



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
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ELECTRONIC FILING

March 16, 2023

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Hells Canyon Complex, Project No. 1971
National Marine Fisheries Service's Response to Idaho Power Company's 28 Dec. 2022
Filing

Dear Secretary Bose:

By this letter, National Marine Fisheries Service (NMFS) provides additional information in response to comments submitted by Licensee Idaho Power Company (IPC) on December 28, 2022 (hereafter, IPC's Comment Letter). IPC's Comment Letter disputes or seeks clarification of several matters addressed in NMFS' August 12, 2022 submission responding to the Federal Energy Regulatory Commission's (FERC's) *Notice of Intent to Prepare a Supplemental Environmental Impact Statement* (NOI) for the above-captioned project (Project) (filed June 13, 2022)¹. NMFS addresses IPC's concerns below.

Background

In 2006, NMFS submitted preliminary terms and conditions (T&Cs) and a preliminary section 18 prescription for the Project². In 2007, the FERC issued a Final Environmental Impact Statement (FEIS). After that, the licensing proceeding essentially went dormant until the FERC's June 2022 NOI. NMFS cannot fully support our 2006 T&Cs and prescription, because relevant new scientific and technical information has become available since 2006. Accordingly, on August 12, 2022, we filed the *National Marine Fisheries Service's Comments and Updated Preliminary Terms and Conditions and Prescriptions, and Filing of Comprehensive Plans* (hereafter, NMFS'

¹ The FERC's Supplemental Environmental Impact Statement (SEIS) will update the FERC's 2007 Final Environmental Impact Statement for the Project. The FERC's NOI suggested that the SEIS would be limited in scope and might not capture the full range of new information that has become available in the intervening 16 years. It does not appear that the FERC intends to undertake scoping for the SEIS, nor has the FERC solicited new information. This is of concern to NMFS, because we are required to make decisions based on the best scientific and technical information available.

² *NMFS' Comments and Preliminary Recommended Terms and Conditions for an Application for a Major New License for the Hells Canyon Hydroelectric Project (FERC No. 1971)* (submitted Jan. 24, 2006).

Comment Letter). Our Comment Letter included:

- Comments on the FERC's June 2022 NOI;
- Notice of NMFS' intent to update our previous preliminary T&Cs and prescription (which reserved our section 18 Authority);
- Preliminary updates to one of our 2006 preliminary T&Cs and to our preliminary section 18 prescription.

IPC's Comment Letter takes issue with some of the matters raised in our Comment Letter and expresses confusion regarding other matters. We provide the following clarifications in hopes of fostering productive and collaborative engagement as the licensing process resumes.

Response to IPC's Comments

IPC's Comment Letter states: "It is unclear whether NMFS' filing is intended to revise its preliminary conditions and prescriptions or is an initial filing providing notice of its intent to update its conditions and prescriptions at a later date." (IPC Comment Letter, p. 1). To clarify, NMFS' Comment Letter includes preliminary updates to NMFS' 2006 T&Cs, which NMFS will likely modify further based on the best information currently available, including the information provided in the SEIS. Because 17 years have now passed since NMFS' initial T&Cs and prescription were filed, and because NMFS must base decisions on the best scientific and technical information available, NMFS has both the right and responsibility to update its previous requirements and recommendations for the new Project license.

Fish Passage

The primary purpose of NMFS' Comment Letter was to inform the FERC of our intent to use our section 18 authority to prescribe fish passage at the Project at some point either before or during the new license term, and that fish passage alternatives should therefore be evaluated in the SEIS. The IPC's Comment Letter asserts that it is "premature for FERC to consider fish passage alternatives for the new license when neither the applicant nor the federal agencies have proposed fish passage measures" and that IPC "does not believe that new information warrants additional Section 18 prescriptions for the new license" (IPC Comment Letter, p. 2). NMFS respectfully disagrees. The likelihood that NMFS will prescribe fish passage at the Project during the new license term is high. The supporting rationale for this determination and the adaptive management approach NMFS is considering are discussed in detail in our Comment Letter. With this letter, we are also submitting informational documents for FERC consideration that are more current than IPC's assessment of potential fish passage submitted with the license application, dated December, 2001.

