

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

FirstLight Hydro Generating Company)	Project Nos. 2485-063 1889-081
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**COMMENTS AND INFORMATION OF
FIRSTLIGHT HYDRO GENERATING COMPANY
REGARDING NOTICE OF STUDY DISPUTE**

On February 21, 2014, the Director of the Federal Energy Regulatory Commission's (Commission) Office of Energy Projects issued a Study Plan Determination for aquatic studies to be conducted at FirstLight Hydro Generating Company's (FirstLight) Turners Falls Hydroelectric Project and Northfield Mountain Pumped Storage Project (Northfield Mountain).¹ The U.S. Fish and Wildlife Service (USFWS) filed a Notice of Study Dispute (Dispute) with regard to the Study Plan Determination on March 13, 2014.² FirstLight submits the following comments regarding the Dispute pursuant to section 5.14(i) of the Commission's regulations.³ As explained below, FirstLight believes that the Dispute does not pertain directly to the exercise of USFWS's authority under section 18 of the Federal Power Act (FPA),⁴ as required by section 5.14(a) of the Commission's regulations.⁵

¹ Letter from Jeff C. Wright, Federal Energy Regulatory Commission, to John S. Howard, FirstLight Hydro Generating Company, Project Nos. 2485-063 and 1889-081 (issued Feb. 21, 2014) (Study Plan Determination).

² ILP Request for Dispute Resolution of U.S. Fish and Wildlife Service/NEFO, Project Nos. 2485-063 and 1889-081 (filed Mar. 13, 2014) (Dispute).

³ 18 C.F.R. § 5.14(i) (2013).

⁴ 16 U.S.C. § 811 (2012).

⁵ 18 C.F.R. § 5.14(a).

I. USFWS'S DISPUTE

USFWS disputes a single aspect of the Study Plan Determination: the Director's decision not to require FirstLight to quantify the level of entrainment of early life stages of American shad during the first year of studies.⁶ The Study Plan Determination instead recommended that:

[i]f the first year studies on juvenile entrainment monitoring (study 3.3.3) at the Northfield Mountain project reveals high rates of juvenile entrainment, and/or a low abundance of juveniles in relation to the adult return rate that year (indicating potentially high egg and larval entrainment at Northfield Mountain), then further investigation into the potential effects of entrainment of earlier life stages of American shad at the Northfield Mountain project should be considered.⁷

The Director therefore recommended that FirstLight consult with USFWS, among other stakeholders, after the results of study 3.3.3 are available to assess the need to further evaluate American shad egg and larval or juvenile entrainment at Northfield Mountain.⁸

USFWS's Dispute focuses exclusively on this ichthyoplankton sampling data, which it says is needed—irrespective of the juvenile entrainment study FirstLight is conducting—to provide a comprehensive picture of the overall impact of entrainment at Northfield Mountain to the shad population.⁹ USFWS further states that the quantification of entrainment of early life stages of American shad at Northfield

⁶ Dispute at 1.

⁷ Study Plan Determination at B-47.

⁸ *Id.*

⁹ Dispute at 4. USFWS acknowledges that a 1992 study (Lawler, Matusky, and Skelly Engineers, 1993) quantified the level of entrainment of American shad eggs and larvae at Northfield Mountain, but claims that a new study is needed because operations at Northfield Mountain have changed since the previous study was conducted. *Id.* at 3. FirstLight has since filed information into the record to clarify that there has been less overall utilization of the Project since the 1992 study was conducted and consequently a decrease in the amount of pumping, and that there has been no significant change in pump discharge since the Project was constructed. Supplemental Information Relevant to U.S. Fish and Wildlife Service Notice of Study Dispute at 2, Project Nos. 1889-081 and 2485-063 (filed Mar. 28, 2014) (March 28 Filing). Thus, the data collected in the 1992 study would overstate the amount of entrainment at the Project today.

