

REPLY TO:

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October 3, 2017

VIA FERC E-FILING

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: Biological Opinion of July 5, 2017; Formal Consultation for Project No. 12514-074-Northern Indiana Public Service Company (NIPSCO), Norway-Oakdale Hydroelectric Project, Tippecanoe River, White and Carrol Counties, Indiana

Dear Secretary Bose:

We represent Shafer & Freeman Lakes Environmental Conservation Corporation (“SFLECC”); Carroll County, Indiana; White County, Indiana; and the City of Monticello, Indiana (collectively the “Interested Parties”). The Interested Parties have intervened and participated extensively in the FERC proceedings stemming from the application filed by the Northern Indian Public Service Company (“NIPSCO”) on October 2, 2014 to amend its license for the 16.4-megawatt (“MW”) Norway-Oakdale Project located on the Tippecanoe River in Carroll and White Counties, Indiana.

NIPSCO proposed to revise Article 403 of the project license issued on October 2, 2007 to include a low-flow definition of abnormal river conditions in order to implement the protocols outlined in the U.S. Fish and Wildlife Service’s (“FWS”) Technical Assistance Letter (“TAL”)



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dated August 13, 2014 (as clarified). The modified definition would allow NIPSCO to drawdown the levels of the lakes during such conditions by much more than the 0.25 feet (*i.e.*, 3 inches) allowed by the current License.

Subsequent to the application, the FERC staff prepared an Environmental Analysis of the potential environmental effects of modifying NIPSCO's license to include the revised definition that was proposed by NIPSCO. In the course of doing so, the FERC staff developed the following alternative definition of abnormal river conditions that would eliminate flow fluctuations associated with project operations during periods of low flow while avoiding the adverse effects of drawdowns:

“Abnormal high river conditions” are defined as conditions with river flows of 3,000 cubic feet per second (cfs) or higher or hourly increases in river flow of 100 cfs or greater at both project dams. Under these conditions, the licensee must at all times act to maintain the fluctuation of the reservoir surface elevation at Lake Shafer within 0.75 feet above and 0.25 feet below elevation 647.47 feet NGVD (between elevation 648.22 feet and elevation 647.22 feet) and at Lake Freeman within 0.75 feet above and 0.25 feet below elevation 612.45 feet NGVD (between elevation 613.20 feet and elevation 612.20 feet).

“Abnormal low river conditions” are defined as a 24-hour daily average of river flow of ≤ 300 cfs as measured at the USGS Winamac gage (No. 03331753); or in the event of an equipment or operation issue at Oakdale unrelated to weather conditions upstream, a 24-hour daily average of river flow of ≤ 570 cfs at the USGS Oakdale gage (No. 03332605). Under these conditions, the licensee must immediately cease generation at the Oakdale Development and must at all times act to maintain the reservoir surface elevation at Lake Freeman no lower than elevation 612.20 feet NGVD. The licensee must release downstream flows in accordance with the Fish and Wildlife Service's August 13, 2014 Technical Assistance Letter (TAL) and Clarifications A, B, and C to the TAL, if possible, without drawing the reservoir surface elevation of Lake Freeman below elevation 612.20 feet NGVD. Project operations may return to normal when: (a) the 24-

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hour daily average flow is >300 cfs at the Winamac gage; and (b) hourly flow readings at the Oakdale gage are >500 cfs.

In the final Environmental Analysis, the FERC staff recommended that NIPSCO's license be amended to include this alternative definition. On November 10, 2016, FERC requested the FWS's concurrence with its proposed action and on December 9, 2016 the FWS indicated that it did not concur. Such being the case, by letter of February 16, 2017, FERC requested formal consultation pursuant to Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). The above referenced Biological Opinion of July 5, 2017 resulted from this request for consultation and evaluation of the effects of the proposed action – the FERC Staff Alternative – on the endangered clubshell mussel (*Pleurobema clava*), fanshell mussel (*Cyprogenia stegaria*), sheepnose mussel (*Plethobasus cyphus*), rayed bean (*Villosa fabalis*), snuffbox (*Epioblasma triquetra*) and threatened rabbits foot (*Quadrula cylindrica cylindrica*) mussel and rabbits foot Critical Habitat in accordance with Section 7 of the ESA.

