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August 17, 2007

BY FACSIMILE (206) 220-7108

Honorable Anthony B. Canorro
Administrative Law Judge
Henry M. Jackson Federal Building
915 Second Avenue Rm. 3448
Seattle, Washington 98174

Re: Yadkin-Pee Dee River Hydroelectric Project, Docket No. 2007-NMFS-0001

Dear Judge Canorro:

Enclosed please find a copy of Progress' Brief in Opposition to the U.S. Fish & Wildlife Service's Motions to Dismiss. A hard copy of the brief will follow by Federal Express, including copies of all of the orders and rulings cited in the brief. A copy of the brief is being provided to opposing counsel via e-mail or fax today as well as Federal Express.

Please let me know if there is any difficulty in transmission.

Sincerely,

P. Stephen Gidiere III

PSG:dc
Enclosure

cc: Gerald A. Thornton, Department of the Interior, Knoxville Field Office
John Rudolph, Department of the Interior, Division of Parks and Wildlife
Kurt Zimmerman, NOAA General Counsel for Natural Resources
Garland M. Walker, NOAA General Counsel for Enforcement and Litigation
Richard Roos-Collins, Natural Heritage Institute
Julie Gantenbein, Natural Heritage Institute

**BEFORE THE
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE**

IN THE MATTER OF:)
Yadkin-Pee Dee River)
Hydroelectric Project)
)
License Applicant Carolina Power) Docket No.: 2007-NMFS-0001
& Light Co. d/b/a Progress Energy)
Inc.)
)
FERC Project No. 2206)
_____)

PROGRESS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS
BY U.S. FISH & WILDLIFE SERVICE

Carolina Power & Light Company, d/b/a Progress Energy Inc. (“Progress”) opposes the four separate motions to dismiss filed by the Department of the Interior’s Fish and Wildlife Service (“FWS”). In its four motions (which are largely redundant and repetitive), FWS argues that Issues 1 through 5 raised by Progress are either (a) policy issues, (b) legal issues, (c) not material, or (d) all of the above. FWS is wrong. Progress is not seeking the resolution of any purely policy or legal issues. Progress’ hearing request raises only material factual issues directly related to FWS’ prescriptions—the very kind of issues that Congress directed FWS to resolve through a hearing process such as this.¹ As discussed

¹ In consideration of the tight time constraints placed on the Administrative Law Judge (“ALJ”) and the parties, and FWS’ repeated request that its just-filed

below, FWS' motions to dismiss are contrary to the statute, the case law, the regulations, the precedent from previous trial-type hearings, and common sense. All of the motions should be denied, and the hearing process should proceed on all issues.

I. BACKGROUND

A. This Hearing

This trial-type hearing is but one important part of the overall licensing process for Progress' Yadkin-Pee Dee Hydroelectric Project (FERC Project No. 2206) in North Carolina ("the Project"). The process started on April 25, 2006, when Progress filed an application for a new license with the Federal Energy Regulatory Commission ("FERC") for the continued operation of the Project. The existing license for the Project was issued in 1958 and is set to expire on April 30, 2008. The Project consists of two hydroelectric dams and their associated reservoirs located on the Yadkin-Pee Dee River system in North Carolina—the upstream Tillery Development and the downstream Blewett Falls Development.

motions to dismiss be addressed at the initial prehearing conference, Progress is filing a single brief opposing FWS' four motions. Most of the motions are repetitive and raise only superficial objections, and thus Progress believes they can be easily rebutted by a single comprehensive brief. If the ALJ would prefer separate responses to each motion, Progress will provide them at the ALJ's request. In addition, as of filing this brief on Friday, August 17, counsel for Progress has not been served with motions to dismiss from any other parties to this hearing. If other parties do file such motions, either before or after the initial prehearing conference, Progress respectfully requests an opportunity to respond to them in writing after the initial prehearing conference, if necessary.

On March 13, 2007, FERC issued a Notice of Application Ready for Environmental Analysis (“REA”). Approximately sixty days later, FWS and the Department of Commerce’s National Marine Fisheries Service (“NMFS”) (collectively “Departments”) filed with FERC different preliminary fish passage prescriptions for the Project.

