

July 19, 2001

David P. Boergers  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Subject: Condit Hydroelectric Project  
(FERC No. 2342-012)

Dear Mr. Boergers:

Enclosed for filing please find the original and fourteen (14) copies of the National Marine Fisheries Service's Motion to Intervene and Comments in the above-captioned proceeding, and certificate of service.

Sincerely,

Brett R. Joseph  
Attorney Advisor  
(301) 713-2231 ex. 171

Enclosures

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

PacificCorp	)	
	)	FERC No. 2342-012
Petition for Declaratory Order	)	(Condit Hydroelectric Project)
_____	)	

**National Marine Fisheries Service's Motion to Intervene and Comments**

The National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), United States Department of Commerce, hereby timely moves for intervention in this proceeding pursuant to 18 CFR 385.214.

Service of process and other communications concerning this proceeding should be made to:

Brett R. Joseph  
Office of General Counsel for Fisheries  
National Oceanic and Atmospheric Administration  
1315 East-West Highway, Rm. 15752  
Silver Spring, MD 20910  
Phone (301) 713-2231 ex. 171  
Fax (301) 713-0658  
e-mail: [Brett.Joseph@noaa.gov](mailto:Brett.Joseph@noaa.gov)

Keith Kirkendall  
Hydro Division  
National Marine Fisheries Service  
525 NE Oregon Street, Suite 500  
Portland, OR 97232-2737  
Phone (503) 230-5431  
Fax (503) 231-2318  
E-mail [Keith.Kirkendall@noaa.gov](mailto:Keith.Kirkendall@noaa.gov)

and

Bryan Nordlund  
National Marine Fisheries Service

525NEOregonStreet;Suite500  
Portland,OR97232-2737  
Phone(503)231-6816  
Fax (503)231-2318  
E-mail[Bryan.Nordlund@noaa.gov](mailto:Bryan.Nordlund@noaa.gov)

## **I. Background**

On June 1, 2001, the Federal Energy Regulatory Commission (Commission or FERC) issued a "Notice of Petition for Declaratory Order" in the above-referenced proceeding. The Notice states that licensee Pacifi Corp filed with the Commission a petition for declaratory order finding that the Commission has jurisdiction to entertain and grant the relief requested in Pacifi Corp's pending application for Amendment of License and Approval of Offer of Settlement which was filed with the Commission on October 21, 1999. The Notice established a deadline for filing comments and/or motions at 30 days from the publication date of the Notice in the Federal Register (i.e. July 20, 2001).

## **II NMFS' Interest**

NMFS is a federal agency with jurisdiction over anadromous fish resources affected by the licensing, operation and maintenance of the Condit Project. See Reorganization Plan No. 4 of 1970, 84 Stat. 2090, as amended; the Federal Power Act (FPA) at 16 U.S.C. §§ 803(j) and 811; and the Fish and Wildlife Coordination Act (FWCA) at 16 U.S.C. §§ 661 and 662; the Sustainable Fisheries Act, 16 U.S.C. §§ 1801 et seq.; the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 et seq.; and the Pacific Salmon Treaty Act of 1985, 16 U.S.C. §§ 3631-3644. The effects of the Project on passage and flow conditions, habitat, water quality and other effects on anadromous fish resources directly concern NMFS

under the FPA and the FWCA.

NMFS also has jurisdiction over anadromous species affected by the Condit Project under the Endangered Species Act, (ESA), 16 U.S.C. § 1531 et seq. NMFS listed the Lower Columbia River Evolutionarily Significant Unit (ESU) of steelhead as a threatened species under the ESA on March 19, 1998 (63 Fed. Reg. 13347). In addition, NMFS listed LCR spring-run ESU of chinook salmon as a threatened species on March 24, 1999 (64 Fed. Reg. 14308). LCR steelhead and chinook salmon utilize habitat in the White Salmon River, and the operation of the Condit Project adversely affects these species by reducing flows in the bypassed reach, blocking fish passage to upstream habitat, and other means described more fully in the 1996 Final Environmental Impact Statement. Implementation of the proposed settlement agreement likewise may have effects on these listed species and other anadromous fish resources (both positive and negative), including the long-term beneficial effect of dam removal as a measure most likely to achieve the restoration and recovery of healthy populations of these fish within the White Salmon River basin.

Pursuant to these authorities, NMFS has a federal statutory responsibility for protection, mitigation and enhancement of anadromous fish resources that will be directly affected by the outcome of this proceeding. Specifically, NMFS has a right to participate conferred by the FPA and the FWCA. The interest of NMFS as a regulatory agency with jurisdictional responsibility for the protection, mitigation and enhancement of affected anadromous fish resources is not adequately represented by any other party in this proceeding. By carrying out its statutory responsibilities under the FPA, FWCA and other authorities cited above, NMFS acts in the public interest. In addition, NMFS is obligated to satisfy its tribal trust responsibilities in the

exercise of its statutory authorities affecting tribal interests and tribal treaty obligations

NMFS is a party/intervenor to the Condit relicensing proceeding, and also a party to the Condit Settlement Agreement currently pending before the Commission, as well as a party/intervenor in the license amendment proceeding which is the subject of the pending petition for declaratory order. See NMFS Motion to Intervene, FERC No. 2342-011, filed March 15, 2000.

As stated in our previous filings, NMFS strongly supports the Settlement Agreement as the product of extensive, good faith negotiation leading to the fair and equitable resolution of all contested issues in the underlying relicensing proceeding. As a reflection of NMFS's strong interest in resolving this proceeding via the pending settlement agreement, NMFS has continued to actively participate in all proceedings before the Commission, including the recent sitetour and technical conference held on May 17 and 18, 2001.

### **III. NMFS' Preliminary Position and Comments**

NMFS concurs with the analysis and conclusions stated in Pacifi Corp's petition, which are incorporated herein by reference. Specifically, NMFS agrees that various statements made by the Commission's staff at the May 18, 2001 technical conference give rise to the need for the Commission to clarify that it has authority to extend the term of its license through 2006, and in so doing to incorporate into the license terms and conditions set forth in the Settlement Agreement, including the consensus-based provisions related to project decommissioning of the project and removal upon expiration of the extended license. As demonstrated in the Edwards Dam case cited in the petition (and consistent with the advice provided to the settlement parties by special Commission legal counsel assigned to this project during the recent settlement

negotiations) the Commission has clear jurisdiction and legal authority to approve and implement the settlement agreement following timely completion of the National Environmental Policy Act review process. NMFS further agrees with the petitioner that Commission has authority to implement the agreement by means of the requested license amendment, without giving third parties the opportunity to take over the project, and without requiring the submission of a surrender application.

#### **IV. Conclusion**

For the above-stated reasons, NMFS respectfully requests that its motion to intervene in this proceeding for the Project be granted, and that the Commission issue the request declaratory order, consistent with the legal analysis and conclusions reached in the petition, as soon as possible to avert critical uncertainty in this proceeding.

DATED this 19<sup>th</sup> day of July, 2001, on behalf of the National Marine Fisheries Service.

Respectfully submitted,

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Brett R. Joseph  
Office of General Counsel  
National Oceanic and Atmospheric  
Administration

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

PacificCorp )FERC No.2342-012  
Petition for Declaratory Order )(Condit Hydroelectric Project  
\_\_\_\_\_) )

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, by first class mail, the National Marine Fisheries Service's Motion to Intervene and Comments, cover letter to David P. Boergers, FERC, and this Certificate of Service upon each person designated on the official service list compiled by the Commission in the above captioned proceeding.

Dated this 19th day of July, 2001.

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Brett R. Joseph