FERC's request for consultation included all of the items required by § 402.14(c), including the Environmental Assessment and Biological Assessment prepared by the FERC staff, and the best scientific and commercial data available to permit an adequate review of the effects that modifying NIPSCO's license to include the alternative definition may have upon the listed species. Additionally, while FERC declined our request to participate in the formal consultation, the fact remains that (1) in the Protest, Comments, and Request for Hearing that the Interested Parties had earlier submitted to FERC they had, among other things, included reports from two

expert hydrologists who fully supported the FERC Staff's Alternative and (2) the FWS was fully aware of the content of this information.

As set out in pertinent part in 50 C.F.R. § 402.14(h) through (j),

(h) The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) **The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).** A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) Incidental take.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), ... the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains 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 sets a clear standard for determining when the level of anticipated take has been exceeded);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 C.F.R. § 13.45 and § 18.27 for FWS and 50 C.F.R. § 216.105 and § 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take

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statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

- (j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(Emphasis added).

Irrespective of the direct participation of the Interested Parties, the FWS is obliged to review all relevant information provided by the Federal agency or otherwise available to formulate its biological opinion, and set forth any reasonable and prudent alternatives that may exist. *See* § 401.14(g). Indeed, item 8 thereof provides in unequivocal terms that:

In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

Here, the FWS's Biological Opinion of July 5, 2107 provided that:

it is the Service's biological opinion that the FERC Staff Alternative, as proposed, is not likely to jeopardize the continued existence of the clubshell, fanshell, sheepnose or rabbitsfoot mussels and is not likely to destroy or adversely modify designated critical habitat. Biological Opinion at 48 (emphasis added).

Nonetheless, the Biological Opinion also contained an incidental take statement and identified one reasonable and prudent measure ("RPM") necessary to minimize the take of mussels – "restoring a more natural flow regime downstream of Oakdale Dam during low-flow

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periods.” The Biological Opinion then sets out the following terms and conditions associated with the identified RPM:

In order to be exempt from the prohibitions of section 9 of the Act, the FERC must comply with the following terms and conditions, which implement the reasonable and prudent measure described above. These terms and conditions are non-discretionary.

- **Adopt the alternative proposed by NIPSCO** in its request for a license amendment and implement the Service TAL of 2014 as clarified (Appendix 1).
- Replace readings from the USGS Winamac Gauge with those from the USGS Buffalo Gauge as the key metric defined in the TAL upon authorization of the USGS Buffalo Gauge by the Service.

As set out in detail both below and in the attached expert reports:

1. The reasonable and prudent measure directed by the FWS was not formulated using the best scientific and commercial data available.
2. There will be no incidental take in connection with implementing the FERC Staff Alternative. Accordingly, there is no basis for the FWS to impose a RPM.
3. The FWS is also not legally authorized to require implementation of the proposed RPM because it will result in major changes to FERC’s Proposed Action.
4. Notwithstanding all else, under the ESA, it is the agency (FERC in this instance) that determines whether and in what manner to proceed with its proposed action in light of its Section 7 obligations and the FWS’s Biological Opinion.
5. Here, FERC need not comply with the reasonable and prudent measure that the FWS set out in the Biological Opinion. In fact, were it to do so it would not be acting properly because it would be complying with a measure that the FWS is unauthorized to put forward.

1. **The reasonable and prudent measure directed by the FWS was not formulated using the best scientific and commercial data available**

SFLECC's two expert hydrologists, Dr. Robert E. Criss, and Dr. Bernard Engel, have proffered opinions in this matter setting forth the many reasons why the reasonable and prudent measure directed by the FWS was not formulated using the best scientific and commercial data available. According to the experts, the methodology and protocols implemented by NIPSCO and the FWS cannot be considered the "best available science available" and, in fact, constitute little more than "junk" science. *See* Expert Report of Robert E. Criss, Ph.D. dated May 15, 2015, pg. 12, attached hereto as Exhibit "A" ("Criss Report"); Expert Report of Bernard Engel, Ph.D., P.E., dated May 15, 2015, pg. 19, attached hereto as Exhibit "B" ("Engel Report").