IPC's Comment Letter suggests that fish passage at the Project may not be feasible (IPC Comment Letter, p. 5-6). The primary challenge for fish passage at the Project is downstream passage of salmon and steelhead smolts migrating to the ocean. Upstream passage is already feasible using a fish trap and truck-loading facility located at Hells Canyon Dam. For the new license, IPC has stated their intent to upgrade the facility to support an experimental

reintroduction effort at Pine Creek (a tributary which empties into the Hells Canyon dam reservoir).³ Thus, in effect IPC has already agreed to upstream passage of fish. We hope to work with IPC, state and federal agencies and tribal nations to explore and develop opportunities for fish passage and reintroduction of species above the Hells Canyon Project.

While safe passage of juvenile salmon (smolts) on their downstream migration was problematic in the past, major strides forward have been made since attempts were abandoned at Brownlee Dam in the early 1960s. The relatively recent development of acoustic tags allows for the collection of detailed information on smolt behavior and survival. Juvenile downstream passage has been established with varying degrees of success at many more sites than just the Baker project, as suggested in IPC's Comment Letter (IPC Comment Letter, p. 5). Possibilities include pumped surface collectors, collectors at dams, screened intake, collection, and surface passage routes at dams. Intensive studies aimed at providing passage are also planned or underway at high head large reservoir projects such as Grand Coulee Dam and Shasta Dam, which are likely to greatly increase the base of knowledge that can be applied in developing a plan for downstream passage at the Project.

In IPC's Comment Letter, IPC acknowledges their responsibility for providing downstream passage for any fall Chinook that may be reintroduced above the Project. Based on our experience, the best (and ultimately least costly) approach is to consider fish passage for multiple species at the same time to prevent an outcome where a fish passage facility is only effective for one species or life history strategy and must later be modified. NMFS would support discussions with IPC and tribal, state, and federal co-managers to further explore and potentially resolve these issues.

The proposed 50-year new Project license term warrants a precautionary, flexible approach to developing a long-term plan for Project operations and fish passage under the context of the best available scientific information regarding the accelerating effects of climate change and the Project's effects on ESA-listed (and non-listed) species. As described in our Comment Letter, NMFS proposes an adaptive management strategy to guide fish passage and reintroductions for the Project. This strategy would include review processes, milestones, and timelines to assess current knowledge, guide further studies, and ultimately make sound, scientifically-based decisions on the type and timing of fish passage implementation. NMFS wishes to maximize the likely success of any fish passage implemented at the Project and invites IPC and tribal, state, and federal co-managers to engage in discussions on this topic.

1980 Settlement Agreement

IPC's Comment Letter states that fish passage at the Project is not warranted because IPC "continues to fully mitigate for the losses of anadromous fish associated with the Project

³ This reintroduction effort is the result of a settlement agreement between IPC and the state of Oregon, and is in accordance with Oregon law requiring fish passage for project relicensing. IPC requested a finding from FERC excluding them from the state law due to federal primacy. FERC rejected the request and instructed IPC to find a solution with the state (158FERC¶ 61,048, January 19, 2017).

pursuant to the Settlement Agreement between the States of Idaho, Oregon and Washington and NMFS (February 14, 1980)” (IPC Comment Letter, p. 2). NMFS does not concur with this contention for two reasons: (1) NMFS expressly declined to enter into the provision regarding the quantity of fish needed for mitigation; and (2) the 1980 Settlement Agreement only applied to the previous license, which expired on July 15, 2005. The 1980 Settlement Agreement provides:

Idaho, Oregon and Washington agree that the numbers of fish herein agreed upon constitute full and complete mitigation for all numerical losses of salmon and steelhead caused by or in any way associated with the construction of, and operation *within the existing license* for [the Project].

