

166 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Northern Indiana Public Service Company LLC

Project No. 12514-085

ORDER DENYING REHEARING

(Issued January 17, 2019)

1. On June 21, 2018, the Commission issued an order amending Northern Indiana Public Service Company LLC's (NIPSCO) license for its Norway-Oakdale Hydroelectric Project No. 12514 (Norway-Oakdale Project), located on the Tippecanoe River in Carroll and White counties, Indiana.¹ The Order Amending License modified license Article 403's definition of "abnormal river conditions," approved a revised operation compliance plan, and terminated a temporary variance. On July 19, 2018, Shafer and Freeman Lakes Environmental Conservation Corporation, together with Carroll County, Indiana; White County, Indiana; and the City of Monticello, Indiana (collectively, Protest Coalition) filed a timely request for rehearing. This order denies rehearing.

I. Background

2. On October 2, 2007, Commission staff issued a 30-year license to NIPSCO to maintain and operate the Norway-Oakdale Project.² The Norway-Oakdale Project is located on a 19-mile segment of the Tippecanoe River. The project consists of two developments (including dams, reservoirs, and powerhouses) with a combined generating capacity of 16.4 megawatts (MW): the upper Norway development and the lower Oakdale development.

3. The Norway development includes: a 915-foot-long dam; a powerhouse equipped with four generating units with a total authorized installed capacity of 7.2 MW; and the 1,291-acre Lake Shafer, which extends 10 miles upstream of Norway dam. The Oakdale development includes: a 1,688-foot-long dam; a powerhouse equipped with three generating units with a total authorized installed capacity of 9.2 MW; and the 1,547-acre Lake Freeman, which extends 10 miles upstream of Oakdale dam.

¹ *N. Ind. Pub. Serv. Co. LLC*, 163 FERC ¶ 61,212 (2018) (Order Amending License).

² *N. Ind. Pub. Serv. Co.*, 121 FERC ¶ 62,009 (2007).

A. Project Operation

4. License Article 403 requires NIPSCO to operate both developments in an instantaneous run-of-river mode, to the maximum extent practicable. Under run-of-river operation, outflow from the Norway dam approximates the sum of inflows to Lake Shafer and the outflow from the Oakdale dam approximates the sum of inflows to Lake Freeman. Further, Article 403 requires NIPSCO to maintain Lake Shafer within 0.25 feet above and below elevation 647.47 feet National Geodetic Vertical Datum (NGVD) and Lake Freeman within 0.25 feet above and below elevation 612.45 feet NGVD.

5. Article 403 allows NIPSCO to temporarily modify run-of-river operations and reservoir elevations during “abnormal river conditions.” Article 403 provides an interim definition for “abnormal river conditions,” stating that these were conditions with river flows of 3,000 cubic feet per second (cfs) or higher, or an hourly increase in river flow of 100 cfs or greater at both project dams. During such abnormal river conditions, Article 403 requires NIPSCO at all times to maintain Lake Shafer within 0.75 feet above and 0.25 feet below elevation 647.47 feet NGVD, and Lake Freeman within 0.75 feet above and 0.25 feet below elevation 612.45 feet NGVD. Article 403 does not allow the licensee to temporarily modify operations during low-flow conditions without the Commission granting a variance.

6. License Article 405 states that within five years of license issuance NIPSCO must propose a permanent definition of “abnormal river conditions” developed in consultation with the U.S. Fish and Wildlife Service (FWS) and the Indiana Department of Natural Resources.

7. Beginning in the summer of 2012, northern Indiana experienced severe droughts that resulted in mussel mortality in the Tippecanoe River downstream of the Oakdale dam, including the sheepnose, clubshell, and fanshell species, which were federally-listed as endangered under the Endangered Species Act (ESA), and the rabbitsfoot, which was unlisted at that time.³ As a result, during the summer of 2012, FWS recommended that NIPSCO release a minimum flow of 200 cfs from the Oakdale dam to avoid the take of federally-listed mussels.⁴

8. While maintaining the FWS-recommended 200-cfs flow, NIPSCO fell out of compliance with license Article 403’s requirement to maintain run-of-river operation – the

³ Rabbitsfoot mussels were listed as threatened under the ESA on September 17, 2013.

