriate to request in order to evaluate the potential for providing safe, timely and effective fish passage at the project.^[23]

17. Interior repeated its prior assertions that the lack of Georgia state standards for contaminated sediments is easily rectified by reference to existing literature, that sampling of fish tissue does not assess risk to the aquatic community, and that sampling of the water column does not include sediments.²⁴ Interior described the goals and objectives of the proposed study,²⁵ and again explained that it considers an analysis of existing data to be insufficient, based in large part on the age of the information and changed conditions in the interim.²⁶ Interior maintained that the long-term deposition and concentration of any contaminants within the reservoir has a direct nexus to the project, the dam of which is causing sediments to accumulate in the impoundment.²⁷

18. On January 6, 2005, Commission staff issued a notice that it had convened a dispute resolution panel to address the issues raised by Interior, and that the panel would, on January 19, 2005, hold a technical conference regarding the dispute.

²³ *Id.* at 10. Interior also explained that the study would assist the National Park Service in meeting resource objectives and responsibilities in its enabling legislation and in the act that created the CRNRA. *Id.* at 13.

²⁴ *Id.* at 11.

²⁵ *Id.* at 11-12.

²⁶ *Id.* at 13-15.

²⁷ *Id.* at 15.

19. On January 10, 2005, Georgia Power filed a response to the notice of study dispute. With respect to the sediment contaminant study, Georgia Power repeated its previous arguments as to why the study was not necessary.²⁸

20. On February 4, 2005, the Study Dispute Resolution Panel issued its findings.²⁹ The panel found that Interior had (1) clearly stated the goals and objectives of the study, (2) identified the need to know the condition of the upstream habitat in order to decide whether to require fish passage at the project, (3) demonstrated that existing information along with proposed studies would not provide the information to adequately and reliably characterize the quality of reservoir surface sediments, (4) identified a nexus between project operations and potential accumulation of sediments in the reservoir, (5) proposed a study methodology consistent with accepted scientific practice, and (6) shown that the study would develop necessary information not provided by existing sources at a relatively small cost. In consequence, the panel unanimously recommended that Georgia Power perform the sediment contaminants study filed by FWS.³⁰

21. On February 24, 2005, the Director sent Interior a letter requesting further information. He stated that, based on the record, he could not determine how the sediment contaminant study was related to Interior's exercise of section 18 authority. He therefore asked Interior to provide a list of the fish species for which Interior believed it

²⁸ Georgia Power also made legal arguments with respect to whether Interior had properly invoked the study dispute resolution process with reference to the Department's statutory authority. Interior did in fact ultimately link the proposed study to its exercise of fishway prescription authority under section 18, but did not do so clearly throughout the proceeding. *See* 18 C.F.R. § 5.14(a) (2004) (agency may file dispute "with respect to studies pertaining directly to the exercise of their authorities under section 4(e) and 18 of the Federal Power Act or section 401 of the Clean Water Act"). While in the future we may conclude that a failure to connect a proposed study to an agency's mandatory authority from the time that it is first proposed may adversely affect the agency's ability to seek dispute resolution regarding that study, we will not do so here, because this is the first occasion in which this process has been utilized and we have not previously spoken on this matter.

²⁹ *See* letter to Magalie R. Salas, Commission Secretary, from Nicholas Jayjack, Chair, Dispute Resolution Panel.

³⁰ The panel also unanimously recommended that Georgia Power not be required to perform an instream flow study, which was the second subject of the dispute resolution. The Director subsequently accepted this recommendation, and Interior did not seek rehearing of this decision.

may be in the public interest to provide upstream passage at the Morgan Falls Project, and an explanation of how the proposed study would yield information useful in determining whether fish passage should be provided at the project.

22. On March 25, 2005, Interior responded to the Director's request. Interior stated that fish species under consideration by the Department for fish passage at the Morgan Falls Project during the term of any new license included striped bass, American eel, Gulf sturgeon, Alabama shad, shoal bass, highscale shiner, and bluestripe shiner.³¹ Interior explained that sediments are settling within the project reservoir, and that contaminants, which bind to sediments, may be accumulating behind the project dam, and may adversely affect the current aquatic community, as well as fish that may be moved upstream of the project. In consequence, Interior concluded, the sediment contaminant study would assist it in determining whether upstream habitat is favorable for moving fish upstream of the project and reestablishing extant fish populations.³²

