

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Loup River Public Power District

Project No. 1256-031

**REQUEST BY LOUP RIVER PUBLIC POWER DISTRICT
FOR REHEARING OF LICENSE ORDER**

Dated: June 16, 2017

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Pursuant to Section 313(a) of the Federal Power Act (“FPA”)¹ and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”),² Loup River Public Power District (“Loup Power District” or “District”) hereby requests rehearing and modification of the “Order Issuing New License” issued for the Loup River Hydroelectric Project (FERC Project No. 1256, “Project”) on May 22, 2017 (“Order”).³ The Commission’s Order is not based on substantial record evidence, is arbitrary and capricious, and is not in the public interest. Therefore, the Order should be modified.

In support of this Request, Loup Power District sets forth as follows:

I. Background

The Loup River Hydroelectric Project, located on the Loup River in Nance and Platte Counties, Nebraska, has an installed nameplate capacity of 53.438 MW⁴ and was most recently relicensed in 1982.⁵ On April 16, 2012, Loup Power District filed its application for a new license to continue to operate and maintain the existing Project for a 30-year term (“Application” or “FLA”).

¹ 16 U.S.C. § 8251(a).

² 18 CFR § 385.713.

³ 159 FERC ¶ 62,198 (2017).

⁴ In 2003 the Commission amended the prior License to increase the authorized installed capacity to 50.937 MW, based on a proposed upgrade to the Project [105 FERC ¶ 62,235 (2003)]. Based on completion of that upgrade, the as-built capacity of the Project has been 53.438 MW, which the District will document as directed in Ordering Paragraph D of the New License.

⁵ 21 FERC ¶ 62,535 (1982).

The Project consists of the Diversion Weir,⁶ an intake structure, a settling basin (“Settling Basin”), the Monroe powerhouse, two regulating reservoirs (Lake Babcock and Lake North), the Columbus powerhouse, and an outlet weir; all located along a 35-mile-long power canal (“Power Canal”) which empties into the Platte River near Columbus. The 1,321-foot-long, 6-foot-high concrete Diversion Weir spans the Loup River and directs water into the Power Canal intake structure. The 2-mile-long Settling Basin in the Power Canal is bordered on both sides by sand management areas (“SMAs”) that have a combined area of approximately 720 acres.⁷ The Project’s North SMA provides habitat used by the Interior least terns and piping plovers within the Project Boundary, contributing to the existence of these species. The Power Canal also provides water for agricultural operations adjacent to the Project.⁸

All of the power generated by the Project is sold to the Nebraska Public Power District (“NPPD”) at the two powerhouse substations, and NPPD dispatches the power in accordance with established operating agreements between the District and NPPD. The District maintains and operates five developed recreation areas and three multi-use trails, which provide opportunities for activities including camping, hiking, biking, and aquatic recreation.

In its 2012 Application, the District proposed to continue to operate the Project with no increase in the Project’s generating capacity, but agreeing to release a bypass flow of

⁶ Contrary to the Order [at para. 130, and in Ordering Paragraph B(2)], there is no dam at the Project. Therefore, the District requests that on rehearing the description of the Project facilities included in Ordering Paragraph B(2) be corrected.

⁷ As referred to in this proceeding, the “Headworks” of the Project consists of the Diversion Weir, the intake gate structure, the sluice gate structure, the Settling Basin, the hydraulic dredge, the SMAs, and the skimming weir; *see*, the FLA at Exhibit A (pages A-3 through A-7); and includes the recreation facilities on property owned by the District in and around these areas.

⁸ In 2011 there were 71 irrigation water withdrawal points along the length of the Power Canal, as documented in the FLA, Volume 2, Exhibit E, Section E.1.7; all such withdrawals have a designated state water right.

approximately 75 cfs (as measured at USGS gage no. 06793000, near Genoa, Nebraska) on days when the ambient air temperature at Genoa or Columbus was forecasted to reach or exceed 98° F.⁹ In support of its relicensing proposal, the District has filed extensive documentation including results from all studies performed pursuant to the Commission Staff's Study Plan Determination¹⁰ during the relicensing proceeding. Studies conducted by the District were based on input from all resource agencies and agreed upon by the Commission and the agencies.

The Commission Staff issued its Draft Environmental Assessment for the Project on May 22, 2014 ("DEA"), with a proposed Staff Alternative for relicensing the Project and with proposed Draft License Articles ("DLAs"). The District filed comments on the DEA and on the DLAs on June 23, 2014, December 5, 2014, and November 5, 2015. On April 30, 2015, the U.S. Fish and Wildlife Service ("USFWS") issued its Draft Biological Opinion ("Draft BO") under the Endangered Species Act ("ESA"). As part of that Draft BO, USFWS determined that the relicensing of the Project under the proposed Commission Staff Alternative as set forth in the DEA and proposed DLAs would not jeopardize the continued existence of any threatened or endangered species. The Draft BO also included an Incidental Take Statement ("ITS") with Reasonable and Prudent Measures ("RPMs") and associated Terms and Conditions for pallid sturgeon, Interior least terns, and piping plovers. The Commission Staff submitted comments on the Draft BO to USFWS on June 5, 2015. In that submittal, the Commission Staff forwarded the District's comments on the Draft BO in which the District demonstrated fatal flaws in the Draft BO.

⁹ See, e.g., FLA at Exhibit B (pages B-12 and B-25), Exhibit D (page D-5), Exhibit E (pages E-53 and E-187), and Exhibit H (page H-18).

¹⁰ Study Plan Determination for the Loup River Hydroelectric Project, Office of Energy Projects, Project No. 1256-029, issued August 26, 2009.

On July 5, 2016, the Commission Staff issued its Final Environmental Assessment for the Project (“FEA”), with the proposed Staff Alternative for relicensing the Project and with proposed revised Draft License Articles (“Revised DLAs”). The District submitted comments on the FEA on September 21, 2016, reaffirming that the requirements of the proposed Staff Alternative and the proposed Revised DLAs: (i) do not adequately address the arguments of the District; (ii) do not consider the significant operational impediments that restrict the District’s ability to implement and comply with the proposed flow modifications; (iii) are unnecessarily burdensome and costly to the Project; (iv) could jeopardize the District’s water right and circumvent water rights administration in the State of Nebraska; (v) are likely to result in economic harm to electric power users; and (vi) are generally arbitrary and capricious and not supported by substantial evidence in the record of this relicensing proceeding.

On December 16, 2016, USFWS issued its final Biological Opinion (“BO”) with minimal modifications to the Draft BO. As part of that BO, USFWS concluded that the relicensing of the Project under the proposed Commission Staff Alternative and proposed Revised DLAs would not jeopardize the continued existence of any threatened or endangered species. On January 27, 2017, the District filed comments with the Commission asserting that the BO (as with the Draft BO) was fatally flawed, inconsistent with applicable ESA standards and USFWS policy, and not supported by substantial evidence in the record of this relicensing proceeding.

The Commission issued the Order granting a New License to the District on May 22, 2017, with an effective date of May 1, 2017. In that Order, the Commission imposes new

significant requirements and obligations on the Project.¹¹ In particular, the Commission includes terms and conditions in the Order requiring changes in Project flows/diversions and use of available water which the District has repeatedly demonstrated are not supported by substantial evidence in the record and, in some cases, are not operationally possible. Furthermore, the Order incorporates the BO's RPMs and associated Terms and Conditions through Ordering Paragraph E (and Appendix A) to the Order. In particular, despite the Commission Staff's comments on the Draft BO (as discussed further below in Sections IV.A.2 and IV.B.2 of this Request), the Order (through Ordering Paragraph E and Appendix A) adopts the BO RPM1 and associated Term and Condition #1(a) for pallid sturgeon that would require the District to shut down hydrocycling operations and cease diversions into the Power Canal if temperatures meet or exceed 93° F., based on real-time temperature readings at the U.S. Geological Survey ("USGS") gage at Louisville. The Commission's issuance of the Order with these terms and conditions (including its reliance on the BO and ITS, with its RPMs and associated Terms and Conditions) is arbitrary and capricious, and is not based on substantial evidence in the record of this proceeding. Therefore, as set forth below, the Commission should modify the Order on rehearing.

II. Statement of Issues and Specifications of Error in the Commission's Order

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,¹² the District submits the following statement of issues and specifications of error for the purpose of this rehearing request:

¹¹ In License Article 201, the Commission also modified the authorized installed capacity of the Project to 50,937 MW, and in Ordering Paragraph D directs the District to file a revised "as-built" Exhibit A description and photographs of the new rating capacity nameplates for each turbine and generating unit. The District does not seek rehearing of this requirement; but, as noted above, the installed capacity of the Project is 53.438 MW. The District will be filing an amended Exhibit A that updates the description of the installed capacity of the Project to 53.438 MW consistent with as-built drawings, pursuant to Ordering Paragraph (D).

¹² 18 CFR § 385.713(c)(2).

- 1) Whether the Commission erred in issuing a License for the Project with terms and conditions that are arbitrary and capricious, are not supported by substantial record evidence, are contrary to the public interest, and are otherwise contrary to law, as prohibited under the FPA and the Administrative Procedure Act (“APA”).¹³
- 2) Whether the Commission erred in issuing its Order based on the FEA that contains errors and omissions and makes conclusion not based on substantial record evidence.¹⁴
- 3) Whether the Commission erred in imposing requirements under License Articles 404 for seasonal minimum bypass flows which requirements are excessive, impose significant operational problems, adversely affect the District’s ability to produce power, may jeopardize the District’s water rights, adversely affect agricultural and industrial operations of others, are not an appropriate balance of licensing factors under the FPA, and are not supported by substantial record evidence. Further, whether the Commission erred in misstating that Loup had agreed that the New License could contain a higher minimum bypass flow from that proposed in its Application.¹⁵
- 4) Whether the Commission erred in imposing a requirement for run-of-canal operations from May 1 through June 7 under License Article 405, without the conditions that the District had indicated were necessary components and without a reasonable allowance for variance, where such restriction in operations imposes significant operational problems, will prevent the District from fully utilizing its regulating reservoirs; adversely affect its ability to produce power; is not an appropriate balance of licensing factors under the FPA; and is not supported by substantial record evidence.¹⁶
- 5) Whether the Commission erred in imposing a requirement to cap diversions into the Power Canal from March 1 through June 30 under License Article 406 which requirement is not an appropriate balance of licensing factors under the FPA, imposes significant operational problems, adversely affects the District’s ability to produce power, may jeopardize the District’s water rights, adversely affects agricultural and industrial operations of others, adversely affects the environment along and in the Canal, and is not supported by substantial record evidence.¹⁷
- 6) Whether the Commission erred in imposing flow and diversion restrictions under License Articles 404, 405 and 406 that adversely impact electric customers and remove a substantial source of renewable power from the electric grid, contrary to the

¹³ See 16 U.S.C. § 8251(b); and 5 U.S.C. § 706(2); see also *Wisconsin Public Power v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (“*Wisconsin*”); see also *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (“*Bangor*”); *City of Oconto Falls v. FERC*, 204 F.3d 1154 (D.C. Cir. 2000) (“*Oconto Falls*”).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

- public interest.¹⁸
- 7) Whether the Commission erred in ignoring operational impediments to the District's ability to implement requirements for minimum bypass flows, run-of-canal operations, and the capped diversions into the Power Canal under License Articles 404, 405 and 406.¹⁹
 - 8) Whether the Commission erred in imposing a requirement in License Article 411 for mitigation based on future monitoring of Interior least terns, piping plovers and Rufa red knot where such requirement for mitigation is speculative and arbitrary and capricious, and where the record does not support a direct causal connection between Project operations and the potential change in nesting or presence of the species, and is not supported by substantial record evidence. Further, whether the Commission erred in refusing to include a provision to remove requirements for species upon their delisting.²⁰
 - 9) Whether the Commission erred in requiring under License Article 413 that the District continue to operate the off-highway vehicle ("OHV") area of the Headworks Park under its License where the District had stated that it would continue to operate the OHV area as part of Project facilities only if a third-party manager agreed to continue to operate that area, and the District had notified the Commission that, as of 2016, no such manager is available. Furthermore, whether the Commission erred in imposing that requirement, failing to recognize that it is excessive, not necessary given the extensive other recreation facilities in the Project, and not an appropriate balance of licensing factors under the FPA.²¹
 - 10) Whether the Commission erred in failing to balance the development and non-development interests in issuing the New License as required by the FPA.²²
 - 11) Whether the Commission erred generally by incorporating the BO (and its RPMs and associated Terms and Conditions) in the New License through Ordering Paragraph E (and Appendix A) where such BO (and ITS) is fatally flawed and is arbitrary and capricious.²³
 - 12) Whether the Commission erred specifically in incorporating the BO's RPM1 associated Term and Condition #1(a) for pallid sturgeon through Ordering Paragraph

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See 16 U.S.C. §§ 797(e), 803(a), and 808; see also *City of Centralia v. FERC*, 213 F.3d 742 (D.C. Cir. 2000) ("*Centralia*"); *U.S. Department of Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992) ("*DOI*").

