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U.S. FISH AND WILDLIFE SERVICE SOME REGULATIONS, POLICIES AND LAWS FREQUENTLY EMPLOYED IN FEDERAL ENERGY REGULATORY COMMISSION LICENSING PROCEEDINGS

(prepared for Oroville Facilities Relicensing Collaborative)

The following information was prepared in response to a request from the Oroville Facilities Relicensing Collaborative - Environmental Work Group. This information is only for purposes of providing general background to members of the collaborative about some of the most pertinent and frequently applied laws, regulations, policies, and mandates that guide the actions of the Fish and Wildlife Service (FWS) in Federal Energy Regulatory Commission proceedings. This information is not intended to identify all of the Federal, State, and local laws, regulations, codes etc. that the FWS must abide by or consider in making decisions or taking actions. The descriptions are condensed summaries of important facets or aspects of the guidance.

Mission of the FWS - The FWS's mission is "Working with others, to conserve, protect, and enhance fish, wildlife, and their habitats for the continuing benefit of the American people."

Ecosystem Approach - The FWS has adopted an ecosystem approach to conservation (FWS 1994). An ecosystem can be defined as a dynamic and interrelating complex of plant and animal communities and their associated non-living environment. An ecosystem approach means protecting or restoring the function, structure, and species composition of an ecosystem while providing for its sustainable socioeconomic use. We recognize that we can't just look at a single animal, species, or piece of land in isolation from all that is around it. We realize that we are not going to achieve conservation unless we take a comprehensive view. Our approach needs to consider all of the physical, chemical and biological conditions within a watershed.

Fish and Wildlife Coordination Act (FWCA)(16 U.S.C. 661-667e et.al) - The FWCA requires federal agencies granting a license or permit for the control, impoundment, or modification of streams and water bodies to first consult with the FWS and the appropriate state fish and wildlife agencies regarding conservation of these resources. Consultation is to be undertaken for the purpose of "preventing loss of and damage to fish and wildlife resources."

Fish and Wildlife Service Mitigation Policy - This policy (established in 1981) provides guidance for conservation recommendations regarding proposed land and water developments. The policy addresses impacts to fish and wildlife populations, their habitat and the human uses thereof. The primary focus is on recommendations related to habitat value losses. Four Resource Categories are used to indicate that the level of mitigation recommended will be consistent with the fish and wildlife resource values involved. The mitigation goals for Resource

Categories are based on the relative value placed on the habitat being impacted. The mitigation goals for Resource Categories 1- 4 are: 1) no loss of existing habitat value, 2) no loss of in-kind habitat value, 3) no net loss of habitat value while minimizing loss of in-kind habitat value, and 4) minimize loss of habitat value. This policy is most frequently applied in our Habitat Conservation Division that aids in planning U.S. Army Corps of Engineers and U.S. Bureau of Reclamation development projects. (Federal Register/Vol. 46, No. 15/Friday, January 23, 1981).

Endangered Species Act of 1973 (ESA)(16 U.S.C. 1531-1544, 87 Stat. 884) as amended - The ESA provides for the conservation of ecosystems upon which threatened and endangered species of fish, wildlife and plants depend, both through Federal action and by encouraging the establishment of State programs. The ESA:

- authorizes the determination and listing of species as endangered and threatened;
- prohibits unauthorized taking, possession, sale, and transport of endangered species;
- provides authority to acquire land for the conservation of listed species, using land and water conservation funds;
- authorizes establishment of cooperative agreements and grants-in-aid to States that establish and maintain active and adequate programs for endangered and threatened wildlife and plants;
- authorizes the assessment of civil and criminal penalties for violating the ESA or regulations and
- authorizes the payment of rewards to anyone furnishing information leading to arrest and conviction for any violation of the ESA or any regulation issued thereunder.

Section 7 of the ESA requires Federal agencies to insure that any action authorized, funded or carried out by them is not likely to jeopardize the continued existence of listed species or modify their critical habitat.

Federal Power Act (FPA)(16 U.S.C. 791-828c;Chapter 285, June 10, 1920; 41 Stat. 1063) as amended - The original FPA provides for cooperation between the Federal Energy Regulatory Commission (FERC) and other Federal agencies, including resource agencies, in licensing and relicensing power projects. The FERC has jurisdiction under the Commerce Clause over "navigable waters" defined to include streams or other bodies of water over which Congress has jurisdiction to regulate commerce among foreign nations and among the States. The FERC is authorized to issue licenses to construct, operate and maintain dams, water conduits, reservoirs, and transmission lines to improve navigation and to develop power from any streams or other bodies of water over which it has jurisdiction.

Section 4e - mandates that licenses shall be issued within any reservation only after a finding by the FERC that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

Section 10a - mandates the FERC to ensure that the project adopted will be best adapted to a

Comprehensive Plan that provides for improving, developing, or conserving a waterway or waterways and gives due weight to the recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and due weight to the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

Section 10j - mandates the FERC to ensure that to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the FWCA from the NMFS, the FWS, and State fish and wildlife agencies. Whenever the FERC believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the FERC and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies.

Section 18 - The FERC shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce or Interior.

Electric Consumers Protection Act (ECPA)(16 U.S.C. 803, P.L.99-495, October 16, 1986; Stat. 1243) - This amendment to the FPA mandated several fish and wildlife provisions. Each license is to include conditions to protect, mitigate and enhance fish and wildlife affected by the project. These conditions are to be based on recommendations received pursuant to the FWCA from the FWS, the National Marine Fisheries Service, and State fish and wildlife agencies. The FERC is empowered to resolve any instances in which such recommendations are viewed as inconsistent while according "due weight to the recommendations, expertise, and statutory responsibilities"of the resource agencies. The FERC is mandated to make two findings if the recommendations are not adopted in whole or in part and these are: 1) a finding that adoption of the recommendations would be inconsistent with the purposes and requirements of this act; and 2) a finding that the conditions selected by the Commission satisfy the requirement to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife.

Anadromous Fish Restoration Program (AFRP)- The FWS is Co-lead on the Central Valley Project Improvement Act (CVPIA) legislation of 1992. One section of this legislation is the development of the AFRP. This Program is tasked with doing all reasonable things necessary to double anadromous fish populations in the Central Valley. (Anadromous fish covered in the program are salmon, steel head, sturgeon, striper and shad.) We focus on instream and riparian habitat values in attempting to accomplish the doubling task.

* note 1 - references used for summarizing the Federal laws included: 1) Digest of Federal Resource Laws, U.S. Department of Interior, U.S. Fish and Wildlife Service, Office of Legislative Services, April 1992, and 2) Federal Energy Regulatory Commission Hydroelectric Project
Relicensing Handbook, April 1990.
* note 2 - references for FWS policies and practices included: 1) U.S. Fish and Wildlife Memorandum titled: "Ecosystem Approach to Fish and Wildlife Conservation" March 8, 1994, Washington, D.C. 2) FWS Webpage http://ecosystems.fws.gov/