On June 8, 2007, Progress filed separate requests for trial-type hearings with respect to the Departments’ prescriptions pursuant to Section 18 of the Federal Power Act, 16 U.S.C. § 811. In its requests, Progress sought resolution of certain disputed issues of material fact that, if proven, may affect the Departments’ respective decisions to affirm, modify, or withdraw their preliminary prescriptions. In total, Progress’ hearing requests raise ten factual issues.² They are:

1. Fish passage at Blewett Falls Dam is necessary to maintain all life stages of American Shad in the Yadkin-Pee Dee River System.
2. Lack of fish passage at Blewett Falls Dam is suppressing the existing American Shad population in the Yadkin-Pee Dee River system.

² Many of the issues raised are exactly the same, except for the fish involved. The hearing request filed with FWS differs in a few ways from the request filed with NMFS because the FWS did not prescribe passage for blueback herring as did NMFS. The NMFS request raises all ten issues. The FWS request contains only seven of the ten issues. In addition, two of the seven issues raised with FWS (numbered 8 and 9 above) do not include the blueback herring. Otherwise, the issues are the same and can be resolved in a consolidated manner.

3. Fish passage at Blewett Falls Dam would increase the size of the American Shad population in the Yadkin-Pee Dee River system.
4. Fish passage at Blewett Falls Dam is necessary to maintain all life stages of American eel in the Yadkin-Pee Dee River system.
5. Fish passage of American eel above Blewett Falls Dam would increase the size of the American eel population in the Yadkin-Pee Dee River system.
6. Fish passage at Blewett Falls Dam is necessary to maintain all life stages of blueback hearing in the Yadkin-Pee Dee river system.
7. Fish passage above Blewett Falls Dam would increase the size of the blueback herring population in the Yadkin-Pee Dee River system.
8. The upstream migration period for American shad and blueback herring is February 15 through May 15.
9. The downstream migration period for American shad and blueback herring is year round.
10. Fish passage at Blewett Falls Dam is necessary to maintain all life stages of Atlantic and shortnose sturgeon in the Yadkin-Pee Dee river system.

The Departments separately answered Progress's requests for trial-type hearings on July 27, 2007 (FWS) and August 1, 2007 (NMFS). The Departments consolidated the hearing requests and referred the consolidated matter to the Office of the Administrative Law Judge for the United States Coast Guard. On August 7, 2007, Chief ALJ Joseph N. Ingolia issued an order assigning the hearing to the

Honorable Anthony B. Canorro and setting the initial prehearing conference for August 21, 2007.³ On August 15, FWS filed the four motions to dismiss that are the subject of this brief in opposition.

B. Section 18 Trial-Type Hearings in General

Trial-type hearings are an integral part of the overall FERC licensing process for hydroelectric projects. The purpose of such hearings is to provide licensees like Progress an opportunity to be heard and for there to be an unbiased resolution of disputed facts, so as to inform FERC's subsequent decision making on the license application and any resulting judicial review related to the Departments' prescriptions. *See Ruling Denying Motions to Dismiss Issues, Idaho Power Co. Hells Canyon Complex*, FERC Project No. 1971, at 1-2 (May 24, 2006) ("Congress wanted to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the federal courts").⁴

The controlling statutory authority here is Section 18 of the Federal Power Act (which has been on the books since 1920). That provision gives the

³ Progress has filed a motion objecting to the referral by NMFS and FWS and requesting that the Chief ALJ return the referral to the Departments for processing consistent with Section 18. But in recognition of the time constraints, Progress is prepared to move forward with the hearing process before the ALJ here without waiver of its legal position.

⁴ All of the ALJ orders from prior trial-type hearings that are referenced in this brief are being provided to the ALJ in a separate bound compilation.

Secretaries of Commerce and Interior the authority to prescribe “fishways” at hydroelectric projects licensed by FERC. 16 U.S.C. § 811. Congress defined the term “fishway” in Section 18 by providing that “the items which may constitute 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.” Pub. L. No. 102-486, Title XVII, § 1701(b), 106 Stat. 3008 (Oct. 24, 1992).

Section 18 was amended by the Energy Policy Act of 2005 (“EPAAct”) to add the procedure for trial-type hearings. Pub. L. No. 109-58, Title II, § 241(b), 119 Stat. 674 (Aug. 8, 2005) (codified at 16 U.S.C. § 811). The statute, as amended by Congress, now reads:

The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.