²³ See 5 U.S.C. § 706(2); see also *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) ("*Tacoma*"); *Arizona Cattle Growers Association v. FWS*, 273 F.3d 1229 (9th Cir. 2001) ("*Arizona Cattle Growers*"); *Aluminum Corporation of America v. BPA*, 175 F.3d 1156 (9th Cir. 1999) ("*ALCOA*"); *California Save our Streams Council v. Youffer*, 887 F.2d 908 (9th Cir. 1989) ("*California*"); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988) ("*Tribal Village*").

E (and Appendix A) when the Commission Staff itself acknowledged that the provision is not supported by record evidence.²⁴

As demonstrated in this Request for Rehearing, the Commission erred on each of the issues listed above. As a result, the Order is arbitrary and capricious, and should be reversed and revised on rehearing.

III. The Commission Erred in its License Order and the Order/New License Should Be Modified on Rehearing.

Based on the errors listed above and as amplified below, the Commission on rehearing should modify the Order to remove the requirements discussed in this Request for Rehearing as not based on substantial evidence in the record of this proceeding, arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with law.

A. Standard of Review

Section 313(b) of the FPA requires that decisions by the Commission must be based on “substantial evidence” in the record.²⁵ Furthermore, the Commission’s orders must meet the “arbitrary and capricious” and the “substantial evidence” standards under the APA, demonstrating reasoned decision making.²⁶ In fulfilling the FPA and APA requirements, the Commission must examine the relevant data and must articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”²⁷ Such “substantial evidence” must be record evidence that is both reliable and probative as to the finding made, and is superior to competing evidence as to that finding.²⁸ Failure by the Commission to consider relevant evidence in the record of the proceeding does not constitute

²⁴ *Id.*

²⁵ 16 U.S.C. § 8251(b).

²⁶ 5 U.S.C. § 706(2); *see, Wisconsin*, 493 F.3d at 256; *see also Bangor*, 78 F.3d at 663 and n.3; *Oconto*, 204 F.3d at 1159.

²⁷ *See, e.g., Wisconsin*, 493 F.3d at 256; quoting *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983) (“*Motor Vehicle*”); *see also, Burlington Truck Lines, Inc. vs. U.S.*, 371 U.S. 156, 168 (1962) (“*Burlington Truck*”).

²⁸ *See, e.g., Motor Vehicle*, 463 U.S. at 43; *Burlington Truck*, 371 U.S. at 168.

reasoned decision making.²⁹

The Order issuing a New License for the Project does not meet those statutory requirements. Therefore, the Order should be modified on rehearing as set forth in this Request.

B. The Commission's Order is in error in relying on the FEA, which contains errors and omissions and is not supported by substantial evidence in the record.

In its Order, the Commission accepts and adopts the findings of the FEA without change (specifically in Order para. 6 and 144, and throughout the Order), and issues a New License for the Project adopting the Staff recommendations in that FEA. Based on the record in this proceeding, the Commission: (i) erred in adopting the FEA Staff recommendations without correcting the factual errors and omissions in the FEA (and the related recommendations); (ii) erred in failing to address relevant record evidence which was ignored in the FEA; and (iii) erred in adopting the Staff's recommendations and conclusions in the FEA that are unsupported by substantial record evidence.³⁰ Such actions do not reflect reasoned decision making.³¹

For example, the FEA (at B-2) states that “[t]he draft EA did not, and the final EA does not, consider continuing operational effects to be past effects associated with project construction, but rather, as ongoing effects associated with current project operation.” The District has provided substantial evidence through the agreed upon studies, and site specific referenced literature, that the Loup River Bypass Reach, the Platte River bypass reach, and the lower Platte River are in a state of dynamic equilibrium (*i.e.*, not experiencing

²⁹ See, e.g., *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992).

³⁰ See the District's September 21, 2016, comments on the FEA.

³¹ See, e.g., *Wisconsin*, 493 F.3d at 256; see also, *Bangor*, 78 F.3d at 663 and n.3; *Oconto*, 204 F.3d at 1159.

aggradation or degradation).³² As part of the District's Study 1.0, Sedimentation, a body of evidence approach was used to characterize the Loup and Platte Rivers in the vicinity of the Project. As stated in Section 5.1, Summary of Results, "Existing literature, including Platte River studies by USACE [U.S. Army Corps of Engineers], USBR [U.S. Bureau of Reclamation], and USGS; calculations of effective discharges; regime analysis; literature on the channels' profiles; and physical observations indicate that the Loup River [B]ypass [R]each and the lower Platte River are not experiencing aggradation or degradation. Instead, these analyses, particularly the bed gradation studies by others and the effective discharge and regime analysis, clearly indicate that both the Loup and lower Platte [R]ivers are well within parameters establishing them as dynamically stable, non-aggrading and non-degrading, braided rivers."³³

Further, the FEA states that a sediment deficit exists at the Project tailrace.³⁴ However, the District has provided substantial information to the record that demonstrates there is no sediment deficit at the Project tailrace.³⁵ In the FEA the Commission Staff also fails to consider and acknowledge the results of the District's Study 4.0, Water Temperature in the Project Bypass Reach.³⁶ This study was agreed upon by all parties during the ILP Study Plan development process. As detailed in Study 4.0, the results of the site-specific study indicated: (i) a statistically significant 1:1 relationship between the temperature upstream and downstream of the diversion; (ii) a statistically significant relationship between ambient temperature and water temperature; and (iii) **NO** statistically significant relationship

³² See the District's June 23, 2014, comments on DEA, Attachment A (page A-2, second bullet).

³³ See the FLA, Volume 3, Appendix A, Sedimentation Study Report (page 69).

³⁴ FEA at 125.

³⁵ See the District's November 23, 2011, response to comments on the Updated Study Report, Attachment B (pages 1-12, including Figures 1-8); the District's December 6, 2012, comments on USFWS's Section 10(j) recommendations, Attachment B (pages B-1 through B-5); and the District's June 1, 2015, comments on the Draft BO, Attachment C (pages 3-8).

³⁶ See the FLA, Volume 3, Appendix C, Water Temperature in the Project Bypass Reach Study Report.

between water temperature and flow rate in the Bypass Reach. Even though there is greater volume of flowing water upstream of the diversion, the measured temperatures were statistically the same upstream and downstream of the diversion. Instead, in the FEA, the Commission Staff relies on non-site specific literature that it claims shows a correlation between river discharge and water temperatures.³⁷

The Order (para. 93) is also in error in its reliance on the FEA's analysis of the proposed minimum bypass flows (as set forth in License Article 404) and cap on diversions into the Power Canal (as set forth in License Article 406). That reliance is unfounded and unsupported by the record. The FEA claims to justify the minimum bypass flows and the maximum diversions into the Canal as enhancing habitat for Interior least terns, piping plovers, and whooping cranes.³⁸ However, the FEA fails to prove that current Project operations are harmful to either species, or that the changes mandated in the New License would benefit the species.

Contrary to the FEA's claim, there is substantial record evidence, including study results and literature, that refutes the FEA's justification for the minimum bypass flows or the cap on diversions into the Power Canal.³⁹ For example, results from Relicensing Study 14.0, Alternative Project Operations and Sediment Management (a study expressly requested by the Commission Staff), clearly show that increased flow would not result in measureable increased Bypass Reach habitat for the species.⁴⁰ Furthermore, the results of Study 14.0 documents that the cap on diverted flow would result in only immeasurable increases in

³⁷ FEA at page 129.

³⁸ See, e.g., FEA at pages xxvii-xxviii.

³⁹ See, e.g., PRRIP, 2015, Final Statement – PRRIP Tern and Plover Habitat Synthesis Chapters, available online at www.platteriverprogram.org/PubsAndData/ProgramLibrary/PRRIP%202015_Tern%20and%20Plover%20Habitat%20Synthesis%20Chapters.pdf. The District referenced this document in its June 1, 2015, comments on the Draft BO (and included this document in Attachment D of that filing).

⁴⁰ See the District's June 23, 2014, comments on the DEA (page 5); and the FLA, Volume, 3, Appendix J, Alternative Project Operations and Sediment Management, Section 5.2.2.

sediment transport indicators width, depth, and velocity in the Loup River Bypass Reach.⁴¹ As discussed further below, these study results do not support the FEA's conclusions, or the flow/diversion restrictions in License Articles 404 and 406. And, as demonstrated by these findings and conclusions, the FEA also failed to consider the indirect adverse effects of the recommended flow modifications: (i) the reduction of diverted flow would result in less dredged material and thus creation of less Interior least tern and piping plover habitat at the North SMA; and (ii) the reduction in diversion flows would have a negative impact on the excellent Canal fishery.

These are a few of the multiple errors in the FEA. Reliance by the Commission on the FEA for the requirements in the Order, is arbitrary, capricious and an abuse of discretion.

C. The requirement for new minimum bypass flows is excessive, arbitrary, and not supported by the record.

In License Article 404 of the Order, the Commission requires that the District implement minimum flows into the bypassed reach of 275 cfs (or inflow, whichever is less) from April 1 through September 30, and of 100 cfs (or inflow, whichever is less) from October 1 through March 31. These flow provisions significantly reduce the water available to the District for power production at the Project. The Commission erred in imposing these high minimum bypass flows contrary to substantial record evidence that confirm such high minimum bypass flows will not provide sufficient environmental benefit to justify the costs.

The record in this proceeding (including study results) does not support the License Article 404 minimum bypass flow requirements. The Order states (at para. 38) that the minimum bypass flows in License Article 404 are required "To protect aquatic resources, water quality, and the endangered [Interior] least tern and piping plover..." However, these

⁴¹ *Id.*

minimum bypass flow requirements are not supported by substantial evidence in the over 4,500 pages of record. The record data instead substantially documents a lack of Project impact on these species. The Commission’s justification for the License Article 404 requirements in fact ignores, misstates, and misinterprets the data in the record. Therefore, the minimum bypass flows in License Article 404 are arbitrary and capricious, and inconsistent with the record evidence.

Specifically, the record documents the lack of justification for the License Article 404 minimum bypass flows as follows:

- ***401 Water Quality Certification*** – The Nebraska Department of Environmental Quality (“NDEQ”) has confirmed in its Certification pursuant to Section 401 of the Water Quality Act (“401 WQC”)⁴² that Project operations are in compliance with all water quality standards and do not adversely affect water quality, including temperature. The 401 WQC was issued based on the District’s relicensing proposal in its FLA and did not contain any conditions for certification. Therefore, the Certification provides no support for the Order’s minimum bypass flow requirements.
- ***Loup River Bypass Reach Fish Community Diversity*** – The record documents that the fish community is more diverse and more abundant downstream of the Project Diversion Weir (*i.e.*, in the Bypass Reach) than upstream of the Diversion Weir, as confirmed in fish sampling performed by the Nebraska Game and Parks Commission (“NGPC”) included in the record in this proceeding⁴³ and as discussed in the FEA.⁴⁴

Therefore, there is no justification for the Order’s minimum bypass flows based on

⁴² The 401 WQC was issued by NDEQ on January 2, 2013; and filed at the Commission on January 2, 2013.

⁴³ See the FLA, Volume 3, Appendix D, Flow Depletion and Flow Diversion Study Report, Section 5.7.1; see also the Loup River Fish Sampling Reports (1997 and 1998) prepared by NGPC, included in the District’s June 18, 2009, Supplemental Information filing.

⁴⁴ FEA at pages 67-68.

the need to enhance aquatic resources.

- ***Frequency of Fish Kills*** – The record confirms that fish kills in the Loup River Bypass Reach have been limited and are directly related to extremely hot weather conditions.⁴⁵ Furthermore, while the District prefers that no fish kills occur, there have been only four fish kill events over the past 19 years.⁴⁶ The record in this proceeding certainly does not support the implication in the Order that there have been regular fish kills in the Project Bypass Reach as a direct result of Project operations and, therefore, this argument provides no justification for the minimum bypass flows in License Article 404.
- ***Water Temperature*** – The results of the site-specific temperature study, performed in this relicensing proceeding, upstream and downstream of the Project’s Diversion Weir (*i.e.*, in the Bypass Reach) were conclusive with respect to flow and water temperature⁴⁷ and those results do not support the need for License Article 404 minimum bypass flows. That study determined that there is a statistically significant relationship between water temperature and ambient air temperature; there is a statistically significant one to one (1:1) relationship between the temperature upstream and downstream of the Diversion Weir; and there is NOT a statistically significant relationship between water temperature and flow.⁴⁸ The results of this study were not refuted in the FEA. Instead, the Order (at para. 98) relies on a “general conclusion” in Sinokrot and Gulliver, as well as other citations referenced in the Order (at para. 68) in support of their “general conclusion,” that high temperatures

⁴⁵ See the FLA, Volume 2, Exhibit E, pages E-178 to E-179, and E-187.

⁴⁶ FEA at pages 63-64.

⁴⁷ See the FLA, Volume 3, Appendix C, Water Temperature in the Project Bypass Reach Study Report, Section 5.

