

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

Sabine River Authority of Texas and)	
Sabine River Authority,)	Project No. 2305-036
State of Louisiana)	

**COMMENTS OF THE SABINE RIVER AUTHORITY OF TEXAS
AND SABINE RIVER AUTHORITY, STATE OF LOUISIANA
ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT**

Pursuant to the Notice of Availability of the Draft Environmental Impact Statement (DEIS) for the Toledo Bend Project, FERC Project No. 2305 (Project), issued on June 14, 2013 by the Federal Energy Regulatory Commission (FERC or Commission), the Sabine River Authority of Texas (SRA-TX) and Sabine River Authority, State of Louisiana (SRA-LA) (collectively, the SRAs), co-licensees for the Project, hereby submit their comments on the DEIS. The SRAs appreciate Commission Staff's recommendation to adopt the license terms and conditions proposed in the comprehensive Offer of Settlement for the Toledo Bend Project (Offer of Settlement) entered into by the SRAs and numerous stakeholders collaboratively participating in the relicensing of the Project.¹

The Staff alternative set forth in the DEIS, however, recommends modifications and additions to the SRAs' relicensing proposal and, in a number of significant instances, expands or otherwise departs from the carefully analyzed and negotiated terms of the Offer of Settlement, which encompassed: (1) the Relicensing Settlement Agreement for Sabine National Forest (SNF Relicensing Agreement) between the SRAs and U.S.

¹ Offer of Settlement for Relicensing of the Toledo Bend Project, Project No. 2305-036 (filed Aug. 1, 2012) [hereinafter, Offer of Settlement].

Department of Agriculture (USDA) Forest Service (USFS); and (2) the Relicensing Settlement Agreement for Lower Sabine River Water Quality and Aquatic Resources (ARA) among the SRAs, U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife Department (TPWD), Texas Water Development Board (TWDB), and Louisiana Department of Wildlife and Fisheries (LDWF). Many of these departures would materially modify both the SNF Relicensing Agreement and the ARA (collectively, Settlement Agreements), as well as substantially change the Shoreline Management Plan (SMP) and Recreation Management Plan (RMP) filed by the SRAs following extensive consultation with resource agencies and stakeholders. Such major modifications to the carefully crafted, consensus-based measures in the Settlement Agreements are antithetical to the Commission's policy of encouraging settlement agreements in hydroelectric relicensing proceedings.² Moreover, many of the recommendations in the Staff alternative do not address Project-related effects but rather are enhancement measures that are not necessary to satisfy the Commission's requirements under the Federal Power Act (FPA) or National Environmental Policy Act (NEPA). Finally, one recommendation in particular—Staff's Draft License Article 408—would fundamentally change the Project's primary purpose of a water supply facility and critically undermine the very purpose for which the States of Louisiana and Texas developed and operate this Project.

Accordingly, Commission Staff should revise its recommendations in the final environmental impact statement (FEIS) and issue a new 50-year license to the SRAs that

² *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 (2006).

is fully consistent with the Settlement Agreements and the complete proposal advanced by the SRAs to relicense the Project.

I. BACKGROUND

In 2008, the SRAs formally initiated relicensing pursuant to FERC's Integrated Licensing Process (ILP).³ Since that time, the SRAs have worked extensively with numerous federal and state resource agencies, local governments, Indian tribes, and the public to develop relicensing goals and design and conduct studies to identify and analyze the effects of the Project's hydroelectric operations. After filing the final license application in September 2011,⁴ the SRAs engaged all active participants in the relicensing process in lengthy and comprehensive settlement negotiations to develop appropriate protection, mitigation, and enhancement (PM&E) measures for the new license term.

Following more than six months of resource-intensive settlement negotiations, the SRAs and other settlement participants executed agreements in principle to address key environmental issues at the Project. During negotiations, the parties: explored numerous operating scenarios using the models developed during the relicensing studies; comprehensively analyzed relicensing study data and relevant scientific literature; and developed proposed licensing measures that carefully balanced numerous developmental and non-developmental values of the Project. The signatories to the agreements in

³ See Letter from Mark Pawlowski, FERC, to Donnie Henson, Sabine River Authority of Texas, Project No. 2305-000 (issued Apr. 4, 2007) (providing advanced notice of license expiration); Notice of Intent and Pre-Application Document for the Toledo Bend Project, Project No. 2305-020 (filed Sept. 22, 2008). The SRAs' original license for the Project, issued by the Federal Power Commission in 1963, expires on September 30, 2013. *Sabine River Auth. of Tex. & Sabine River Auth. of La.*, 30 F.P.C. 1009 (1963) [hereinafter, License Order].

⁴ Final License Application of the Sabine River Authority of Texas and Sabine River Authority, State of Louisiana, Project No. 2305-036 (filed Sept. 30, 2011) [hereinafter, FLA].

principle then invested even more time and effort to reach consensus on the precise language of PM&E measures to address aquatic and other natural resources, water quality, water quantity, recreation, and federal lands. At the conclusion of this significant undertaking, which took nearly a year to complete, the SRAs and these relicensing stakeholders in August 2012 filed the comprehensive Offer of Settlement, comprised of the SNF Relicensing Agreement and ARA. As fully detailed in the Offer of Settlement's Explanatory Statement, the suite of PM&E measures contained in the Settlement Agreements reach an appropriate balance of the competing power and non-power resource interests at the Project. Importantly, the parties to the ARA agreed that the measures advocated therein are consistent with and fully satisfy any and all of their responsibilities under the FPA and other applicable federal and state statutory, regulatory and other responsibilities related to the new license.⁵ The USFS also agreed that the measures set forth in the SNF Relicensing Agreement are consistent with and fully satisfy its statutory and regulatory responsibilities for the new license term related to the lands it administers that are affected by the Project.⁶

In the DEIS, Commission Staff recognized these settlement measures, as well as the SRAs' proposed resource management plans, and recommended the Commission include them in the new license for the Project. Specifically, in the DEIS Commission Staff recommended the new license require the SRAs to:

- Implement the SNF Recreation Areas Operations & Maintenance and Capital Improvements Plan (SNF Recreation Plan) (SNF Relicensing Agreement USFS Condition 13);

⁵ ARA § 3.1.

⁶ SNF Relicensing Agreement § 3.

- Implement the SNF Erosion Monitoring and Management Plan (SNF Erosion Monitoring Plan) (SNF Relicensing Agreement USFS Condition 14);
- Provide new continuous flow releases at the Project spillway (ARA Proposed License Article A-1);
- Develop a flow release plan for measuring and managing continuous releases from the spillway (ARA Proposed License Article A-2);
- Monitor the original earthen cofferdam (ARA Proposed License Article A-3);
- Implement seasonal powerhouse operations including the development of a weekend operations plan (ARA Proposed License Article A-4);
- Provide for the upstream and downstream passage of American eel (ARA fishway prescription);
- Implement the proposed RMP;
- Implement the proposed SMP; and
- Implement the proposed Historic Properties Management Plan (HPMP).⁷

The Staff alternative in the DEIS, however, recommended a number of modifications to the measures advanced by the SRAs and the settling parties, and proposed new measures not advocated in the SRAs' relicensing proposal. Among the proposals in the Staff alternative that significantly depart from the SRAs' proposed relicensing measures are recommendations for the SRAs to:

- Prepare an erosion monitoring plan for non-USFS lands classified as Public Access and Conservation lands (Draft License Article 403);
- Conduct direct monitoring of the cofferdam every 10 years (Draft License Article 406);
- Implement seasonal powerhouse operations under a different timeframe than provided for in the ARA (Draft License Article 407);
- Consult with American Whitewater and Sabine Whitewater Club prior to filing the weekend operations plan (Draft License Article 407);
- Maintain reservoir elevation levels between 168 and 172 feet msl (Draft License Article 408);
- Treat Chinese tallow along the SNF shoreline and prepare an annual report outlining the treatment (Draft License Article 409);
- Prepare a spillway channel recreation access plan (Draft License Article 412);
- Revise the RMP to include 29 recreation access areas within the Project Boundary (Draft License Article 412); and

⁷ DEIS at 27-28.

- Revise the SMP to include measure to address Chinese tallow (Draft License Article 413).⁸

II. COMMENTS ON THE DEIS

A. Overview

As an initial matter, the SRAs believe that Commission Staff's analysis and recommendations in the DEIS in most instances were supported by the technical record developed in this relicensing proceeding, largely consistent with the terms of the Settlement Agreements, and sufficient to meet NEPA requirements. The SRAs appreciate Staff's inclusion of draft license articles (in Appendix A of the DEIS) to help focus the discussion of Staff's analysis. Yet, many recommendations in the Staff alternative diverge—in some cases significantly—from the settling parties' proposed PM&E measures. The Staff alternative in many cases affects critical provisions of the Settlement Agreements that were carefully negotiated and crafted by the settling parties and upsets the delicate balance reached by the settling parties on interrelated and, at times, competing resource issues. Incorporation of these Staff recommendations in the new license would risk upheaval of the Settlement Agreements, which authorizes the settling parties to terminate the Settlement Agreements in the event that the Commission issues a new license with a material modification to any of the settlement measures.⁹

Moreover, the adoption of these Staff recommendations would be fundamentally inconsistent with the Commission's policy of encouraging settlements.¹⁰ While the SRAs understand the Commission's independent responsibilities under the FPA to issue

⁸ *Id.* at 28-29. All draft license articles appear in Appendix A of the DEIS.

⁹ *See* ARA § 4.5.2; SNF Relicensing Agreement § 4.4.2.

¹⁰ *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270.

licenses in the public interest,¹¹ and evaluate the environmental effects of different alternatives under NEPA,¹² where, as here, the settling parties have used their expertise and statutory responsibilities for the same trust resources to comprehensively and thoroughly investigate and negotiate PM&E measures, Commission Staff's approach could well have a chilling effect on the settlement process. There is no reason for the Commission to shake the foundation of the Settlement Agreements by adopting recommendations that in many instances are not aimed at addressing Project-related effects (but, rather, are recommended enhancement measures), are unnecessary to meet FPA and NEPA requirements, are duplicative, or are without support in the record. The Commission should resist making these types of changes to a thoroughly vetted settlement that meets all public interest requirements.