16 U.S.C. § 811. Interior and Commerce issued interim procedural regulations implementing this provision, effective November 17, 2005. *See* 70 Fed. Reg. 69,804 (Nov. 17, 2005) (codified at 43 C.F.R. Part 45, subparts A & B, and 50 C.F.R. Part 221, subparts A & B). No final regulations have been issued.

By providing that a license applicant, like Progress, “shall be entitled” to a hearing on disputed factual issues, Section 18 “affords [the licensee] the absolute procedural right to a hearing on-the-record.” BLM’s Motions to Dismiss Denied in Part and Reversed in Part, *Idaho Power Co. Hells Canyon Complex*, FERC Project No. 1971, at 3 (May 1, 2006) (emphasis added). *See also* Ruling Denying Motions to Dismiss Issues, *Hells Canyon Complex*, at 2. As one ALJ put it, Congress added the trial-type hearing provision “to afford interested parties an opportunity to raise concerns and *restore fairness to hydroelectric license proceedings.*” Order Granting, In Part, The Federal Agencies’ Motion to Dismiss Certain PacifiCorp Issues, *Klamath Hydroelectric Project*, FERC Project No. 2082, at 3 (July 13, 2006) (emphasis added). In fact, shortly before Congress added the trial-type hearing process to the statute, the D.C. Circuit had suggested that such an administrative hearing process regarding fishway prescriptions may be a constitutional a due process requirement. *Wisconsin Power & Light v. F.E.R.C.*, 363 F.3d 453, 465 (D.C. Cir. 2004) (Randolph, J. concurring).

While *pure* legal and policy issues are generally not appropriate for a trial-type hearing, “[m]ixed questions of fact finding and law/policy . . . may be entertained by the judge under EPAAct.” Order Granting, In Part, The Federal Agencies’ Motion to Dismiss Certain PacifiCorp Issues, *Klamath Hydroelectric Project*, at 4. The only line that ALJs should not cross is to opine whether the preliminary prescription should be adopted, modified, or rejected. *Id.* See also 50 C.F.R. § 221.60(b)(3). That is a call the Departments make after the hearing process is concluded, when they decide what their final prescriptions will be.⁵

Unfortunately, NMFS’ and FWS’ collective and institutional response to Congress’ decision to give licensees an opportunity to be heard has been to attempt in every case to define away an applicant’s hearing right to nearly nothing. This tactic is reflected in FWS’ sweeping motions to dismiss in this case, which accuse Progress of raising “policy,” “legal,” and “immaterial” issues. As ALJs have observed when denying similar motions in other cases, under the Departments’ narrow view of what is a “factual issue,” trial-type hearings would be “virtually meaningless.” See Ruling Denying Motions to Dismiss Issues, *Hells Canyon*, at 2. (“Couching every factual issue as potentially involving a legal or policy decision,

⁵ The Departments’ prescriptions at issue in this hearing are only *preliminary* prescriptions. Under FERC’s procedural regulations, the Departments will submit their *final* prescriptions after this hearing process is complete. 70 Fed. Reg. 69804, 69807 (Nov. 15, 2005). Thus, one purpose of this trial-type hearing is to explore and establish facts that may influence whether the Departments adhere to their preliminary prescriptions, modify them, or withdraw them altogether.

as the [agencies] consistently appear to do, serves to do little but avoid the very task that Congress sought to impose on the administrative judiciary by the 2005 amendments.”). *See also* BLM’s Motions to Dismiss Denied in Part and Reversed in Part, *Hells Canyon*, at 2 (“[The agency’s] motions seek to nullify a recently enacted statute.”). That is not what Congress intended when it created the trial-type hearing process. *Id.* And, as discussed below, ALJs assigned to trial-type hearings have not accepted this cramped notion, but have instead moved forward over the Departments’ objections.

There also is an important practical reason for denying FWS’ motions to dismiss and allowing the issues to proceed to a full hearing. The trial-type hearing process takes place under a tight schedule (90 days from start to finish) that fits snugly in the FERC licensing and review process. *See* 70 Fed. Reg. at 69,806/3 (“[T]he new hearing process [is] carefully crafted to work within FERC’s time frame.”). If an ALJ dismisses an issue as “non-factual” or “immaterial” and FERC or a reviewing court later disagrees, “the regulatory process could be significantly delayed, as there is a possibility of FERC or the federal courts remanding the case for a subsequent factual finding.” Ruling Denying Motions to Dismiss Issues, *Hells Canyon*, at 2. On the other hand, there is no prejudice to FWS to proceeding with the hearing and leaving it to FERC and the reviewing court to decide if the

issues decided by the ALJ are out of bounds or irrelevant to their own review. *Id.* at 3.