⁴⁸ See the FLA, Volume 2, Exhibit E, page E-165.

in streams can be reduced with increased stream flow. However, as the District has demonstrated⁴⁹, the Sinokrot and Gulliver analysis is flawed and not comparable because conditions that existed in that analysis are different than the conditions at the Project. The increased stream flow in the Sinokrot and Gulliver analysis, as well as other research cited in the Order, comes from a source of cooler water, which is not the case at the Project diversion structure in this proceeding. The conditions at the Diversion Weir do not allow for a cooler source of water to be provided because there is no dam. Releasing more water from upstream of the Project diversion that is the same temperature as the water downstream of the diversion, will not cool the water downstream of the diversion. In addition, as documented in the record, there is no statistically significant relationship between low flows in the Bypass Reach and water temperature excursions for this Project.⁵⁰

- ***Habitat for T&E Species and Sediment Transport*** – Relative to habitat for the Interior least terns and piping plover, there is nothing in the record to support any measurable habitat benefit that would result from the License Article 404 minimum bypass flows. In fact, as shown in the Final EA in Table 30 (adapted from Study 14.0, Tables 5-4 and 5-5), an increase in the minimum bypass flows as set forth in License Article 404 (combined with a cap on diverted flows as set forth in License Article 406) would provide, at most, immeasurable changes in width and depth of the flowing water in the Bypass Reach. Furthermore, Study 14.0 evaluated a significantly larger flow in the Bypass Reach for an entire year – with no measurable

⁴⁹ See the FLA, Volume 3, Appendix D, Flow Depletion and Flow Diversion Study, pages 80-81.

⁵⁰ See the FLA, Volume 3, Appendix C, Water Temperature in the Project Bypass Reach Study Report, Section 5.7.

benefit to the habitat for Interior least terns and piping plovers in the Bypass Reach.⁵¹ The FEA acknowledges that the levels of minimum bypass flows recommended (and adopted in License Article 404) are not large enough on their own to remove vegetation or produce significant scouring of sandbars and/or banks in the Loup River bypassed reach...⁵² Therefore, there is no justification for the License Article 404 minimum bypass flows based on these species. This issue is also discussed further below in connection with the required maximum diversion to the Power Canal (under License Article 406) essentially to increase bypass flows.

- **Canal Fishery** – In contrast, as documented in the record of this proceeding, regular diversion of water into the Power Canal is needed to maintain the excellent fishery that has been established in the Canal.⁵³ Neither the Order, nor the FEA disputes that fact. However, to comply with License Article 404, any time inflow at the Diversion Weir is less than the minimum bypass flow required under License Article 404, the District would be required to cease diversion of water into the Power Canal, resulting in stagnant water in the Canal that could adversely impact that existing Canal fishery. This adverse impact as a result of the License Article 404 minimum bypass flows is arbitrarily ignored in the Order.

Therefore, there is not substantial record evidence in this proceeding supporting the License Article 404 minimum bypass flows and that provision should be removed from the License.

In its Order, the Commission states that in November 2015 the District modified its relicensing proposal in its Application to propose, instead, to maintain a minimum bypass

⁵¹ See the FLA, Volume 3, Appendix J, Alternative Project Operations and Sediment Management, Section 5.2.3.

⁵² FEA at page B-21.

⁵³ See the FLA, Volume 2, Exhibit E, Section E.6.3.2.

flow of “125 cfs, or inflow, whichever is less, from April 1 through September 30 and 50 cfs, or inflow, whichever is less, from October 1 through March 31” (Order at para. 25), and further states that the District did not provide a “basis or justification for its change” (Order at para. 95). Both Commission statements are incorrect. In support of its statements, the Commission pointed to the District’s November 5, 2015, letter responding to a Commission Staff request that the District provide potential word changes to the proposed DLAs that would resolve issues presented by the District.⁵⁴ In response to the Commission Staff request, in the November 2015 letter the District provided potential edits to proposed DLA 404 (among other proposed DLAs) with the statement that it would agree to the indicated changes in the minimum bypass flows as a way to resolve this issue by reason of a settlement. This filing was not a modification to the District’s proposal for relicensing the Project as set forth in its Application. The FEA did not accept the District’s proposed revision to DLA 404 and, therefore, the District’s offer was rescinded.

However, it is important to recognize that in its November 2015 letter, the District not only stated a potential modification to the minimum bypass flow, but also recommended the use of a three-day rolling average, with a single-day average flow parameter and with recognition of lack of gage data due to ice or other affects – instead of the instantaneous determination that is now in the New License.⁵⁵ This comment by the District highlighted the lack of operational feasibility to the instantaneous flow requirement, as more fully discussed below. Further, the District provided aerial oblique photos of the Loup River Bypass Reach during flows ranging between 120 cfs and 150 cfs.⁵⁶ The aerial photos illustrate the River connectivity that would be achieved by the District’s alternative proposal.

⁵⁴ See the District’s November 5, 2015, comments on the proposed DLAs (page 3).

⁵⁵ *Id.*

⁵⁶ *Id.* at Attachment B.

The Commission does not refute that the alternative minimum bypass flow discussed in the District's November 2015 letter would achieve the FEA's stated intent to enhance water quality and downstream aquatic habitat in the Bypass Reach.

Therefore, whereas the District did not modify its relicensing proposal for the Project to propose the higher minimum bypass flow that the Commission claims it offered in the November 2015 letter, the Commission's rejection of that minimum bypass flow is arbitrary and capricious, and contrary to the record evidence. And certainly the Commission's failure to adopt more operationally feasible compliance measures, rather than an instantaneous requirement, is arbitrary and capricious.

- D. The requirement for a run-of-canal operation, without the conditions the District indicated were necessary and without an allowance for a variance, is arbitrary and not supported by the record.

In License Article 405 of the Order, the Commission requires the District to operate the Canal in a run-of-canal mode from May 1 through June 7 "to facilitate pallid sturgeon migrations in the lower Platte River." The License Article further requires that such run-of-canal mode shall mean that the District must maintain a constant water surface elevation in Lake North and Lake Babcock such that "at any point in time, the sum of all outflows" from the two lakes approximates the sum of inflows to the Lakes. This provision, as written in License Article 405, is not supported by substantial record evidence and adversely affects the District by preventing it from fully utilizing its regulating reservoirs and by negatively affecting its ability to produce power, without substantial record evidence that such flows are needed for pallid sturgeon.

As acknowledged in the Order (para. 15), the Columbus powerhouse uses the stored water in the two regulating reservoirs, Lake North and Lake Babcock, to produce power in

peak times of electric use. As further acknowledged in the Order (at para. 16), the available inflow to the Lakes is generally stored and used for power generation within a 24-hour period. In addition, as acknowledged in the Order (*id.*), discharges from the Columbus powerhouse, and therefore downstream, generally do not go below approximately 1000 cfs. The flow impact downstream of the Columbus powerhouse does not merit the imposition of the run-of-canal requirement under License Article 405.

However, as the District suggested in its November 2015 comments on the DLAs,⁵⁷ it would be willing to implement a run-of-canal mode of operation – if, and only if, when diversions into the Power Canal are less than 1,000 cfs, the District would be permitted to store water as necessary to safely operate the Columbus powerhouse turbines at 1,000 cfs. Under such a scenario, as explained in the District’s November 2015 comments, run-of-canal operation would resume when diversions into the Power Canal were again above 1,000 cfs.⁵⁸

Furthermore, the run-of-canal requirement under License Article 405 should be modified to allow for a variance between the inflow and outflows at a level of 20% to allow for travel time needed for water to run from the Headworks to the Project tailrace. Changes to the inflow at the Headworks take approximately 24 hours to flow through the Power Canal making it impossible to balance inflow and outflow on an instantaneous basis. Such a variance allowance is necessary to account for inaccuracies in gages and gate operation as discussed in Section III.H. below.

E. The requirement to cap diversions into the Power Canal is arbitrary and not supported by the record.

In License Article 406 of the Order, the Commission requires the District to cap

⁵⁷ See the District’s November 5, 2015, comments on the proposed DLAs, Attachment A (page 4).

⁵⁸ Note that there are no gages at the Lakes that could measure flows into and out of the Lakes. Therefore, run-of-canal mode would be implemented by comparing inflow at the Headworks and outflow at the Project tailrace.

diversions into the Power Canal from March 1 through June 30 at an instantaneous rate of 2000 cfs. In support of that License Article, the Commission states (Order at para. 39) that limiting the amount of water diverted into the Power Canal is required to enhance downstream habitat for the Interior least tern, piping plover, whooping crane, and Rufa red knot. This requirement is not supported by the record, and even the Order acknowledges (para. 93), as discussed above, that the rationale for this requirement is in doubt, indicating uncertainty as to whether or not this diversion requirement would help the species.

The record contains substantial evidence that additional flows into the Bypass Reach will not create the desired habitat. As discussed briefly above, Relicensing Study 14.0, Alternative Project Operations and Sediment Management⁵⁹ clearly shows that increased flow would not result in the increased habitat that the Order (and FEA) purports to seek, and refutes the claimed justification for the maximum diversion to the Canal.⁶⁰ As affirmed in the FEA, the results of Study 14.0 indicate that the cap on diversions into the Canal would result in only “minor” increases in sediment transport into the Bypass Reach based on indicators of width, depth, and velocity.⁶¹ In fact, as shown in FEA Table 30 (adapted from Study 14.0, Tables 5-4 and 5-5), an increase in flows in the Bypass Reach by reason of the maximum diversion flow under License Article 406 (and with the minimum bypass flow under License Article 404) would provide, at most, immeasurable changes in width and depth of the flowing water in the Project Bypass Reach.⁶²

Furthermore, as discussed above, Study 14.0 evaluated a significantly larger flow in

⁵⁹ See the FLA, Volume 3, Appendix J, Alternative Project Operations and Sediment Management (pages 45-50).

⁶⁰ See the District’s June 23, 2014, comments on the DEA (page 5); and the FLA, Volume, 3, Alternative Project Operations and Sediment Management, Section 5.2.2.

⁶¹ FEA at page 123.

⁶² FEA at page 120.

the Bypass Reach for an entire year – with no measurable benefit to the habitat for Interior least terns and piping plovers in the Bypass Reach.⁶³ The increases in sediment transport to the Bypass Reach (stated either as percentages or absolute values) would obviously be considerably less for the 4-month period dictated by License Article 406, as opposed to the 12-month period analyzed in Study 14.0. Based on the range of habitat types for which Interior least terns and piping plovers have been documented to use, and based on the unknowns relative to what is considered suitable, it is speculative that the change in sediment transport indicators that would result from implementation of the maximum diversion to the Canal would have any benefit to habitat or the species as intended by the Commission.

Studies by the PRRIP further confirm the results of the District’s relicensing studies. Based on its analysis, the PRRIP Executive Director’s Office concluded that flow and sediment management strategies, like those in License Article 406, cannot create or maintain suitable in-channel habitat for Interior least terns and piping plovers.⁶⁴ The Order (at para. 94) states that use of the PRRIP is “not reasonable” for this proceeding because the PRRIP experiments used short-duration, sediment deficient, high-flow events from Lake McConaughy to simulate the kinds of seasonal flooding events that have the potential to build sandbars and subsequently produce new Interior least tern and piping plover sandbar habitat. The District, as noted in its FEA comments, disagrees.⁶⁵ The PRRIP research is not only reasonable, but appropriate and relevant. Over the last 10 years, the PRRIP has performed research and monitoring to evaluate the probable success of implementation of

⁶³ See the FLA, Volume 3, Appendix J, Alternative Project Operations and Sediment Management, Section 5.2.3.

⁶⁴ See the District’s June 1, 2015, comments on the Draft BO (pages 8 and 9, and Attachment C, pages 11 through 16). See the February 25, 2015, PRRIP Interior Least Tern and Piping Plover Habitat Synthesis Chapters available online at https://www.platteriverprogram.org/PubsAndData/ProgramLibrary/PRRIP_2015_Tern_and_Plover_Habitat_Synthesis_Chapters.pdf (“February 2015 PRRIP Chapters”); a copy of that Report has been filed in this proceeding on June 1, 2015.

⁶⁵ See the District’s September 21, 2016, comments on the FEA (pages 8-10).

high flow releases to produce suitable sandbar habitat for Interior least tern and piping plover nesting. This was done by measuring the height and area of sandbars created from actual runoff events that were greater in magnitude and duration than the proposed flows associated with License Articles 404 and 406. The PRRIP analyses were NOT sediment deficient as the analysis was limited to the portion of the central Platte downstream of Kearney, Nebraska, the reach that is in sediment balance.⁶⁶

The speculative benefit of the flow modifications was acknowledged in the FEA: “it is difficult to quantify changes to the river channel at a small, localized scale (*i.e.*, at specific sandbars) because of the dynamic nature of the river system...”⁶⁷ Relative to License Article 406, the FEA stated, “...it is unclear whether setting a maximum diversion of water into the Power Canal would improve the number of established nests or improve fledgling ratios or create suitable nesting sandbars in the Loup River bypassed reach...”⁶⁸

Given that the District’s studies and those performed by the PRRIP show that managed flow will not create the desired habitat, the suitability of off-channel habitats was evaluated. As documented in the record,⁶⁹ the PRRIP continues to evaluate off-channel vs. in-channel nesting habitat. From 2001 to 2014, Interior least tern and piping plover breeding pairs have increased 5 fold (from 20 to 100) and 3 fold (from 10 to 30), respectively, on sandpits maintained or created by the PRRIP. During the same period, there has been essentially no change in the number of in-channel Interior least tern (<10) and piping plover (<5) breeding pairs.⁷⁰ These results lead to a reasonable conclusion that the birds prefer off-

⁶⁶ See the February 2015 PRRIP Chapters, Chapter 3.