The SRAs continue to believe that the PM&E measures included in the Settlement Agreements, together with the SRAs' previously filed RMP, SMP, and HPMP, constitute the full and complete suite of PM&E measures that should be included in the new license for the Project.¹³ Moreover, these measures are wholly supported by the record developed in this proceeding, satisfy and exceed all requirements under the FPA and attendant statutory and regulatory obligations, and accommodate all public interest considerations applicable to the Project during the new license term. In light of the tremendous efforts to reach agreement among the settling parties and in furtherance of its strong policy of encouraging settlements, it is critical that the Commission adopt the provisions of the Settlement Agreements without modification. The FEIS and licensing

¹¹ 16 U.S.C. §§ 797(e), 803(a)(1).

¹² Pub L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4331 *et seq.* (1970)).

¹³ *See* SNF Relicensing Agreement § 2.1; ARA § 2.1.

order for the Project should fully incorporate, without expansion or modification, the proposed relicensing measures in the Settlement Agreements as guided by the comments below.

B. Comments on Draft License Articles and Staff NEPA Analysis

The SRAs' comments are organized numerically by draft license article in the DEIS, Appendix A. Some of the draft license articles—especially Draft License Articles 403, 406, 407, 408, and 412—are more problematic than others. Adoption of Draft License Article 408 would be particularly problematic, as it would undermine the primary purpose of the Project as a water supply facility, frustrate the purposes of the Sabine River Compact, and severely strip the long-term value of this resource. For each draft license discussed below, the SRAs: explain where Staff's recommendations depart materially from the intent of settling parties or the proposal advanced by the SRAs, as applicable; discuss the SRAs' objection to Staff's analysis,¹⁴ where not supported by substantial evidence, such as the relicensing studies in the record; and propose a redline of the license article, where warranted.

1. Commission Approval, Notification, and Consultation Requirements (Draft License Article 401)

Draft License Article 401(a) would require the SRAs to submit for Commission approval within 10 years after license issuance site-specific erosion management plans provided under USFS Condition No. 14.¹⁵ The SRAs do not object to submitting such plans to the Commission for its approval under Article 401(a). However, the SRAs

¹⁴ As a general matter, the SRAs do not agree with Staff's economic analysis of the PM&E measures. The SRAs describe below those instances in which Staff underestimates the cost of implementing the Staff alternative.

¹⁵ DEIS at A-1.

clarify that they are only required under the SNF Erosion Monitoring Plan to develop a site-specific plan if they determine in consultation with the USFS, at the conclusion of the 10-year monitoring period, that shoreline erosion within Sabine National Forest (SNF) attributable to Project operations is causing, or, during the new license term, will cause any adverse resource effect.¹⁶ If shoreline erosion is not attributable to Project operations or will not cause any adverse resource effect, no site-specific plan is necessary.

Article 401(b) would require the SRAs to prepare summary reports of consultation meetings with the USFS under the SNF Erosion Monitoring Plan and file them with the Commission.¹⁷ The SRAs do not object to filing a summary report of consultation meetings for the Commission's information, when such consultation is contemplated under the SNF Erosion Monitoring Plan. However, Article 401(b) without explanation imposes new and unnecessary consultation requirements beyond those set forth in the plan. Specifically, the SNF Erosion Monitoring Plan does not require the SRAs to file a report or hold a consultation meeting following annual monitoring. Rather, it explicitly provides for meetings between the SRAs and the USFS every three years during the 10-year monitoring period to review annual monitoring results.¹⁸

Based on the foregoing comments, the SRAs believe that Article 401 should be amended as follows (changes are reflected in ~~strikeout~~ and double underline):

¹⁶ See SNF Erosion Monitoring Plan at 12.

¹⁷ DEIS at A-1.

¹⁸ SNF Erosion Monitoring Plan at 9.

Article 401. Commission Approval, Notification, and Consultation Requirements.

(a) Requirement to File Plans for Commission Approval

One of the Forest Service 4(e) conditions requires the licensees to prepare plans for approval by the Forest Service for implementation of specific measures, in the event that shoreline erosion within SNF attributable to Project operations is causing, or, during the new license term, will cause any adverse resource effect, but ~~did~~ does not require prior Commission approval. Each such plan, if required under the Forest Service condition, shall also be submitted to the Commission for approval. These plans are listed below.

Forest Service condition no.	Plan name	Due date
14	Site-specific erosion management and mitigation plans	10 years after license issuance, <u>if the licensees, in consultation with the Forest Service, determine that shoreline erosion within SNF attributable to Project operations is causing, or, during the new license term, will cause any adverse resource effect</u>

(b) Requirement to Consult with Forest Service

One of the Forest Service 4(e) conditions requires the licensees to consult with the Forest Service for several programs. These consultation meetings document compliance with requirements of this license and may have a bearing on future actions. Each meeting shall be memorialized in a summary report and be filed with the Commission. These consultation meetings are listed in the following table.

Forest Service condition no.	Description	Due date Consultation Requirement
14	Annual monitoring	Not specified
14	Periodic evaluation and adjustment of erosion monitoring program	Not specified <u>Every three years during the 10-year monitoring effort</u>
14	Periodic review of shoreline classifications	Not specified <u>Every three years during the 10-year monitoring effort and every five years thereafter</u>

Forest Service condition no.	Description	Due date Consultation Requirement
14	Results of 10-year monitoring effort	Not specified <u>Following the 10-year monitoring effort</u>

2. Erosion Control Plan for Project Construction (Draft License Article 402)

Draft License Article 402 would require the SRAs to prepare and file with the Commission an erosion control plan for the construction of the minimum flow generating unit.¹⁹ Because the SRAs' proposed minimum flow generating unit was not part of the Offer of Settlement, the SRAs do not view incorporation of Article 402 into the new license as a material modification to either Settlement Agreement and do not object to its inclusion in the new license.²⁰ However, the SRAs clarify that because construction of the minimum flow generating unit will occur completely within the State of Louisiana, it is neither necessary nor appropriate for Article 402 to include a consultation requirement with any Texas state resource agencies.

Based on the foregoing comments, the SRAs believe that Article 402 should be amended as follows:

Article 402. *Erosion Control Plan for Project Construction.* At least 60 days prior to the start of construction of the proposed minimum flow generating unit, the licensees shall file with the Commission for approval, an erosion control plan that includes the following: (1) a description of specific best management practices to be used; (2) detailed descriptions and/or drawings showing the location of hay bales, siltation fabric, the cofferdam, staging locations, and spoil pile locations, in the area of disturbance; (3) a description of how construction areas would be restored to their original state, including any plans to revegetate

¹⁹ DEIS at A-2.

²⁰ The SRAs will be required to develop an erosion control plan as part of the Louisiana Department of Environmental Quality's National Pollutant Discharge Elimination System stormwater permit process. Additional state permits also may be necessary to construct the minimum flow generating unit, and the requirements set forth therein could be largely duplicative of the plan recommended by Commission Staff in Article 402.

disturbed areas; and (4) a schedule for implementation of the plan and completion of restoration measures, as applicable.

The plan shall be prepared after consultation with U.S. Fish and Wildlife Service, Louisiana Department of Wildlife and Fisheries, and Louisiana Department of Environmental Quality, ~~Texas Parks and Wildlife Department, and Texas Commission on Environmental Quality~~. The licensees shall include with the plan an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensees are ~~is~~ notified by the Commission that the plan is approved. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

3. Erosion Monitoring and Management on Non-USFS Lands (Draft License Article 403)

Draft License Article 403 would require the SRAs to prepare and file for Commission approval an erosion monitoring plan for non-USFS lands classified as Conservation and Public Access lands in the SMP.²¹ This is an expansion of the plan required in the SNF Relicensing Agreement and is therefore a material modification of the agreement.²² Moreover, as explained below, there is no basis for Staff's recommendation because the management and protection of resources in these classifications of lands are already covered in other license measures.

Staff's recommendation to develop an erosion monitoring plan for Conservation and Public Access lands outside of the SNF is based on the unfounded premise that there

²¹ DEIS at A-2 to A-3.

²² SNF Relicensing Agreement § 1.4.9.

are areas of “active erosion” at the Project.²³ There is no evidence in the record that there is active erosion at the Project. When developing the Commission-approved study plan for the Project’s relicensing, no resource agency or other participant requested studies to assess whether active erosion is occurring at the Project. And while the relicensing studies recorded areas where erosion had occurred in the past, this investigation did not identify “active erosion” in Conservation and Public Access lands—or anywhere else along the Project reservoir—as the DEIS mistakenly states.²⁴ All relicensing participants recognized that erosion is normally a slow process in a mature reservoir that needs to be assessed over a longer term, and asserting that erosion is “active” is not supported by simply observing an area that had eroded sometime in the past.²⁵ This is the precise reason why the SNF Erosion Monitoring Plan requires a 10-year monitoring effort prior to developing any site-specific management plan.²⁶

Because there is no record evidence establishing “active” erosion at the Project, the SRAs believe that Article 403 is unwarranted. As a Staff-recommended alternative under NEPA, the article would not protect any affected resource or mitigate any Project-related effect, as the relicensing studies did not identify any terrestrial or aquatic resources along the Toledo Bend shoreline are adversely affected by Project operations and the DEIS made no such conclusion. While the SRAs recognize that shoreline erosion attributable to Project operations possibly could affect cultural resources and public

²³ See DEIS at 176.

²⁴ *Id.*

²⁵ As discussed in the SMP, erosion is an ongoing and natural process that may result in loss of soil material when water moves along a shoreline, and wave action from prevailing winds is the primary cause of erosion at the Project. See SMP at 8; see also Reservoir Shoreline Erosion Study Plan at 8-9, Project No. 2305-000 (filed Nov. 30, 2009).