Lastly, it should be noted that the standard for granting motions to dismiss is a tough one to satisfy, given that all facts and inferences are made in favor of the non-movant (here, Progress). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (June 21, 2007) (“faced with a . . . motion to dismiss courts must . . . accept all factual allegations in the complaint as true”); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 2007 WL 2238914, at *22 (D.C. Cir. Aug. 7, 2007) (“[A]t the motion-to-dismiss stage [] all reasonable inferences must be drawn to the plaintiff’s benefit”); *see also Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 487 F.3d 1368, 1373 (Fed. Cir. 2007) (“granting every reasonable inference in favor of the nonmovant”). Given this traditional standard, the ALJ should deny the motions to dismiss if the issues raised by Progress, viewed in the light most favorable to Progress, can be construed in any way to present factual material issues. As discussed below, that is clearly the case.

II. ARGUMENT

A. Progress’s Issues are Factual

The FWS argues that Issues 1, 3, 4, and 5 are not factual in nature, but rather “policy and legal determination[s].” *See, e.g.*, FWS Motion to Dismiss Issue No. 1 at 1. To the contrary, these issues are factual in nature and do not involve policy

decisions or legal determinations. A “fact” is defined by the most recent edition of Black’s Law Dictionary as:

1. Something that actually exists; an aspect of reality <it is a fact that all people are mortal>. Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions.
2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation <the jury made a finding of fact>.

Black’s Law Dictionary 628 (8th ed. 2004).

All of Progress’ ten issues fall squarely within this definition. For example, consider Issues 1, 4, 6, and 10 (which are basically the same issue for four different fish—American shad, American eel, blueback herring, and sturgeon). That issue puts in dispute the following factual assertion in the Departments’ prescriptions: “Fish passage at Blewett Falls Dam is necessary to maintain all life stages of [American Shad] in the Yadkin-Pee Dee River System.” This ultimate issue and its sub-components are factual in nature and do not involve policy or legal determinations. Whether something is “necessary” simply asks whether the thing is “absolutely essential.” *American Heritage Dictionary* 1207 (3d ed. 1996). “To maintain” means “to keep up or carry on.” *Id.* at 1084. Thus, whether fish passage at Blewett Falls Dam is absolutely essential for American shad to carry on all their life stages in the Yadkin-Pee Dee River is plainly “an aspect of reality” and an “actual or alleged event or circumstance.” Either it is or it isn’t. Therefore, it is fact.

To be even more specific, the evidence that Progress intends to offer, in the form of testimony and scientific studies, includes: the life stages of American shad are egg, larvae, juvenile, and adult; the Yadkin-Pee Dee River below Blewett Falls Dam presently contains habitat that supports these life stages; a stable, healthy, reproducing, and self-sustaining population of American shad presently exists in the river; the river and larger tributaries below Blewett Falls Dam have not reached their carrying capacity for American shad; American shad do not prefer higher gradient rapid complex reaches for spawning, as the Departments assert, but rather broad shallow riverine habitat including tidal freshwater, such as exists on the Yadkin-Pee Dee River below Blewett Falls dam; fish passage above Blewett Falls Dam, therefore, is not necessary to maintain all life stages of American shad in the Yadkin-Pee Dee River System. If Issue 1 were a pure legal or policy issue, it could not be susceptible to proof in this way. Of course, FWS might disagree with some of these facts or offer contrary evidence; but resolving that disagreement is the very purpose of a trial-type hearing.

FWS' motions confuse and restate the issues raised by Progress in an attempt to contort them into "policy" or "legal" issues. There should be no confusion. Progress does not, as FWS contends, question here whether "providing American shad with access to their former habitat above the Dam is a *preferable* and achievable means of expanding the location of American shad further into the

Yadkin-Pee Dee River System.” FWS Motion to Dismiss Issue No. 1 at 6. That would involve a policy determination. Progress is not asking the ALJ to decide what is “preferable” or what “should” happen. The Departments are free to exercise their policy judgment about what is “preferable” when they issue their final prescriptions after this hearing.