⁶⁷ FEA at page B-20.

⁶⁸ FEA at page B-23.

⁶⁹ See the District’s November 5, 2015, comments on the proposed DLAs (pages 3-4).

⁷⁰ See PRRIP, State of the Platte Report, September 1, 2015, pages 22-24 (as cited in the District’s November 5, 2015, comments on the DLAs (pages 3-4).

channel habitat (*e.g.*, habitat at North SMA) to in-channel habitat (in the Bypass Reach area). Based on the studies performed by the District⁷¹ and confirmed by the PRRIP,⁷² capping the amount of flow diverted into the Canal will not create desired habitat in the Bypass Reach, and any habitat created would be inundated by subsequent storm events, which would be detrimental to the Interior least terns and piping plovers.

Comments filed in the record by the American Bird Conservancy further support the position that increased bypass flows as a result of the maximum diversion requirement, (and the minimum bypass requirement) will not create the desired habitat, consistent with the District's and the PRRIP's study findings.⁷³ As confirmed by the American Bird Conservancy letter, these findings are supported by the fact that the majority of Interior least tern and piping plover nesting on the Loup River has occurred at off-channel sites, such as the District's North SMA.⁷⁴

The Order also fails to consider the indirect adverse effects of the required maximum diversion under License Article 406, *i.e.*, less dredged material and, thus, creation of less Interior least tern and piping plover habitat at the North SMA. The District's operation of the Project historically has provided significant benefits to the Interior least tern and piping plover by reason of the sand operations on the Canal.⁷⁵ Since 1985, most recorded Interior least tern and piping plover nesting along the Loup River (both on- and off-river) has occurred downstream of the Project Diversion Weir (69 percent for Interior least tern and 66 percent for piping plover), with the majority of all nesting occurring at off-river sites (52

⁷¹ See the FLA, Volume 3, Appendix J, Alternative Project Operations and Sediment Management, Section 5.2.3 (pages 49-50).

⁷² See the February 2015 PRRIP Chapters, Executive Summary (page 2).

⁷³ See the American Bird Conservancy's December 18, 2014, letter to Secretary Bose; and the District's response dated January 12, 2015.

⁷⁴ See the District's supplemental filing dated April 30, 2013, Attachment C.

⁷⁵ See the FLA, Volume 2, Exhibit E, pages E-40 to E-44, E-218 to E-223, E-229, E-231 to E-233, and E-255 to E-256.

percent for Interior least tern and 58 percent for piping plover).⁷⁶ The District's North SMA supports the majority of off-river nests for both species with 33 percent of all Interior least tern and 50 percent of piping plover nests along the Loup River occurring at the North SMA.⁷⁷ The high incidence of off-river nesting at the North SMA is consistent with the regional behavior of these species.⁷⁸ Even the BO concluded that the North SMA provides a net benefit of increased Interior least tern and piping plover nests.⁷⁹ However, these benefits would not be fully available with the License Article 406 requirements.

In addition to reduced benefit to the Interior least terns and piping plovers with the reduced diversions into the Canal by reason of the flow restrictions/requirements of the new License, there would also be other adverse impacts to the environment and to the public by reason of those requirements. As discussed above, regular diversions of water into the Power Canal are needed to maintain the excellent fishery that has been established.⁸⁰ Reduced or ceased diversion of water into the Power Canal would result in stagnant water that would adversely impact the existing Canal fishery. Limiting the amount of water that the District can divert into the Power Canal could also adversely affect agricultural interests on the Power Canal by decreasing the available water for irrigation during weather conditions that likely require irrigation for sustaining crop growth. Sand operations on the Power Canal would also be adversely affected with the lower flows in the Power Canal, potentially costing jobs.

⁷⁶ See the District's May 7, 2013, letter filing supplemental nesting information, Attachment C (pages 5 and 8).

⁷⁷ *Id.* at pages 5 and 9.

⁷⁸ See the American Bird Conservancy's December 18, 2014, letter to Secretary Bose.

⁷⁹ BO at pages 100 and 130-131.

⁸⁰ See, e.g., the FLA, Volume 2, Exhibit E, Section E.6.3.2; see also the FEA at pages 66-67.

- F. The minimum bypass flow, run-of-canal, maximum diversion, and BO flow requirements cause adverse impacts on electric consumers and the public.

As noted above, in addition to the minimum bypass flows (under License Article 404), the run-of-canal requirements (under License Article 405), and the maximum diversion (under License Article 406), the Order (through Ordering Paragraph E and Appendix A; see also para. 64-66) adopts the BO RPM1 and associated Term and Condition #1(a) for pallid sturgeon that would require the District to shut down hydrocycling operations and cease diversions into the Power Canal if temperatures meet or exceed 93° F.⁸¹ These flow provisions, particularly taken together, significantly reduce the water available to the District for power production at the Project. Further, these provisions remove the District's ability to produce power when most needed in the grid, *e.g.*, during high energy usage, and will not improve the water temperature at Louisville.

If the minimum bypass flow requirement, the run-of-canal limitations, and the maximum Canal diversion limitation in the Order are required at the Project, based on the analysis in the FEA the District would lose approximately 14,667 MWh per year in power generation, valued at over \$816,000 per year (using the 2015 contract price of \$55.64/MWh).⁸² That calculation of lost power and revenues does not include the additional losses by reason of the limitation on hydrocycling operations when real-time temperatures have met or exceeded 93 °F, as required under Ordering Paragraph E and Appendix A. These flow provisions substantially affect the District's ability to efficiently use the water

⁸¹ As part of this Request, the District is seeking rehearing of the imposition on the Project of this additional flow restriction from the BO, by the Commission's adoption of the BO's RPMs and associated Terms and Conditions (under Ordering Paragraph E and Appendix A of the Order); *see* Section IV of this Request for Rehearing below.

⁸² *See* FEA at page 263.

resources at the Project and to generate renewable power for sale into the grid.⁸³

The electric customers that ultimately purchase power generated by the District through NPPD, and the electric grid generally, would have reduced power from the District based on the decreased flows available for generation under the Order⁸⁴ and would be forced to obtain the lost power from other sources, likely to be more expensive,⁸⁵ particularly during periods of high energy use. The License Order acknowledges: (i) that the additional License requirements would reduce hydro power to the electric grid (Order at para. 140 and 141); (ii) that the Project power displaces non-renewable sources and thus provides environmental benefits (Order at para. 134); (iii) that alternative power sources would be more expensive (Order at para. 139-40); and (iv) that hydro power provides unique operational benefits to the electric utility system (Order at para. 142). However, removal of these benefits to the public and the electric grid are not given adequate consideration in the Order.

G. The required minimum bypass flows, the cap on diversions, and the BO flow requirements and cessation of diversions into the Power Canal may adversely affect the District's water rights.

The minimum bypass flow requirements under License Article 404, the maximum diversion into the Power Canal under License Article 406, and the flow restrictions under BO RPM1 and associated Term and Condition #1(a) for pallid sturgeon could jeopardize the District's water rights and circumvent water rights administration in the State of Nebraska.⁸⁶ Although, as noted in the Order (at para. 91), the Commission believes that it has no authority to "adjudicate" water rights, the Commission clearly does have the authority, and

⁸³ The Order (at para. 141) estimates the lost power by reason of the flow requirements at an even higher value. With the differential of power under the existing License compared to the New License of approximately 16,200 MWh, at \$55.64/MWh the annual lost power equates to nearly \$1 million.

⁸⁴ See FEA at pages 261–263.

⁸⁵ *Id.*

⁸⁶ See the District's June 23, 2014, comments on the DEA (page 9); and the District's September 21, 2016, comments on the FEA (pages 1-5).

the obligation, to consider issues such as water rights when issuing a license. As the Order acknowledges (*e.g.*, at para. 143) and discussed further below, FPA Sections 4(e) and 10(a)⁸⁷ state a range of issues that the Commission must consider in its licensing process, including the public interest generally. There is no justification for the Commission’s decision to ignore the potential adverse impact of the Order’s requirements on the District’s water rights.

Nebraska water law adheres to the prior appropriation doctrine, which includes a priority and preference system. Priority refers to the date on which the appropriation was granted while preference refers to the type of use associated with the appropriation. With respect to priority “As between appropriators, the one first in time is first in right” (Nebraska Revised Statutes [Neb. Rev. Stat.] §46-203⁸⁸). In instances where a senior appropriator by priority is subordinate to a junior appropriator by preference, Neb. Rev. Stat. §70-669 states that “No inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefore to the inferior user. The just compensation paid to those using water for power purposes shall not be greater than the cost of replacing the power which would be generated in the plant or plants of the power user by the water so required.”

The Nebraska Department of Natural Resources (“NDNR”) is responsible for administering water rights in Nebraska based on the priority and preference system. As documented in the District’s September 21, 2016 comments on the FEA, if water is to be bypassed as mandated by the License Articles 404 and 406, NDNR will not be able to administer the District’s “call” on the Loup River; which could ultimately result in less water

⁸⁷ 16 U.S.C. §§ 797(e) and 803(a), respectively.

⁸⁸ See <http://www.dnr.nebraska.gov/Media/Default/DNRGeneral/Publications/SWstatutes2016.pdf>. Additional clarification between priority and preference, as well as power generation, is provided in Neb. Rev. Stat. §46-204, and Neb. Rev. Stat. §70-668, respectively.

in the Bypass Reach, the Platte River bypass reach, and the lower Platte River.⁸⁹

The Order (at para. 91 and fn. 57) references other projects in Nebraska that it claims demonstrate that there is no water rights issue for the District. However, the projects cited in the Order are distinguishable from the Project here in that there are no interference agreements on the Platte River associated with those licensees' water rights and, thus, they have no need to issue a call on the river to invoke payment of interference agreements. With respect to the Project and the District's water rights, the NDNR has stated: "The Department [NDNR] will not close a junior appropriator simply to see water go unused by the calling senior."⁹⁰ The District would not be able to invoke their interference agreements with upstream water users if water is not used for its stated beneficial purpose at the Project.

H. The minimum bypass flow, run-of-canal, and the diversion cap requirements fail to recognize operational impediments.

In imposing the minimum bypass flows, run-of-canal, and the maximum flow into the Power Canal (under License Articles 404, 405 and 406, respectively), the Commission ignores the operational impediments to the District's ability to implement those requirements.

Initially, as to License Articles 404 and 406, the District has provided substantial information in the record as to why the current infrastructure of the Project could not support instantaneous measurements required under those License Articles (and could not provide any such data when a gage was affected by ice), which would be needed for the District to remain in compliance with those License Articles.⁹¹ As discussed above, at the request of the Commission, in November 2015 the District submitted proposed revisions to the proposed

⁸⁹ See the District's September 21, 2016, comments on the FEA, referencing water rights (pages 1-5).

⁹⁰ See the District's September 21, 2016, comments on the FEA (page 3), referencing NDNR's May 25, 2007, letter from Ann Bleed, NDNR, to Surface Water Appropriators (including Loup Power District).

⁹¹ See the District's June 23, 2014, comments on the DEA (pages 12-15); the District's June 1, 2015, comments on the Draft BO (Attachment A, pages 1-4, 5-7); the District's November 5, 2015, comments on the proposed DLAs (pages 2-4); and the District's September 21, 2016, comments on the FEA (pages 11-14).

DLAs that would provide workable alternatives⁹² and explained the operational impediments that would prevent the District from compliance with the instantaneous measurement requirements of License Articles 404 and 406).⁹³

As further discussed in the District's filings, operation of the Project Headworks is a complex and dynamic process involving many variables and limited feedback. The inflow to the Project diversion and the associated sediment buildup at the intake gate structure is variable and dynamic in nature. The Headworks operator must frequently adjust intake gate utilization and individual gate settings to manage both sand and water at the intake gate structure.⁹⁴ In general, the operating procedures employed have been established to maximize water flow into the Settling Basin while simultaneously managing admission of sand and debris into the Canal.⁹⁵ As noted above and as the District has reiterated, the Project does not have a dam that allows storage of inflow for immediate use, or for use at a later time.⁹⁶ Rather, all flow diverted into the Loup Power Canal is released from the Project tailrace within approximately one day's time.⁹⁷

The site conditions at the diversion structure make it very difficult to effectively know on a daily average, and certainly not instantaneously, the magnitude of the flow above the Diversion Weir, as well as the flow being diverted into the Canal and the amount flowing into the Bypass Reach. Accurately regulating inflow using gate rating tables or curves is not practical because of the continuous formation and reformation of sand bars both upstream

⁹² See the District's November 5, 2015, comments on the proposed DLAs.

⁹³ *Id.*

⁹⁴ See the FLA, Volume 1, Exhibit B, Section B.1.3 (page B-2).