²⁶ SNF Erosion Monitoring Plan at 2.

recreation features, Article 403 is unnecessary to ensure proper protection and management of these resources, because they are specifically addressed in the HPMP and RMP.²⁷ Moreover, to the extent that future shoreline erosion could potentially adversely affect bald eagles or migratory birds, measures in Commission Staff's Draft License Article 413, to which the SRAs do not object, would appropriately protect these resources. Thus, requiring a separate plan for erosion monitoring to protect and manage resources that already are managed under proposed resource management plans is duplicative and unnecessary, and may lead to later conflicts over the intent and purpose of a separate erosion monitoring plan.

In the alternative, if the Commission finds that Staff's recommended Article 403 is supported by the record and warranted despite the management measures set forth in the HPMP, SMP, and RMP, it should revise Article 403, at a minimum, to correct several inaccuracies and make the monitoring protocol consistent with the methods outlined in the SNF Erosion Monitoring Plan.

First, Article 403 uses the terms "erosion monitoring program" and "erosion monitoring plan" interchangeably. The SRAs believe that, for clarity, all references should be to an "erosion monitoring plan." Second, the Commission should eliminate the reference to "actively eroding locations." As explained above, there is no evidence in the record that any location within the Project boundary is "actively eroding." The whole purpose of the 10-year erosion monitoring effort of the SNF Erosion Monitoring Plan is

²⁷ For example, the HPMP provides a process for the SRAs to take actions, including site erosion, to resolve an adverse effect to a cultural resource. *See* HPMP at 76. The Recreation Management Plan obligates the SRAs to keep all Project-sponsored recreation facilities—which are within the SMP-designated Public Access lands—in good working order, including conducting rehabilitation efforts when necessary. *See* Final Recreation Management Plan for the Toledo Bend Project 10-13, Project No. 2305-036 (filed Mar. 6, 2012) [hereinafter, RMP].

to evaluate whether ongoing erosion attributable to Project operations is occurring at Toledo Bend. If the Commission, therefore, decides to require the SRAs to use the same protocols and criteria for Conservation and Public Access lands that are set forth in the SNF Erosion Monitoring Plan,²⁸ Article 403 must be modified to apply the same procedures and methodology. Third, the Commission should eliminate as a criterion for determining the need for site-specific management plans “the potential loss of communities of Forest Service sensitive flora or populations of Forest Service sensitive fauna.”²⁹ The SRAs believe it is inappropriate for the Commission to adopt USFS standards for flora and fauna in areas outside SNF that are managed by the SRAs. Fourth, in the event the Commission requires the plan under Article 403, the Commission should clarify that effects to Project-sponsored public recreation facilities under the RMP, and not to private facilities or recreation generally, is a proper criteria for determining the need for site-specific management plans.³⁰ Finally, the SRAs believe that any Article 403 adopted by the Commission should include regulatory deadlines for preparing and filing the plan for Commission approval.

Again, the SRAs do not believe that the erosion monitoring and management plan contemplated under Article 403 is warranted or appropriate, given proposed protection and management of historic properties, Project-sponsored recreation, and bald eagles and migratory birds, as set forth in the HPMP, RMP, and SMP. But if the Commission’s relicensing order requires the plan recommended by Staff, Article 403 should be amended as follows:

²⁸ DEIS at 114-15.

²⁹ *Id.* at A-2.

³⁰ The SRAs’ permitting process under the SMP for third party-operated or private recreation facilities includes sufficient safeguards for protecting shoreline resources.

Article 403. Erosion Monitoring and Management. Within one year following the effective date of the license, ~~t~~The licensees shall file with the Commission for approval an erosion monitoring ~~program plan~~ program plan for non-Forest Service project lands classified as Conservation and Public Access lands in the licensees' Shoreline Management Plan. The plan, which shall be consistent with the Sabine National Forest Erosion Monitoring and Management Plan required under FPA Section 4(e) Condition 14, shall include provisions for: (1) identifying representative sites for erosion monitoring ~~the actively eroding locations within Shoreline Management Plan designated Conservation and Public Access lands~~ from available records and through selected site visits; (2) establishing baseline conditions at these locations during a field survey using appropriate photo-documentation, and descriptions, and measurements; (3) revisiting these areas in the field every 5 years using the same approach; and (4) preparing and implementing a site-specific management plan for Commission approval if erosion shows potential for adversely affecting sensitive resources or project-sponsored recreation features managed under the RMP. Criteria for determining the need for site-specific management plans should include: (1) adverse effects on federally listed threatened or endangered species; (2) ~~the potential loss of communities of Forest Service sensitive flora or populations of Forest Service sensitive fauna;~~ (3) the take of an eagle or eagle nest; (4) ~~effects to the botanical character of the Evergreen Forest/drainage group A;~~ or (5) ~~effects to~~ project-sponsored recreation facilities under the RMP and or cultural resources.

The erosion monitoring ~~program plan~~ program plan shall be developed after consultation with the U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, Louisiana Department of Wildlife and Fisheries, and Louisiana Department of Culture, Recreation and Tourism. The ~~program plan~~ program plan filed with the Commission shall include documentation of consultation, copies of comments and recommendations on the completed ~~program plan~~ program plan after it has been prepared and provided to the above entities, and a specific description of how comments are accommodated by the ~~program plan~~ program plan. The licensees shall allow a minimum of 30 days to comment before filing the ~~program plan~~ program plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on site-specific information.

The Commission reserves the right to require changes to the ~~program plan~~ program plan. Upon Commission approval, the licensees shall implement the ~~program plan~~ program plan, including any changes required by the Commission.

4. Continuous Releases from Spillway (Draft License Article 404)

Draft License Article 404 adopts the SRAs' proposal in ARA Proposed License Article A-1 to implement new continuous flow releases at the Project spillway.³¹

³¹ *Id.* at A-3 to A-4.

However, Commission Staff—perhaps out of a mistaken view that the release schedule proposed in the Offer of Settlement constitutes a minimum flow requirement—recommends that ARA Proposed License Article A-1 be modified by removing a critical sentence in the proposed license article that, if adopted by the Commission, would remove the SRAs’ discretion to provide releases at the spillway greater than the rates specified in the Article 404 schedule. The SRAs object to Staff’s recommendation, which would amount to a material modification to the ARA,³² and believe that the Commission’s relicensing order should adopt ARA Proposed License Article A-1 as set forth in the ARA.

The continuous flow releases provided in ARA Proposed License Article A-1 are not minimum flow releases as described in the DEIS.³³ Recognizing that minor fluctuations in downstream flow releases do not adversely affect downstream resources, the settling parties specifically designed a flow release requirement consisting of continuous values at the Project that affords the SRAs some limited flexibility in implementing spillway flows to ensure that minor flow fluctuations that deviate from the values set forth in the monthly schedule will not amount to violations of the new license for the Project.³⁴ Because the settling parties agreed to specific tolerances for flows that may be lower than the values set forth in the monthly schedule, the parties felt it

³² ARA § 1.4.9.

³³ See DEIS at 178.

³⁴ See, e.g., Letter from Kelly Houff, FERC, to Todd Jastremski, Wisconsin Electric Power Company, Project No. 2131-125 (issued May 28, 2013) (minimum flow of 8 cfs (1.1 percent) less than required daily minimum resulting from human error a license violation); Letter from William Guey-Lee, FERC, to Teresa Rogers, Appalachian Power Company, Project No. 2210-227 (issued Dec. 10, 2012) (deviation from minimum flow requirements for approximately four hour period because of equipment failure a license violation); Letter from Kelly Houff, FERC, to Karen Hill, Exelon Generation Company, LLC, Project No. 405-107 (issued Nov. 7, 2012) (failure to meet minimum flow requirements for a 10-minute period due to operator error a license violation).

necessary to expressly provide that higher flows attributable to storm events passed through the system also would not amount to a violation of the continuous flow requirement.

Based on the foregoing comments, the SRAs believe that Article 404 should be amended as follows:

Article 404. Continuous Releases from the Spillway. From the effective date of the license through the later of (1) the end of the second year of the license term, or (2) 10 days following the Commission's approval of the flow release plan filed under Article 4045, the licensees shall release continuous flows at the project spillway of 144 cubic feet per second (cfs). Such releases shall be measured and reported in accordance with U.S. Geological Survey (USGS) standards applicable to USGS Gage 08025360, Sabine River at Toledo Bend Reservoir. The Licensees are not required to provide releases at the spillway greater than 144 cfs, but may do so at their discretion.

Upon the later of (1) the commencement of the third year of the license term, or (2) 10 days following the Commission's approval of the flow release plan filed under Article 405, the licensees shall release continuous flows at the project's spillway from a reservoir outlet with an elevation no lower than 145 feet above sea level (msl) (NGVD 1929) according to the flow release schedule in the table below. All flow releases in this table are targeted, continuous values at the project spillway. Releases at reservoir levels less than or equal to 162 feet msl comprise drought management protocols.

Reservoir Elevation (msl)	Minimum Release at Spillway (cfs)											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
At >162 feet	150	150	300	300	300	300	200	200	200	200	200	150
From 162 feet to 156 feet	150	150	225	225	225	225	150	150	150	150	150	150
At <156 feet	150	150	150	150	150	150	150	150	150	150	150	150

The continuous flow release requirement in this article will be met so long as: (1) the releases at the project spillway on an instantaneous basis are at least 144 cfs; (2) the releases at the project spillway on a mean daily basis are at least

90 percent of the applicable continuous flow release value in the table above; and (3) the release rate for the calendar month (calculated from the mean daily flows) is at least 95 percent of the applicable continuous flow release value in the table above. The Licensees are not required to provide releases at the spillway greater than the applicable continuous flow release value in the table above, but may provide greater releases at the spillway at their discretion.