Progress also does not raise the issue of whether “fish passage *will be* the means by which American Shad are reintroduced into a portion of the Yadkin-Pee Dee River System currently located above Blewett Falls Dam.” FWS Motion to Dismiss Issue No. 1 at 5. That would involve a legal determination about what is properly included in Progress’ license from FERC. Progress is not asking the ALJ to decide the ultimate legal issue of whether fish passage “will be” required. That is a question for the Departments, in the first instance, and FERC and any reviewing court later. In the end, FWS’ arguments are nothing more than attempts to re-characterize and reframe Progress’ factual disputes regarding the prescriptions as “policy” and “legal” issues so as to avoid ever having this factual issue decided.

FWS also argues that Progress’ disputed issues infringe on their “expert scientific [] judgments” and are therefore not factual. FWS Motion to Dismiss Issue No. 1 at 6. That is a red herring. Just because experts may disagree over some of these issues or because their resolution may require some kind of scientific

or biological judgment or opinion that falls within the Departments' expertise, does not mean they are not factual. The case law is quite clear on this point. As the D.C. Circuit explained in a similar case involving review of agency conditions in a hydropower license: "Given the presence of disputing expert witnesses, this controversy parallels one described by the Supreme Court as '**a classic example of a factual dispute** the resolution of which implicates substantial agency expertise.'" *Wisconsin Valley Improvement Co. v. F.E.R.C.*, 236 F.3d 738, 746 (D.C. Cir. 2001) (emphasis added) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989)). See also *Black's Law Dictionary* 628 (8th ed. 2004) ("fact" includes "states of mind such as [] opinions"). The specific issues the D.C. Circuit was describing in the *Wisconsin Valley* case as "classic" factual disputes included issues much like those raised by Progress—for example, whether "the use of 'detritus mats' would be an effective way of reintroducing wild rice to the reservoir." 236 F.3d at 745. That sounds very similar to Progress' Issues 3, 5, and 7: whether "fish passage at Blewett Falls Dam would increase the size of the [American Shad] population in the Yadkin-Pee Dee River system."

In the American legal system, it is uniquely the role of the trier of fact to be the final arbiter of disagreements over issues like these, which often involves sorting through conflicting expert opinions and drawing inferences to reach conclusions on ultimate factual issues. *Beech Aircraft Corp. v. Rainey*, 488 U.S.

153, 168 (1988) (“All statements in language are statements of opinion, i.e., statements of mental processes or perceptions. So-called ‘statements of fact’ are only more specific statements of opinion. . . . A factual finding, unless it is a simply report of something observed, is an opinion as to what more basic facts imply.”). The role of the ALJ here is to make the required factual findings—indeed, the Departments’ own regulations contemplate that expert opinions will be part of the proof of facts presented to the ALJ in a trial-type hearing. See 50 C.F.R. § 221.41(g). The issues raised by Progress may be the subject of debate and involve scientific judgment and expertise, but, like the issues in the *Wisconsin Valley* case, they are classic examples of factual disputes and properly raised in this trial-type hearing.

To put Progress’ issues in some perspective, it is helpful to see some of the other issues raised in trial-type hearings that ALJs have determined are factual in nature. These include:

1. Whether ladders and screens at each Project dam are essential for reintroducing anadromous fish into their historic habitat above the Project and achieving robust populations.⁶
2. Whether stocks of anadromous fish suitable to conditions above Iron Gate are available to use prescribed fishways?⁷

⁶ Order Granting, In Part, The Federal Agencies’ Motion to Dismiss Certain PacifiCorp Issues, *Klamath Hydroelectric Project*, at 4.

⁷ Decision, Disputed Issue of Material Fact 1, *Klamath Hydroelectric Project*, FERC Project No. 2082, at iii (Sept. 27, 2006).