1980 Settlement Agreement Art. II (emphasis added); *id.* Art. I (parties “intend to settle all issues raised by this proceeding related to the numbers of salmon and steelhead lost or destroyed as a result of the construction of, and operation within the existing license for [the Project]”) (emphasis added); *id.* Art III (“Petitioners agree that they will not for the duration of the current Project No. 1971 license seek relief from the [FERC] on any matter concerning Licensee’s responsibility to compensate for salmon and steelhead losses”) (emphasis added); *id.* Art. IV (same, referring to mitigation for “operations within the existing license).

By its plain terms, the 1980 Settlement Agreement expired on July 15, 2005, when the license to which it applied expired. It has no bearing on the current licensing proceeding and does not in any way restrain NMFS’ ability to exercise our section 18 authority for the new license. Information made available since 1980 raises questions as to whether the numeric mitigation targets in the 1980 Settlement Agreement were in fact sufficient to fully mitigate the Project’s effects. Also, tribal nations affected by the loss of anadromous fish caused, at least in part, by the Project, were not part of the 1980 Settlement Agreement. NMFS recommends dialog among the relevant tribal, state, and federal fish resource management agencies and the Licensee to develop mutually-agreeable license articles based on the best scientific and technical information available.

Endangered Species Act

Because the previous license for the Project preceded the Endangered Species Act (ESA)⁴ listings of Snake River spring/summer Chinook salmon, fall Chinook salmon, sockeye salmon, and steelhead, NMFS has never evaluated the Project for ESA compliance. NMFS acknowledges and appreciates IPC’s efforts to implement measures to reduce the Project’s effects on ESA-listed species (*see* IPC’s Comment Letter, p. 2). To date, the FERC has not completed ESA section 7 consultation with NMFS. *See* 16 U.S.C. § 1536(a)(2). NMFS therefore cannot determine if current Project operations jeopardize any ESA-listed species or destroy or adversely modify critical habitat and has not provided incidental take coverage for the Project.

⁴ 16 U.S.C. §§ 1531 *et seq.*

NMFS' Authorities and Responsibilities

IPC's Comment Letter seems to misunderstand NMFS' various authorities and responsibilities in the hydropower relicensing context (*see, e.g.*, IPC Comment Letter, p. 4) ("NMFS would be exceeding its Section 18 and ESA authorities if it attempted to require that Idaho Power fulfill [broad sense recovery] goals and tribal trust obligations in the FERC relicensing process."). NMFS' authorities under the Federal Power Act are not limited to the protection of ESA-listed species; NMFS has authority to prescribe fishways for any or all fishery resources under NMFS' jurisdiction, including both listed and non-listed species. 16 U.S.C. § 811 ("The FERC shall require the construction, maintenance, and operation by a licensee at its own expense of such . . . fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.").

As for tribal relations, the tribal trust responsibility applies to all of NMFS' actions and decisions, as well as to FERC's. NMFS' ESA authority is separate from, but, in the hydropower relicensing process, often complementary to, NMFS overarching section 18 authority, as protection, mitigation and enhancement measures and/or fish passage may be needed for the conservation of ESA-listed species. Other NMFS responsibilities in hydropower relicensing include ensuring that projects are operated consistent with the Magnuson-Stevens Fishery Conservation and Management Act's⁵ goals of preserving and enhancing fishery resources and protecting essential fish habitat and with comprehensive plans for the affected waterway, including, as relevant here, the Columbia Basin Collaborative Phase II Report (filed with FERC in our August 15, 2022 letter to FERC) and ESA recovery plans.

Fish Distribution for Tribal Nations

The IPC claims in their Comment Letter that they lack the authority to distribute fish to upstream tribal nations to partially mitigate the effects of the Project. There has been a voluntary effort since 2006 that has delivered some fish to the affected tribes, but it has been somewhat limited, and the fish are often of questionable quality. The distribution also relies on the state management agencies determining that there are "surplus" fish available. The IPC, as they have demonstrated both in the 1980 Settlement Agreement and the more recent settlement agreement with the state of Oregon, has the ability to contract with other parties to culture fish to fulfill their mitigation obligations. This ability could be extended to cover the relatively small number of fish required by NMFS' preliminary 10(j) recommendation. IPC could also negotiate with state fisheries agencies to provide fish, as they have over the past 16 years. It is well within the ability of IPC to provide fish for these limited purposes and falls squarely under the category of mitigation which justifies its inclusion under section 10(j).