The continuous flow release requirement in this article may be temporarily modified or suspended: (1) due to circumstances beyond the reasonable control of the licensees, such as equipment failure or malfunction, disruption in operations, blockage of intake structures, inclement weather, or operating emergencies; or (2) as necessary to protect public and project safety or to undertake any repair, maintenance, replacement, or inspection of project works and equipment. The licensees shall notify the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, Texas Water Development Board, Louisiana Department of Environmental Quality, and Louisiana Department of Wildlife and Fisheries (collectively, resource agencies) and the Commission of any such temporary modification or suspension as soon as possible, but not later than 10 days after any such incident. The licensees also may provide releases at the project spillway that are less than the applicable continuous flow value in the table above for short periods upon prior mutual agreement of the licensees and resource agencies. The licensees shall notify the Commission of any such mutually agreed upon flow modification as soon as possible, but not later than 10 days after any such incident.

5. Measurement and Management of Continuous Releases from Spillway (Draft License Article 405)

Draft License Article 405 adopts the SRAs' proposal in ARA Proposed License Article A-2 to develop a flow release plan for providing and measuring the continuous flow releases at the Project spillway under Article 404.³⁵ As part of ARA Proposed License Article A-2, the plan would include the means for making such flow release data available electronically.³⁶ However, Commission Staff has recommended that the SRAs provide both continuous flow and reservoir level data "instantaneously" in real time to

³⁵ DEIS at A-4 to A-5. The SRAs note, however, that the Commission's adoption of Article 405 should include the 90-day comment period contemplated in Proposed License Article A-2 of the ARA.

³⁶ ARA at A-2.

provide boaters and other recreational users information that may allow planning of future recreational visits to the project.³⁷

The SRAs have no objection to providing the continuous flow release and lake elevation data to the public. The SRAs committed in their response to comments on the Settlement Agreements that they would provide this data electronically to the public,³⁸ and in fact, the data is currently available online on the United States Geological Survey (USGS) website.³⁹ The SRAs provide links to the USGS databases on their websites, and will continue to provide such data consistent with USGS standards.⁴⁰ The SRAs note, however, that an “instantaneous” standard for providing this information is not practicable. Rather, the SRAs will provide flow information in near real time, in accordance with time intervals that meet USGS standards.⁴¹

6. Cofferdam Monitoring (Draft License Article 406)

Draft License Article 406 adopts the SRAs’ proposal set forth in ARA Proposed License Article A-3 to conduct temperature monitoring in the Project’s tailrace channel

³⁷ See DEIS at 172-73.

³⁸ See Response of the Sabine River Authority of Texas and Sabine River Authority, State of Louisiana, to Recommendations, Terms and Conditions, Prescriptions, and Settlement Comments at 17-18, Project No. 2305-036 (filed Dec. 6, 2012) [hereinafter, Response to Comments].

³⁹ See USGS, Combined Texas Streamflow and Lakes Table, *available at* http://waterdata.usgs.gov/tx/nwis/current/?type=flow_res&group_key=basin_cd#tx05 (last visited Aug. 1, 2013) (for Texas data); USGS, Current Conditions for Louisiana: Streamflow, *available at* http://waterdata.usgs.gov/la/nwis/current/?type=flow&group_key=basin_cd#la01 (last visited Aug. 1, 2013) (for Louisiana flow release data); USGS, Current Conditions for Louisiana: Lakes and reservoirs, *available at* http://waterdata.usgs.gov/la/nwis/current/?type=lake&group_key=basin_cd#la01 (last visited Aug. 1, 2013) (for Louisiana lake elevation levels).

⁴⁰ See Sabine River Authority of Texas, U.S. Geological Survey (USGS) Real-time Data for Texas and Louisiana Sabine Basin Stations, *available at* http://www.sratx.org/basin/lake_and_river_conditions2.htm (last visited Aug. 1, 2013); Sabine River Authority, State of Louisiana, Links, USGS Gauge at Ruliff, *available at* <http://12.6.56.180/index.php?q=content/links> (last visited Aug. 1, 2013).

⁴¹ The SRAs believe that the current language of Draft License Article 405(2), which would require any device, structure, or method for measuring continuous flows to meet or exceed USGS standards, together with a requirement that the SRAs make flow release data available to the public in “real time on a public website,” adequately addresses this issue.

each year in July, August, and September to ensure that dissolved oxygen and temperatures are maintained at acceptable levels.⁴² In addition to this temperature monitoring, Commission Staff's recommended Article 406 proposes to expand ARA Proposed License Article A-3 by adding an additional requirement to conduct direct monitoring of the elevation of the forebay cofferdam by bathymetric survey at 10-year intervals.⁴³ Because this addition would only increase new license implementation costs and obligations without any corresponding protection to water quality downstream of the Project,⁴⁴ the SRAs object to the addition of the bathymetric survey.

As noted in the DEIS, a large portion of the original earthen cofferdam was left in place during original construction and now remains upstream of the powerhouse intake at the Project and ensures that water entering the powerhouse intake is dominated by warmer, well-oxygenated epilimnetic waters, thereby minimizing the discharge of hypolimnetic water to the tailrace.⁴⁵ The continued persistence and functioning of this cofferdam remnant will keep tailwater dissolved oxygen and temperatures at acceptable levels.⁴⁶ ARA Proposed License Article A-3 includes provisions for the SRAs to monitor temperatures in the Project's tailrace channel during summer months to identify if cooler water temperatures are being experienced in the tailrace, as this would be an indication that more water is being drawn into the turbines from lower reservoir levels.⁴⁷ Higher

⁴² DEIS at A-6 to A-7.

⁴³ *Id.* at A-7; *see* ARA § 4.5.2.

⁴⁴ Staff estimates that the annual cost of conducting the survey every 10 years is \$760. DEIS at 159. The SRAs believe this significantly underestimates the cost of such survey, which would likely require the SRAs to hire outside consultants to provide these services.

⁴⁵ *Id.* at xxiv, 85.

⁴⁶ *Id.* at 85-86.

⁴⁷ ARA at A-3.

temperature water has been shown by relicensing studies to contain acceptable levels of dissolved oxygen; therefore, temperature monitoring serves as an appropriate surrogate for dissolved oxygen levels.⁴⁸ If monitoring demonstrates the presence of lower temperature water in the tailrace, ARA Proposed License Article A-3 requires the SRAs to undertake a survey of the cofferdam.⁴⁹

Because ARA Proposed License Article A-3 provides a plan of action to survey the cofferdam only in the event that certain water quality parameters are exceeded, Commission Staff's proposed addition in Article 406 of bathymetric surveys of the elevation of the cofferdam every 10 years would impose an economically unjustified and unnecessary burden on the SRAs. Moreover, this requirement seems to overlook that there is no independent Project purpose for ensuring the continued integrity of the cofferdam. Only if water temperatures in the tailrace channel for at least 10 percent of the monitored days in July, August, and September is below 20°C is there a need to survey the cofferdam. As proposed by the settling parties, ARA Proposed License Article A-3 is not intended to protect the structural integrity of the cofferdam, but rather to monitor and maintain temperature and dissolved oxygen levels in the tailrace channel. If the water quality monitoring program under ARA Proposed License Article A-3 does not indicate a decrease in temperature levels, there is no justification to conduct bathymetric surveys of the elevation of the cofferdam. Contrary to statements in the DEIS, the cofferdam serves no independent significance at the Project.⁵⁰ Moreover,

⁴⁸ See generally Sabine River Water Quality Monitoring, 2009 to 2010 Final Report § 6, Project No. 2305-000 (filed Apr. 13, 2011).

⁴⁹ ARA at A-3.

⁵⁰ DEIS at 88-89.

Staff's concerns that it is unlikely that the 20°C threshold for triggering the survey would ever be met, even if the entire cofferdam were to erode,⁵¹ is unfounded.

For these reasons, the SRAs believe that Commission Staff's proposed expansion of ARA Proposed License Article A-3, as set forth in Article 406, is unnecessary to protect water quality downstream of the Project. Indeed, both the Louisiana Department of Environmental Quality and the TCEQ have issued water quality certifications for the Project without additional requirements for protecting downstream water quality.⁵² Moreover, the Commission's relicensing order should not disrupt this carefully negotiated provision of the ARA to impose unnecessary requirements that are not justified by the record. Therefore, the Commission should not require the SRAs to conduct bathymetric surveys every 10 years, and should amend Article 406 to ensure that it is consistent with ARA Proposed License Article A-3, as follows:

Article 406. Cofferdam Monitoring.

(a) Water Quality Monitoring

Each year during the months of July, August, and September during the license term, the licensees shall continuously monitor water temperature in the project's tailrace channel at Station RM 141TR, which is located at the pipeline crossing approximately mid-way down the tailrace channel. If the mean daily temperature of at least 10 percent of the monitored days in July, August, and September, during which the project is generating under normal conditions, is below 20 degrees Celsius, the licensees shall obtain an in situ measurement of

⁵¹ *Id.* at 89. Staff used an average of the temperature of stratified water measured in the reservoir. *See id.* The parties to the ARA recognized erosion of the cofferdam below the thermocline would not be an average of the water column, but rather would be weighted strongly to the hypolimnetic water. Relicensing studies that evaluated water temperatures during hydroelectric operations in 2009 and 2010 indicated that water temperatures in the tailrace at the location of the proposed monitoring site during non-generating periods when water leaking through the turbines dominated the temperature was between 20 and 25°C at the current cofferdam configuration. Temperature during generation ranged between 28 and 32°C. Thus, the threshold for survey set forth in ARA Proposed License Article A-3 is valid and supported by the SRAs' relicensing studies.

⁵² Louisiana Department of Environmental Quality's water quality certification for the Toledo Bend Project, Project No. 2305-036 (filed Oct. 1, 2012); Texas Commission on Environmental Quality's water quality certification for the Toledo Bend Project, Project No. 2305-036 (filed July 31, 2013).

dissolved oxygen at Station RM 141TR during a period of normal project generation.

The licensees shall prepare a report summarizing the water quality monitoring and provide the report to the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, Texas Water Development Board, Louisiana Department of Environmental Quality, and Louisiana Department of Wildlife and Fisheries (collectively, resource agencies) by October 31 each year, with a copy also filed with the Commission.