3. To what extent facilitating the movement of anadromous fish via prescribed fishways presents a risk of introducing pathogens to resident fish inhabiting the basin above Iron Gate?⁸
4. Whether access to habitat within the Project would benefit coho salmon, and if so, to what extent?⁹
5. Whether the Logistical Plan and Cost Estimate in Exhibit 2 to the FS Justification Statement (FSJ) presents a technically feasible sandbar restoration and maintenance plan that can be implemented at a cost of \$6 million without causing adverse impacts to the environmental quality of the area.¹⁰
6. Whether the operations of the HCC as proposed in the Final License Application (FLA), together with the measures being developed cooperatively by IPC and NOAA Fisheries to address entrapment issues, adversely affect aquatic habitat, including spawning and rearing habitat, below the HCD and by so doing adversely affect the populations of aquatic species that use that habitat.¹¹
7. Whether Project operations to maintain the summer Lake level have adverse impacts on native fish in the Lake, including impacts resulting from . . . whether these impacts are due to other non-Project factors.¹²
8. Whether NMFS/FWS has erroneously applied the 50 American shad/acre estimate used for the Susquehanna River restoration

⁸ *Id.*

⁹ *Id.*

¹⁰ Ruling Denying Motions to Dismiss Issues, *Hells Canyon*, at 3 (denying motion to dismiss issue 4.5 in hearing request).

¹¹ *Id.* (denying motion to dismiss issue 4.6 in hearing request).

¹² Final Decision, *Avista Corp. Spokane and Post Falls*, FERC Project Nos. 2545, 12606, at 76 (Jan. 8, 2007).

program in establishing its shad population projections for the Santee Basin?¹³

Comparing this list to Progress' ten issues makes abundantly clear that Progress is raising factual issues. They may be complex issues; they may involve judgment, opinions, and special expertise; and FWS might strongly disagree with Progress on the correct answers. But that does not mean they are not factual. Progress' issues should proceed to a full hearing, as is its "absolute procedural right" under Section 18. BLM's Motions to Dismiss Denied in Part and Reversed in Part, *Hells Canyon*, at 3.

B. The Departments' Materiality Objections are Not Ripe

The issue of materiality, which FWS raises with respect to Issues 2 through 5, is not ripe for decision at the preliminary stage of the hearing process, as FWS insists it is. Other ALJ's faced with materiality objections at the outset of the trial-type hearing process have decided that such objections should wait "until the written testimony is proffered prior to the hearing [] and, until those witnesses are cross-examined during the hearing." BLM's Motions to Dismiss Denied in Part and Reversed in Part, *Hells Canyon*, at 3. This is the most sensible approach. As other ALJs have explained, the license applicant "must be given the procedural due process right to attempt to prove its case through the statutorily mandated 'agency

¹³ Order Memorializing Prehearing Conference, *Santee Cooper Hydroelectric Project*, FERC Project No. 199, at 5 (Sept. 15, 2007) (denying motion to dismiss issue 2 in hearing request).

trial type hearing.’ [The applicant] is not required by the statute or the regulations to prove its entire case through prehearing filings.” *Id.*

FWS openly disagrees with these prior ALJ holdings. *See, e.g.*, FWS Motion to Dismiss Issue No. 2 & 3 at 3. Its arguments for a different approach, however, are unavailing and rely on a strained reading of the regulations.¹⁴ According to FWS, its “implementing regulations establish a process whereby determinations of factuality, materiality, and dispute are front-loaded so that discovery and the hearing can focus on issues that are appropriate for resolution by hearing.” FWS Motion to Dismiss Issue No. 2 & 3 at 2. That is not the whole story.¹⁵ To the contrary, under the Department’s regulations, “a materiality determination is not required to be made exclusively on the basis of prehearing filings.” BLM’s Motions to Dismiss Denied in Part and Reversed in Part, *Hells Canyon*, at 3 (emphasis added). Instead, the regulations plainly state that rulings

¹⁴ FWS’ contrary position on this issue is particularly astounding given that the ALJ decision that FWS is attacking is by the Honorable James H. Heffernan, an ALJ in FWS’ own Office of Hearings and Appeals at the Department of the Interior.

¹⁵ In truth, the entire process—given its tight deadlines—is “loaded.” The “front end” activities in the regulations—like the requirements for an unusual level of specificity in the hearing request and answers—are also meant to enable the parties and the ALJ to simply complete the hearing processing within the statutory 90-day period. For example, the requirement that the requester must provide in the initial hearing request “a list of the witnesses and exhibits it intends to use at the hearing” is to “assist other parties in planning their discovery.” 70 Fed. Reg. at 69,810/2.

by the ALJ on materiality are to be made in the ALJ's final decision issued after the hearing. 50 C.F.R. § 221.60(b) (“The [ALJ’s] decision *must contain*: . . . (ii) Conclusions of law necessary to make the findings of fact (*such as rulings on materiality* and on the admissibility of evidence) . . .”) (emphasis added). It is not necessary to pick through the regulations and cobble together a theory on when materiality rulings should be made, as FWS’ motions attempt to do, because the regulations are clear. The ALJ here should follow the lead of prior ALJ’s and the plain language of the regulations, and issue any rulings on materiality as part of the final decision issued after the submission of written testimony, cross examination of witnesses, and the submission of post-hearing briefs.