⁹⁵ See the District's June 23, 2014, comments on the DEA (page 14); and the District's June 1, 2015, comments on the Draft BO, Attachment A (pages 5-6).

⁹⁶ See, e.g., the District's June 23, 2014, comments on the DEA (page 12); the District's June 1, 2015, comments on the Draft BO (at Attachment A, page 1, and Attachment C, page 9); and the District's January 27, 2017, comments on the Final BO (page 3).

⁹⁷ See the District's June 23, 2014, comments on the DEA (page 12); and the District's June 1, 2015, comments on the Draft BO, Attachment A (page 1).

and downstream of the Intake Gate Structure.⁹⁸ Leakage from the Diversion Weir, flash boards, sluice gates, intake structure, and Settling Basin are unmeasurable at these points; the leakage amount could only be quantified at the USGS gage near Genoa (gage no. 06793000).⁹⁹ Any gage on the Loup River, either upstream or downstream of the diversion, is subject to ever-changing rating curves, and there are no locations for hydraulic control structures to be placed that can determine the instantaneous inflow to the diversion structure or flows into the Bypass Reach for management purposes within any reasonable degree of accuracy. The generally-accepted flow measurement accuracy at USGS gages located at continually shifting natural river sections in sandy braided rivers is +/- 10 to 15 percent, which are considered good and fair, respectively. Records less accurate are considered poor.¹⁰⁰ Furthermore, during low flow periods, gages on braided rivers often indicate low or no river flow when the thread of the stream has simply wandered away from the stage recorder as is characteristic of a braided river in regime.¹⁰¹ The measured values for the Loup River at the USGS gage near Genoa (USGS gage no. 06793000) are typically rated after each measurement as either fair or poor.¹⁰²

Given the dynamic nature of the flows and the nature of sediment buildup upstream of the Headworks, there is no known or calculable combination of gate openings (intake or sluice gates) and staff gage readings that will allow the Headworks operator to produce a

⁹⁸ See the District's June 23, 2014, comments on the DEA (pages 12 and 14); and the District's June 1, 2015, comments on the Draft BO, Attachment A (pages 1-2, 6).

⁹⁹ See the District's June 23, 2014, comments on the DEA (pages 12-13); and the District's June 1, 2015, comments on the Draft BO, Attachment A (page 2).

¹⁰⁰ See Herrett, T.A., G.W. Hess, J.G. House, G.P. Ruppert, and M.L. Courts, 2004, Water Resources Data, Oregon, Water Year 2004: U.S. Geological Survey Water Data Report OR-04-1, 996 p.; *see also* http://waterdata.usgs.gov/nwis/measurements/?site_no=06793000.

¹⁰¹ See the District's June 23, 2014, comments on the DEA (page 13); and the District's June 1, 2015, comments on the Draft BO, Attachment A (page 3).

¹⁰² *Id.*; *see also* the District's September 21, 2016, comments on the FEA (pages 12-13).

given instantaneous flow rate into the Canal or into the Bypass Reach.¹⁰³ In addition, there is no method to gradually reach, but never exceed, a 2,000 cfs diversion; or to gradually reach, but never be lower than, the minimum bypass amount.¹⁰⁴ Based on these factors, it would be technically impossible to maintain a set value of instantaneous flow either into the Power Canal or down the Bypass Reach.

Attempting to comply with the specified flow requirements under License Articles 404 and 406, on an instantaneous basis, would unfairly cause the District to bypass considerably more water than specified and could result in repeated out-of-compliance submittals to the Commission based on *de minimis* and short-lived (*e.g.*, potentially as short as a minute) deviations from the instantaneous requirements. Therefore, flow requirements under License Articles 404 and 406 should include provision for a reasonable range of operation. As noted above, in its November 2015 response to the Commission Staff's inquiry on the District's concerns about the difficulty in operating under the DLAs, the District suggested a three-day rolling average, with a single-day average flow parameter and with recognition of lack of gage data due to ice or other affects. An instantaneous flow requirement is arbitrary and capricious, and an abuse of discretion.

Furthermore, as discussed above in Section III.D, the run-of-river requirement under License Article 405 poses significant operational problems to the District, particularly if the condition for diversions less than 1,000 cfs is not included in that requirement.¹⁰⁵ Absent that adjustment to License Article 405, the District would have operational problems at the Columbus powerhouse. Furthermore, as discussed above, there are no gages at the Lakes

¹⁰³ See the District's June 23, 2014, comments on the DEA (page 12); the District's June 1, 2015, comments on the Draft BO, Attachment A (page 1); and the District's September 21, 2016, comments on the FEA (pages 11-12).

¹⁰⁴ See the District's September 21, 2016, comments on the FEA (page 12).

¹⁰⁵ See the District's November 5, 2015, comments on the proposed DLAs, Attachment A (page 4).

that could measure flows into and out of the Lakes. Therefore, run-of-canal mode would be implemented by comparing inflow at the Headworks and outflow at the Project tailrace.

Finally, the run-of-canal requirement under License Article 405 should be modified to allow for a variance between the inflow and outflows at a level of 20%. As demonstrated above, this variance is consistent with multiple USGS gages determining flow. Therefore, this variance should be added to the License Article.

- I. The requirements for monitoring Interior least terns, piping plovers and Rufa red knot, with future potential mitigation, and the failure to include removal of monitoring requirements upon delisting of the species, are arbitrary and capricious.

In License Article 411 of the Order (as discussed in the Order at para. 45), the Commission requires that the District develop and file a plan to monitor and mitigate for Project effects on Interior least terns, piping plovers and Rufa red knot in the Bypass Reach and the “project-affected reach of the lower Platte River.” In addition, the plan is to assess any changes in “...sandbar formation resulting from the operational requirements of Articles 404 and 406” and the claimed intent of License Articles 404 and 406 is to mitigate Project effects by improving nesting habitat in the Loup River bypassed reach. The plan is to include management goals and objectives and measures to protect, mitigate and/or enhance on and off-river habitat for Interior least terns and piping plovers. The License Article requires the District to monitor the species annually for 5 years and file a report with additional mitigation potentially including “habitat modification measures.”

First, the monitoring and mitigation under License Article 411 should not extend beyond the Project boundaries – to “the project-affected reach of the lower Platte River.” The elements of what is to be included in the plan under License Article 411 include “assessment” of any changes in Interior least tern and piping plover “presence, habitat use,

and sandbar formation.” As the District has previously commented, such monitoring and analysis should be limited to lands that the District owns.¹⁰⁶ Any requirement beyond the Project boundary is inconsistent with the Commission’s jurisdiction. Accordingly, the language of the License Article needs to be changed.

Furthermore, as discussed above, extensive studies have been done in this relicensing proceeding and those studies, and the record generally, do not support a claim that the minimum bypass flow and/or the maximum diversion flow requirements in License Articles 404 and 406 would create significant additional nesting habitat in the Bypass Reach to justify the License requirements. The District has demonstrated in the record that the proposed flow modifications and diversion restrictions under License Articles 404 and 406 would produce “immeasurable” changes in sandbar habitat.¹⁰⁷ As the FEA admits,¹⁰⁸ the NGPC affirmed this conclusion in their comments on the DEA where they concluded that it is unlikely that any monitoring conducted in the area can determine whether variation in species’ use is “a result of the staff-recommended flow releases,” primarily because of the extremely small sample sizes and numerous confounding variables. The speculative benefit of the flow modifications was even acknowledged in the FEA: “it is difficult to quantify changes to the river channel at a small, localized scale (*i.e.*, at specific sandbars) because of the dynamic nature of the river system....”¹⁰⁹ Therefore, imposing on the District the additional requirement to perform 5 more years of studies is burdensome and an abuse of discretion.¹¹⁰ In addition, the District has stated in the record that differentiating changes in bank erosion between project operations and natural processes is virtually impossible, and the Commission

¹⁰⁶ See the District’s November 5, 2015, comments on the proposed DLAs (page 5).

¹⁰⁷ See the District’s June 23, 2014, comments on the DEA (pages 4-6).

¹⁰⁸ FEA at page B-29.

¹⁰⁹ FEA at page B-20.

¹¹⁰ See, *e.g.*, *Centralia*, 213 F.3d at 748-49.

agreed.¹¹¹ The same holds true for sandbar formation. Differentiating changes in sandbar formation between project operations and natural processes is also virtually impossible.

Assuming, *arguendo*, that on rehearing the Commission affirms the need for this Plan, the Commission nevertheless errs in failing to include in License Article 411, despite District's requests,¹¹² a provision for removal of Interior least terns from this monitoring and potential mitigation requirement should that species be delisted, as has been proposed by the USFWS' 5-year Review of the Interior least tern published October 24, 2013. Monitoring and potential mitigation under License Article 411 should terminate as to the Interior least tern immediately upon its delisting. Similarly, such License Article 411 requirements should terminate as to piping plover¹¹³ and Rufa red knot if either is delisted.

J. The requirement for the District to continue to operate the OHV area in the Headworks Park without a third-party to manage that area, is not supported by the record.

In License Article 413(4) of the Order (and as discussed in the Order at para. 118), the Commission requires the District to operate and maintain the "Headworks OHV Park" even if the Nebraska Off Highway Vehicle Association ("NOHVA") decided to terminate its agreement with the District to manage that "Park". License Article 413 also directs the District to submit a revised Recreation Management Plan that includes the operation and maintenance by the District of the "Headworks OHV Park". According to the Order (at para. 118, citing the FEA¹¹⁴), this License Article requirement is based on the claim that the District has proposed to continue to operate and maintain that OHV riding area.

However, the District has repeatedly clarified to the Commission that the continued

¹¹¹ FEA at page B-9.

¹¹² See the District's September 21, 2016, comments on the FEA (page 18).

¹¹³ FEA at page B-23.

¹¹⁴ FEA at pages 249-50.

operation of the OHV riding area was contingent on a third-party, with the necessary expertise and potential liability protection, managing that area.¹¹⁵ Historically NOHVA has provided that third-party management. However, as the District notified the Commission on October 20, 2016,¹¹⁶ NOHVA disbanded in the fall of 2016 and, to-date, the District has been unable to find another third-party partner with the appropriate expertise and experience. Therefore, the OHV riding area was closed on September 29, 2016. Absent such a third-party with the expertise required, and with the potential liability coverage needed, as a matter of public safety the District will not manage the OHV recreation area.

Furthermore, what is referred to as the “Headworks OHV Park” is really only a portion of the larger Headworks Park which the District continues to operate and maintain. In its Application and throughout this relicensing proceeding, the District has referred to the area within the Headworks Park where there have been OHV riding activities as the “Headworks OHV Park” and, for clarity, the District has separately shown the OHV area on materials in the record. However, that area is really just a part of the Headworks Park. The rest of the Headworks Park remains open to the public (*e.g.*, providing camping, fishing, and picnicking facilities).

The Commission also cannot justify its requirement for the District to operate the OHV area under License 413 based on a need for recreation in the area. The District has many other recreation facilities in the Project boundary, including the rest of the Headworks Park, all of which remain open and available for public use, free of charge. Therefore, the

¹¹⁵ See the District’s July 30, 2012, response to Commission Staff’s Additional information Request, Attachment A (page 15); the District’s June 23, 2014, comments on the DEA (page 16); the District’s November 5, 2015 suggested revisions to the proposed DLAs (page 5); and the District’s September 21, 2016, comments on the FEA (page 18). The District is not able to handle on its own the additional liability of operating the OHV area.

¹¹⁶ See the District’s October 20, 2016, letter regarding closure of Headworks OHV Park.

requirement to include the OHV recreation area (*i.e.*, the “Headworks OHV Park”) as part of the Project and as part of the Recreation Plan, should be deleted from License Article 413.

- K. The Commission erred in failing to adequately balance interests and issues presented, to achieve a New License which contains reasonable terms and conditions as required by the FPA.

As the Commission acknowledges in the Order (at para. 94 and 143), under the FPA the Commission is required to include reasonable terms in its license and to consider and balance power and non-power values in determining the public interest.¹¹⁷ Further, as the Order acknowledges (*e.g.*, at para. 143), under the FPA¹¹⁸ the Commission is required to give equal consideration to power and non-power purposes in licensing a project. Specifically, on acting on a license application, the Commission is required under FPA Section 4(e) to make an independent decision based on the record evidence as to appropriate license conditions, and to provide “equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreation opportunities, and the preservation of other aspects of environmental quality.”¹¹⁹ FPA Section 10(a) further affirms the Commission’s obligation to balance power and non-power interests, including water power development, fish and wildlife resources, and “other beneficial public uses” including irrigation, flood control, water supply, recreation and other purposes.¹²⁰ And under this FPA statutory requirement, environmental factors are not given preemptive force.¹²¹

However, in its Order in this proceeding, the Commission has failed to fulfill its

¹¹⁷ FPA Section 15, 16 U.S.C. § 808; *see, e.g., Centralia*, 213 F.3d at 748-49; *see also DOI*, 952 F.2d at 543 and 545.

¹¹⁸ FPA Sections 4(e) and 10(a), 16 U.S.C. §§ 797(e) and 803(a), respectively.