⁴ FWS’ July 17, 2012 Filing (Accession No. 20120717-0022). The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19) (2012).

outflows from Oakdale dam exceeded inflows to Lake Freeman, causing the surface elevation of Lake Freeman to fall below 612.20 feet NGVD.⁵

9. Consequently, between August 2012 and 2014, NIPSCO requested temporary variances of license Article 403⁶ and an extension of time to comply with Article 405's requirement to develop a permanent definition of "abnormal river conditions." Commission staff approved NIPSCO's requests for temporary variances during this time.⁷

10. On August 13, 2014, FWS issued a Technical Assistance Letter (Assistance Letter) to NIPSCO, identifying dam operation measures that FWS stated would mimic natural run-of-river conditions in order to avoid project-induced take of federally-listed mussels and avoid adverse modification of critical habitat attributable to project operation.⁸ The Assistance Letter set forth an abnormal low-flow plan that is triggered by an abnormal low-flow event.⁹ When an abnormal low-flow event occurs, NIPSCO must stop generation at the Oakdale development and release 1.9 times the flow of the previous 24-hour daily average flow measured at the Winamac gage, or 500 cfs, whichever is less. The abnormal low-flow event ends when the 24-hour daily average flow is greater than 300 cfs at the Winamac gage and greater or equal to 500 cfs at the Oakdale gage. The Assistance Letter does not affect operations at the Norway development.

⁵ A more detailed description of drought events and procedural history appears in the Order Amending License, 163 FERC ¶ 61,212 at PP 10-18.

⁶ NIPSCO August 3, 2012 Filing (Accession No. 20120803-5042).

⁷ *N. Ind. Pub. Serv. Co.*, 141 FERC ¶ 62,012 (2012); *N. Ind. Pub. Serv. Co.*, 143 FERC ¶ 62,043 (2013); *N. Ind. Pub. Serv. Co.*, 148 FERC ¶ 62,156 (2014).

⁸ See Order Amending License, 163 FERC ¶ 61,212 at Appendix B. FWS issued three clarifications to the Assistance Letter filed with the Commission on October 2, 2014 (clarifying flows that trigger and terminate an abnormal low-flow event); November 6, 2015 (addressing gage malfunctions); and June 7, 2016 (clarifying that NIPSCO was not required to release more than 500 cfs from the Oakdale dam).

⁹ FWS defined a "low-flow event" as occurring when the 24-hour daily average flow is equal to or less than 300 cfs at the U.S. Geological Survey's (USGS) Winamac gage, located 30 river miles upstream of the Norway dam and 45 river miles upstream of the Oakdale dam, or is equal to or less than 570 cfs at the Oakdale gage, located 0.25 miles downstream of the Oakdale dam.

11. FWS selected the trigger flows and downstream flow requirements for abnormal low-flow conditions by using linear scaling.¹⁰ FWS explained that linear scaling is commonly used as a proxy for discharge, based on the assumption that discharge increases as drainage basin area increases.¹¹

12. FWS further explained that it used the Winamac gage to set trigger flows and approximate natural flows because it is the closest upstream gage that is unaffected by the project. However, NIPSCO, FWS, and USGS have been working to bring a new gage on line at Buffalo Bridge, approximately 12.5 miles upstream of Lake Shafer and 34.9 miles upstream of the Oakdale dam. By using a gage at Buffalo Bridge, NIPSCO states that it would be able to approximate flows at a point that is not subject to potential water withdrawals that occur between the Winamac and Buffalo Bridge gages.¹²

B. License Amendment Proposal

13. On October 2, 2014, as required by license Article 405, NIPSCO filed a license amendment application proposing a modified definition of “abnormal river conditions” consistent with FWS’ recommendations contained in its Assistance Letter. Specifically, NIPSCO proposed to modify the definition of “abnormal river conditions” in license Article 403 to the following:

