

COMMENTS
Scoping Document 1
Merced Hydroelectric Project, P-2179-042

Submitted by:

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Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission

Dear Ms. Bose:

Thank you the opportunity to provide the comments of the California Sportfishing Protection Alliance for the scoping of the relicensing of the Merced Hydroelectric Project.

CSPA has long been extremely concerned and extremely active in seeking improved management of the San Joaquin River and its major tributaries. CSPA is one of the organizations that successfully sued to have flow in the San Joaquin downstream of Friant Dam restored. The Senate passed legislation earlier in January to begin funding that restoration, one of whose goals is the restoration of Spring-run Chinook salmon to the San Joaquin.

However, recent numbers of returning fall-run Chinook in the Merced, Tuolumne and Stanislaus Rivers have been precariously low, to the point where the Fish and Wildlife Service, in April, 2008, stated that these fall-runs are in danger of extirpation, an assessment that seems to be supported by a model developed by the California Department of Fish and Game and presented to the State Water Resources Control Board in September, 2008. Returns of fall-run Chinook to the Merced in 2008-9, as shown in preliminary data collected by DFG, numbered about 250 live fish observed. This is a level that places the Merced fall-run in immediate danger of disappearing.

Numbers of steelhead returning to these rivers also appear to be low.

Management of the Merced River from its headwaters downstream to the Golden Gate is entwined in a number of overlapping and possibly conflicting jurisdictions. The National Park Service manages the river in Yosemite National Park. Downstream of the Park, the Merced is subject to regulation under the federal Wild and Scenic Rivers Act. The

Merced Project boundary begins at McClure Reservoir. More or less immediately downstream of the Merced Project is PG&E's Merced Falls Project. Downstream of Merced Falls, MID's consumptive water rights are exercised at Crocker-Huffman Diversion Dam. Downstream of Crocker-Huffman, water is withdrawn from the river by riparian and other water rights holders on the Lower Merced.

Still further downstream, future requirements are to be determined in the next few years for flows for the lower San Joaquin River, to replace the Vernalis Adaptive Management Project flows now that VAMP has officially expired. Integral to the VAMP flows were the operating agreements to meet various flow requirements at Vernalis that were reached among dam operators on the Stanislaus and Tuolumne Rivers as well as the Merced, and which will likely become more contentious as standards to meet or strengthen Vernalis flow requirements as given by D-1641 come into effect. We note that jurisdictional responsibility for flows to meet Vernalis, and more broadly, Delta flow requirements, has not recently been tested, as operators of New Melones, New Don Pedro, and McClure reservoirs entered into a voluntary allocation of responsibility, but is more likely to be disputed as flow requirements grow in magnitude.

The resolution of the future of water management of water in the California Bay-Delta is also likely to be greatly clarified over the next ten years, and to some unknown extent during the time that the relicensing process for the Merced Project takes place.

Overlaid onto these differing jurisdictions which can largely be conceptualized geographically are three Biological Opinions: two for the Central Valley Project's and State Water Project's Operations and Criteria Plan (OCAP) (for listed pelagic species, especially Delta Smelt, and for listed salmon, steelhead and green sturgeon), and one for listed Central Valley steelhead in the Merced River itself.

This multitude of jurisdictions presents significant difficulties for both FERC and for relicensing stakeholders, as well as for other jurisdictional agencies and parties concerned with aspects of management outside the Merced Project's geographical footprint.

The Federal Power Act, Section 10(a)(1), 16 U.S.C. § 803(a)(1) requires:

“That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes... .”

If the term “comprehensive” cited above is to have any meaning, then a comprehensive plan for the Merced River and waters upstream and downstream of the Merced Project cannot be decided piecemeal, divided up solely according to FERC project boundaries as

appears to be proposed in Section 3 of the Pre-Application Document for the Merced Project Relicensing.