C. Progress’ Issues will Prove to be Material

When the ALJ does consider FWS’ materiality objections, it will be apparent that Progress’ issues are indeed material. The Departments’ interim regulations provide a definition of “material” for trial-type hearings, stating that a “material fact” is “a fact that, if proven, *may affect* a Department’s decision whether to affirm, modify, or withdraw any condition or prescription.” 50 C.F.R. § 221.2; 43 C.F.R. § 45.2 (emphasis added).

It is important to note that the definition of “material fact” in the Departments’ regulations establishes a lower threshold for materiality than is employed in traditional motions practice in court. Under the traditional summary

judgment standard, a fact is “material” “only if in the particular case it makes a difference in the final decision.” *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1984) (cited in FWS Answer at 6-7 and NMFS Answer at 7). The “may affect” standard established by the Departments’ rules, in contrast, is a lower standard. *Cf. id.* (“Materiality for purposes of Rule 56 [summary judgment] has a meaning different from that in other contexts such as under the securities laws. An issue is not material [under Rule 56] simply because it *may* affect the outcome.”) (emphasis in original).¹⁶ Thus, Progress need not prove that a fact, if proven at the hearing, *will* change the Departments’ minds—only that it *may* affect the final outcome.

Further, while FWS is correct that the prescription itself and the agency’s justification “should be *the starting point* for any materiality analysis,” they are not the ending point. FWS Motion to Dismiss Issue No. 5 at 2 (emphasis added). A fact may also be material if it will bear or inform subsequent proceedings at FERC

¹⁶ Thus, according to the legal authority cited by FWS and NMFS in their answers, a better analogy for the materiality standard for this trial-type hearing is the securities context. *See* FWS Answer at 6-7 and NMFS Answer at 7 (citing *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1984)). In this context, a fact is “material” if “there is a *substantial likelihood* that a reasonable shareholder would consider it important” in making his decision. *TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (emphasis added). Under this standard, it need not be shown that the fact would have changed the decision maker’s mind, only that it would have “significantly altered the ‘total mix’ of information” available to the decision maker. *Id.*

or the court of appeals with respect to FWS' decision on its prescription. Ruling Denying Motions to Dismiss Issues, *Hells Canyon*, at 1-2 (“Congress wanted to provide the parties an opportunity to develop facts that *might* prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the federal courts.”) (emphasis added).

Judged against this backdrop, the factual issues raised by Progress are plainly “material.” In its motions, FWS challenges Issues 2, 3, 4, and 5 as not material. For several reasons, they are wrong. Consider, for example, Issue 4, in which Progress disputes, among other things, the data contained in Figure 3 of FWS' prescription regarding the current potential accessible stream habitat for American eel in the Yadkin-Pee Dee River basin. Interior Hearing Request at 12-13. In arguing that Issue 4 is not material, FWS cavalierly says that “the complete removal of Figure 3 from the preliminary prescription would not alter the Department's preliminary prescription.” FWS Motion to Dismiss Issue No. 4 at 8. This argument begs the question—why, then, did FWS include Figure 3 in its prescription in the first place? The answer, of course, is that FWS was quite plainly relying on the data in Figure 3 to justify its prescription.¹⁷ Now that

¹⁷ FWS must justify its prescriptions with data like that in Figure 3 because a reviewing court will decide whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle*

Progress has challenged the data, FWS wants to change the subject—like Lucy yanking the football away from Charlie Brown at the last minute. The problem with dismissing issues for this reason—simply because FWS says “we didn’t really mean what we said” or “we would do the same thing even if what we said was wrong”—is that nothing will stop FWS from including the very same data in its final prescriptions once this hearing is over and Progress will have lost the opportunity for an on-the-record determination on the issue.¹⁸