Conditions with river flows of 3,000 cubic feet per second (cfs) or higher; hourly increases in river flow of 100 cfs or greater at both project dams; a 24-hour daily average of river flow of \leq 300 cfs as measured at the USGS Winamac gage; in the event of an equipment or operation issue at Oakdale unrelated to weather conditions upstream, a 24-hour daily average of river flow of \leq 570 cfs at the USGS Oakdale gage; or a 24 hour daily average of river flows of \leq 410 cfs at the NIPSCO Buffalo Bridge gage. Under “abnormal river conditions,” as defined by river flow, the licensee shall at all times act to maintain the fluctuation of the reservoir surface elevation within 0.75 feet above (rather than 0.25 feet under normal conditions) and 0.25 feet below elevation

¹⁰ See Final Environmental Assessment (EA) at 42. Linear scaling is a method of estimating stream flow at an ungaged stream site with a known drainage area based on flows measured at a gaged site with a known drainage area. The method assumes that the only factor affecting flows between the two sites is the size of the drainage areas. The method is also known as the drainage area ratio method. A linear relationship is shown by a straight line, as opposed to other types of relationships (e.g., exponential or logarithmic).

¹¹ See Order Amending License, 163 FERC ¶ 61,212 at Appendix B at 3.

¹² See NIPSCO’s October 2, 2014 Application at 6 (Accession No. 20141002-5140).

647.47 feet NGVD for Lake Shafer and 0.75 feet above 612.45 feet NGVD for Lake Freeman.

14. NIPSCO did not propose a minimum elevation for Lake Freeman during abnormal flow conditions.

C. Environmental Review and Staff Recommendation

15. On October 9, 2015, Commission staff issued a draft EA which found that NIPSCO's proposed action would overestimate inflows to Lake Freeman because it was based on the linear scaling method using data from the Winamac gage, located 45 miles upstream from the Oakdale dam, and, as a result, did not account for local hydrologic events, including groundwater inflows, stormwater runoff, evaporation, tributary inflows, changes in the accuracy of flow measurements over time, or lag time for measured flows to reach the project.¹³

16. Instead, the draft EA recommended the staff alternative, which separately defined abnormal high flows and abnormal low flows. Abnormal low flows would be triggered by the same flows as provided in the proposed amendment and Assistance Letter; however, NIPSCO would not have to release minimum flows that exceed inflow, which would cause Lake Freeman to drop. Rather, the staff alternative would require the licensee to cease generation at both developments and operate the gates to maintain Lakes Schafer and Freeman at the levels where they were when generation ceased. Once a triggering event occurred, outflows would equal inflows and storage in Lake Freeman would not be called upon to augment low flows downstream of Oakdale dam.

17. The draft EA found that Commission staff's alternative would reduce adverse effects of project operations on endangered mussels, while requiring that lake levels be held constant during abnormal low-flow conditions. The draft EA explained that the staff alternative may slightly enhance conditions for listed mussels downstream of the project compared to current conditions, by maintaining the natural hydrology of the river and by reducing rapid flow fluctuations that can adversely affect downstream mussels and subject them to stranding, desiccation, and predation, while protecting the numerous resources of Lake Freeman that depend on stable lake levels.¹⁴ Accordingly, the draft EA recommended the staff alternative.

18. The Commission received comments in support of and opposition to the draft EA's recommendations. Specifically, NIPSCO stated that Commission staff's alternative is not operation feasible because the dams' equipment is not designed, and cannot be modified to maintain constant reservoir elevations. The Protest Coalition agreed with staff's alternative

¹³ Draft EA at 65.

¹⁴ *Id.* at 80.

and found that science does not support the use of linear scaling. In response to the comments, Commission staff conducted a publicly-noticed technical conference on May 10, 2016, to discuss the proposed operational changes; the hydraulic analyses performed by NIPSCO, Commission staff, and the Protest Coalition; alternatives to NIPSCO's proposal; and Commission staff's analysis in the draft EA. Commission staff, NIPSCO, FWS, and the Protest Coalition participated in the conference and met on several occasions thereafter to discuss methods for approximating natural run-of-river flows and minimizing flow variability. The parties did not reach an agreement.