23. On April 1, 2005, Georgia Power filed a response to Interior's filing. The company asserted that Interior has not provided evidence that sediment contaminants in the Morgan Falls impoundment are adversely affecting aquatic resources.³³ Georgia Power maintained that there is no evidence that certain of the species mentioned by Interior as candidates for passage (American eel, Gulf sturgeon, and Alabama shad) ever inhabited the reach occupied by the project or can feasibly be passed by other downstream dams, while the other four species (striped bass, shoal bass, bluestripe shiner and highscale shiner) are warmwater fish, and the habitat upstream of Morgan Falls is operated as a coldwater fishery.³⁴ Georgia Power also argued that Interior had failed to provide criteria (such as numerical values associated with contaminant concentrations and their effects on the species) by which to establish a relationship between sediment quality and the referenced species.³⁵

24. On April 11, 2005, the Director issued a determination concluding that Georgia Power should not be required to conduct the sediment contaminant study. The Director stated:

³¹ Interior's March 25, 2005 response at 3.

³² *Id.* at 4-6.

³³ Georgia Power's April 1, 2005 response at 2-4.

³⁴ *Id.* at 4-7.

³⁵ *Id.* at 7-8.

I find that the study request does not meet the study criteria [in the Commission's regulations] because Interior failed to explain how the passage of the target fish is consistent with the management goals established by the state for the subject reach and because there is no nexus between project effects and the referenced species. In addition, the Commission can require only those studies that it finds are reasonably likely to provide data that will assist in the analysis of the impacts of the proposal under consideration. I find that a sediment contaminant study is not needed for any analysis of fish passage in the circumstances of this case.

American eel, Gulf sturgeon, and Alabama shad are found over 150 miles downstream of the Morgan Falls Project with intervening dams including four large Army Corps of Engineers' facilities. Consequently, I can find no nexus between the effects of the Morgan Falls Project and fish passage of these species.

The shoal bass is a warmwater species native to the southeastern United States. As a result of the coldwater discharge from Buford Dam, the Chattahoochee River upstream of the Morgan Falls impoundment is actively managed by the Georgia Department of Natural Resources (Georgia DNR) as a mixed rainbow and brown trout fishery. Further, there is no information in the record to suggest that the management of a coldwater fishery in this reach of the Chattahoochee River is being discontinued. Therefore, I conclude that passage of shoal bass would not be consistent with the relevant resource management goals for the Chattahoochee River upstream from Morgan Falls Dam.

Striped bass in the Chattahoochee River downstream of the Morgan Falls Dam originate from striped bass stocked in West Point Lake, which is approximately 77 miles downstream of the Project. Striped bass ascend the Chattahoochee River to Morgan Falls Dam. Existing information indicates that striped bass in the Chattahoochee River are predatory on trout which are actively managed by the Georgia DNR in the reach between Buford Dam and Morgan Falls Dam. Similar to the reason stated above for shoal bass, I conclude that passing striped bass upstream of Morgan Falls Dam would not be consistent with the relevant resource management goals for the Chattahoochee River upstream from Morgan Falls Dam.

Highscale shiner and bluestripe shiner are native warmwater minnows. The nearest known populations of these species are located downstream of West Point Lake. Because of the distance involved between the known downstream populations of these minnows and Morgan Falls Dam and

because there are no suitable conditions for their survival due to the coldwater temperature regime of the subject reach, I conclude that there is no nexus between the effects of Morgan Falls Dam and fish passage of highscale shiner and bluestripe shiner.

25. The Director added that, while he had concluded that the study will not yield useful information with respect to fish passage, the study could be relevant to an understanding of the impacts of sediment removal. He noted that Georgia Power was conducting a study on erosion and sedimentation within the Morgan Falls Project boundary, including an evaluation of the feasibility and cost of dredging Bull Sluice Lake. The Director explained that, if the study shows that dredging Bull Sluice Lake is economically feasible and may be in the public interest, the Commission's regulations would afford the opportunity for new study proposals based on those results.

26. On May 4, 2005, Interior filed a request for rehearing, arguing that the Director had erred in rejecting the panel's recommendation and in not requiring the sediment contaminants study. The pleading also contained a motion to strike Georgia Power's April 1, 2005 filing.