FWS makes the same “this won’t change our mind” argument with respect to Issues 2, 3, and 5. Its arguments will ultimately fail, however, because Progress is not required to prove that its version of the facts “will” or “would” change the Departments’ mind—only that it “may affect” the outcome before the Departments, FERC, or a reviewing court with respect to the prescriptions. That is exactly what will happen here. Whether or not an existing population is suppressed (Issue 2) and whether or not passage is needed to increase the population (Issues 3 and 5) are issues of fact squarely within the purview of subsequent review of the prescriptions, and thus they are material. *See Wisconsin*

Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

¹⁸ At a minimum, before these issues are dismissed based only on FWS’ self-serving representations in its motions that the issues aren’t important anymore, Progress must be given the opportunity to cross-examine FWS witnesses with respect to what issues may affect the Department’s final decision. BLM’s Motions to Dismiss Denied in Part and Reversed in Part, *Hells Canyon*, at 3.

Power & Light Co., 363 F.3d at 462 (holding that, in order to support their prescriptions on review, the Departments “must provide substantial evidence to show that fishery resources [1] will be adversely affected by a particular project as well as [2] to support the particular solutions for protecting those resources”).¹⁹

Issue 2 raised by Progress directly challenges whether the fishery resources will be adversely affected by the continued operation of the Project, and Issues 3 and 5

¹⁹ The D.C. Circuit’s decision in *Wisconsin Power & Light Co. v. F.E.R.C.*, 363 F.3d 453 (D.C. Cir. 2004)—a decision that the Departments cite throughout their answers and motions—discusses only one aspect of judicial review of fishway prescriptions—namely, the arbitrary and capricious standard. The decision does not, however, define the entire scope of judicial review of fishway prescriptions, and thus it does not define the materiality standard *in toto* for this hearing. In this sense, the Departments mischaracterize the decision. The Departments assert, only partially quoting *Wisconsin Power & Light*, that a “prescription will be upheld where NMFS or FWS has provided ‘substantial evidence to show that fishery resources will be adversely affected by a particular project as well as to support the particular solutions for protecting those resources.’” NMFS Answer at 13 (quoting *Wisconsin Power & Light*, 363 F.3d at 462). This is not exactly an accurate description of the D.C. Circuit’s holding. The court actually said that the Departments “**must provide**” substantial evidence of this type in order to prevent their prescription from being set aside—**not that the prescription will be upheld in every case if such evidence is provided**. There is a big difference. Lack of “substantial evidence” is not the only reason a fishway prescription can be set aside—it can also be rejected if the agency failed to consider all relevant factors or made a clear error of judgment. *Wisconsin Power & Light Co.*, 363 F.3d at 461. And, as FERC has explained, a prescription can be rejected if it does not meet the definition of a “fishway” established by Congress. *See City of Tacoma, Wash.*, 86 F.E.R.C. P. 61311, 62079 (1999) (“Section 18 is [] a specific grant of authority to the agencies and does not entail a broad power to impose whatever mandatory license conditions the federal fisheries agencies deem appropriate. We have consistently exercised authority to determine whether the conditions submitted by the agencies *actually prescribe fishways*.”) (emphasis added). Thus, there are multiple bases for a materiality determination in this trial-type hearing, and, at the appropriate time, the ALJ should consider all these bases.

directly challenge whether the Departments' particular solutions will protect those fishery resources.²⁰ The issues are plainly material.

III. CONCLUSION

For these reasons, the ALJ should deny FWS's motions to dismiss.

Respectfully submitted,


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²⁰ With respect to Issue 2, FWS correctly points out that "FWS did not state in its prescription justification that lack of passage was suppressing the downstream population of American shad." FWS Motion to Dismiss Issue No. 2 & 3 at 5. However, NMFS clearly *did* make such claims in its prescription. NMFS Prescription at 13-15. Given that it was FWS's own decision to consolidate its hearing with NMFS for a single trial-type hearing, it seems disingenuous at best to now attempt to have issues dismissed from the hearing simply because only one agency has taken a stated position on the issues.

CERTIFICATE OF FILING AND SERVICE

Pursuant to 50 C.F.R. § 221.12(c), I hereby certify that a copy of the foregoing was filed facsimile and/or by placing it in express mail on August 17, 2007, for delivery the next business day to the following:

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