19. On November 10, 2016, Commission staff issued a final EA, recommending a modified staff alternative that would require, under abnormal low-flow conditions, that NIPSCO "immediately cease generation at the Oakdale [d]evelopment and at all times act to maintain the reservoir elevation at Lake Freeman at elevation 612.20 feet NGVD."¹⁵ Staff also requested concurrence from FWS that the staff alternative was not likely to adversely affect federally-listed mussels or adversely modify designated critical habitat. FWS and the U.S. Environmental Protection Agency (EPA) filed comments on the final EA. EPA recommended the Commission coordinate with the FWS, clarify whether impacts to mussels would be significant, and assess whether the operation of the project would be resilient to changing climate conditions.

20. By letter dated December 9, 2016, FWS stated it did not concur with Commission staff's finding in the final EA and requested additional information to prepare its biological opinion.¹⁶ On February 16, 2017, staff provided FWS with the requested additional information and asked for formal consultation under ESA section 7(a)(2).¹⁷

21. On July 6, 2017, the FWS issued a biological opinion for the modified staff alternative. The biological opinion concurred that the staff alternative is not likely to adversely affect the rayed bean and snuffbox mussels, because it is unlikely those species still occur downstream of the project.¹⁸ Further, the biological opinion concluded that the staff alternative is not likely to jeopardize the continued existence of the clubshell, fanshell,

¹⁵ Final EA at 17.

¹⁶ See FWS's December 9, 2016 filing (Accession No. 20161209-5105).

¹⁷ 16 U.S.C. § 1536(a) (2012).

¹⁸ FWS' July 5, 2017 Biological Opinion at 2 (Accession No. 20170706-5012) (Biological Opinion).

sheepnose, and rabbitsfoot mussels, and is not likely to destroy or adversely modify designated rabbitsfoot critical habitat.¹⁹

22. However, FWS did not agree with Commission staff's alternative to approximate run-of-river operations at the Oakdale development. FWS stated that under the Commission staff's alternative, during the late summer and early autumn, when flows are often naturally low, the quantity of water released from Oakdale dam would not match the flows that FWS has determined would best mimic the natural flow of the river (i.e., the linearly-scaled flow measured at the Winamac gage). Rather, FWS stated that the best way to protect mussel populations is to maintain run-of-river operations at the Oakdale development using linear scaling.

23. The biological opinion includes an incidental take statement, with one reasonable and prudent measure to avoid or minimize incidental take, and two terms and conditions to implement that measure. The reasonable and prudent measure is to minimize take of listed mussels by restoring what FWS considers to be a more natural flow regime downstream of Oakdale dam during low-flow periods. To implement the reasonable and prudent measure, the terms and conditions require the adoption of NIPSCO's proposed license amendment and implementation of the Assistance Letter, as clarified, and replacement of readings from the Winamac gage with those from the Buffalo Bridge gage, once that gage is operational.

D. Order Amending License

24. The Order Amending License incorporated FWS' modified incidental take statement, reasonable and prudent measures, and terms and conditions into the license. The order explained that although FWS and Commission staff have different approaches to maintaining run-of-river operations at the Oakdale development, the ESA constrains the Commission's discretion to implement Commission staff's recommended alternative.²⁰

25. On rehearing, the Protest Coalition argues that the Order Amending License: (1) should have adopted the Commission staff alternative; (2) did not adequately consider expert opinion other than that from FWS; (3) should not have adopted FWS' reasonable and prudent measures; (4) ignored riparian rights; and (5) violated the due process clause of the U.S. Constitution.

¹⁹ Final EA at 64. In a 2008 comment letter, FWS stated that northern riffleshell mussels are not known to be extant in the Tippecanoe River. *Id.*

²⁰ Order Amending License, 163 FERC ¶ 61,212 at P 53.

