

151 FERC ¶ 61,240  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Turlock Irrigation District and  
Modesto Irrigation District

Project No. 14581-001

ORDER DENYING REHEARING

(Issued June 18, 2015)

1. On March 27, 2015, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) filed a request for rehearing of a February 27, 2015 decision by the Commission staff in the pre-filing phase of the licensing proceeding for the La Grange Hydroelectric Project No. 14581. NMFS objects to staff's determination that a disputed study request by NMFS would not be considered in the Commission's formal dispute resolution process. As discussed below, we deny the rehearing request.

**I. Background**

2. The unlicensed La Grange Hydroelectric Project is located on the lower Tuolumne River near the town of La Grange in Stanislaus and Tuolumne counties in California.<sup>1</sup> The La Grange Project is jointly owned by the Turlock and the Modesto Irrigation Districts (Districts). The La Grange reservoir extends upstream of the La Grange Dam

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<sup>1</sup> On December 19, 2012, Commission staff issued an order finding that the La Grange Project is required to be licensed under section 23(b)(1) of the Federal Power Act. *Turlock Irrigation District and Modesto Irrigation District*, 141 FERC ¶ 62,211 (2012), *aff'd Turlock Irrigation District and Modesto Irrigation District*, 144 FERC ¶ 61,051 (2013). On May 15, 2015, the U.S. Court of Appeals for the District of Columbia Circuit denied the Districts' appeal and affirmed the Commission's finding that the La Grange Hydroelectric Project requires licensing. *Turlock Irrigation District, et al., v. FERC, et al.*, No. 13-1250 (D.C. Cir. May 15, 2015).

on the Tuolumne River, ending just downstream of the Don Pedro Hydroelectric Project Dam.<sup>2</sup>

3. On January 29, 2014, the Districts commenced the pre-filing process by filing a Pre-application Document (PAD) for licensing the La Grange Project. As part of the licensing process, the Districts are required to consult with resource agencies, tribes, and other stakeholders to develop plans and subsequently conduct studies that will serve to inform Commission staff's environmental analysis, and ultimately, the Commission's decision on whether, and, if so, under what conditions, to issue a license for the project. The studies will also provide information to resource agencies as they provide comments, recommendations, and terms and conditions for inclusion in any license that may be issued for the project.

4. In the PAD, the Districts did not propose any specific studies. The Districts proposed to meet with licensing participants to examine existing information and to discuss any additional information that might be needed to complete an environmental review.<sup>3</sup> The Districts also included in section 6 and Appendix D of the PAD information on studies, which they believe are relevant to the La Grange Project, that were completed as part of the Don Pedro Project relicensing proceeding.

5. On May 23, 2014, the Commission issued notice of the filing of the Districts' PAD and solicited comments on the PAD and Commission staff's initial environmental scoping document, as well as study requests.<sup>4</sup> Pursuant to section 5.9 of the Commission's regulations,<sup>5</sup> NMFS filed a request for five studies relating to effects of the La Grange Project.<sup>6</sup> At issue here is NMFS's request to study the existing upper Tuolumne River habitats for anadromous fish above the Don Pedro reservoir

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<sup>2</sup> The Don Pedro Hydroelectric Project No. 2299 is located approximately two miles upstream of the La Grange Project and is also jointly owned by the Districts. Water discharged from the Don Pedro Project is either diverted at La Grange dam by the Districts for irrigation and water supply or released to Tuolumne River below La Grange Dam. The Districts filed a license application in April 2014 to relicense the Don Pedro Project.

<sup>3</sup> See PAD at 5-56.

<sup>4</sup> See 18 C.F.R. § 5.8 (2014).

<sup>5</sup> 18 C.F.R. § 5.9 (2014).

<sup>6</sup> See NMFS July 22, 2014 Study Request.