27. On May 19, 2005, Georgia Power filed an answer opposing the motion to strike.

Discussion

28. In the integrated licensing process, the Commission established a new procedure for the development of study plans regarding proposed projects. Under this process, participants in a hydropower licensing proceeding may, following issuance of the pre-application document, file requests that specified studies be performed by the prospective applicant. As relevant here, study requests must satisfy the following criteria: describe the goals of the study; explain the management goals of the agencies or Indian Tribes with jurisdiction over the resource to be studied; describe existing information and the need for additional data; explain any nexus between project operations and effects on the resource to be studied, and how the study will inform the development of license requirements; explain how the proposed methodology is consistent with accepted scientific practice; and describe considerations of level of effort and cost.³⁶

³⁶ See 18 C.F.R. § 5.9(b) (2004). An addition criterion, not applicable here where the request at issue was made by Interior, calls for non-agencies to explain the public interest consideration relevant to their requests.

29. The prospective applicant is then to issue a proposed study plan and hold a meeting or meetings to discuss it,³⁷ receive comments,³⁸ and file a revised study plan.³⁹ The Director is then to issue a study plan determination, including any modifications deemed to be necessary.⁴⁰

30. Following issuance of the study plan determination, agencies with authority to provide mandatory conditions pursuant to FPA section 4(e)⁴¹ or to prescribe fishways under FPA section 18,⁴² as well as agencies and Indian Tribes with authority to 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 . . .”⁴³ A three-person dispute resolution panel then delivers to the Director a finding regarding studies in dispute, “concerning the extent to which each criteria set forth in § 5.9(b) is met or not met, and why, and mak[ing] recommendations regarding the disputed study requests based on its findings.”⁴⁴ The Director then reviews and considers the recommendations of the panel, and will issue a written determination “with reference to the study criteria set forth in § 5.9(b), and any applicable law or Commission policies and practices,” taking into account the technical expertise of the panel, and explaining why any panel recommendation was rejected.⁴⁵

31. This proceeding is one of the first in which the ILP is being used and it is the first, and thus far only, instance in which our new study dispute resolution procedures have been invoked. We appreciate the efforts of the parties in acting as pioneers of our new process. We also recognize that no process is perfect, and that it is difficult to determine

³⁷ 18 C.F.R. § 5.11 (2004).

³⁸ 18 C.F.R. § 5.12 (2004).

³⁹ 18 C.F.R. § 5.13(a) (2004).

⁴⁰ 18 C.F.R. § 5.13(c) (2004).

⁴¹ 16 U.S.C. §797(e).

⁴² 16 U.S.C. § 811.

⁴³ 18 C.F.R. § 5.14(a) (2004).

⁴⁴ 18 C.F.R. § 5.14 (k) (2004).

⁴⁵ 18 C.F.R. § 5.14(l) (2004).

how new procedures will work until they are actually tried out. This case gives us the opportunity to review some of the details of the dispute resolution process, and to give guidance to others who are or will be engaged in the ILP.

A. Resource Management Goals Relating to the Proposed Study

32. Section 5.9(b) of our regulations⁴⁶ sets forth the requirement for information or study requests. Section 5.9(b)(2) states that such a request must, “[i]f applicable, explain the relevant resource goals of the agencies or Indian tribes with jurisdiction over the resource to be studied.”

33. The Director concluded that Interior had not satisfied this criterion in part because “Interior failed to explain how the passage of the target fish is consistent with the management goals established by the state for the subject reach . . .” Interior argues that the resource to be studied is the fish habitat upstream of Morgan Falls, and that Interior will use information from the sediments contamination study to help decide how to implement its fish passage authority under section 18.⁴⁷

34. We do not believe that section 5.9(b)(2) requires that an agency or tribe requesting a study must relate the study to the objectives of another agency that may have jurisdiction over the reach to be studied. It is often the case that more than one entity has jurisdiction – and perhaps differing objectives – with respect to the same part of a river, and it is not our intent either that we must establish which agency has primary jurisdiction or that one agency must discern another agency’s goals. Rather, section 5.9(b)(2) asks a requesting agency or tribe to explain its own relevant resource goals.

35. It would be preferable if an agency or tribe could provide a specific goal (*e.g.*, restoring salmon to the reach above the project reservoir). However, in a case like this, where it appears that Interior does not have specific goals for the Chattahoochee River in the project area, but states that it is trying to determine whether to exercise its section 18 authority, that suffices to satisfy section 5.9(b)(2).

B. Nexus between Study and Project Operations

36. Section 5.9(b)(5) of the regulations provides that a study requestor must “[e]xplain any nexus between project operations and effects (direct, indirect and/or cumulative) on

⁴⁶ 18 C.F.R. § 5.9(b)(2) (2004).