(b) Cofferdam Survey

If any water quality monitoring report prepared by the licensees under the above water quality monitoring demonstrates that the mean daily temperature of at least 10 percent of the monitored days in July, August, and September, during which the project is generating under normal conditions, is below 20 degrees Celsius, the licensees shall undertake a survey of the cofferdam.

~~In addition, while water quality monitoring may be a cost-effective, first-order approach for monitoring the variability of water quality conditions in project releases, and would provide a better understanding of the relationship of water quality and the condition of the cofferdam, the licensees shall also directly monitor the elevation of the cofferdam by bathymetric survey at 10-year intervals. This would ensure that the cofferdam integrity and elevation is maintained, in the event the temperature monitoring program fails to detect a substantial erosion of the cofferdam.~~

The purpose of the cofferdam survey will be to determine whether: (1) the average crest elevation of the entire span of the cofferdam, as compared to the 2011 baseline cofferdam profile appearing in Appendix C to the Aquatic Resources Agreement filed on August 1, 2012, filed with the Commission, has lowered by at least 20 percent; or (2) the available area for flow over the cofferdam above elevation 145 feet msl (NGVD 1929) is less than 80 percent of the available total flow area when computed with the reservoir at elevation 170 feet msl. The scope of any such cofferdam survey will be commensurate with the scope of the 2011 baseline cofferdam survey.

By January 31 in years in which the cofferdam survey is conducted, the licensees shall complete the cofferdam survey, together with an analysis of the survey results, and file it with the Commission, with copies to the resource agencies for their review.

(c) Cofferdam Restoration Plan

If the licensees' cofferdam survey demonstrates that either: (1) the average crest elevation of the entire span of the cofferdam, as compared to the

2011 baseline cofferdam profile has lowered by at least 20 percent; or (2) the available area for flow over the cofferdam above elevation 145 feet msl is less than 80 percent of the available total flow area when computed with the reservoir at elevation 170 feet msl, the licensees shall file with the Commission for approval a cofferdam restoration plan.

The licensees shall file any required cofferdam restoration plan by July 1 following the January 31 distribution of the cofferdam survey. The plan shall propose detailed specifications, methods, and a schedule for restoring the cofferdam to elevations consistent with the 2011 baseline cofferdam survey. The licensees shall develop the plan after consultation with the resource agencies. The licensees shall allow a minimum of ~~30~~45 days for the resource agencies to comment and make recommendations before filing the plan with the Commission. The licensees shall include with the plan filed with the Commission documentation of consultation, copies of comments and recommendations from the resource agencies, and specific descriptions of how the resource agencies' recommendations are accommodated by the plan. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

In the event the Commission believes there is sufficient evidence to require a periodic cofferdam survey recommended by Staff in Article 406, there certainly is no evidence suggesting that this effort should be undertaken every 10 years.⁵³ Thus, any requirement to periodically survey the cofferdam should be very infrequent, such as only every 15 to 20 years during the license term. Having lasted in its current configuration for almost 50 years, a more frequent interval is not justified.

7. Seasonal Powerhouse Operations (Draft License Article 407)

ARA Proposed License Article A-4, as originally proposed by the SRAs and other settling parties under the ARA, requires the SRAs, upon the 2018 expiration of the

⁵³ The SRAs submit that there is no evidence that the cofferdam is actively eroding; it has withstood the test of time with minimal erosion over the past nearly 50 years. Moreover, the SRAs estimate that the average water velocities conveyed across the cofferdam are less than one foot per second, a velocity that would not be expected to erode compacted material.

current Power Sales Agreement (PSA) (or an earlier date if a new PSA is reached prior to 2018), to implement the following seasonal powerhouse operations as an enhancement to downstream aquatic resources: (1) reduce normal maximum powerhouse peaking flows to 12,000 cfs during operations in March through June; (2) release 1,450 acre-feet of water every weekend day in March and April and depending on water year type, every weekend day in May and June; and (3) after flow testing conducted by the agencies to determine appropriate flow rate and duration of weekend releases, determine the optimum timing for releasing the 1,450 acre-feet of water, and file a weekend operations plan prior to initiating weekend operations.⁵⁴

In the DEIS, Commission Staff recommended the substance of the SRAs' proposal, but suggested significant changes to the timing of the new seasonal powerhouse operations. Specifically, in the DEIS, Staff recommended changing the timing of the obligation to reduce normal maximum powerhouse peaking flows to 12,000 cfs to commence upon license issuance.⁵⁵ Staff also recommended changing the timing of the weekend flows to commence after Commission approval of the weekend operations plan, which must be filed for Commission approval within 18 months after license issuance.⁵⁶ As justification for altering the timing of the obligations under Draft License Article 407, Commission Staff states that:

[b]ecause these changes in powerhouse operations would be beneficial for downstream aquatic habitat and recreational opportunities, and we see no benefit in delaying their implementation tied to the unknown and uncertain status of a future [PSA], we recommend that the reduction in spring peak powerhouse flows from 14,000 to 12,000 cfs begin upon license issuance

⁵⁴ ARA at A-4 to A-6.

⁵⁵ DEIS at 173, A-7.

⁵⁶ *Id.* at 173.

and supplemental weekend flows after Commission approval of the weekend operations plan.⁵⁷

The SRAs strongly object to Staff's recommended changes in Article 407 to the timing of the SRAs' implementation of the seasonal powerhouse operations set forth in ARA Proposed License Article A-4. If adopted by the Commission, these changes would constitute a material modification of the ARA.⁵⁸ In addition, Staff's rationale does not appear to understand that the purpose of the delay until 2018 has nothing to do with the "unknown and uncertain status of a future" agreement,⁵⁹ but rather to ensure that the SRAs can comply with their *current* obligations—under the *existing* and valid contract governing power production that the Commission has approved.⁶⁰ This current PSA expires in 2018; therefore, ARA Proposed License Article A-4 was intentionally drafted to allow the SRAs to meet current and ongoing obligations, with the understanding that any future contractual obligations after 2018 must accommodate the seasonal powerhouse operations provided under ARA Proposed License Article A-4.

The existing PSA requires the SRAs to make 1.058 million acre-feet of water available for power generation from May through September.⁶¹ This water provides approximately 65.7 million kilowatt hours of on-peak power for Cleco Power LLC, Entergy Gulf States, Inc., and Entergy Louisiana, LLC's use during the summer

⁵⁷ See *id.* at 179.

⁵⁸ ARA § 1.4.9.

⁵⁹ DEIS at 179.

⁶⁰ *Sabine River Auth. of Tx. & Sabine River Auth., La.*, 31 FPC 885 (1964).

⁶¹ See FLA, Exh. B § 3.1. The SRAs must provide replacement power if they cannot meet this contractual obligation. In the DEIS, Staff did not estimate any additional cost to the SRAs to implement the seasonal powerhouse operations upon license issuance. In fact, there could be significant costs associated with Staff's proposal, such as the cost of replacement power if the SRAs cannot provide the amount of water required by their current contract.

months.⁶² Any changes in seasonal powerhouse operations and increases in continuous flow releases before 2018 will increase the likelihood that the SRAs will not be able to meet their obligations under the PSA,⁶³ because the weekend operations proposed under ARA Proposed License Article A-4 would consume water required for contractual peaking operations. Because the SRAs are bound by contract and the PSA is Commission-approved under FPA section 22,⁶⁴ the settling parties appropriately negotiated ARA Proposed License Article A-4 to initiate upon expiration of the PSA in 2018. In addition, in agreeing to begin the seasonal powerhouse operations in 2018, the settling parties recognized the SRAs' need to conduct performance testing on the generating equipment to ensure safe and reliable operation.⁶⁵ ARA Proposed License Article A-4 also built in sufficient time for the SRAs and resource agencies to prepare for and conduct the weekend flow testing.⁶⁶

The negotiated 2018 implementation of ARA Proposed License Article A-4 is fully justified by the Commission Staff's analysis in the DEIS. Based on relicensing studies and other existing information, Staff appropriately concluded that the lower Sabine River downstream of the Project is a healthy and vibrant fishery under existing operations.⁶⁷ Thus, the seasonal powerhouse flows proposed in ARA Proposed License Article A-4 are not required to mitigate any identified adverse Project effect. Rather, the

⁶² *See id.*

⁶³ Commission Staff acknowledges this in the DEIS, but recommended changing the timing obligations nonetheless. *See* DEIS at 20 n.17 ("The proposed delay in implementation may be because implementation of the proposed project operations would result in conditions that would prevent the Authorities from meeting their obligations under the power sales agreement.").

⁶⁴ 16 U.S.C. § 815.

⁶⁵ *See* ARA, App. D.

⁶⁶ *See id.*

⁶⁷ DEIS at 92.

reduction in on-peak maximum flow to 12,000 cfs is only intended to enhance the downstream fishery. As such, the SRAs believe that Article 407, as adopted by the Commission in the relicensing order, should preserve the timing element of ARA Proposed License Article A-4 that requires these seasonal flows to commence following expiration of the PSA in 2018.

Commission Staff also recommended modifying ARA Proposed License Article A-4 to require the SRAs to consult with American Whitewater and Sabine Whitewater Club regarding release scheduling and timing of the weekend releases prior to filing the weekend operations plan with the Commission.⁶⁸ The SRAs object to this new consultation requirement because the purpose of the weekend releases is not to promote whitewater recreation at the Project, and as discussed below,⁶⁹ the SRAs object to Staff's recommendation in Draft License Article 412 to provide Project-sponsored recreation in the Project tailrace because opening the area would threaten public safety.

Based on the foregoing analysis, the SRAs believe that Article 407 should be amended as follows:

Article 407. Seasonal Powerhouse Operations. Upon the earlier of: (1) the 2018 expiration of the Licensees' current power sales agreement; or (2) the effective date of any new or extended power sales agreement, the Licensees. The licensees shall implement seasonal powerhouse operations with the following components.

(a) Powerhouse Releases during Seasonal Peaking Operations

During the months of March, April, May, and June, the licensees shall limit the maximum powerhouse flow during peaking operations at the project to 12,000 cubic feet per second (cfs). This limitation on peaking operations shall not apply to: (1) any call on the portion of the project's generation capacity which is held in reserve, as spinning or non-spinning reserve, or is needed to respond to

⁶⁸ DEIS at 29.