II. Discussion

A. Order Properly Adopted the Biological Opinion's Method of Operation

26. On rehearing, the Protest Coalition argues that the Commission should have adopted the Commission staff alternative for project operation.²¹ The Protest Coalition states that FWS found that the Commission staff alternative “is not likely to jeopardize the existence of the clubshell, fanshell, sheepsnose or rabbitsfoot mussels and is not likely to destroy or adversely modify designated critical habitat.”²² The Protest Coalition contends that this “no jeopardy” determination states that harm to endangered mussels and their habitat is not likely to occur under the staff alternative and therefore limits FWS’ authority to dictate dam operation measures to the Commission. As a result, the Protest Coalition concludes that the Commission has the discretion to adopt either its staff alternative or the biological opinion’s alternative for operation.²³

27. ESA section 7(a)(2) imposes both substantive and procedural responsibilities. The Protest Coalition, however, overstates the independence of federal agencies in acting under that section. Although a federal agency must ensure that its action will not jeopardize the continued existence of listed species or destroy or modify their designated critical habitat, it must do so in consultation with FWS or the National Marine Fisheries Service, as appropriate. Because those agencies are charged with implementing the ESA, they are the recognized experts with regard to matters of listed species and their habitat. The Supreme Court, in *Bennett v. Spear*, recognized that although a biological opinion “theoretically serves an advisory function ... in reality it has a powerful coercive effect on the agency action.”²⁴ The statutory framework is based on the assumption that the biological opinion will play a central role in the action agency’s decision making, and an agency that disregards a biological opinion and proceeds with its proposed action “does so at its own peril.”²⁵

28. For these reasons, we affirm the Order Amending License’s determination that the ESA constrains our discretion to implement staff’s recommended alternative.²⁶ Under the

²¹ Protest Coalition’s Request for Rehearing at 1.

²² *Id.* (quoting Biological Opinion at 2).

²³ Protest Coalition’s Request for Rehearing at 1-2.

²⁴ 520 U.S. 154, 169 (1997) (*Bennett*) (internal citation omitted).

²⁵ *Id.* at 170.

²⁶ Order Amending License, 163 FERC ¶ 61,212 at P 53.

Federal Power Act (FPA), the Commission is responsible for balancing environmental and developmental values in determining what measures should be required in connection with relicensing or amending a hydroelectric project. Under the ESA, the FWS has a different role. As the consulting agency, FWS must offer its expert opinion on whether the proposed action is likely to cause jeopardy to the species or destroy or adversely modify the species' critical habitat, without concern for other, possibly competing interests. We would not necessarily expect FWS to reach the same conclusion regarding run-of-river operations as Commission staff did under the FPA. We recognize that FWS' linear scaling approach provides less than ideal certainty in maintaining run-of-river conditions at Lake Freeman. These differing opinions do not provide us with any basis for rejecting the biological opinion here or in the Order Amending License.²⁷ Further, the importance of the consulting agency's role in protecting endangered species, coupled with the coercive effect of the ESA,²⁸ make it unlikely that we will act in a manner that is inconsistent with the conditions of a biological opinion.

29. The Protest Coalition argues that the Order Amending License's reliance on *Bennett* is misplaced, because that case involved a "jeopardy" determination rather than a "no jeopardy" determination.²⁹ The Protest Coalition argues that this distinction grants the Commission the authority to decide whether it should adopt the reasonable and prudent measures in FWS' "no jeopardy" biological opinion.³⁰ We disagree. A "no jeopardy" determination does not mean that the proposed action is not likely to cause harm to endangered species and their habitat. Rather, it means that the proposed action will not jeopardize the continued existence of listed species or destroy or modify their designated critical habitat.³¹ As explained in the Order Amending License, ESA section 9 prohibits *any* taking of a listed species, except in compliance with an incidental take statement included in a biological opinion after formal consultation.³² Violations of the ESA, including the taking prohibition, present a risk of civil and criminal penalties, including imprisonment. The Commission is not required to adopt the biological opinion. But, compliance with the terms and conditions of the biological opinion is necessary to ensure that any taking of a listed species does not violate the ESA, thus providing the licensee, as well as the Commission

²⁷ *Id.*

²⁸ *Bennett*, 520 U.S. at 169-170.

²⁹ Protest Coalition's Request for Rehearing at 4.

³⁰ *Id.*

³¹ 50 C.F.R. § 402.14(h)(3) (2018).

³² Order Amending License, 163 FERC ¶ 61,212 at P 53.

and its employees, “safe harbor” from possible prosecution.³³ The Commission could choose not to adopt the biological opinion, but in doing so it loses safe harbor protection.³⁴ *Bennett* did not limit consideration of safe harbor provisions to compliance with a “jeopardy” biological opinion, and neither do we.