The first shortcoming lies with the FWS personnel themselves. The FWS personnel completing the Biological Opinion are biologists, not hydrologists, and they failed to rely upon the multiple site-specific reports provided by hydrological experts. *See* Expert Report of Bernard Engel, Ph.D, P.E., dated October 1, 2017, pg. 1, attached hereto as Exhibit "C" ("Supplemental Engel Report"). Furthermore, the data used by the FWS personnel was "arbitrarily selected and excluded other relevant data," thus undermining the validity of any conclusions that can be drawn from the data. *See* Criss Report, pg. 14. In fact, "there is considerable evidence that the FWS used data sets it preferred, while ignoring other data that would not have supported linear scaling." *See* Engel Report, pg. 16. For instance, the FWS personnel involved ignored a published paper by Dr. Criss criticizing the linear scaling approach and John C. Galster's 2006 and 2007 papers relied upon by the FWS. The FWS personnel also failed to consider a later

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paper by Galster in 2009 which emphasized that “linear scaling must be applied with caution,” “linear scaling may not be valid for all locations,” and “linear scaling should be used in addition to comparison of actual changes in discharges.” *See* Engel Report, pg. 13.

Additionally, the FWS personnel failed to consider data that shows that Lake Freeman and its immediate surroundings *contribute* “an unexpectedly large amount of runoff to the river.” *See* Criss Report, pg. 18 (emphasis added). At the very least, the approach taken by the FWS personnel is flawed because the “FWS personnel should have considered other methodologies to establish that linear scaling is, in fact, the ‘best available science.’” *See* Engel Report, pg. 14.

Perhaps the most glaring defect in the “science” supporting the FWS’s putative reasonable and prudent measure is its sole reliance on two papers by Joshua C. Galster to support its use of linear scaling. *See* Engel Report, pg. 9. The two Galster papers relied upon by the FWS/NIPSCO are flawed. *See* Criss Report, pg. 9. Dr. Criss, in a published Comment, demonstrated that the 2006 paper by Galster “contains many errors, including mathematical impossibilities, and provides a uselessly confused figure” and many of these errors have been acknowledged by Galster. *See* Criss Report, pg. 9 (“Galster *et al.* (2007) acknowledge several of these problems”). Furthermore, in his 2007 paper, Galster provides no quantitative evidence that linear scaling holds for any of the rivers he examined in his paper. *See* Criss Report, pg. 9.

Similarly, the FWS’s reliance upon the two Galster papers is faulty in another respect. The assumption from Galster’s 2006 paper involving a study of *impervious surfaces* on the rate of flow in creek systems in two watersheds during *peak* flows is that “watersheds of

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approximately equal area should have approximately equal rates of flow during periods of peak (not low) flow, i.e., they should scale linearly.” *See* Engel Report, pg. 10. This study does not apply to the issue here – whether the near constant water levels in Lake Freeman have any impact on the natural flow of the river during periods of *low* flow. *See* Engel Report, pg. 10 (emphasis added). Similar to his 2006 paper, the Galster 2007 paper “does not assess periods of low flow; rather, it only assesses flow rates during peak annual discharge, and mean annual discharge.” *See* Engel Report, pg. 10. Additionally, Galster’s papers do not support the position taken by the FWS here, *see* Engel Report, pg. 19, that sole reliance upon “linear scaling is a superior method to using decades of data regarding actual flow rates as are available for the Tippecanoe River.” *See* Engel Report, pg. 11. Simply put, “the research of Professor Galster into the uses of linear scaling does not support the FWS’s attempt to apply linear scaling here.” *See* Engel Report, pg. 19.