⁴⁷ Request for rehearing at 5-7.

the resource to be studied, and how the study results would inform the development of license requirements.”

37. In determining whether there was a nexus between the proposed study and the impacts of the Morgan Falls Project, the Director examined the species of fish that Interior had indicated it might consider for passage at the project. With respect to American eel, Gulf sturgeon, and Alabama shad, the Director stated that these species are found over 150 miles downstream of the Morgan Falls Project with intervening dams, including four large Army Corps of Engineers’ facilities. He stated that shoal bass is a warmwater species, while the Chattahoochee River upstream of the Morgan Falls impoundment is actively managed by the Georgia Department of Natural Resources as a coldwater fishery, such that passage of shoal bass would be inconsistent with state management of the river. The Director reached the same conclusion with respect to striped bass. Highscale shiner and bluestripe shiner, he stated, are native warmwater minnows, and given that conditions in the coldwater reach above the project dam are not suitable for their survival, there was no nexus shown between project effects and passage of these species.

38. Interior asserts that the Director erred by considering the “nexus between project effects and the referenced species,” instead of the “nexus between project operations and effects on the resource to be studied.” According to Interior, the proper nexus is between project operations and effects on the sediments above Morgan Falls Dam.⁴⁸ Interior contends that the dispute resolution panel correctly concluded the project is causing sediment to fall out of the water column and accumulate in the reservoir, that contaminants could be binding to the sediments, and that understanding the extent to which this had occurred would assist FWS in determining whether to require fish passage.⁴⁹ Interior states that fish passage is an important issue in the Chattahoochee River and maintains that the results of a sediment contaminants study would help it decide whether it is prudent to reestablish extirpated fish populations above the dam and whether fish passage at the project is appropriate.⁵⁰

39. Our regulations provide that an entity requesting a study is to explain (1) any nexus between project operations and effects on the resource to be studied and (2) how the study results will assist in crafting a license. Interior appears to be drawing a distinction between the Director’s consideration of the impact of project operations on

⁴⁸ Request for rehearing at 8.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 10-12.

specific species, which it considers to be in error, and consideration of the impact of the project on general conditions in the project impoundment, which it considers to be the correct standard against which its requested study should be judged.

40. It is not clear to us that the distinction Interior is attempting to draw is valid. The habitat in the reservoir is not relevant in the abstract, but is only significant to the extent that it affects resources that need to be studied to understand the impacts of the Morgan Falls Project. In other words, it would not seem meaningful that a reach of a river had a low dissolved oxygen content unless those conditions in turn had a detrimental impact on flora or fauna that utilize, or might otherwise utilize, that area.

41. Interior has stated that the purpose of the sediment contaminants study would be to gauge the project's impact on fisheries habitat with respect to the Department's authority to require fish passage. In response to the Director's inquiry, Interior listed several species concerning which it might consider exercising that authority. The Director then discussed whether those species were likely to be affected by project operations. We conclude that the Director did not err in his determination of what nexus to examine. The relevant nexus in this instance is the connection between the environment in the project's impoundment and those species that might be passed. If there are no species that can be passed successfully, then no nexus has been demonstrated between the proposed study and the impacts of the project.

42. Interior does not dispute the Director's conclusion that shoal bass, highscale shiner, and bluestripe shiner are warmwater species, and that therefore the reach above the project dam, which is managed by the State of Georgia as a coldwater fishery through releases from Buford Dam, is unsuitable habitat for these species. Interior does reference its earlier comments that five highscale shiners were found during a 1995 study in Lower Big Creek, a warmwater tributary to the project reservoir.⁵¹ However, the collection of a small number of individuals in a 10-year-old study of a warmwater stream does not overcome the uncontroverted fact that the riverine habitat above the project dam is not suitable for the highscale shiner and the other referenced warmwater species, nor does it assert or demonstrate that this habitat is suitable for striped bass.⁵²

⁵¹ Request for rehearing at 16, *citing* FWS May 14, 2004 comments.

⁵² The Director noted that striped bass are stocked above West Point and thus can migrate to the Morgan Falls Dam. However, given that striped bass prefer warmwater temperatures of spawning, the species would not thrive in the coldwater environment above the project, so that passing it there would be at best problematic. *See* Crance, *Habitat Suitability Index Models and Instream Flow Suitability Curves: Inland Stocks of Striped Bass* (U.S. Fish and Wildlife Service (1984) at Table 2 (striped bass eggs did not hatch at temperatures below 52 degrees Fahrenheit and hatchlings died rapidly at

(continued...)