B. FWS’ Biological Opinion Used Best Available Data

30. The Protest Coalition states that the Commission and FWS must use the “best science and commercially available data” to reach their final determinations.³⁵ The Protest Coalition contends that, during periods of low flow, endangered mussels downstream of the Oakdale Dam are entitled to the natural river flow, no more, no less; thus, in Protest Coalition’s view, the basic tenet of this case is determining what that flow would be without the presence of the Norway and Oakdale dams.³⁶ The Protest Coalition maintains that the Commission improperly accepted evidence submitted by FWS over that of its own staff or other parties.³⁷

31. Under the ESA, the Commission must provide “the best scientific and commercial data available” for formal consultation, and FWS must use the best available data when developing its biological opinion.³⁸ The purpose of the “best available science standard is to prevent an agency from basing its action on speculation and surmise.”³⁹ “The best available data requirement merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.”⁴⁰ An agency

³³ 16 U.S.C. § 1536(o)(2) (2012).

³⁴ *Me. Council of the Atlantic Salmon Fed’n v. Nat’l Marine Fisheries Serv.*, 203 F. Supp. 3d 58, 76 (D. Me. 2016).

³⁵ Protest Coalition’s Request for Rehearing at 2.

³⁶ *Id.*

³⁷ *Id.* at 2-3.

³⁸ 16 U.S.C. § 1536(a)(2) (2012); 50 C.F.R. §§ 402.14(d) and 402(g)(8) (2018).

³⁹ *San Luis & Delta – Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (*Locke*).

⁴⁰ *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (*Kern Cnty*) (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (internal quotations omitted). *See also Locke*, 776 F.3d at 995 (“Moreover, if the only available data is weak, and thus not dispositive, an agency’s reliance on such data does not

“complies with the best available science standard so long as it does not ignore studies, even if it disagrees with or discredits them.”⁴¹

32. The areas of disagreement between the Protest Coalition and FWS concern the nature and quantity of evidence on which FWS has relied and the ultimate conclusions that may appropriately be drawn from that evidence. The Protest Coalition asks the Commission to review the validity of the biological opinion and substitute our judgement for that of FWS, the agency Congress has determined in the ESA should be responsible for providing its expert opinion regarding whether amending the operation of the Norway-Oakdale Project is likely to jeopardize the continued existence of the listed species, or destroy or adversely modify its critical habitat. As we stated above,⁴² although Commission staff’s analysis concurred with the Protest Coalition’s hydrology experts’ concerns with FWS’ linear scaling approach for determining the low flow requirements for the project,⁴³ those concerns were not sufficient to lead the Commission to reject FWS’ findings in the biological opinion.⁴⁴ Additionally, the Protest Coalition has not provided any additional information to lead us to question those findings now. None of the Protest Coalition’s arguments presented on rehearing or in its protest to the Order Amending License provide any basis for rejecting FWS’ finding that project operation can result in the incidental taking of listed mussel species, and that the terms and conditions of the incidental take statement are needed to avoid or minimize the taking.

33. When a biological opinion is prepared in the course of a Commission proceeding, the only means of challenging its substantive validity is on judicial review.⁴⁵ Therefore, a reviewing court, and not the Commission, must decide whether FWS considered the relevant factors and adequately explained its choices in the biological opinion. Although the Commission makes an independent decision under the FPA as to what measures should be included in a license amendment, we are unlikely to contradict the consulting agency’s

render the agency’s determination arbitrary and capricious” (quotations and citations omitted)).

⁴¹ *Locke*, 776 F.3d at 995; *Kern Cnty*, 450 F.3d at 1080-81 (quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)).

⁴² See P 28, *supra*.

⁴³ Final EA at 45.

⁴⁴ Order Amending License, 163 FERC ¶ 61,212 at P 65.

⁴⁵ *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006).

recommendations in the absence of a showing that the biological opinion, and the remainder of the record, do not provide substantial evidence to support them.