The FWS’s reliance on linear scaling does reflect the “best scientific and commercial data available.” *See* Criss Report, pg. 16 (“linear scaling lends no support to the conclusions in the TAL and by no means is it the best available science”); Engel Report, pg. 19 (“linear scaling does not represent the best science available to determine whether the existence of the Oakdale Dam/Lake Freeman alter the natural flow of the Tippecanoe River during periods of low flow”). “In general, the theory of ‘linear scaling’ is a poor predictor of low flows along rivers, and no available literature suggests it is valid for this purpose.” *See* Criss Report, pg. 2. Specifically, there is not a simple or consistent relation between low flow magnitude and basin area in the

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Tippecanoe River basin, so linear scaling is a very poor predictor of low flow rates. *See* Criss Report, pg. 12. In fact, the application of linear scaling “has no predictive value for low flow rates on the Tippecanoe River.” *See* Criss Report, pg. 2. The “validity of proportional scaling between flow and watershed area has been established only for *long-term* mean flows along rivers in the eastern U.S.” *See* Criss Report, pg. 9 (emphasis added). However, the FWS used “linear scaling to set very specific flow rates on a daily and hourly basis during periods of low flow based on flow rates above a dam,” a use which is unsupported by any studies known to the experts. *See* Engel Report, pgs. 11, 19; Criss Report, pg. 13.

In sum, the reasonable and prudent measure directed by the FWS was not formulated using the best scientific and commercial data available because, as the two hydrological experts set forth in more detail in their respective reports: (1) the FWS personnel arbitrarily selected linear scaling to the exclusion of other and superior data; (2) the data relied upon by the FWS does not support the use of linear scaling in the current matter; and (3) the FWS’s application of linear scaling to the situation at hand is flawed.

2. There will be no incidental take in connection with implementing the FERC Staff Alternative. Accordingly, there is no basis for the FWS to impose a RPM

As stated in cases such as *Westlands Water Dist. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1157, 1223, (E.D. Cal. 2002), *aff’d in part, rev’d in part and remanded*, 376 F.3d 853 (9th Cir. 2004), RPMs are only required if they are necessary or appropriate to minimize incidental take and may only be imposed where there is evidence the agency action will result in a take. *See also Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273

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F.3d 1229, 1246 (9th Cir. 2001) (“Without evidence that a take would occur as a result of livestock grazing, issuing an Incidental Take Statement imposing conditions on the otherwise lawful use of the land was arbitrary and capricious”); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 910 (9th Cir. 2012) (“Service could not attach binding conditions on permittees via an ITS [Incidental Take Statement] where no listed species were present in the area and thus the agency ‘ha[d] no rational basis to conclude that a take will occur incident to the otherwise lawful activity’”) (internal citations omitted); *Pub. Employees for Env'tl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 115 (D.D.C. 2014); *Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1144 (D. Colo. 2012), *aff'd sub nom. WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677 (10th Cir. 2015). Here, the hydrologists’ reports also establish that, contrary to the FWS’s finding, there will be no incidental take in connection with implementing the FERC Staff Alternative.

The July 5, 2017 Biological Opinion stated that “it is the Service’s biological opinion that the FERC Staff Alternative, as proposed, is not likely to jeopardize the continued existence of the clubshell, fanshell, sheepnose or rabbits foot mussels and is not likely to destroy or adversely modify designated critical habitat.” Biological Opinion, pg. 48. Despite this conclusion, the FWS went on to attribute, without justification, all mussel mortality to the dams. *See* Expert Report of Robert E. Criss, dated September 30, 2017, pg. 3, attached hereto as Exhibit “D” (“Supplemental Criss Report”) (“The FWS commonly claims that they have ‘documented take’ of mussels. . . when they have only documented dead mussels in low water, conditions that

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commonly occur naturally”); *see* Supplemental Engel Report, pg. 4 (“FWS assume operation of the dams is responsible for mussels being killed”). In doing so, the FWS failed to acknowledge natural mussel mortality. *Id.*

The deficiency lies with the fact that the FWS personnel improperly relied upon a study by Vaughan and Taylor (1999) in alleging a “take” of mussels. According to Dr. Criss, the FWS’s reliance on the Vaughan and Taylor report regarding negative impacts on mussels in the Little River, OK watershed was inappropriate because the Okaloosa reservoirs in that study [which have surface areas more than 100 times larger than Lakes Shafer and Freeman] feature “a management style that is highly dissimilar to the ‘run of the river’ operation of the Tippecanoe R. dams and their comparatively tiny lakes.” *See* Supplemental Criss Report, pg. 4. Additionally, the FWS personnel did not perform any controlled studies of mussel mortality above Lake Shafer, which is not influenced by the Norway-Oakdale Hydroelectric Complex, to identify the specific causes of mussel mortality. *See* Supplemental Engel Report, pg. 4. Instead, the FWS simply attributed all mussel mortality to the dams. *See* Supplemental Engel Report, pg. 4.