At minimum, the following study needs inevitably overlap, and cannot be practically approached under a narrow limitation on geographic scope for the relicensing:

1. The hydrology of the Merced River.
2. Hydrologic modeling of the movement of water from El Portal to McClure Reservoir to the lower Merced River.
3. Water temperature modeling. This will need to begin with water temperature in the Merced River downstream of El Portal down to the project. The hydrodynamics of McClure Reservoir will also need to be modeled, stratification evaluated, and possible temperature variability in releases out of this reservoir evaluated. The thermal loading in McSwain Reservoir, Merced Falls Reservoir, the Merced Falls Project, and in the Merced River upstream of the Crocker-Huffman Diversion pool must be evaluated under different historic and potential operations and operating scenarios, and finally accounting for thermal loading in the Merced River downstream of Crocker-Huffman.
4. Evaluation of fish passage past Crocker-Huffman, McSwain Dam and New Exchequer Dam, and out of McClure Reservoir.
5. Evaluation of fish migration along the entire length of the Merced River.

All of these studies, at minimum, require an examination and an analysis that goes beyond FERC project boundaries.

Such analysis is needed to understand project effects on Central Valley steelhead, listed under the Federal Endangered Species Act, in order to fulfill the requirements of the National Marine Fisheries Service and its Section 7 consultation. To comply with the applicable regulations (50 CFR 402.14(c)) developed under ESA section 7, the consultation initiation package must include, among other information, a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects. In conducting its own analysis, NMFS will need to understand the total effects of all past activities, including effects of the past operation of the project, current non-federal activities, and Federal projects with completed section 7 consultations, in addition to future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects). In addition, 18 CFR 5.9 (Integrated Licensing Process procedures) states that study requests should include information and studies need for consultation under section 7 of the Endangered Species Act.

Such an analysis is also needed under NEPA. Section 3 of the PAD, which describes direct and indirect effects of the project as being limited to the immediate project area, presents as conclusion that which the NEPA process is designed to determine. Stating that all other effects are cumulative does not make it so. Nor is an effect necessarily cumulative under NEPA if it acts in concert with other effects. The geographic scope of

what is studied in relicensing must be sufficiently broad to quantify and evaluate that which licensee's consultants have stated upfront as a foregone conclusion. If the relicensing studies nothing outside the immediate project area, it goes without saying that it will find no project effects outside that area.

Wherever FERC decides to draw lines on scope, it should clearly delineate where it believes it has jurisdiction, over what, to what extent, and in the cases of the Merced River Project and the Merced Falls Project, in what venue.

The various aspects of water movement and management on the Merced River must be coordinated to optimize management benefits for anadromous salmonids as well as resident trout. It will do no good to release cold water in the summer from McClure Reservoir if the water is allowed to heat up to an unnecessary degree in McSwain and Merced Falls Reservoirs downstream.

By the same token, we believe that it would be efficient, both for licensees and for other relicensing participants on both the Merced River and Merced Falls Projects, to, at minimum, coordinate overlapping studies such as those noted above.

FERC must consider and set forth how it plans to address the soon-to-be-set new flow standards to replace the VAMP flows at Vernalis, under a reopening of D-1641 or whatever succeeds it. The VAMP flows have been shown to be grossly deficient and to directly affect Merced River steelhead and fall-run Chinook. Water to meet new standards must come from somewhere. Until the San Joaquin above Merced confluence once again flows on a regular basis, there are only three feasible sources of water to meet the new standards: the Stanislaus, the Tuolumne and the Merced. The Merced and the Tuolumne both contain FERC-jurisdictional rim dams; New Don Pedro is on a relicensing timeline two years behind the Merced River Project. FERC EIS's for the Merced and Tuolumne relicensings must consider the effect of each proposed action on the other, and how the combined actions can best address flow requirements in the lower San Joaquin River.

A Biological Opinion for Delta Smelt for the State Water Project and Central Valley Project's Operations Criteria and Planning (OCAP) was issued by the Fish and Wildlife Service on December 15, 2008. A draft Biological Opinion for salmon and steelhead under OCAP was released by the National Marine Fisheries Service in January, 2009, with a final BO expected in March, 2009. The FERC DEIS for the Merced Project, and the Biological Assessment for the accompanying Section 7 consultation, must intersect with the OCAP Biological Opinions to protect fisheries resources without jurisdictional gaps or loopholes based on overlapping or ambiguous jurisdictions.

Respectfully submitted,

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California Sportfishing Protection Alliance