



# Shafer and Freeman Lakes

*Environmental Conservation Corporation*

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July 19, 2018

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

**Re: Request for rehearing of a FERC decision issued June 21, 2018 on an ORDER AMENDING LICENSE, APPROVING REVISED OPERATION AND COMPLIANCE PLAN, AND TERMINATING TEMPORARY VARIANCE FOR PROJECT No. 12514-074-Northern Indiana Public Service Company (NIPSCO), Norway-Oakdale Hydroelectric Project, Tippecanoe River, White and Carrol Counties, Indiana**

The Shafer & Freeman Lakes Environmental Conservation Corporation ("SFLECC"); Carroll County, Indiana; White County, Indiana; and the City of Monticello, Indiana (collectively the "Interested Parties" or "Protest Coalition") have intervened and participated extensively in the FERC proceedings stemming from the application filed by the Northern Indiana 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.

The Interested Parties request a rehearing of the above named Order issued on June 21, 2018 on the following points:

**1. The Final Biological Opinion (BO) issued by the US Fish and Wildlife Service (FWS) on July 5, 2017 clears the FERC Staff Alternative of the likelihood of causing harm to river habitat and mussel colonies:**

"it is the Services's biological opinion that the FERC Staff Alternative, as proposed, is not likely to jeopardize the continued existence of the clubshell, fanshell, sheepsnose or rabbitsfoot mussels and is not likely to destroy or adversely modify designated critical habitat"

This "no jeopardy" opinion brings into question the legality of FWS to dictate dam operation measures to FERC. Since the FWS Final Biological Opinion states that harm to endangered mussels and their habitat is "not likely" to occur if the FERC Staff Alternative were to be put in place, FWS has no legal authority under the Endangered Species Act and under the FWS "not

*likely*” statement to seek to impose their own formula for dam operations. Further, it is FERC, not FWS, who legally have the right to determine whether to proceed and in what manner, not FWS.

Our question is if harm to endangered mussels and their habitat is *“not likely”* to occur under use of the FERC Staff Alternative procedures, then why not adopt the FERC Staff Alternative procedures since, in addition to protecting the mussels, they also offer protection for Lake Freeman recreational users, lake habitat, and wildlife?

**2. The Commission erred by automatically accepting FWS self-proclaimed “Best Science,” totally discounting expert testimony brought by three other parties:**

The basic tenant held by all parties in this case is that, during periods of low flows, the endangered mussels downstream of the Oakdale Dam are entitled to the natural river flow, no more and no less.

The key question is simple:

**During a period of low flows, what would be the natural river flow if the Norway and Oakdale dams did not exist?**

The question is about hydrology, not biology.

In answering this question, federal law requires both the Commission and the FWS to use “best science and commercially available data” (“best science”).

In attempting to answer this question, the Commission erred in several ways:

First, in the June 21<sup>st</sup> Order, the Commission erred by ignoring the fact that the FWS did not document the hydrological qualifications of the FWS employees or consultants that applied the linear scaling concept in the Assistance Letter.

Second, the Commission erred by disregarding the extensively documented qualifications and expertise of the Protest Coalitions’ experts, who sharply criticized the applicability of linear scaling to this hydrologic situation and concluded that the protocols contained in the Assistance Letter were not based on best science.

Third, in the June 21<sup>st</sup> Order, the Commission erred by relying on FWS hydrological conclusions over the FERC staff members’ and consultants’ hydrological expertise who contributed to the development of the FERC Staff Alternative. The FERC staff employed the expertise of Louis Berger, a respected global professional services firm with extensive hydrological experience that employs thousands of engineers and scientists. The Order failed to even mention that the Commission employed the services of Louis Berger.

Fourth, the Commission erred by not considering the flawed foundation that the FWS used as a basis for the Assistance Letter, which was incorporated into the BO as reasonable and prudent measures. FWS adopted the linear scaling concept contained in a publication by Professor Galster (2007) as the methodology behind the Assistance Letter. The Protest Coalition's two well-credentialed experts discredited the application of linear scaling in determining the natural flow of the Tippecanoe River. Additionally, the Order ignored Protest Coalition evidence that Professor Galster himself opined that the use of linear scaling is inappropriate in the day-to-day management of a reservoir.

Fifth, the Commission erred by not considering the credibility of the report filed by the Office of Indiana's Lieutenant Governor. Although the report was mentioned in the Order, the Commission failed to disclose that the report was conducted by INTERA, an employee-owned geoscience and engineering consulting firm with expertise in planning, developing, and managing water resources. INTERA's capabilities include modeling, mapping, engineering, and scientific investigation. The INTERA report, as noted in the Order, concluded that the *"...Commission staff's alternative ...is the best practical method to ensure flows are available to maintain downstream habitat for federal-listed species."*

Another way of stating this conclusion is: *the method contained in the FWS Assistance Letter is NOT the best practical method to ensure flows are available to maintain downstream habitat for federal-listed species.*

In summary, the Commission failed to weigh the quality of the evidence presented by the various parties. Rather, the Commission blindly accepted the FWS BO as "best science" because FWS is the FWS, effectively ceding huge authority to individuals simply because they work for a certain agency.

### **3. The Commission erred in adopting the Reasonable and Prudent Measures contained in the FWS BO because they constitute a major change to the Commission's proposed action:**

In its Environmental Assessment, the Commission's proposed action calls for the adoption of the FERC Staff Alternative. The FERC Staff Alternative specifies that during periods of low flow NIPSCO *"...must at all times act to maintain the reservoir surface elevation at Lake Freeman no lower than elevation 612.20 feet NGVD"*, which is 3 inches (0.25 feet) below normal reservoir surface elevation.