Mountain is necessary to “establish[] . . . a full record upon which to base possible prescriptions for fishways following the [USFWS’s] authority as described in Section 18 of the FPA”¹⁰ because it would “directly inform the need for measures to reduce or offset entrainment mortality” at Northfield Mountain.¹¹ In an April 1 teleconference between USFWS staff, Commission staff, and FirstLight regarding the Dispute, USFWS further clarified that it believed the early life stage entrainment data would inform its section 18 prescription specifically with respect to potential operational restrictions at Northfield Mountain.¹²

II. COMMENTS

FirstLight already has submitted information related to Northfield Mountain pumping operations, as well as existing reports containing factual data relevant to the scientific aspects of the Dispute.¹³ The purpose of these comments is to provide for the Commission’s—and the panel’s—consideration why the Dispute is improper in the first place. Simply put, a study to quantify ichthyoplankton entrainment does not pertain directly to the exercise of USFWS’s authority under section 18 of the FPA, which it must in order to trigger formal study dispute resolution under the Commission’s regulations.

Section 5.14(a) states that a “Federal agency with authority to provide mandatory conditions on a license pursuant to FPA Section 4(e), 16 U.S.C. § 797(e), or to prescribe

¹⁰ Dispute at 1.

¹¹ *Id.* at 4. USFWS also states the entrainment information would indirectly inform the level of downstream passage protection at the Turners Falls Hydroelectric Project. *Id.*

¹² See Memorandum Regarding Teleconference Between Commission Staff, the U.S. Fish and Wildlife Service (FWS) and FirstLight Hydro Generating Company on the FWS’s Formal Dispute, Project Nos. 2485-063 and 1889-081 (filed Apr. 7, 2014).

¹³ See Letter from John S. Howard, FirstLight Hydro Generating Company, to Kimberly D. Bose, Federal Energy Regulatory Commission, Project No. 2485-000 (filed Mar. 18, 2014); March 28 Filing; Supplemental Information of FirstLight Hydro Generating Company, Project No. 2485-063 and 1889-081 (filed Apr. 3, 2014).

fishways pursuant to FPA Section 18, 16 U.S.C. § 811 . . . may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under sections 4(e) and 18 of the [FPA]. . .”¹⁴ The Commission enacted this provision to recognize that agencies with mandatory conditioning authority, “to the extent they are exercising that authority, are differently situated than participants whose role is to make recommendations” to the Commission pursuant to other provisions of the FPA and other applicable statutes.¹⁵

Section 18 of the FPA authorizes USFWS to prescribe “fishways” at Commission-licensed hydropower projects.¹⁶ Statutory guidance makes clear that a fishway:

under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.¹⁷

Because eggs and larvae do not need to pass upstream and downstream to complete their life cycles, whether shad eggs and larvae are entrained in the Northfield Mountain pumps is not an issue about fish passage. Moreover, it is not clear what type of physical structure, facility, or device would facilitate upstream and downstream passage of American shad eggs and larvae, even if they needed

¹⁴ 18 C.F.R. § 5.14(a).

¹⁵ *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150 at P 140 (2003), 68 Fed. Reg. 51,070 (Aug. 25, 2003), *order on reh’g*, Order No. 2002-A, 106 FERC ¶ 61,037 (2004).

¹⁶ 16 U.S.C. § 811.

¹⁷ Energy Policy Act of 1992, Pub. L. No. 102-486, § 1701(b), 106 Stat. 2776, 3008 (1992); *see also* Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses; Interim Final Rule, 70 Fed. Reg. 69,804, 69,805 (Nov. 17, 2005).

to pass the Northfield Mountain intakes to maintain their life cycles. Without any such structure, facility, or device, USFWS does not have the authority to require operational restrictions at Northfield Mountain to prevent entrainment of American shad eggs and larvae. Consequently, this study is not directly relevant, if relevant at all, to USFWS's section 18 authority to prescribe fishways.

USFWS's Dispute therefore does not directly pertain to the exercise of its FPA section 18 authority. Instead, the USFWS study request that is the subject of the Dispute seeks general information on Northfield Mountain impacts on the American shad. While USFWS was certainly free to make the study request, and to disagree with the Director's decision to deny it, it is not the appropriate subject of a formal study dispute under the Commission's regulations.

III. CONCLUSION

FirstLight appreciates the opportunity to provide these comments on USFWS's Dispute, and respectfully requests the study dispute panel to consider them in its technical conference and subsequent recommendation to the Director pursuant to sections 5.14(j) and 5.14(k) of the Commission's regulations.¹⁸ FirstLight further requests that the Director consider the comments herein in issuing the written determination required by section 5.14(l).

Respectfully submitted,



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¹⁸ 18 C.F.R. §§ 5.14(j), (k).

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 7th day of April, 2014.

/s/ Mealear Tauch
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