Historical data shows that the Oakdale Dam/Lake Freeman do not appreciably alter the natural run-of-river and therefore do not impact the mussels. *See* Engel Report, pg. 20. Available evidence does not show that “losses of flow on the Tippecanoe River below the Oakdale Dam are caused by the existence of Lakes Shafer and Freeman.” *See* Criss Report, pg. 9. In fact, “the best available scientific data, i.e., actual gauge data above and below Lake

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Freeman, suggest that the lake is a *contributor* of flow to the Tippecanoe River.” See Criss Report, pg. 9 (emphasis added), *i.e.*, “the lakes contribute more water to the Tippecanoe River than is lost through evaporation.” See Criss Report, pg. 2; Engel Report, pg. 20.

There is no evidence to suggest that the lakes appreciably alter the natural run-of-river. Rather, the available data shows that low flows occur naturally. “Low, daily-average flows of less than 600 cfs at the Oakdale Dam, the value chosen by the FWS to trigger abnormally low flow conditions, are quite common.” See Criss Report, pg. 3. “Such low flows occur naturally and are also common on undammed Midwestern rivers of comparable size.” See Criss Report, pg. 2. Historically, low flows were documented long before construction of the dams. See Criss Report, pg. 3.

In conclusion, the available data demonstrates that the mussel mortality cannot be “simply attributed to the existence of the lakes and dams.” See Criss Report, pg. 4. “Exposure of river mussels is a natural occurrence during periods of drought.” See Criss Report, pg. 2. “[S]uch exposures are a natural and frequent occurrence on undammed Midwestern rivers” and have been repeatedly observed by experts in the field. See Criss Report, pg. 4 (“I have repeatedly observed the exposure of a variety of mussel species along the lower Meramec River”). Therefore, there will be no incidental take resulting from the FERC Staff Alternative because the “documented take” of mussels claimed by the FWS is caused by naturally occurring low flows and other potential causes of mussel mortality unrelated to FERC’s proposed action. See Supplemental Criss Report, pg. 3; Supplemental Engel Report, pg. 4.

Based on the fact that there will be no incidental take, the RPM outlined by the FWS simply may not be imposed.

3. The FWS is also not legally authorized to require implementation of the proposed RPM because it will result in major changes to FERC's Proposed Action

The FWS has exceeded its statutory authority in purporting to require implementation of the reasonable prudent measure it has put forward. Pursuant to 50 C.F.R. § 402.14(i)(1)(ii), the FWS is authorized to specify implementation of reasonable and prudent measures necessary to minimize impact upon an endangered species. However, the “[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action [proposed by the agency] and may involve only minor changes.” 50 C.F.R § 402.14 (v)(2); *see Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 876 (9th Cir. 2004) (upholding district court’s decision to set aside RPMs because proposed RPMs constituted major changes and altered the timing of the agency action); *Pub. Employees for Env’tl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 82 (D.D.C. 2014). “RPM may not mandate major changes.” *Westlands Water Dist.*, 275 F. Supp. 2d at 1222. Indeed, the FWS exceeds its statutory authority where its mandates RPMs that would result in major changes. *Westlands Water Dist.*, 275 F. Supp. 2d at 1222 (“The USFWS exceeded its authority in mandating the X2 RPM because it was not legally authorized to require implementation of an RPM that would result in the major changes”).