43. Interior disagrees with what it characterizes as the Director's assertion that there are four Corps dams within 150 miles downstream of the project. In fact, Interior says, there is one Corps Dam – the West Point Dam – within 150 miles of the project, and three other Corps dams are much further downstream. Interior contends that “the three lowermost [Corps] dams in the system are not absolute bars to fish passage. American eel can be found above all three Army Corps facilities (and three other dams) as far up as the North Highlands Project Reservoir, and research has shown that striped bass, Alabama shad, and Gulf sturgeon are able to negotiate some of the lowermost Corps facilities.”⁵³

44. Interior is correct that the West Point Dam, some 77 miles downstream of the Morgan Falls Project, is the Corps dam closest to the project. However, the fact that the Director's references to the location of Corps' dams was imprecise appears to have no significance here. Interior itself states that American eel can be found above the three lowermost Corps facilities and other obstacles, only up to the North Highlands Project reservoir, which is located 150 miles downstream of Morgan Falls. According to Interior, Alabama shad, and Gulf sturgeon are able to pass some – but apparently not all – of the lower Corps structures. Assuming that these species all can negotiate the Chattahoochee up to the North Highland Project reservoir (which is more than Interior claims), that still leaves them 150 miles below Morgan Falls, with six dams, including West Point, between them and the project. Interior makes no claim that any of the species can pass West Point or any of the other intervening structures.

45. Given that Interior's own analysis leads to the conclusion that several of the species it references cannot reach the Morgan Falls project, and that the habitat above the project is unsuitable for the remaining species, Interior has not shown a nexus between the proposed study and project impacts.⁵⁴ Moreover, we note that in the preamble to Order No. 2002, we explained that “the more broadly stated the legal, regulatory, or policy mandate [supporting a request] is, the more clearly a requester needs to explain how the mandate relates to the study request and, in turn, project impacts.”⁵⁵ Given the broadness of the section 18 mandate cited by Interior, the requirement for extra clarity as to how the mandate relates to the request and to project impacts clearly applies here.

temperatures below 54 degrees Fahrenheit). Water temperatures in the reach of the Chattahoochee below Buford Dam and above the Morgan Falls Projects (the CRNRA) rarely are warmer than 50 degrees Fahrenheit. *See Chattahoochee River National Recreation Area*, (National Park Service) at 1 and 3 (www.nps.gov.chat.fishing.htm).

⁵³ *Id.* at 16 (citation omitted).

⁵⁵ FERC Stats. & Regs. ¶ 31,150 at P 94.

While our discretion to require prelicensing studies is broad, we will not require studies that we conclude cannot lead to the development of reasonable license conditions. We therefore conclude that Interior has failed to properly support the requested study.⁵⁶

46. Finally, Interior contends that the Director incorrectly stated that FWS submitted the sediment contamination study with the goal of developing information about sediment removal in the impoundment, rather than for the purpose of studying impacts on the aquatic community.⁵⁷ As discussed above, FWS initially stated that the purpose of the study was to “enable the resource agencies to make the best management decisions for protecting the aquatic community in the project boundary.” In the parties’ various pleadings discussing sediment studies, the issue of dredging was at times intermingled with the discussion of the sediment contaminant study. It was not until the filing of its notice of study dispute resolution that Interior clearly linked the study to its exercise of section 18 authority. Thus, the purpose of the study was not clearly and consistently set forth throughout the proceeding. In any event, there is no evidence that the manner in which the Director characterized the purpose of the study led to any error.

D. Treatment of the Panel’s Decision

47. Section 5.14(1) of our regulations provides that the Director “will review and consider the recommendation of the dispute resolution panel, and will issue a written determination which will be made with reference to the study criteria . . . and any applicable law or Commission policies and practices, will take into account the technical expertise of the panel, and will explain why any panel recommendation was rejected, if applicable.”⁵⁸

48. Interior reiterates its contentions that the Director improperly applied the study criteria with respect to management goals and objectives and nexus adding that, in its

⁵⁶ We recognize that Interior can prescribe fishways regardless of whether we believe them to be in the public interest. That is a matter solely within Interior’s discretion. However, it is our decision whether to require a particular study, and we are not obligated to order studies simply because Interior deems them to be related to its exercise of mandatory authority. We have no statutory obligation to require studies that we do not deem necessary to evaluate the public interest. *See Curtis/Palmer Hydroelectric Company LP and International Paper Company*, 92 FERC ¶ 61,037 (2000).