¹¹⁹ 16 U.S.C. § 797(e).

¹²⁰ 16 U.S.C. § 803(a).

¹²¹ *See, e.g., Centralia*, 213 F.3d at 748; *see also DOI*, 952 F.3d at 545.

statutory obligation for the New License. Contrary to those statutory obligations, in its Order the Commission fails to give adequate consideration to the water power development and other beneficial public uses of the Project which would be significantly adversely affected by the New License requirements. In its Order the Commission has even failed to give adequate consideration to the significant environmental benefits in habitat development and maintenance of continued operations without the New License flow restrictions and requirements.

The Commission further fails to adequately balance the power considerations of the Project – and the adverse impact on power production and electric consumers of the New License requirements. As discussed in detail above, the flow limitations and requirements in the New License (including particularly the minimum bypass flow requirements, requirement for run-of-canal operations, maximum Power Canal diversion limitations, and the limitation on operations when water temperatures at the Louisville gage equal or exceed 93° F.) severely reduce the water available to the District for power production at the Project and, thereby, significantly limit the District’s ability to operate the Project in an efficient and economic manner. As the Commission acknowledges in its Order (*e.g.*, at para. 134 and 139-142) and as discussed above, replacement power available to the public for the power generation lost by the District based on these requirements in the Order would likely be from carbon-based resources and would be more expensive. The power that would be produced by the Project during these times of flow restrictions and cap on diversions would be at peak times of demand.

Furthermore, as discussed above, the flows into the Power Canal and associated dredge materials provide, and historically have provided, substantial benefit to endangered

bird species. Consistently, one of the largest colonies of nesting Interior least terns and piping plovers along the Loup River has been located on the North SMA. It is because of the operation of the Project with flows into the Power Canal, without the limitations that the Commission would now impose under the New License, that there is a dredging operation that creates habitat for Interior least terns and piping plovers.¹²² Without the Project operating as it has in the past, this habitat would not have been developed. This site is where sand dredged from the adjacent Settling Basin is stockpiled, creating a large sandy area with adjacent wetted areas.¹²³ The District's dredging activities at the Settling Basin and North SMA maintain excellent habitat for Interior least tern and piping plover nesting. The deposition of dredge material each spring and fall maintain the large expanses of open sand preferred by Interior least terns and piping plovers and provide an important source of water and food to the North SMA for the Interior least terns and piping plovers.¹²⁴ Yet, the new requirements for increased minimum bypass flows and maximum diversion flows into the Canal would reduce the ability of the District to maintain and enhance the North SMA.

In times of low overall flow, the minimum flow requirements in the Bypass Reach under License Article 404 of the Order could result, and the flow restrictions under BO RPM1 and associated Term and Condition #1(a) for pallid sturgeon would result, in periods of no diversion into the Power Canal.¹²⁵ As discussed further above, during such periods agricultural interests would be adversely affected by the loss of available water for irrigation during weather conditions that likely require irrigation for sustaining crop growth. And

¹²² See the FLA, Volume 2, Exhibit E, pages E-40 to E-44, E-218 to E-223, E-229, E-231 to E-233, and E-255 to E-256.

¹²³ See the FLA, Volume 2, Exhibit E, Appendix E-2, page 29.

¹²⁴ See the FLA, Volume 2, Exhibit E, Appendix E-2, page 70.

¹²⁵ As discussed above, there is no substantial record evidence supporting the License Article 404 requirement. Furthermore, as discussed below in Part IV, there is no justification for the requirement to cease all diversions into the Power Canal under the BO RPM1 associated Term and Condition #1(a) for pallid sturgeon.

according to the District's records, as of February 2011 there were 71 irrigation water withdrawal points along the length of the Loup Power Canal.¹²⁶ In addition, sand operations on the Power Canal would be adversely affected with restrictions on diversions into the Power Canal resulting in lower sediment removal, potentially costing jobs.¹²⁷

In summary, the appropriate balancing required under the FPA dictates that the Commission should recognize the substantial interests in ensuring adequate flow diversions into the Canal. The Commission erred in its Order by imposing the new flow restrictions and requirements in the New License. On rehearing, the Commission should modify the Order to remove these flow restrictions and requirements.

IV. The Commission Erred in Adopting the Biological Opinion and its RPMs and the Associated Terms and Conditions.

As documented below, the findings in the BO, and the ITS RPMs and associated Terms and Conditions for pallid sturgeon, Interior least terns, and piping plovers are not supported by substantial evidence in the record as required, and the BO is arbitrary and capricious as a result. The Commission erred in adopting the BO and its RPMs and associated Terms and Conditions into the New License.¹²⁸

A. The BO and ITS are not supported by substantial record evidence and are arbitrary and capricious.

The BO (including the ITS) is fatally flawed, arbitrary and capricious, and not supported by the record. In issuing its BO, USFWS has failed to comply with the requirements of the ESA, has failed to comply with its own agency guidelines and regulations, and has failed to recognize the lack of substantial record evidence supporting the

¹²⁶ See the FLA, Volume 2, Exhibit E, Section E.1.7 (page E-5).

¹²⁷ See the FLA, Volume 1, Exhibit B, Section B.1.3 (page B-3 to B-8).

¹²⁸ As noted in the Order (at para. 62), the Commission changed the BO ITS when incorporating it into the New License (through Ordering Paragraph E and Appendix A) by substituting the District for the references to the Commission in the ITS as to actions and studies which are to be performed.

RPMs and associated Terms and Conditions in the ITS. Therefore, the BO cannot be the basis of reasoned decision-making by the Commission and should be rejected.

1. Review of the BO (and ITS) is appropriate at this time.

Review of the BO and the ITS must be done in the context of the Commission's Order issuing a New License for the Project. When a BO is prepared in the course of a Commission relicensing proceeding, the "only means of challenging the substantive validity" of the BO is on review of the Commission order.¹²⁹ And, pursuant to FPA Section 313(a) in order to challenge a Commission order, a request for rehearing on that issue must be filed at the Commission.¹³⁰ Therefore, this is the appropriate time and place to raise these issues.

And, that review by the Commission on rehearing is particularly imperative here given the fatal flaws in the BO and its ITS/RPMs and associated Terms and Conditions in this proceeding. As the District has documented in its filings in this proceeding and detailed further below, the BO does not comply with requirements of the ESA, USFWS policies and regulations, or case law.¹³¹ In particular, the BO is fatally flawed because it fails to demonstrate a direct causal connection of Project operations to the alleged adverse impacts; relies on findings that are not based on substantial record evidence; is not based on best scientific and commercial data; ignores study results and analysis in the record; and uses an incorrect environmental baseline, inconsistent with ESA Section 7 regulations, the USFWS Endangered Species Consultation Handbook,¹³² and applicable case law. In summary, the record in this proceeding does not support the BO's determination that pallid sturgeon, Interior least terns and piping plovers are adversely affected as a direct result of Project

¹²⁹ See *Tacoma*, 460 F.3d at 76; see also *California*, 887 F.2d at 911-12.

¹³⁰ 16 U.S.C. § 8251(a).

¹³¹ See the District's June 1, 2015, comments on the Draft BO (pages 2-3); and the District's January 27, 2017, comments on the Final BO (pages 1-2).

¹³² USFWS and NMFS 1998 ("Handbook").

operations or the proposed relicensing of the Project, and is inconsistent with law and policy. Therefore, the BO cannot be the basis of the Commission's Order in this proceeding.

2. The conclusions in the BO/ITS are not consistent with the record evidence and are contrary to the applicable law; therefore, they do not meet the requirements of the APA.

As discussed above (in Section III.A), regulatory agency decisions must meet the “arbitrary and capricious” and the “substantial evidence” standards, demonstrating reasoned decision making, under the APA.¹³³ A BO (including its ITS) must meet this APA standard, and must consider the relevant factors in the record and articulate a “rational connection between the facts found and the choice made.”¹³⁴

However, in this proceeding the BO and ITS do not meet this standard. As detailed below, many of the BO's major conclusions do not follow from the reasoning and evidence the BO presents to support them and, in some cases, conclusions in the BO conflict with the reasoning and evidence presented elsewhere in the BO. Furthermore, as discussed further below, the BO is not in accordance with the law. The ITS contains RPMs and associated Terms and Conditions that are not supported by substantial record evidence and are contrary to the applicable law, as more fully described below.

In particular, as a result of its failure to consider record evidence including the District's Study 4.0, USFWS included RPM1 and associated Term and Condition #1(a) for pallid sturgeon in the BO. As outlined above, that provision would require the District to shut down hydrocycling operations into the Power Canal if temperatures meet or exceed 93° F. based on real-time temperature readings at the USGS gage at Louisville, and further states that such cessation of hydrocycling “represents no Project diversion of water into the Loup

¹³³ 5 U.S.C. § 706(2). See, e.g., *Tacoma*, 460 F.3d at 76; see also *Tribal Village*, 869 F.2d at 1193.

¹³⁴ *Tacoma* at 76, citing *Arizona Cattle Growers*, 273 F.3d at 1235-36.

Power Canal.” However, the record demonstrates that this provision is arbitrary and capricious. As the District has confirmed in the record,¹³⁵ given the statistically significant 1:1 relationship between temperature upstream of the Project Diversion Weir and temperature downstream of the Diversion Weir as demonstrated in Study 4.0,¹³⁶ the only conclusion is that cessation of diversion of water into the Power Canal would have no effect on water temperature downstream of the Project. Therefore, requiring the District to cease hydrocycling as set forth in Term and Condition #1(a) to benefit pallid sturgeon downstream of the Project is pointless and unsupported by the record evidence. And even if, *arguendo*, one could argue that there is some record support for the requirement under this RPM Term and Condition #1(a) to cease hydrocycling, the record certainly doesn’t support a requirement to cease all diversions into the Canal as required in Term and Condition #1(a), as this requirement can be accomplished through run-of-canal operations.

The Commission Staff came to the same conclusion as the District based on Study 4.0 and responded in opposition to the USFWS proposal to include Term and Condition #1(a) for pallid sturgeon, stating: “the Service has not provided supporting evidence that project operation affects water temperatures at the Louisville gage” and further that there “does not appear to be a direct nexus between water temperatures at the Louisville gage and project operations.”¹³⁷ The Commission Staff further affirmed: “There are too many variables on water temperatures in the lower Platte River to justify that [P]roject operation causes increased water temperatures at the Louisville gage to the extent that the [P]roject would cause the deaths of pallid sturgeon at that site.”¹³⁸ Despite the District’s and the Commission

¹³⁵ See the District’s January 27, 2017, comments on the Final BO (page 3).

¹³⁶ See the FLA, Volume 3, Appendix C, Water Temperature in the Project Bypass Reach Study Report.

¹³⁷ Commission Staff’s letter to USFWS dated June 5, 2015, at Appendix A (page 4).

¹³⁸ *Id.*

Staff's comments, USFWS included the requirement in the Final BO – contrary to the record evidence.

3. The BO is not based on the best scientific and commercial data available, contrary to the ESA regulations, policies and applicable case law.

ESA Section 7(a)(2)¹³⁹ and USFWS Section 7 regulations¹⁴⁰ require the USFWS to use the best scientific and commercial data available when it formulates its biological opinions. This statutory and regulatory requirement is further amplified in agency policy requiring USFWS to (a) “evaluate all scientific and other information used to ensure that it is reliable, credible, and represents the best scientific and commercial data available” and (b) “gather and impartially evaluate biological, ecological, and other information disputing official positions, decisions, and actions proposed or taken by the Services.”¹⁴¹ The BO in this proceeding does not satisfy these standards.

First, the BO omits or neglects data and record evidence, particularly evidence that would support conclusions that are different from those the USFWS made in the BO. For example, the BO ignores the report of the District's Study 4.0, Water Temperature in the Project Bypass Reach.¹⁴² As discussed above, the results of this Study show that there is a statistically significant relationship between water temperatures and ambient temperatures; that water temperatures upstream of the diversion are directly related to water temperatures downstream of the diversion; and that there is **no** statistical relationship between water temperature and flow rate – which establishes that the diversion by the District into the Canal does not cause an increase in temperatures in the Bypass Reach. However, the BO's effects

¹³⁹ 16 U.S.C. § 1536(a)(2).

¹⁴⁰ 50 CFR 402.14(g)(8).

¹⁴¹ See, e.g., the Handbook at page xi; see also, the 1994 Interagency Cooperative Policy on Information Standards Under the Endangered Species Act (59 FR 34271; 1 July 1994).

¹⁴² See the FLA, Volume 3, Appendix C, Water Temperature in the Project Bypass Reach Study Report.

analyses ignores this Study and reaches conclusions that would be refuted by this Study.¹⁴³

The BO similarly neglects record evidence presented in the results of other Studies done pursuant to the Commission's Study Plan Determination in this proceeding, and with the agreement of USFWS and all other parties. The results of these Studies refute conclusions in the BO with respect to sediment deficits in the Tailrace Return,¹⁴⁴ sediment coarsening or degradation,¹⁴⁵ undermining associated with the Tailrace Weir,¹⁴⁶ influence of increased sediment transport on sandbar maintenance,¹⁴⁷ and patterns of degradation/aggradation in the Loup River Bypassed Reach and the lower Platte River.¹⁴⁸ Another example of best available data in the record that is ignored in the BO is the February 2015 PRRIP Chapters, as discussed above in Section III.E.