(Request No. 3).<sup>7</sup> Request No. 3 includes four elements: (1) identification and analysis of barriers to migration to develop an assessment of fish passage; (2) monitoring of water temperature and development of water temperature models; (3) implementation of monitoring actions in the upper Tuolumne basin; and (4) development of salmonid life-cycle models for Chinook salmon and steelhead above the Don Pedro Reservoir.<sup>8</sup> NMFS stated that Request No. 3 would “focus on an evaluation of historic habitat, to inform a potential reintroduction that will likely target the historic salmonid habitat above Don Pedro Reservoir as called for in NMFS Recovery Plan.”<sup>9</sup>

6. On September 5, 2014, the Districts filed a proposed study plan pursuant to section 5.11 of the Commission’s regulations.<sup>10</sup> The proposed study plan included the studies that are being conducted as part of the Don Pedro Project relicensing and three additional studies, which the Districts stated would provide all the information needed to evaluate the effects of the La Grange project and inform license requirements.<sup>11</sup> The proposed study plan did not include NMFS’s Study Request No. 3. On December 4, 2014, NMFS filed comments on the proposed study plan, including the Districts’ rejection of Request No. 3.

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<sup>7</sup> *Id.* at 35-45.

<sup>8</sup> *Id.* at 36-39.

<sup>9</sup> *Id.* at 35. In 2014, NMFS developed a Recovery Plan, pursuant to section 4(f)(4) of the Endangered Species Act (ESA), outlining a framework for the recovery of ESA-listed anadromous fish species in California’s Central Valley. *Id.* at 11. The Recovery Plan identifies the upper Tuolumne River as a candidate area for reintroduction of Central Valley steelhead. *Id.* at 15. In its comments, NMFS noted that a separate study request asked for a study and evaluation of options for safe and effective upstream and downstream fish passage.

<sup>10</sup> 18 C.F.R. § 5.11 (2014). Also on September 5, 2014, Commission staff issued Scoping Document 2, which stated staff’s intention to prepare a single environmental impact statement for both licensing the La Grange Project and relicensing the Don Pedro Project.

<sup>11</sup> The three studies include: a cultural resources study, a recreation access and safety assessment, and a fall-run chinook salmon migration barrier study.

7. On January 5, 2015, the Districts filed a Revised Study Plan pursuant to section 5.13(a) of the Commission's regulations.<sup>12</sup> The Districts stated that although they did not believe that the request to study the upper Tuolumne River habitat is needed to satisfy the Commission's regulations, they would conduct an Upper Tuolumne River Basin Habitat Assessment as part of their Fish Passage Assessment Study.<sup>13</sup> The Districts' proposed Habitat Assessment is a two-year assessment, investigating migration barriers, temperature conditions, and general habitat conditions in the upper Tuolumne River.

8. On January 20, 2015, NMFS filed comments on the Revised Study Plan. In its comments, NMFS stated that the Districts' proposed Fish Passage Assessment study plan included studying many of the same elements of NMFS's Request No. 3, but recommended modifications or inclusions to more closely parallel the NMFS study request.<sup>14</sup>

9. On February 2, 2015, Commission staff issued a study plan determination pursuant to section 5.13(c) of the Commission's regulations.<sup>15</sup> The study plan determination approved, with modifications, five studies proposed by the Districts and approved, as filed, one requested study by NMFS.<sup>16</sup> The Study Plan Determination did

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<sup>12</sup> 18 C.F.R. § 5.13(a) (2014). The revised study plan included a cultural resources study, a recreation access and safety assessment, and a fish passage assessment study plan. The fish passage assessment study includes: a fish passage facilities assessment, an upper Tuolumne River basin habitat assessment, and a habitat assessment and fish stranding observations below the La Grange Dam and powerhouse.

<sup>13</sup> See NMFS January 5, 2015 Revised Study Plan, Appendix D, Fish Passage Assessment Study Plan, at 13 and 14.