C. The Biological Opinion's Reasonable and Prudent Measure and Implementing Conditions Do Not Constitute a Major Change

34. The Protest Coalition states that “reasonable and prudent measures, along with terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.”⁴⁶ The Protest Coalition asserts that FWS’s reasonable and prudent measure and implementing terms and conditions constitute a major change to the Commission staff’s alternative because they eliminate the lower reservoir elevation limit of Lake Freeman⁴⁷ and the Commission staff alternative set Lake Freeman’s reservoir surface elevation no lower than elevation 612.20 feet NGVD, which is 3 inches (0.25 feet) below normal reservoir surface elevation.⁴⁸

35. We disagree with the Protest Coalition’s argument that implementation of these conditions will result in major changes to the staff alternative.⁴⁹ We affirm the Order Amending License’s determination that although FWS’ reasonable and prudent measure would result in lower reservoir levels during periods of low flow, this approach is designed to achieve the same purpose as the Commission staff alternative, to approximate run-of-river flow and protect downstream mussel populations.⁵⁰ Thus, we do not consider implementation of the biological opinion’s reasonable and prudent measure a major change.

D. The Order Amending License Considered Riparian Rights

36. The Protest Coalition argues that the Order Amending License failed to consider the riparian rights of property owners surrounding Lake Freeman.⁵¹ Specifically, the Protest

⁴⁶ Protest Coalition’s Request for Rehearing at 4 (quoting 50 C.F.R. § 402.14(i)(2) (2018)).

⁴⁷ Protest Coalition’s Request for Rehearing at 4.

⁴⁸ *Id.* at 3.

⁴⁹ *See Westlands Water District v. U.S. Dep’t of the Interior*, 376 F.3d 853, 876 (9th Cir. 2004) (setting aside a reasonable and prudent measure as a major change because it required the relocation of hundreds of thousands of acre-feet of water, with wide ranging effects).

⁵⁰ Order Amending License, 163 FERC ¶ 61,212 at P 66.

⁵¹ Protest Coalition’s Request for Rehearing at 5.

Coalition contends that by permitting NIPSCO to lower Lake Freeman, the Commission denied property owners access to navigable waters and the reasonable use of that water for boating, domestic purposes, and recreation.⁵²

37. We disagree. The Order Amending License acknowledged that removal of the lower lake-level restriction for Lake Freeman would allow NIPSCO to use storage from Lake Freeman to comply with the flow releases from Oakdale dam required by the Assistance Letter.⁵³ These drawdowns would result in frequent and substantial adverse effects on other environmental resources associated with Lake Freeman.⁵⁴ For example, the Order Amending License cited to a 1.5-foot drawdown in Lake Freeman that:

occurred in August 2014 and resulted in lake levels that:
(a) prevented use of docks and boat lifts, thus stranding boats above the water level; (b) caused boat ramp closures; (c) created unsafe boating conditions; (d) created a noxious odor due to mortality of fish and mussels and decay of exposed aquatic vegetation in the lake; (e) significantly diminished recreational experiences; and (f) potentially endangered cultural resources present at the lake.⁵⁵

Users' access to Lake Freeman will only be restricted during periods of "abnormal river conditions."⁵⁶ However, despite these concerns, as stated above and in the Order Amending License,⁵⁷ the ESA constrains the Commission's discretion to implement the staff recommended alternative that set a minimum lake elevation level for Lake Freeman.

⁵² *Id.*

⁵³ Order Amending License, 163 FERC ¶ 61,212 at P 52.

⁵⁴ *Id.*

⁵⁵ *Id.* (citing EA at v).

⁵⁶ See P 13, *supra*; final EA at 74-76.

⁵⁷ See PP 27-29, *supra*; Order Amending License, 163 FERC ¶ 61,212 at P 53.