Similarly, the BO analyzes data on Interior least tern nests and piping plover nests from only 2008 to 2014, although as the BO acknowledges¹⁴⁹ data on this nesting has been collected since at least 1987. The District provided comments on the BO¹⁵⁰ noting that use of a reduced data set does not represent use of the best available data, as required, and thus constitutes arbitrary decision making. Further, the USFWS provided no response as to why the reduced data set was used.

¹⁴³ BO at pages 46-47, 80-100, and 119-131.

¹⁴⁴ See the District's November 23, 2011, response to comments on the Updated Study Report, Attachment B (pages 1-12, including Figures 1-8); the District's December 6, 2012, comments on USFWS's Section 10(j) recommendations, Attachment B (pages B-1 through B-5); and the District's June 1, 2015, comments on the Draft BO, Attachment C (pages 3-8).

¹⁴⁵ See the District's June 1, 2015, comments on the Draft BO, Attachment C (pages 3-8).

¹⁴⁶ *Id.*

¹⁴⁷ See the FLA, Volume 3, Appendix J, Alternative Project Operations and Sediment Management, Section 5.2.3 (pages 49-50).

¹⁴⁸ See the FLA, Volume 3, Appendix A, Sedimentation Study Report (page 69).

¹⁴⁹ BO at 78.

¹⁵⁰ See the District's January 27, 2017, comments on the Final BO, Attachment B (pages 4-5).

4. The environmental baseline in the BO is not consistent with the regulations, policies and applicable case law.

Under USFWS regulations, the “effects” of a proposed Federal action being analyzed (*i.e.*, the relicensing of the Project in this proceeding) provide that:

“Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.”¹⁵¹

As further amplified in the implementation of those regulations:

“In determining the ‘effects of the action,’ the Director first will evaluate the status of the species or critical habitat at issue. This will involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of totality of factors affecting the species or critical habitat. The evaluation will serve as the baseline for determining the effects of the action on the species or critical habitat.”¹⁵²

By regulation, the “environmental baseline” that serves as the point of reference for a BO’s effects analysis (hereinafter referred to as “ESA baseline” for the purpose of this Request for Rehearing) includes “the past and present *impacts* of all Federal, State or private actions and other human activities in the action area, the anticipated *impacts* of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the *impact* of State or private actions which are contemporaneous with the consultation in process.”¹⁵³

The Handbook clarifies that the ESA baseline is to be “an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area.” As further amplified in the Handbook, the ESA baseline is intended to be a “‘*snapshot*’ of a

¹⁵¹ 50 CFR § 402.02.

¹⁵² 51 Fed. Reg. 19932.

¹⁵³ 50 CFR § 402.02 (emphasis added).

species' health at a specified point in time."¹⁵⁴ Courts have emphasized that "environmental baselines" require analyses of the "impact" of the suite of activities identified in the regulations rather than merely referencing those other activities.¹⁵⁵ The ESA baseline requires BOs to assess the *impacts* of the various activities that have affected or currently affect listed species in the action area (which, in this proceeding, would include current Project operations) on the current status of those species.

USFWS acknowledges this obligation in the BO where it cites to the Handbook as providing a basis for its ESA analysis of the effects in this proceeding:¹⁵⁶

"(1) 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, form the environmental baseline.

(2) To this baseline, 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), are added to determine the total effect on listed species and their habitat."

However, despite citing the Handbook, USFWS fails to construct an ESA baseline that satisfies this definition in its analysis in the BO. Instead, the BO defines the ESA baseline for the purpose of this proceeding as:

"a) *no diversion into the Project canal for the purpose of hydropower production*;
b) existing Project infrastructure remains in place; and
c) current habitat conditions that have been formed through past Project operations represent a starting condition for the environmental baseline."¹⁵⁷

In addition, the BO states: "The environmental baseline will also include the following assumptions: a) species habitat conditions are expected to change under a no diversion baseline; and b) species status in the action area is expected to be different under a no

¹⁵⁴ Handbook at page 4-22, "Environmental Baseline," paragraph 1 (emphasis added).

¹⁵⁵ See, e.g., *Defenders of Wildlife v Babbitt*, 130 F.Supp.2d 121, 126-28 (D.D.C. 2001); see also *Greenpeace v. NMFS*, 80 F.Supp.2d 1137, 1149 (W.D. Wash. 2000).

¹⁵⁶ BO at B-1.

¹⁵⁷ BO at 22 and B-2 (emphasis added).

diversion baseline.”¹⁵⁸

Clearly the “no diversion” scenario is not an appropriate ESA baseline for the purposes of the analysis of relicensing of the Project, and is contrary to the required “snapshot” of the demographic and ecological health of the species at issue at the time of the consultation on the Project. As the District has detailed in its comments on the Draft BO and comments submitted to FERC on the final BO,¹⁵⁹ the USFWS has erroneously created a fictional ESA baseline (*i.e.*, “no diversion”) that does not exist, has not existed for nearly a century, and is not the appropriate basis for an ESA analysis. Water has been diverted into the Power Canal since the Project began operations – which operations were licensed by the Commission in 1934 and again in 1984. A baseline of “no diversion” is contrary to the record and the USFWS’s own policy, and is arbitrary and capricious.

As a result of the choice of an erroneous ESA baseline in the BO, the effects analysis in the BO incorrectly compares the proposed New License described in the FEA (including the new maximum diversion cap and minimum bypass flows, which reduce the diversion into the Power Canal) with a “no diversion” hypothetical condition that is based on no facts and certainly not supported by the record in this proceeding. The correct ESA baseline analysis would be to compare the effects of proposed New License conditions in the FEA against the existing License operations (with no minimum bypass flow requirement and no cap on diversions into the Power Canal).

Further, treating the ESA baseline as representing Loup and Platte River conditions that might have existed if the Project had not been constructed erroneously ignores the substantial beneficial impacts of the Project on Interior least terns and piping plovers. As the

¹⁵⁸ BO at B-2.

¹⁵⁹ See the District’s June 1, 2015, comments on the Draft BO (pages 2-3); and the District’s January 27, 2017, comments on the Final BO (pages 1-2).

BO (at 104 and 134) acknowledges, Interior least tern and piping plover populations in the area affected by Project operations are either stable or increasing in large part because of how sand management associated with historical Project operations has created a very favorable environment for the Interior least terns and piping plovers.

The BO's use of an ESA baseline that presumes no diversion into the Canal is arbitrary and capricious, contrary to USFWS policy and regulations, and certainly contrary to the record evidence.

5. The ITS contained in the BO is not in compliance with regulations, policies, and case law under the ESA.

The USFWS has codified some of the requirements that apply to an ITS in its regulations.¹⁶⁰ The regulations and the case law have express requirements for a determination of whether an incidental take is expected and whether a surrogate measure can be used to determine the amount or extent of an incidental take. Extensive case law has also established explicit requirements that apply to an ITS.¹⁶¹ The BO in this proceeding does not meet those requirements and is, therefore, arbitrary and capricious.

Specifically, to determine if an incidental take is anticipated USFWS regulations require the application of a "reasonable certainty" standard, with three steps: (1) a determination is made regarding whether a listed species is present within the area affected by the proposed Federal action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (*e.g.*, noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed

¹⁶⁰ 80 CFR § 26844.

¹⁶¹ See, *e.g.*, *Arizona Cattle Growers*, 273 F.3d at 1233; see also *Natural Resources Defense Council v. Evans*, 279 F.Supp.2d 1129, 1184-85 and 1187 (N.D. Cal. 2003) ("*NRDC*"); cited with approval in *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031 at 1038 (9th Cir. 2007) ("*Oregon NRC*"); and *Wild Fish Conservancy v. Salazar*, 628 F. 3d 513 at 532 (9th Cir. 2010) ("*Wild Fish Conservancy*").

species' biological response to that exposure corresponds to the statutory and regulatory definitions of take (*i.e.*, kill, wound, capture, harm, etc.).¹⁶²

The regulations allow USFWS to use a surrogate measures to specify the amount or extent of an incidental take, but USFWS is required to satisfy three conditions: (1) the ITS must describe the causal link between the surrogate measures and the take of the listed species; (2) the ITS must explain why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and (3) the ITS sets a clear standard for determining when the level of anticipated take has been exceeded.

Numerous cases have ruled on the USFWS' ability to rely on surrogate measures in ITSs. If USFWS can establish that it is impractical to express the "amount or extent" of an incidental take in terms of the number of individuals "taken," USFWS can express it in terms of the percentage of an affected population that would be "taken." If this is also impractical, USFWS can express the extent of take using an ecological surrogate or habitat marker – a surrogate measure. If the USFWS uses a surrogate measure, however, two standards apply: (1) USFWS must establish that the action they say is likely to incidentally take listed species is likely to cause the change in the surrogate measure rather than some other causal factor (*i.e.*, USFWS must demonstrate a causal connection of an effect to the proposed action and must disconnect the effect from other potential causal agents); and (2) USFWS must causally link the change in the surrogate measure to the "take" of the species.¹⁶³

¹⁶² 80 CFR § 26837.

¹⁶³ *See, e.g., Arizona Cattle Growers*, 273 F.3d at 1250; *see also Miccosukee Tribe of Indians of Florida v. USFWS*, 697 F.Supp.2d 1324, 1331 (S.D. Fla. 2010).

However, as the District has detailed in its comments on the Draft and Final BOs,¹⁶⁴ the ITS ignores these regulatory requirements and legal standards. Contrary to the plain requirements of applicable regulations, the ITS is not supported by the BO's effects analysis; the BO and ITS fail to identify biological responses that correspond to statutory and regulatory definitions of take; and the ITS relies on surrogate measures without satisfying the legal requirements that apply to such measures.

First, the BO fails to satisfy the "reasonable certainty" standard contained in the regulations. For pallid sturgeon, the BO (at 135, emphasis added) first concludes that Project hydrocycling operations "will result in incidental take in the form of harm to pallid sturgeon, resulting in the death of two individuals in the Lower Platte River via stranding during low flow and high stream temperatures" and "will result in incidental take in the form of harm to pallid sturgeon by impairing the feeding and sheltering, thus *resulting in a short-term effect to 926 pallid sturgeon in the Lower Platte River.*" However, the BO also concludes "[W]hen considering the short-term effects to feeding and sheltering, *individuals affected by the Staff Alternative in the Lower Platte River are expected to maintain an excellent condition, higher than that described for individuals in the adjacent Missouri River.*"¹⁶⁵ These two claims are mutually exclusive and demonstrate that the biological response of pallid sturgeon exposed to Project hydrocycling *does not* correspond to the statutory and regulatory definition of "harm."

The regulations define "harm" to mean "an act which *actually* kills or injures wildlife by *significantly* impairing essential behavioral patterns, including breeding, feeding or

¹⁶⁴ See, e.g., the District's June 1, 2015, comments on the Draft BO (pages 10-11); and the District's January 27, 2017, comments on the Final BO, Attachment B (pages 14-15).

¹⁶⁵ BO at 60 (emphasis added).

sheltering.”¹⁶⁶ However, the BO fails to establish that pallid sturgeon feeding or sheltering are likely to be *significantly* impaired such that they are expected to be “actually” killed or injured by Project operations. In fact, the BO’s conclusion that the pallid sturgeon affected would *remain in excellent condition* argues that the Project would not *significantly* impair their feeding or sheltering to a degree tantamount to *actually* killing or injuring those sturgeon.¹⁶⁷ The only conclusion these conflicting claims support is that these pallid sturgeon are not likely to be “taken in the form of harm” by Project operations. It was arbitrary and capricious for the BO to conclude that the Project would “take” pallid sturgeon and prescribe RPMs and Terms and Conditions for this species.¹⁶⁸

The BO’s ITS for pallid sturgeon also relies on surrogate measures without satisfying the legal requirements that apply to such measures. The Terms and Conditions of the ITS for pallid sturgeon use surrogate measures such as “average annual differences in flow and water surface elevation,”¹⁶⁹ to infer that pallid sturgeon would be “taken” as a result of proposed Project operations under the New License. However, the BO fails to establish that these alleged annual differences in flow and water surface elevation or high water temperatures would be caused by Project operations rather than other factors such as regional droughts or weather patterns.

Furthermore, courts have directed that “it is arbitrary and capricious to set the trigger at one animal unless defendants can adequately detect the taking of a single animal.”¹⁷⁰

However, contrary to this case law, the ITS for pallid sturgeon in the BO determines that the

¹⁶⁶ 50 CFR § 17.3 (emphasis added).

¹⁶⁷ BO at 60-61.

¹⁶⁸ See, e.g., *Arizona Cattle Growers*, 273 F.3d at 1233.

¹⁶⁹ BO at 137.

¹⁷⁰ See, e.g., *NRDC*, 279 F.Supp.2d at 1187; cited with approval in *Oregon NRC*, 476 F.3d at 1038, and *Wild Fish Conservancy*, 628 F.3d at 532.