⁶⁹ See Section II(B)(12)(b) *infra*.

unanticipated changes in scheduled system generation; and/or (2) any emergency call on power that requires the licensees to respond to an unexpected transmission system upset or anomaly, including such issues as congestion, frequency or voltage anomalies, or grid disturbances, including brown-outs or black-outs.

(b) Weekend Operations in March through June

March and April: On each weekend day in March and April, the licensees shall provide a volume of 1,450 acre-feet of flow releases from the powerhouse. Such flows will be released in the range of 4,000 to 7,000 cfs, after approval of the weekend operations plan by the Commission under this article. The Licensees shall not be required to provide powerhouse flow releases greater than 1,450 acre-feet each weekend day, but may provide greater weekend powerhouse flows at their discretion.

May and June: On each weekend day in May and June, the weekend operations provided in March and April will apply if both of the following conditions are met:

(1) The mean calculated inflow to the reservoir for the first six months of the current water year (October 1 to March 31) is greater than 80 percent of the mean calculated inflow of the water year for the same six-month period for the most recent 38-year period of record. The current water year shall not be included in the most recent 38-year period of record.

(2) The licensees are able to safely operate at least one turbine-generator unit within its normal operating range.

For purposes of the annual calculation of the inflow to the reservoir, the licensees shall perform such calculation in substantial conformance with the methods employed during relicensing as provided in section 3 of the final report entitled *Toledo Bend Project, Operations Model, Operations/Verification Report* dated October 2010. The licensees shall compute the reservoir inflow for the first six months of each water year to determine if that year's inflow is greater than 80 percent of the long-term mean for that period as provided in paragraph (1) above. The licensees shall submit that calculation and supporting documentation to the U.S. Geological Survey, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, Texas Water Development Board, Louisiana Department of Environmental Quality, and Louisiana Department of Wildlife and Fisheries (collectively, resource agencies) for review and comment by April 10 of each year. The licensees shall allow 10 days for the resource agencies to comment on the calculation and supporting documentation. No later than April 25, the licensees shall file with the Commission their May/June weekend flow schedule.

Each tenth year during the license term, the licensees shall evaluate, in consultation with the resource agencies, the frequency of May and June weekend powerhouse operations. If this evaluation demonstrates that weekend powerhouse operations in May and June occurred in fewer than seven years of the prior ten-year period, the licensees shall adjust the 80 percent criterion in consultation with the resource agencies, such that weekend powerhouse operations in May and June are expected to occur in approximately two-thirds of the years over the next ten-year period. Any proposed adjustment to the criterion triggering weekend powerhouse operations must be approved by the Commission.

Flow Testing to Establish Weekend Operations: Prior to implementing weekend operations under this article, the licensees shall cooperate with the resource agencies' monitoring of the lower Sabine River downstream of Toledo Bend dam. The licensees' obligations related to assisting resource agencies' monitoring and evaluation program shall be consistent with the *Flow Testing to Optimize Weekend Operations Benefits* contained in Appendix D to the Aquatic Resources Agreement (ARA) filed on August 1, 2012.

Not later than four ~~Within 18 months prior to initiating weekend operations under this article, from the date of issuance of this license,~~ the licensees shall file with the Commission for approval a weekend operations plan for implementing weekend operations as provided under this article. In any case, the project's powerhouse operations under the plan shall not require the licensees to operate either turbine-generator unit at flows considered by the licensees to be unsafe, potentially damaging to the unit, or at very low efficiency. The licensees must support any such determination with appropriate documentation of the unfavorable conditions.

The licensees shall develop the weekend operations plan after consultation with the resource agencies, ~~American Whitewater, and Sabine Whitewater Club.~~ The licensees shall allow a minimum of ~~30~~45 days for the resource agencies and other entities to comment and make recommendations before filing the plan with the Commission. The licensees shall include with the plan filed with the Commission documentation of consultation with the resource agencies and other entities, copies of comments and recommendations from the resource agencies and other entities, and specific descriptions of how the resource agencies' and other entities' recommendations are accommodated by the plan. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

Subject to the total 1,450 acre-feet daily volume under this article, the flow rate and duration of weekend releases in the Commission-approved plan are

subject to change, but no more frequently than once every ten years. If, after ten years of implementation, the resource agencies elect to re-conduct flow testing and, based on such flow testing, seek to adjust the Commission-approved plan, the licensees shall consult with the resource agencies, American Whitewater, and Sabine Whitewater Club as provided in the *Flow Testing to Optimize Weekend Operations Benefits* (Appendix D to the ARA). Any proposed changes to the weekend operations plan must be filed with the Commission for approval.

8. Reservoir Levels (Draft License Article 408)

Draft License Article 408 is an entirely new license article recommended by Commission Staff which would require the SRAs to “operate the project reservoir within a normal operating range of elevation 168 and 172 feet msl.”⁷⁰ Although the DEIS is not always clear on what Commission Staff intends by the phrase “operate the project,” the SRAs are very concerned that Article 408 could impose significant and far-reaching operational changes at the Project—well beyond the scope of what any party has advocated or recommended during the relicensing process. More importantly, a broad interpretation of the language “operate the project” could undermine the primary purpose of the Project—water supply—inadvertently and inappropriately, elevating recreational and aesthetic values above the primary purpose for which the States of Louisiana and Texas jointly funded and built the Project. If the Commission adopts Article 408 as currently drafted, the SRAs are concerned that the primary purpose of the Project would fundamentally change, critically damage the primary economic value provided by the Project,⁷¹ and inhibit the SRAs’ ability to meet current and future water supply obligations. The SRAs cannot agree to Article 408 as proposed by Staff.

⁷⁰ DEIS at A-10.

⁷¹ The SRAs note that the DEIS made no attempt to calculate the economic impact of restricting all Project operations—including water supply, for example—to occur within the normal operating range of 168 to 172 feet msl. In fact, Staff mistakenly states that “[t]here would be no additional cost to continuing this mode of operation.” *Id.* at 179. Because Toledo Bend has 4,477,000 acre-feet of active storage and constitutes the largest unallocated supply of water within the State of Texas, FLA, Executive Summary at

The SRAs could potentially agree to a license article that establishes a normal operating range for *hydroelectric power production purposes* only (*i.e.*, a power pool). However, for the reasons set forth below, Commission Staff's proposed Article 408 as drafted is completely unacceptable to the SRAs. While the SRAs do not believe that any license article governing reservoir levels is necessary or appropriate, any such article imposed by the Commission should apply only to hydroelectric power production operations, and not to other Project operations such as releases for downstream water supply.

The Project was built for the primary purpose of water supply.⁷² As the DEIS recognizes, hydroelectric power generation and recreation are secondary purposes.⁷³ The SRAs historically operated the reservoir for power generation purposes, with a normal maximum reservoir elevation of 172 feet, and until 2007, a normal minimum reservoir elevation of 162.2 feet. Since the 2007 amendment of the PSA, reservoir levels for power generation purposes were artificially limited to vary during the year from a normal maximum pool level of 172 feet to a lower pool level of 168 feet.⁷⁴ As expressly recognized by the PSA (and required by the SRAs during the negotiations leading to the 2007 amendment), this limited operational range applies only to hydroelectric power production purposes.⁷⁵ The SRAs always have maintained the ability and authority to

1, the SRAs believe that the operational changes possibly contemplated by Article 408 could well result in millions of dollars in lost revenue annually over the term of the new license.

⁷² DEIS at xviii; License Order at 1011.

⁷³ DEIS at xviii; License Order at 1011.

⁷⁴ See FLA, Executive Summary at 2, Exh. B at 9.

⁷⁵ In addition, the Louisiana State Legislature recently amended existing statutes to restrict the use of hydroelectric power to water levels in the reservoir above 168 feet, subject to certain exceptions, to maintain downstream flow and improve lake access surrounding the reservoir. See *id.*, Initial Statement at 5.

maximize Project operations for the benefit of water supply, in fulfillment of the Project's primary purpose, and in accordance with their rights and obligations under the Sabine River Compact,⁷⁶ the PSA, and state water rights.

In some places, the DEIS appears to recognize the Project's primary water supply purpose. For example, the DEIS states that "[i]n keeping with the project's primary purpose as a water supply facility, a provision of the [PSA] recognizes that water will be used for power generation unless it is needed for the purposes of municipal, domestic, and industrial water supply."⁷⁷ Further, the DEIS correctly recognizes that "the current license allows the lowering of the reservoir level as low as elevation 162.2 feet msl *for power production purposes*."⁷⁸

However, there are many other instances in the DEIS where Commission Staff appears to lose sight of the Project's primary purpose as a water supply facility, and that hydroelectric operations and recreation are secondary purposes. For example, the DEIS states:

- "A requirement to continue maintaining reservoir levels between elevations 168 and 172 feet msl beyond the expiration of the current [PSA], as recommended by staff, would maintain existing recreational use of the reservoir and protect shoreline areas."⁷⁹
- "Current reservoir operations have successfully balanced power generation and environmental protection, including recreational use. Continuation of these operations, with a normal operating range of 168 to 172 feet msl, would in turn continue a balanced approach to reservoir operations that would benefit all project resources."⁸⁰

⁷⁶ Sabine River; Consent of Congress to Interstate Compact, Pub. L. No. 82-252, 65 Stat. 736 (1961); Sabine River Compact; Consent of Congress, Pub. L. No. 83-578, 68 Stat. 690 (1954).

⁷⁷ See DEIS at 43.

⁷⁸ See *id.* at 40 (emphasis added).

⁷⁹ See *id.* at xxv-xxvi.

⁸⁰ See *id.* at 84.