Supplemental information on fish passage

The U.S. Department of Commerce's National Oceanic and Atmospheric Administration's National Marine Fisheries Service, West Coast Region (NMFS), is filing supplemental

⁵ 15 U.S.C. §§ 1801 *et seq.*

information pursuant to Section 10(a)(2)(A) of the Federal Power Act (FPA). NMFS has determined that this information is necessary for FERC to properly assess the potential for fish passage at the Hells Canyon Complex. Digital copies of the referenced documents are attached. P-1971. In addition, we request that FERC include these documents under Docket P-1971 for the Hells Canyon Hydroelectric Project.

Table 1. Documents submitted as supplemental information under Section 10 (a)(2)(A) of the FPA.

Citation	Link (if available)
Northwest Power and Conservation Council. Document number 2016-4. Staff paper: Review of fish passage technologies at high-head dams. December 2016	https://www.nwcouncil.org/reports/staff-paper-review-fish-passage-technologies-high-head-dams/
Kock TJ, Ferguson J.W., Keefer ML Schreck, CB. 2021. Review of trap-and-haul for managing Pacific salmonids (<i>Oncorhynchus</i> spp.) in impounded river systems. Reviews in Fish Biology and Fisheries. Vol 31:1 March 2021.	https://doi.org/10.1007/s11160-020-09627-7
Kock TJ, Verretto NE, Ackerman NK, Perry RW, Beeman JW, Garello MC, Fielding SD. 2019. Assessment of Operational and Structural Factors Influencing Performance of Fish Collectors in Forebays of High-Head Dams. Transactions of the American Fisheries Society 148:464–479.	Not open source
Keefer ML, Jepson MA, Clabough TS, Caudill CC. 2021. Technical fishway passage structures provide high passage efficiency and effective passage for adult pacific salmonids at eight large dams. PLoS ONE 16(9): e0256805.	https://doi.org/10.1371/journal.pone.0256805

Digital copies of these documents are attached to this letter

Conclusion

The upcoming draft SEIS is not an appropriate venue to dispute the possibility of fish passage being required under the new license. Rather, it is an opportunity to consider passage alternatives and their effects to inform future decision-making. In 2006, NMFS reserved authority to prescribe passage at some point during the new license, thereby indicating that passage may be warranted prior to license expiration. Seventeen years have elapsed since NMFS' reservation of authority. Given technological advancements and the increasing understanding of climate change and of the status of fish species affected by the Project, tribal trust responsibilities that may not have been completely fulfilled by the now-expired license for the Project, and associated social justice issues, NMFS stands by our August 2022 Comment Letter stating that passage will likely be necessary during the new license. NMFS urges FERC to include this important issue in their deliberations and would welcome the opportunity to discuss it further with interested licensing participants.

Sincerely,



Ritchie J. Graves
Columbia Hydropower Branch
Interior Columbia Basin Office
NOAA Fisheries, West Coast Region

Attachments: Informational documents



NPCC-2016-Review-
of-Fish-Passage-Tec



keefe et al
2021.pdf



kock et al 2019
tafs.pdf



kock et al 2021
rfbf.pdf

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Idaho Power Company) FERC NO: P-1971
) Hells Canyon Hydroelectric Project

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by electronic filing, the National Marine Fisheries Service’s cover letter to Kimberly D. Bose, FERC, and this Certificate of Service upon each person designated on the official service list compiled by FERC in the above captioned proceeding.

Date this 16 day of March 2023.

Bonnie J. Hossack
Bonnie Hossack
Administrative Assistant

Document Content(s)

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