<sup>14</sup> See NMFS January 20, 2015 comment letter, at 10-12. Specifically, NMFS requested: (1) the inclusion of Eleanor Creek, a tributary to the Tuolumne River, in all study components for the upper Tuolumne River habitat assessment; (2) the expansion of the water temperature model to simulate water years 1970 through the present (instead of only the proposed 2015-2016 water years); (3) the collection of information in the barrier assessment related to the distribution of coarse sediment and large woody debris; and (4) adoption of element four of Request No. 3, which is the development of salmonid life-cycle models for Chinook salmon and steelhead above Don Pedro reservoir.

<sup>15</sup> 18 C.F.R. § 5.13(c) (2014).

<sup>16</sup> The Study Plan Determination approved NMFS's request to study the effects of the Project on the loss of marine-derived nutrients in the Tuolumne River.

not recommend the Upstream Habitat Assessment, which the Districts had included as part of their Fish Passage Assessment Plan.

10. On February 23, 2015, NMFS filed a notice of study dispute, arguing that its request to study the upper Tuolumne River habitats for anadromous fish should be required.<sup>17</sup> On February 27, 2015, Commission staff issued a letter stating that the study dispute panel would not consider Request No. 3, because a similar study request had been rejected in the Don Pedro relicensing proceeding.

11. On March 27, 2015, NMFS filed its request for rehearing of staff's February 27 decision, arguing that staff erred in determining that its Study Request No. 3 would not be subject to dispute resolution.

## **II. Discussion**

12. Section 5.14 of the Commission's regulations provides for a dispute resolution process, which allows resource agencies with mandatory conditioning authority to file a notice of study dispute after staff issues a study plan determination, with respect to studies pertaining directly to the agencies' authority.<sup>18</sup> Pursuant to section 5.14(b), the notice of study dispute must explain how the study request satisfies criteria set forth in section 5.9(b). The Commission then convenes a study dispute panel, consisting of a designated Commission staff member, an official designated by the agency that filed the notice of dispute, and an independent third person selected by the other two panelists. The panel holds a technical conference, gathers information regarding the dispute, and makes a recommendation to the Director of the Office of Energy Projects (Director) regarding the disputed study request. The Director then reviews the panel's recommendation and issues a written determination.

13. Pursuant to section 5.14(k), the study plan dispute resolution panel must make and deliver to the Director a finding regarding the studies in dispute, "concerning the extent to which each criteria set forth in section 5.9(b) is met or not met, and why, and make recommendations regarding the disputed study requests based on its findings."<sup>19</sup> Section 5.9(b)(5) of the regulations requires that, among other criteria, any study request must "explain any nexus between project operations and effects (direct, indirect, and/or

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<sup>17</sup> NMFS February 23, 2015 Notice of Study Dispute, at 5-8.

<sup>18</sup> 18 C.F.R. § 5.14(a) (2014).

<sup>19</sup> 18 C.F.R. § 5.14(k) (2014).

cumulative) on the resource to be studied, and how the study results would inform the development of license requirements.”<sup>20</sup>

14. NMFS has the authority to prescribe fishways under section 18 of the FPA,<sup>21</sup> and would ordinarily be provided an opportunity for dispute resolution for studies pertaining to that authority.<sup>22</sup> However, in this case, Commission staff determined at the outset that NMFS’s Request No. 3 would not be considered for dispute resolution because NMFS’s request for the same study had already been denied, after dispute resolution, in the Don Pedro relicensing proceeding.