- “Current operations maintain reservoir levels between an elevation of 168 and 172 feet msl. Prior studies and determinations (FERC, 2003) suggest this operation range provides the maximum benefit to project recreation—particularly facilities associated with [private recreation].”⁸¹
- “No entities recommended any changes to the current reservoir operations, which have successfully balanced power generation and environmental protection, including recreational use (FERC, 2003). Continuation of these operations, with a normal operating range of elevation 168 to 172 feet msl, would continue to provide a balanced approach to reservoir operation that would benefit all project resources.”⁸²

The Commission should clarify these statements and refine its analysis in the FEIS. There is no evidence in the record, for example, to support Staff’s conclusion that lake levels below 168 feet have an adverse effect on public recreation.⁸³ To the contrary, Staff specifically finds in the DEIS that public recreation facilities at the Project extend to areas that are accessible when lake levels are much lower than 168 feet. The DEIS notes that public access sites on the Texas side of the reservoir “provide 15 ramps that are usable at elevations as low as 160.5 to 165.1 feet msl, and 24 of 29 commercial ramps are useable at elevations as low as 162.87 to 166.05 feet msl.”⁸⁴ Moreover, the boat launch facilities at the SRAs’ public recreation sites in Louisiana “are fully usable at elevations as low as 160 to 164 feet msl, depending on each specific ramp and site. Thirty-eight of commercial boating facilities on the Louisiana side of the reservoir have boat launching ramps that are usable below elevation 165 feet msl.”⁸⁵

⁸¹ See *id.* at 131.

⁸² See *id.* at 179.

⁸³ While a broad interpretation of Article 408 may be beneficial to private recreational structures that do not provide water access below 168 feet msl, *id.* at 131, these private structures do not serve a Project purpose, and the SRAs consistently notify its permittees and leaseholders that Project operations for non-hydroelectric operations can (and do) cause the reservoir to drop below 168 feet msl—in recognition of the primary water supply purpose of the Project.

⁸⁴ *Id.* at 127.

⁸⁵ *Id.*

Similarly, there is no evidence in the record to support that maintaining reservoir levels above 168 feet msl will protect the shoreline, as the DEIS suggests.⁸⁶ As discussed above, there is no evidence of actively-eroding shoreline sites at the Project.⁸⁷ The 10-year program under the SNF Erosion Monitoring Plan, discussed previously herein,⁸⁸ is designed to monitor erosion over the long term. Nevertheless, maintaining reservoir levels at any given level will not stop erosion, even if monitoring shows that it actually is occurring.⁸⁹ Therefore, there is no justification to require the SRAs to maintain reservoir elevation levels for the purposes of shoreline protection.

For these reasons, the SRAs cannot agree to Article 408. In the event the Commission decides, nonetheless, to include a license requirement addressing reservoir operations, Article 408 needs significant redrafting to: (1) preserve the primary Project purpose of water supply; (2) establish a power pool that applies only to hydroelectric power production; and (3) recognize the specific instances in which the SRAs are authorized to operate for hydroelectric power production outside the established power pool (some of which are contractual under the current PSA). Recognizing the Commission's ongoing oversight responsibilities for the Project, any such license requirement could include a reporting requirement to inform the Commission of instances in which it operates for hydroelectric power production outside the established power pool. To accommodate all these objectives, the SRAs believe that Article 408, if it is to be included in the new Project license, should be revised as follows:

⁸⁶ See DEIS at xxv-xxvi.

⁸⁷ See Section II(B)(3) *supra*.

⁸⁸ See *id.*

⁸⁹ See, e.g., SMP at 8.

Article 408. Reservoir Operations for Purposes of Hydroelectric Power Production. The licensees shall operate the project reservoir for hydroelectric power production purposes within a normal operating range of elevation 168 to 172 feet msl, ~~in accordance with the terms of the existing power sales agreement.~~ The licensees are authorized to operate the project reservoir for hydroelectric power production purposes outside this normal operating range:

~~These required reservoir operations may be temporarily modified or suspended:~~
(1) due to temporary circumstances beyond the reasonable control of the licensees, such as equipment failure or malfunction, disruption in operations, weather conditions including drought, storm, or high water events, or other operating emergencies; ~~or~~

(2) as necessary to protect public and project safety or to undertake any repair, maintenance, replacement, or inspection of project works and equipment;

(3) when hydroelectric power production below 168 feet msl is necessary to avoid an insufficient supply of firm or non-interruptible power to the licensees' wholesale customers;

(4) for releases to meet continuous release requirements under Article 404;

(5) for releases to satisfy the licensees' water supply obligations; or

(6) until termination of the existing Power Sales Agreement, in the event the licensees fail to make all credits or reimbursements owed to Cleco Power LLC, Entergy Gulf States, Inc., and Entergy Louisiana, LLC, as required by Sections 3.02A and 3.07 of the Power Sales Agreement.

With the exception of criteria (4) and (5) above, by January 31 of each year during the license term, the licensees shall file an annual report listing any event in which the licensees operated the project reservoir for hydroelectric power production purposes outside the normal operating range of elevation 168 to 172 msl. For each event included in the annual report, the licensees shall identify the circumstances that caused hydroelectric operations outside the normal operating range, the criterion or criteria under this Article 408 authorizing such operation, and the duration of the event.

Nothing in this Article 408 restricts or otherwise affects the licensees' authority to operate project reservoir levels for purposes other than hydroelectric power production.

9. Chinese Tallow (Draft License Article 409)

Draft License Article 409 would require the SRAs to file an annual report outlining the amount and general location of Chinese tallow treatments on SNF lands

under SNF Relicensing Agreement USFS Condition 15.⁹⁰ The SRAs object to Staff's conclusion that the SRAs, rather than USFS personnel, should be responsible for implementing the Chinese tallow treatment measures on the SNF lands,⁹¹ and believe the addition of this article as drafted is unnecessary, inappropriate, and a material modification of the SNF Relicensing Agreement.⁹²

The SNF Agreement was carefully negotiated with the USFS. Funding for Chinese tallow treatments was a critical component of the agreement. The parties determined in negotiations that the actual treatments on lands administered by the USFS should be a USFS responsibility and conducted by USFS personnel, and that a funding obligation by the SRAs was most appropriate. This approach provides flexibility and discretion to the USFS to use these resources in a manner it deems best for the management of lands for which it has administrative responsibilities.

Although Commission Staff recognizes in the DEIS that Chinese tallow measures in the SNF "could be accomplished through funding of a third party such as the Forest Service,"⁹³ the USFS in this instance is not a third party. Rather, it is the USFS, and not the Commission, that has statutory responsibilities for the management of the SNF. For this reason, the SRAs believe it inappropriate for Commission Staff to recommend that Article 409 include authority for the Commission to unilaterally require the SRAs to undertake management measures on SNF lands in instances in which the USFS has decided to place its resources elsewhere. Although the SRAs are willing to work with the

⁹⁰ DEIS at A-10.

⁹¹ *See id.* at 180.

⁹² SNF Relicensing Agreement § 1.4.9.

⁹³ *Id.*

USFS to develop and provide an informational annual report to the Commission on the USFS's efforts to treat Chinese tallow, Article 409 should recognize the USFS's management responsibilities for SNF lands.

Based on the foregoing comments, the SRAs believe that Article 409, if it is to be included in the new license, should be amended as follows:

Article 409. Chinese Tallow Treatment. By January 31 of each year during the license term, the licensees shall file with the Commission annually a report outlining the amount and general location of Chinese tallow treatment on Sabine National Forest lands funded by the licensees under Forest Service 4(e) condition 15, *Treatment of Chinese Tallow*. ~~The Commission reserves the right to require any additional measures necessary to treat Chinese tallow consistent with the intent of Forest Service 4(e) condition 15.~~

10. Bird-Friendly Transmission Lines Plan (Draft License Article 410)

Draft License Article 410 would require the SRAs to design and construct the transmission line associated with the proposed minimum flow generating unit in accordance with the Avian Power Line Interaction Committee guidelines to reduce potential effects of Project operation on birds in the Project area.⁹⁴ The SRAs have no objection to this draft license article. However, given that the Commission's jurisdiction under the FPA extends only to "the primary line or lines transmitting power" at the Project,⁹⁵ Article 410 should clarify it only applies to the primary transmission line at the Project associated with the construction of the proposed minimum flow generating unit.⁹⁶

⁹⁴ DEIS at A-10.

⁹⁵ 16 U.S.C. § 796(11). FERC has defined "primary transmission lines" as "those necessary to ensure the 'viability' of the project in the event of Federal takeover. If a line 'is used solely to transmit power from [Commission-licensed] projects to load centers,' and if without it 'there would be no way to market the full capacity of the projects,' then that line is primary to the project. . . ." *Pac. Gas & Elec. Co.*, 85 FERC ¶ 61,411 at p. 62,559 (1998) (quoting *Niagara Mohawk Power Corp.*, 5 FERC ¶ 61,301 at p. 61,646 (1978)).

⁹⁶ The current primary transmission line extends only from the turbine generators to the switchyard. See FLA, Exh. A at 6.

In addition, because it is not yet certain whether the primary transmission line will be located solely within Louisiana or will cross into Texas, Article 410 should not include an absolute requirement to consult with TPWD.

For these reasons, the SRAs believe that Article 410, if it is to be included in the new license, should be amended as follows:

Article 410. Bird-Friendly Transmission Lines Plan. At least 90 days before the start of any land-disturbing or land-clearing activities associated with construction of any primary transmission line associated with construction of the minimum flow generating unit, the licensees shall file with the Commission for approval, a primary transmission line design plan to protect birds from electrocution and collision hazards.

The plan shall include adequate separation of energized conductors, groundwires, and other metal hardware, adequate insulation, and any other measures necessary to limit potential for collisions or electrocutions. The licensees shall design and construct the primary transmission lines associated with construction of the minimum flow generating unit in strict accordance with the industry standard guidelines set forth in the following protection guidelines: (1) Avian Power Line Interaction Committee (APLIC) *Suggested Practices for Raptor Protection on Power Lines: The State of the Art in 2006*; and (2) APLIC's *Reducing Avian Collisions with Power Line: The State of the Art in 2012*.