Through the formal ESA consultation process, the FWS issued a "no jeopardy" BO regarding the FERC Staff Alternative. The BO included the associated reasonable and prudent measures, which includes the adoption of the Technical Assistance Letter (TAL). The TAL, which was originally issued in August 2014, does not contain a lower limit on the surface elevation of Lake Freeman.

The requirements for reasonable and prudent measures are specified in 50 CFR 402.14(i)(2), which states:

*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.*

The BO's reasonable and prudent measures eliminate the lower reservoir elevation limit, which significantly alters the basic design and scope of FERC's proposed action of adopting the FERC Staff Alternative. The reasonable and prudent measures constitute a major change to FERC's proposed action. As such, the reasonable and prudent measures in the BO are not permitted under federal law and regulations. Thus, FERC erred in adopting the BO's reasonable and prudent measures.

#### **4. The Commission erred in relying on *Bennett v. Spear*:**

*Bennett v. Spear*, 520 U.S. 154, 169 (1997) dealt with whether the plaintiff Bennett had standing to sue the FWS over a biological opinion. The case did not deal with whether or not a federal agency is required to accept the reasonable and prudent measures in a biological opinion, which the commission implies in the Order (Order, paragraph 53).

In the Order, the Commission erred by not distinguishing between a "jeopardy" biological opinion and "no jeopardy" biological opinion when it stated:

*Although the Commission is ultimately responsible for ensuring that its proposed actions comply with the ESA and thus may choose to disregard the provisions of a biological opinion, the Supreme Court has recognized that an agency does so "at its own peril (and that of its employees)"<sup>49</sup>*

*Bennett v. Spear* involved a "jeopardy" biological opinion, which included reasonable and prudent *alternatives*. In the case of the FERC's proposed action to adopt the FERC Staff Alternative, the FWS issued a "no jeopardy" biological opinion, which included reasonable and prudent *measures*. The two types of biological opinions are materially different.

Read in its proper context of the Supreme Court's *Bennett v. Spear* opinion, the quotation "*at its own peril (and that of its employees)*" references the implication of not adopting the "jeopardy" biological opinion in *Bennett v. Spear*.

As stated in the Order, the Commission is free to reject the BO's reasonable and prudent measures. In doing so, the Commission must articulate, in the record, its reasons for disagreeing with the conclusion of the BO. The Commission is not obligated to and should not automatically accept FWS' self-proclaimed best science. To do so is contrary to the Commission's responsibility. The Commission has many best science-based reasons to reject the FWS BO and adopt the FERC Staff Alternative.

## **5. The Commission erred by ignoring riparian rights:**

In the June 21<sup>st</sup> Order, the Commission erred by not considering the riparian rights of property owners. The Order permits the lowering of Lake Freeman to such an extent that it denies property owners access to navigable water and the reasonable use of the water for general purposes such as boating, domestic purposes, and recreation.

## **6. The Commission's June 21<sup>st</sup> Order violates the Due Process Clause of the U.S. Constitution:**

NIPSCO operates the Norway-Oakdale Hydroelectric Project No. 12514 (Norway-Oakdale Project) under a single license from FERC. The Norway Dam impounds Lake Shafer and the Oakdale Dam impounds Lake Freeman. The Tippecanoe River is the water source for both lakes.

Both Lake Shafer and Lake Freeman are an integral part of the Monticello area economy. Both lakes are replete with homes, cottages, and businesses. The residents, tourists, and businesses (collectively "users") of both lakes are alike in all relevant ways and thus are similarly situated. Historically, the reservoir elevations of both lake have remained within  $\pm 0.25$  feet of the normal during all river conditions.

The June 21<sup>st</sup> Order amended Article 403 to define "abnormal river conditions." This definition states in part:

*Under "abnormal river conditions," as defined by river flow, the licensee must at all times act to maintain the fluctuation of the reservoir surface elevation within 0.75 feet above (rather than 0.25 feet under normal conditions) and 0.25 feet below elevation 647.47 feet NGVD for Lake Shafer and 0.75 feet above 612.45 feet NGVD for Lake Freeman.*

During abnormal river conditions caused by low flows (which occurs more than 10% of the time), Lake Shafer has a lower limit on its surface elevation, which is the same lower limit as during normal river conditions. On the contrary, there is no lower limit on Lake Freeman's surface elevation during periods of low flows, thus allowing Lake Freeman to be drawn down – potentially to the original river bed.

Under the June 21<sup>st</sup> Order, during periods of abnormal river conditions caused by low flows, Lake Shafer users enjoy all the benefits of Lake Shafer at normal levels. Meanwhile, Lake Freeman will be lowered, leaving the Lake Freeman users to bear the entire burden of the increased river flow required by the Amended License. This burden is well documented.

The Order creates a disparate impact among the lake users that are similarly situated. Lake Freeman users are being denied equal protection under the June 21<sup>st</sup> Order. Federal Courts have ruled that the Due Process Clause of the 5th Amendment imposes an equal protection requirement on the federal government.

It is because of the afore mentioned reasons that the Coalition is requesting a rehearing of the June 21<sup>st</sup> Order.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of July 2018, I have caused a copy of the foregoing document to be served electronically on each person listed below:

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