15. Commission staff did not include Request No. 3 in its study plan determination because it concluded that “potential anadromous fish habitat in the upper Tuolumne River above the Don Pedro Project is not affected by operation of either the La Grange or Don Pedro projects.”<sup>23</sup> Accordingly, staff found that “there is no nexus between the Don Pedro and La Grange projects and effects on anadromous fish habitat in the upper Tuolumne River,” as required by section 5.9(b)(5).<sup>24</sup> Further, staff stated that the “suitability of upstream habitat for anadromous salmonids, as it relates to recovery planning under NMFS guidelines, pertains to management decisions and actions which most appropriately fall under NMFS jurisdiction.”<sup>25</sup>

16. In its notice of study dispute, NMFS argued that Request No. 3 should be required, as it would assist NMFS in exercising its section 18 authority to determine whether to prescribe or reserve authority to prescribe fishways at the project. NMFS disagreed with staff’s finding that the La Grange and Don Pedro projects do not affect the habitat in the upper Tuolumne River above the Don Pedro Project.<sup>26</sup> NMFS stated that the blockage of upstream anadromous fish migration to their historical spawning grounds affects the

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<sup>20</sup> 18 C.F.R. § 5.9(b)(5) (2014).

<sup>21</sup> 16 U.S.C. § 811 (2012).

<sup>22</sup> NMFS’s other disputed study, Request No. 4, was sent to a dispute resolution panel. The Director issued a formal study dispute determination for that study on May 1, 2015.

<sup>23</sup> See Director’s February 2, 2015 Study Plan Determination, at B-9.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See NMFS’s February 23, 2015 Notice of Study Dispute, at 6.

upper Tuolumne River by depriving the ecosystem of marine-derived nutrients<sup>27</sup> and by eliminating the beneficial effect on stream bed conditions caused by the bed scour and sediment transport that would result from fish passing through the area.

17. In its February 27 letter, Commission staff determined that the panel would not consider Request No. 3 because NMFS had already been afforded the Commission's formal study dispute resolution process in the pre-filing phase of the Don Pedro relicensing proceeding. Staff stated that Request No. 3 is the same study that NMFS requested in the relicensing proceeding for the Don Pedro Project and, in that proceeding, the study was not required or recommended in the study plan determination, the study dispute resolution panel's report, and the formal study dispute determination. Staff noted that, in the Don Pedro Project proceeding, it gave two reasons why a study of the existing upper Tuolumne River habitat was not required: first, that the project did not affect upstream habitat in the Tuolumne River, and second, that the La Grange Dam blocked the upstream passage of anadromous fish. Staff explained in its February 27 letter that "[e]ven though there is a possibility that fish passage may now be required at La Grange dam, it would not change the other rationale for not requiring the study: that the projects would not affect the aquatic habitat related to instream flow and water temperature upstream of the Don Pedro Project."

18. On rehearing, NMFS opposes staff's February 27 determination. NMFS contends that in the Don Pedro Project proceeding, a similar study was not required because the Don Pedro Project was not viewed as the barrier to the anadromous fish migration due to effects of the La Grange Dam. NMFS also disagrees with staff's second reason for denying NMFS the opportunity for formal study dispute resolution: that the La Grange Project, as well as the Don Pedro Project, does not affect the habitat upstream of the Don Pedro Project.

19. In the Don Pedro Project proceeding, staff's study plan determination found no nexus between the Don Pedro Project and the effects on the fish habitat in the upper

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<sup>27</sup> When fish die in an area, their decomposition results in release of nutrients that can be used by plants and by other animals. NMFS argues that staff acknowledged the direct nexus between the La Grange Project's blockage of fish passage and resulting loss of marine-derived nutrients by recommending that the Districts provide information (through a desktop analysis) on the effects of the project on the loss of marine-derived nutrients in the Tuolumne River. See Director's February 2, 2015 study plan determination for the La Grange Project, at B-16-17. However, the La Grange Dam only affects marine-derived nutrients in the reach between the La Grange Dam and the Don Pedro Dam, since it is the latter dam that blocks fish passage (and, accordingly, the presence of nutrients) further upstream. There is no nexus between the La Grange Project and the level of marine-derived nutrients above the Don Pedro Dam.