Commission Staff alternative in the FEA would result in the incidental take in the form of harm to pallid sturgeon “*resulting in the death of one pallid sturgeon* in the Platte River Bypassed Reach due to lethal water temperatures from reduced flows.”¹⁷¹ THE BO’s RPM2 and associated Term and Condition #2(a) directs monitoring, but this monitoring requirement focuses solely on “*average annual differences in flow and water surface elevation for: a) Platte River at North Bend; and b) Platte River at Louisville.*”¹⁷²

Two aspects of this monitoring program required by the BO suggest that it cannot adequately detect the take of one pallid sturgeon and, therefore, the monitoring is not consistent with ESA policy and regulations. First, the monitoring program does not collect information from the area in which the single pallid sturgeon is expected to be taken (*i.e.*, in the Project Bypass Reach), so it could not detect pallid sturgeon taken by high temperatures in that area. Second, the monitoring program does not collect information on the fate of pallid sturgeon exposed to high temperatures; so the monitoring program could not adequately detect the take of one pallid sturgeon due to lethal water temperatures rather than from reduced flows in the Project Bypass Reach under the New License.

As the District has also pointed out in comments it submitted to the Commission and USFWS, the ITSs for Interior least tern and piping plover suffer from similar defects.¹⁷³ The RPMs for both species require the District to “ensure Project hydrocycling operations affecting” the two species’ “reproduction in the Lower Platte River will not result in take that exceeds” the take estimate for the two species (104 Interior least tern and 37 piping

¹⁷¹ BO at 135 (emphasis added).

¹⁷² BO at 137 (emphasis added).

¹⁷³ *See, e.g.*, the District’s June 1, 2015, comments on the Draft BO (pages 10-11); and the District’s January 27, 2017, comments on the Final BO, Attachment B (pages 15-16).

plovers).¹⁷⁴ The RPMs associated Terms and Conditions for both species require the District to develop and implement a monitoring plan that identifies the amount and frequency of inundation of nests “specifically due to the difference in stage variation caused by hydrocycling” under the New License.

As with the ITS for pallid sturgeon, the ITS for Interior least tern and piping plover relies on surrogate measures without satisfying the legal requirements that apply to such measures. The Terms and Conditions of the ITS for these species use two surrogate measures – “differences in average annual” and “average seasonal stage and discharge” – to infer that Interior least tern and piping plover nests would be “taken” as a result of Project operations under the New License. However, the BO recognizes that: (i) “some degree of sandbar/island erosion is a natural process and a dominant factor in the evolution of sandbars and islands within the Platte River”; (ii) “...decreases in island size were reported from year-to-year for many nesting islands”; and (iii) “[I]slands created from peak flows one year may have been overtopped and reworked by flows of significantly less magnitude the following year, often resulting in a reduction of bar height and size.”¹⁷⁵

Because there is no question that Interior least tern and piping plover nests in the action area are destroyed by natural processes (irrespective of Project operations under the New License), under the ESA requirements the BO was required to establish that differences in average annual and average seasonal stage and discharges would be caused by Project operations rather than caused by other non-Project factors such as regional droughts or weather patterns. Although USFWS makes numerous assumptions to estimate the number of Interior least tern and piping plover nests it expects to be taken as a result of Project

¹⁷⁴ BO at 138 and 140.

¹⁷⁵ BO at 88.

operations under the New License, the BO fails to establish that differences in average annual and seasonal stage and discharges would be caused by Project operations and “take” Interior least tern and piping plover nests as a result.

In addition, the ITS exempts the “take” of 104 Interior least tern eggs or chicks and the “take” of 37 piping plover eggs or chicks, due to hydrocycling over the 30-year license period.¹⁷⁶ For the Interior least tern this “take” translates to an annual loss estimated to be 1.16 nests per year or approximately 6 nests every 5 years.¹⁷⁷ For the piping plover, this take translates to an annual loss estimated to be 0.31 nests per year or approximately 3 nests every 5 years.¹⁷⁸ Like the ITS for pallid sturgeon, the BO fails to address the regulatory standards that apply to this kind of determination.

Furthermore, the RPM 1 Term and Condition #1(a) for Interior least terns and RPM 1 Term and Condition #1(a) for piping plover requires the District to monitor “average annual differences (and seasonal differences) in flow and water surface elevation” at six different sites or stream reaches.¹⁷⁹ And Term and Condition #1(d) for both species require the District to reinitiate consultation when “average *annual* stage and discharge differences” and “average *seasonal* stage and discharge differences” at North Bend and Louisville are greater than that described under Current Operations.”¹⁸⁰ Nothing in the BO or the ITS establishes that this monitoring, designed to estimate annual or seasonal averages, can adequately detect the take of 6 Interior least tern nests and 3 piping plover nests, every 5 years, that have been caused by Project operations under the New License, as opposed to other factors.

Because of these defects, the ITS fails to comply with the USFWS regulations and

¹⁷⁶ BO at 137 and 139, respectively.

¹⁷⁷ BO at 137.

¹⁷⁸ BO at 139.

¹⁷⁹ BO at 138 and 139, respectively.

¹⁸⁰ BO at 138 and 140, respectively (emphases in original).

policies, and applicable case law.

- B. The Commission erred in adopting the BO and ITS RPMs and associated Terms and Conditions, and its action was arbitrary and capricious.

Pursuant to Ordering Paragraph E (and Appendix A), as noted above, the Commission imposes the BO's RPMs and associated Terms and Conditions as to pallid sturgeon, Interior least terns, and piping plovers on the New License – without significant modification or comment. However, as demonstrated above, the BO (including the ITS RPMs and associated Terms and Conditions) is fatally flawed, is not supported by substantial record evidence, and is arbitrary and capricious. The Commission's adoption of the arbitrary and capricious BO and RPMs and associated Terms and Conditions is itself arbitrary and capricious. Furthermore, the Commission's inclusion of the BO's RPMs and associated Terms and Conditions in the New License is contrary to its FPA statutory mandate for balancing multiple factors in imposing license conditions and, therefore, is an abuse of discretion and should be reversed on rehearing.

1. The ITS RPMs and associated Terms and Conditions adversely impact the Project operations, power production, and the environment and other commercial interests in the Canal.

The RPMs and associated Terms and Conditions impose additional monitoring and study requirements on the District. These monitoring and study requirements would impose additional burdens on the New License that are not supported by the flawed BO and are, therefore, arbitrary and capricious. Furthermore, as discussed above, RPM1 and associated Term and Condition #1(a) for pallid sturgeon would require the District to shut down hydrocycling operations and cease diversions into the Power Canal if temperatures meet or exceed 93° F., without justification. Even if, *arguendo*, the BO justified the cessation of hydrocycling based on this temperature condition, there is no justification in the record for

the requirement also to cease all diversions into the Power Canal. This flow provision for pallid sturgeon would substantially adversely affect the District's ability to efficiently use the water resources at the Project and to generate renewable power for sale into the grid. Furthermore, as discussed above in the context of License Article 406 requirements, ceasing diversions into the Power Canal would also adversely affect the Interior least tern and piping plovers by providing less dredged material which has historically created Interior least tern and piping plover habitat at the North SMA. Ceasing diversions of water into the Power Canal would also result in stagnant water that would adversely impact the existing Canal fishery, could adversely affect agricultural interests that depend on water from the Power Canal for irrigation, and sand operations.

These are considerations in the Commission's relicensing process, as required by the FPA, and they cannot be ignored by the Commission in issuing a New License.

2. The Commission must reject the ITS RPMs and associated Terms and Conditions in order to fulfill its statutory obligations under the FPA.

The Commission must not blindly adopt the conclusions of a BO including its RPMs and associated Terms and Conditions.¹⁸¹ Commission case law acknowledges this fact.¹⁸² In particular, the Commission is not required to adopt provisions from a BO (and stated requirements in an ITS) where the BO and the ITS do not comply with ESA standards, are not based on substantial record evidence, and are arbitrary and capricious.¹⁸³ And the USFWS ESA regulations even acknowledge that the USFWS performs strictly "an advisory

¹⁸¹ See, e.g., *ALCOA*, 175 F.3d at 1161; see also *Tribal Village*, 869 F.2d at 1193; *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300 at 1304 (9th Cir. 1993) ("*Resources Limited*"); *Pyramid Lake Paiute Tribe of Indians v. U.S. Department of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) ("*Pyramid Lake*").

¹⁸² See, e.g., *Pacific Gas & Electric Co.*, 107 FERC ¶ 61,232 at para. 15-16 and fn.18 (2004) (citations omitted).

¹⁸³ See, e.g., *Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) ("*Defenders of Wildlife*"); see also e.g., *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F. 3d 581, 643 (9th Cir. 2014) ("*San Luis*"); and *Pyramid Lake*, 898 F.2d at 1418 .

function under section 7” – that the action agency, here the Commission, retains the ultimate decisional authority.¹⁸⁴ Furthermore, Commission and court cases affirm that in actions under the ESA and FPA the Commission is not obligated to consult on hypothetical baselines¹⁸⁵ and, instead, is to use an existing condition for its baseline on environmental analysis – not pre-project conditions.¹⁸⁶

The flaws in the ITS are legal in nature; therefore, discerning them (and, as a result, rejecting the BO and ITS) does not require technical or scientific expertise that justifies Commission deference to the USFWS. By failing to discern these flaws and, instead relying on the flawed BO, the Commission erred in adopting the BO, its RPMs, and associated Terms and Conditions into the New License.¹⁸⁷ The Commission’s reliance on a legally flawed BO and its associated ITS (as presented in this proceeding) is itself arbitrary and capricious.¹⁸⁸ In particular, as discussed above, the Commission Staff has itself confirmed the lack of record support in this proceeding for the BO’s RPM1 Term and Condition #1(a) for pallid sturgeon requiring the District to shut down hydrocycling operations and cease diversions into the Power Canal if a part of the Platte River reaches temperatures at or above 93° F. at Louisville. The Order never addresses the lack of record evidence to support this BO/ITS requirement – despite the Commission Staff’s clear statements in 2015.

The ESA does not override the Commission’s FPA obligations. The Commission has the ultimate responsibility for issuing a hydro license consistent with the FPA and the

¹⁸⁴ See, e.g., 51 Fed. Reg. at 19928.

¹⁸⁵ See, e.g., *Forest Conservation Council v. Espy*, 835 F.Supp. 1202, 1217 (D. Id. 1993).

¹⁸⁶ See, e.g., *American Rivers v. FERC*, 201 F.3d 1186, 1196-99 (9th Cir. 1999); see also *Conservation Law Foundation v. FERC*, 216 F.3d 41, 46 (D.C. Cir. 2000).

¹⁸⁷ See, e.g., *Defenders of Wildlife*, 420 F.3d at 976; see also *San Luis*, 747 F.3d at 643; and *Pyramid Lake*, 898 F.2d at 1418.

¹⁸⁸ See, e.g., *Center for Biological Diversity v. Salazar*, 804 F.Supp.2d 987, 990 and 1010 (D. Ariz. 2011); see also *Wild Fish Conservancy*, 628 F.3d at 532.

enumerated developmental and non-developmental issues, as discussed above.¹⁸⁹ In this proceeding the Commission cannot incorporate the BO provisions into the New License because they violate the Commission's own statutory responsibilities under the FPA, particularly where, as here, the BO is fatally flawed. As discussed above, the imposition of the BO's RPMs and associated Terms and Conditions will significantly injure the ability of the District to operate the Project for power generation and will also adversely affect other interests (including other fishery resources in the Power Canal, irrigation water rights).

The Commission acknowledges in its Order (*e.g.*, para. 99 and 143) that, under the FPA it must balance a number of factors – only one of which is environmental impacts. That balancing process should favor rejecting the BO and the ITS/RPMs and associated Terms and Conditions, particularly where: (i) as affirmed in the BO, relicensing the Project as proposed by the District would not jeopardize any endangered or threatened species;¹⁹⁰ and (ii) the BO itself does not meet the required standard of review and should be overturned, as discussed above.

On rehearing the Commission should revise the Order by removing references to, and its incorporation of the provisions of, the BO and the ITS RPMs and associated Terms and Conditions. At a minimum, on rehearing the Commission should withdraw the Order and should re-enter ESA consultation with USFWS to resolve the substantial errors in the BO (including the ITS RPMs and associated Terms and Conditions) before issuing a New License for the Project.

¹⁸⁹ *See, e.g., Resources Limited*, 35 F.3d at 1304; and *Tribal Village of Akutan*, 869 F.2d at 1193.

¹⁹⁰ *See, e.g., Final BO* at pages 60, 102, 132, 136, 137, and 139.

V. Conclusion

WHEREFORE, the District requests that the Commission grant rehearing of the Order and on rehearing modify the Order as discussed above.¹⁹¹

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that she has served the foregoing document upon each person designated on the Commission's official service list for this proceeding, pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C., this 16th day of June, 2017.

By 

Nancy J. Skancke
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¹⁹¹ Including the required correction to the description of the Project in Ordering Paragraph B(2) (and in Order at para. 130) to remove any reference to a dam, as discussed above.