E. The Commission Protected Parties' Due Process Rights

38. The Protest Coalition argues that the Due Process Clause of the Fifth Amendment to the U.S. Constitution imposes an equal protection requirement on the federal government, and that the order denies Lake Freeman users equal protection under that provision.⁵⁸

39. Constitutional due process requires certain procedural safeguards, including the requirement that a party affected by government action be given “notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action,”⁵⁹ and also the “opportunity to be heard at a meaningful time and in a meaningful manner.”⁶⁰ With respect to due process and equal protection, the Protest Coalition and other interested persons had an opportunity to present concerns regarding the amendment of the license, and in fact did. Commission staff issued a notice of NIPSCO’s amendment on February 12, 2015, to which the Protest Coalition responded by filing a motion to intervene and protest.⁶¹ Additionally, Commission staff held a publicly-noticed technical conference on May 10, 2016, to solicit comments on staff’s draft EA and on the various hydraulic analyses and expert opinions available.⁶² The Protest Coalition had an opportunity to present its analysis and to ask the FWS questions regarding the methods in its Assistance Letter during the technical conference. The Commission considered those arguments and agreed with the Protest Coalition in some respects. Thus, we find that the Protest Coalition was afforded due process and therefore, that users of Lake Freeman and Shafer were afforded similar treatment in our proceeding.

40. The Protest Coalition contends that the Order Amending License treats users at Freeman Lake disparately from users at Lake Shafer.⁶³ The Protest Coalition explains that the order sets a minimum elevation limit at Lake Shafer, which has the effect of protecting

⁵⁸ Protest Coalition’s Request for Rehearing at 5.

⁵⁹ *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

⁶⁰ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁶¹ Order Amending License, 163 FERC ¶ 61,212 at P 25 (staff extended the filing deadline of NIPSCO’s amendment application twice, affording interested persons an additional 60 days to file a motion to intervene, comment, or protest).

⁶² *Id.* at P 28.

⁶³ Protest Coalition’s Request for Rehearing at 5.

recreation at this lake.⁶⁴ However, Lake Freeman has no lower limit and could potentially be drawn down to the river bed.⁶⁵

41. “Both the Equal Protection Clause and the [Administrative Procedure Act] prohibit agencies from treating similarly situated petitioners differently without providing sufficiently reasoned justification for the disparate treatment.”⁶⁶

42. We agree that users of Lake Freeman bear the burden of ESA compliance under the requirements of the biological opinion and the Order Amending License, and that users of Lake Shafer are not similarly burdened. Prior to issuance of the order, the reservoir elevations of Lakes Freeman and Shafer remained within 0.25 feet above or below their normal reservoir elevations, which afforded lake users similar treatment for recreation and tourism. In the final EA, Commission staff recommended that NIPSCO maintain the reservoir elevation at Lake Freeman at no lower than an elevation of 612.20 feet NVGD⁶⁷ in order to preserve the numerous resources at Lake Freeman in addition to enhancing mussel populations downstream of the project.⁶⁸ However, FWS disagreed. FWS determined that removing Lake Freeman’s lower lake-level restriction would allow NIPSCO to use storage from Lake Freeman to comply with the flow releases required by the Assistance Letter. FWS explained that flows downstream of the Oakdale dam (from Lake Freeman) have been frequently reduced as a result of NIPSCO maintaining certain minimum lake levels in Lakes Freeman and Shafer.⁶⁹ FWS stated that mussel mortality linked to dam management is likely to increase with the duration of the natural low-flow period, and that it is essential to the protection of mussels that the Norway-Oakdale Project be managed to avoid even brief episodes of inadequate flow downstream of Lake Freeman.⁷⁰ Thus, FWS required the removal of the lower lake restriction at Lake Freeman to protect endangered mussel species, causing disparate treatment between users at Lakes Freeman and Shafer. However, we find that because FWS provided sufficient justification for this disparate treatment, the order did not violate the Due Process Clause or the Administrative Procedures Act.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp.2d 105, 115 (D.D.C. 2006) (citing *Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1102-03 (D.C. Cir. 2005)).

⁶⁷ Order Amending License, 163 FERC ¶ 61,212 at P 36; final EA at 17.

⁶⁸ Order Amending License, 163 FERC ¶ 61,212 at P 32; final EA at 87.

⁶⁹ Order Amending License, 163 FERC ¶ 61,212 at P 48.

⁷⁰ *Id.*

43. In summary, for the reasons discussed above, we hereby deny rehearing.

The Commission orders:

Shafer and Freeman Lakes Environmental Protest Coalition's request for rehearing is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.