As discussed above, the FWS has exceeded its statutory authority in requiring implementation of the proposed reasonable prudent measure because there will be no incidental

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take in connection with implementing the FERC Staff Alternative. Additionally, the FWS has also exceeded its statutory in requiring implementation of the proposed reasonable prudent measure because the RPM will result in major changes to FERC's proposed action. *See Westlands Water Dist.*, 275 F. Supp. 2d at 1222 (“The USFWS exceeded its authority in mandating the X2 RPM because it was not legally authorized to require implementation of an RPM that would result in the major changes”).

The FERC Staff Alternative proposes an alternative definition of abnormal river conditions (high and low river conditions) that would eliminate flow fluctuations associated with project operations during periods of low flow while avoiding the adverse effects of drawdowns. On the other hand, the FWS's reasonable and prudent measure would allow NIPSCO to draw down the levels of the lakes during such conditions by much more than the 0.25 feet (*i.e.*, 3 inches) allowed by the current License. The FWS's RPM requires increase flow out of the Oakdale Dam to establish what the FWS believes to be the natural run-of-river during periods of low flow by maintaining a run of the Tippecanoe River at the Oakdale gauge below the dams to be 1.9 times the rate of the flow at the Winamac gauge upstream of the dams. *See Engel Report*, pg. 9. The FWS proposal “suggests that NIPSCO release additional, sometimes vast, amounts of water from the Oakdale Dam and cease generation of power.” *See Engel Report*, pg. 4.

Being totally at odds with FERC's proposed action, the RPM could hardly be any more of a major change to the planned action. Accordingly, the FWS exceeded its authority under § 402.14 (v)(2) in proposing it.

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4. **Notwithstanding all else, under the ESA, it is the agency (FERC in this instance) that determines whether and in what manner to proceed with its proposed action in light of its Section 7 obligations and the FWS's Biological Opinion**

Ultimately, it is FERC's obligation to determine whether and in what manner to proceed here, *i.e.*, whether to follow the FWS's purported reasonable and prudent measure. While FERC has a duty under Section 7 of the ESA to "insure that any action authorized, funded, or carried out" by it is not likely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species..." that duty "does not *require* acquiescence" with the FWS's Biological Opinion. *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (8th Cir. 1976) (emphasis added). As the Court stated in *Froehlke*, "Should a difference of opinion arise as to a given project, the responsibility for decision after consultation is not vested in the Secretary [of the Interior] but in the agency involved." *Id.*; see also *Vill. of False Pass v. Watt*, 565 F. Supp. 1123, 1154 (D. Alaska 1983), *aff'd sub nom. Vill. of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984) ("After formal consultation has ended and a biological opinion has issued, the decision whether or not to proceed with the [planned action] rests ultimately with the Secretary [of the acting agency]"); *Defs. of Wildlife, Friends of Animals & Their Env't v. Hodel*, 851 F.2d 1035, 1037 (8th Cir. 1988); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). Indeed, a FWS biological opinion supporting the action proposed by the agency is not in and of itself sufficient to establish that in proceeding with the action, the agency has met its obligation under Section 7

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to insure that the action is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of habitat of such species.

See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990).

5. **Here, FERC need not comply with the reasonable and prudent measure that the FWS set out in the Biological Opinion. In fact, were it to do so it would not be acting properly because it would be complying with a measure that the FWS is unauthorized to put forward**

Given the above, not only is FERC not required to follow the suggestions of the Biological Opinion issued by the FWS, *see Tribal*, 869 F.2d at 1193, but, in fact, it has an obligation not to follow the suggestions of the FWS's Biological Opinion. *See Roosevelt*, 684 F.2d at 1049 ("a federal agency which proceeds with an action in the face of inadequate knowledge or information . . . does so with the risk that it has not satisfied the standard" of Section 7) (internal quotations omitted), because, for reasons set forth above:

- the reasonable and prudent measure putatively required by the FWS was not formulated as the ESA requires using the best scientific and commercial data available;
- the FWS assumed, without justification, that there will be an incidental take of mussels; and
- the FWS proceeded to mandate a reasonable and prudent measure which was both
 - unwarranted and impermissible, and
 - in violation of the regulations implementing the ESA because it constituted a major change to FERC's proposed action.

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Respectfully submitted,

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Attachments

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2017, I have caused a copy of the foregoing document to be served electronically on each person listed below:

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