⁵⁷ Request for rehearing at 14-15.

⁵⁸ 18 C.F.R. § 5.14(1) (2004).

view, he also failed to explain why the panel recommendation was rejected and did not give sufficient deference to the panel.⁵⁹ We have dealt with the first two issues above.

49. With respect to the deference given to the panel, Interior asserts that the Director's statements that he carefully considered the panel's finding and recommendations and that he took into account the panel's technical expertise do not satisfy the requirements of the regulations.⁶⁰ We do not agree. As we noted in the preamble to Order No. 2002, while the Director is to take into account the expertise of the panel and explain where he differs with it, the Commission cannot delegate to the panel its decisional authority.⁶¹ There are no specific standards governing the manner in which the Director is to weigh the panel's recommendations and expertise. The intent of our regulations is to ensure that the Director carefully considers the panel's recommendations in reaching a determination, not that the Director be required to comply with a precise formula in doing so. Here, it is clear from the Director's determination that he thoughtfully examined the issues at hand, that he explained the basis of his decision, and that he disagreed with the panel as to whether Interior had related the study to resource management goals and whether it had shown the proper nexus between the study and the project. Our regulations require no more.

E. Motion to Strike

50. Interior asks that we strike as improper Georgia Power's April 1, 2005, response to Interior's March 25, 2005 submittal, and rule that the Director could not rely upon it. According to Interior, the company's filing contravenes the Commission's intent in crafting the dispute resolution regulations.⁶²

⁵⁹ Request for rehearing at 12-13.

⁶⁰ Request for rehearing at 13-14.

⁶¹ During the rulemaking, Interior suggested that the regulations provide that the Director be bound by a majority decision by the panel, while another commenter asked that deference to the panel's recommendations be written into the regulations. We declined to do so. FERC Stats. & Regs. ¶ 31,150 at P 190. While we intend that the Director respect the work of the panel, we expect the Director to ultimately use his own best judgment, based on the regulations and informed by the panel's recommendations, in these situations.

⁶² Request for rehearing at 17.

51. We do not agree. Interior cites to a portion of the preamble to Order No. 2002 in which we rejected as unnecessary a suggestion by licensee commenters that a potential applicant be allowed to file a response to the dispute panel recommendation before the Director made a study plan determination.⁶³ Here, in an effort to fully understand Interior's position, the Director took a step not contemplated by – but by no means inconsistent with – the regulations: he asked Interior to submit additional information following the panel decision. Given that Interior was afforded the opportunity to supplement the record, it was appropriate for Georgia Power to respond to that filing.⁶⁴ Fairness requires us to accept Georgia Power's pleading, and, to the extent that the Director relied upon it, he did not err.

Conclusion

52. We do not disagree with Interior that a study of sediment contaminants might yield useful information about conditions in the Morgan Falls Project impoundment. However, given that the fish species designated by Interior as possible candidates for passage under Interior's section 18 authority either do not occur in the project area or are ill-suited to inhabit the coldwater habitat above the project, and that there is currently no way to pass these fish by intervening obstructions, Interior has not provided sufficient justification for us to require Georgia Power to conduct the requested study pursuant to the study dispute resolution process. However, as the Director pointed out in his April 11, 2005, determination, Georgia Power is conducting a geology and soils study, as part of which the company will evaluate the feasibility and costs of dredging the impoundment. Once the study results are filed with the Commission, Commission staff and stakeholders will have an opportunity to review and discuss the results.⁶⁵ Based on the study results, parties or Commission staff may conclude that dredging of the impoundment is economically feasible and in the public interest, and that therefore the geology and soils study should be modified, or a new study developed, to examine sediments in light of this information.⁶⁶ Thus, we may in the future require the sediment contaminants study.

⁶³ *Id.*, citing Final Rule and Tribal Policy Statement, Docket No. RM02-16-000 (Order No. 2002) at A-75 ¶ 191 (July 23, 2003).

⁶⁴ Interior does not allege that Georgia Power's filing went beyond the bounds of responding to the information submitted by the Department.

⁶⁵ The geology and soils study must be filed by April 1, 2006. Georgia Power proposes to hold a study results meeting on April 15, 2006.

⁶⁶ *See* 18 C.F.R. § 5.15(c) (2004) (providing process for modifying ongoing studies or proposing new studies).

The Commission orders:

The request for rehearing filed by the U.S. Department of the Interior on May 4, 2005, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.