Tuolumne River, due, in part, to the fact that the downstream La Grange Dam prevents fish from traveling upstream.<sup>28</sup> However, staff also found that the project does not affect the upstream habitat, and even though NMFS may need to study all potential anadromous fish habitat in the upper Tuolumne River above Don Pedro reservoir for reintroduction purposes, that would fall under the jurisdiction of NMFS. In other words, because the project affects neither water temperature upstream, non-project passage barriers, and the other matters that NMFS asks be studied, these matters are not something that the Commission is obligated to consider during the relicensing proceeding. The study dispute panel recommended no change to staff's study plan determination, and, after considering the study dispute panel's report, staff made no changes to the study plan with respect to this issue.<sup>29</sup>

20. Here, NMFS again contends that the project affects the habitat upstream of the Don Pedro Project, by blocking marine-derived nutrients and eliminating bed mobilization and scouring effects that accompany anadromous salmonid spawning. NMFS asserts that it requested Study Request No. 3 to provide information that would inform the mitigation and enhancement measures that may be required because of the project's blockage of anadromous fish from migrating to their historical habitat above Don Pedro reservoir.

21. NMFS is incorrect that operation of the La Grange Project affects the habitat above the Don Pedro Project. Operation of the downstream La Grange Project cannot affect upstream water flow and temperatures or the existence of upstream barriers to passage. As noted above, we are requiring a study relating to the impacts the Project has on the loss of marine-derived nutrients in the Tuolumne River. While there is an opportunity to assess fish passage as a potential measure at both the La Grange and Don Pedro projects during the current proceedings, and Commission staff will study this matter, we do not think that requiring detailed studies on the quality of upstream habitat is justified because these projects can affect upstream habitat to only the very limited extent that passed fish would add nutrients to the system and scour the riverbed. The significant matters affecting habitat, such as water quality and temperature and other barriers, are unaffected by the La Grange and Don Pedro projects and thus do not warrant study.

22. Based on the foregoing, while we agree with Commission staff that the results of the proposed study could inform a NMFS decision on reintroducing anadromous fish into the upper Tuolumne River, the proposed study is not necessary for staff to evaluate the

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<sup>28</sup> See Director's December 22, 2011 Study Plan Determination for the Don Pedro Hydroelectric Project No. 2299-075, at Appendix A, 83-85.

<sup>29</sup> See Director's May 24, 2012 Final Study Dispute Determination Letter.

potential effects of operation of the La Grange Project on fisheries resources in the Tuolumne River.<sup>30</sup> We recognize NMFS's statutory authority, and have provided a licensing process where applicants, agencies, and other interested parties can work together to ensure that necessary studies are performed. However, it is up to the Commission to determine whether a particular study is necessary for the Commission to fully understand the effects of licensing or relicensing a project, and we are not obligated to require a study to support another agency's decision making.<sup>31</sup>

23. We agree with staff's determination that there was no need to afford NMFS a second opportunity for dispute resolution concerning its request to study the habitat of the upstream Tuolumne River. NMFS already had an opportunity to participate in the formal dispute resolution process in the Don Pedro Project proceeding for its request to study the habitat of the upper Tuolumne River, and Commission staff did not recommend the study. NMFS has presented no persuasive, new justification for its study request here, such that we should reach a different result in the La Grange proceeding than we did with respect to the Don Pedro Project. Given that, as we have explained, the La Grange Project has little impact on habitat above the Don Pedro Project, the fact that the La Grange Project is now in the licensing process provides no reason to reverse staff's well-reasoned conclusions in this and the Don Pedro proceeding. Therefore, we deny NMFS's request for rehearing of staff's February 27, 2015 letter.

The Commission orders:

The request for rehearing filed by the National Marine Fisheries Service on March 27, 2015, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>30</sup> See February 2, 2015 Study Plan Determination, at B-9.

<sup>31</sup> See *United States Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992). See also *York Haven Power Company, LLC*, 132 FERC ¶ 61,035, at P 11 (2010) (citing *Curtis/Palmer Hydroelectric Company LP and International Paper Company*, 92 FERC ¶ 61,037 (2000)).