The plan shall be prepared after consultation with the U.S. Fish and Wildlife Service, ~~Texas Parks and Wildlife Department, and Louisiana Department of Wildlife and Fisheries, and, as appropriate, Texas Parks and Wildlife Department.~~ The licensees shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensees are notified by the Commission that the plan is approved. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

11. Bald Eagle Survey (Draft License Article 411)

The SRAs have no objections to this draft license article.

12. Revised Recreation Management Plan (Draft License Article 412)

If adopted by the Commission in the new license, Draft License Article 412 would require a significant revision and expansion of the RMP filed by the SRAs on March 6, 2012. Specifically, Article 412 directs the SRAs to revise the RMP to include: a description of 29 identified public recreation facilities within the Project boundary; a discussion of and schedule for improvements at each site; a spillway channel recreation access plan; a schedule for updating the RMP every 12 years; and a description of the six recreation sites within the SNF.⁹⁷

As described in detail below, the SRAs object to most of Staff's recommended modifications to the RMP set forth in Article 412. The RMP is a carefully crafted plan, developed in consultation with federal and state resource agencies and relicensing stakeholders, which purposefully includes operational maintenance and rehabilitation measures for only those Project-sponsored recreation sites both owned and operated by the SRAs that are needed to meet public recreation demand at the Project. In addition, the RMP developed by the SRAs and filed with the Commission is consistent with the relicensing recreational studies and provides for Project-sponsored recreation facilities that far exceed current demand. Finally, the existing RMP includes a monitoring, reporting, and surveying program at appropriate intervals throughout the license term to periodically assess changes in demand and need, and modify the RMP as needed. Accordingly, as discussed below, a significant increase in the scope of the SRAs'

⁹⁷ DEIS at A-11 to A-12.

regulatory obligations to maintain public recreation facilities under the RMP, as envisioned by Article 412, is unwarranted.

a. Inclusion of 29 Recreation Sites

The SRAs do not object to including a general overview description and inventory in the RMP of additional non-Project-sponsored recreation sites along the Reservoir for informational purposes, to provide a “single source for all things related to recreation” at the Project, and an understanding of Project-sponsored recreation sites within the “greater context of overall recreation opportunities available” at the reservoir, as the DEIS recommends.⁹⁸ The SRAs object, however, to the recommendation for all 29 identified recreation facilities to become Project-sponsored recreation facilities for which the SRAs must schedule and undertake improvements and for which the SRAs would become ultimately responsible under the new license for all construction, management, and maintenance.⁹⁹

Many of the 16 recreation sites which Commission Staff seeks to add to the 13 sites covered by the RMP are not sites currently maintained by the SRAs, as the DEIS erroneously states,¹⁰⁰ and are not appropriate for inclusion in the RMP as Project-sponsored recreation facilities. Indeed, the SRAs’ Recreation Use and Needs Assessment Study found that the Project offers a wide variety of public recreational opportunities that are serving the current needs of many types of recreation users.¹⁰¹ In fact, because recreation capacity far exceeds demand in this remote, rural area, inclusion of the 13 sites

⁹⁸ *Id.* at 134.

⁹⁹ *See, e.g., id.*

¹⁰⁰ *Id.* at 17.

¹⁰¹ ILP Updated Study Report, Recreation Use and Needs Assessment at 2-4, Project No. 2305-036 (filed Oct. 31, 2011) [hereinafter, Recreation Report].

addressed in the RMP is more than sufficient at this time to address reasonably foreseeable future need. The RMP already meets—and indeed, exceeds—FERC’s requirements for providing “suitable” public recreational facilities for “adequate public access” to Project lands and waters “consistent with the needs of the area.”¹⁰² In the event that recreation needs and demands in the area change over time, the RMP provides a process for revising the RMP to accommodate such changes during the new license term. Requiring the SRAs—state governmental entities with limited budgets—to take on additional responsibility for 16 more recreation sites now, when the need does not exist, is unreasonable and unwarranted.¹⁰³ In addition to the six SNF recreation sites covered by the SNF Recreation Agreement, which are discussed separately below, many of the 16 sites are not both owned and operated by the SRAs. Each of the 10 non-USFS sites are discussed below.

- Yellow Dog Park is an undeveloped area on the Sabine River just north of the reservoir. It was excluded from the RMP because it is operated by Panola County.¹⁰⁴
- Garrett Park and boat ramp, located just outside of Logansport, is a small recreation site that serves as an access point to the Sabine River north of the reservoir. It was excluded from the RMP because it is owned and operated by Desoto Parish.¹⁰⁵
- Joaquin Public Ramp is a small site that functions as a boat launch for access to the Sabine River. It was excluded from the RMP because the facility, which includes a parking lot and signage, is maintained by the Texas Department of Transportation.¹⁰⁶

¹⁰² 18 C.F.R. § 2.7.

¹⁰³ Moreover, Staff did not even consider the potentially increased cost to the SRAs in assuming ultimate responsibility for the operations, maintenance, and management of these sites, which, given the number of facilities and amenities, could be an insurmountable expense.

¹⁰⁴ Recreation Report at 7-7, App. A.

¹⁰⁵ *Id.* at 7-8, App. A.

¹⁰⁶ *Id.*, App. A.

- Frontier Park was excluded from the RMP because it is a commercially owned and operated facility located at about the mid-point of the reservoir on the Texas shoreline. The site is a Recreational Vehicle (RV) park that also provides camping, cabins, a boat ramp, and boat storage.¹⁰⁷ It is on lands of mixed ownership; the majority of the site is on privately owned lands that are not within the Project boundary.
- North Toledo Bend State Park was excluded from the RMP because it is owned and operated by the Louisiana Department of Culture, Recreation, and Tourism (LDCRT), and provides day use picnicking, hiking, camping, RV and cabin accommodations, boating, fishing, swimming access, a pool, a large group camp, and dining hall.¹⁰⁸ With the exception of a small portion of shoreline lands needed by the SRAs for Project purposes, North Toledo Bend State Park is outside the Project boundary on lands owned by LDCRT.
- South Toledo Bend State Park was excluded from the RMP because it also is owned and operated by LDCRT. While this facility does provide water access, as well as cabins, campsites, picnicking, and playgrounds, it also provides recreational opportunities that have no association to the Project, such as all-terrain vehicle trails and conference facilities.¹⁰⁹ With the exception of a small portion of shoreline lands needed by the SRAs for Project purposes, South Toledo Bend State Park is outside the Project boundary, on lands owned by LDCRT.
- Cow Bayou Wilderness Area is on SRA-LA lands. It was excluded from the RMP because the site, which is actually an undeveloped system of dirt roads and trails primarily for use of off road vehicles,¹¹⁰ does not provide or facilitate any access to the reservoir.
- The Tourist Information Center was excluded from the RMP because it is part of an office building housing SRA-LA's administrative headquarters. It provides information about the entire region—not just the Project. The play equipment and picnic tables adjacent to the building are part of Pendleton Park, a Project-sponsored recreation facility included in the RMP.¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 7-15, App. A.

¹⁰⁹ *Id.*, App. A.

¹¹⁰ *Id.*

¹¹¹ *Id.*

Like county, state, and privately operated parks and recreation facilities at other FERC-licensed hydroelectric projects—and like the numerous other privately owned and operated recreation-related business ventures along the reservoir¹¹²—all of these sites should be considered non-Project uses of Project lands, and should not be brought into the Project boundary.¹¹³ They were excluded as Project-sponsored recreation sites in the RMP because the needs of recreationists in the area can be met by the 13 Project-sponsored recreation sites alone. Moreover, many of the sites include recreation redundant to what the Project already offers, other entities in the Project vicinity have responsibility for recreation, and private facilities provide opportunities for private enterprise.¹¹⁴ Because of the limited demand for recreation in the Project area, the SRAs specifically limited the number of sites in the RMP to avoid competing with private enterprise and to facilitate success of local business in the rural Project area. In addition, in many instances—particularly the large state parks—these facilities offer recreation opportunities that are unrelated to water-based recreation at the Project, such as boating and fishing. Most importantly for the Commission’s consideration is the fact that the RMP as filed fully addresses current and future public access to Projects lands and waters, and recreation need.

Similarly, the tailrace should be excluded from the RMP. It is not a recreation site, and the SRAs object to adding the tailrace access area as a Project-sponsored site.

¹¹² *Id.*, App. G.

¹¹³ *See, e.g., Union Elec. Co.*, 139 FERC ¶ 62,177 at P 59 (2012) (noting that parks operated and maintained by the state, not the licensee, need not be enclosed within the project boundary for recreation purposes).

¹¹⁴ Maintenance and upkeep of those portions of these facilities located on SRA-owned Project lands are controlled by permit terms and conditions as described in the SMP

Although there is a “primitive cut in the bank” which people use to launch small boats,¹¹⁵ the area is only intended to be accessed by SRA personnel to conduct water quality measurements, and for first responders when necessary. Although the DEIS notes two boating “play spots” in the tailrace described as Class III rapids at flows between 6,000 and 9,000 cfs on American Whitewater’s website,¹¹⁶ the area is a flat coastal river. Moreover, and most importantly, the Project is a peaking facility, where powerhouse releases can increase dramatically over a matter of just a few minutes. Flows with one unit generating are 7,000 cfs, and flows with two units generating are 14,000 cfs.¹¹⁷ The SRAs limit access to the tailrace before they begin generating, because water levels and velocities rapidly increase, and the tailrace area becomes quickly inundated when the generating units are placed on line. It is simply not safe for the public to access the tailrace for recreational purposes, and the SRAs should not be required to sponsor and promote an inherently dangerous activity.¹¹⁸

The spillway channel was similarly excluded from the RMP as a Project-sponsored recreation site. There is limited opportunity and demand to use the spillway.¹¹⁹ While the SRAs do not object to continuing to treat the spillway as an informal, dispersed recreation site during normal operations, the SRAs object to formalizing the site as a Project-sponsored recreation site under the RMP. Because the

¹¹⁵ Recreation Report at 7-21.

¹¹⁶ DEIS at 129.

¹¹⁷ FLA, Exh. B at 10.

¹¹⁸ *See, e.g., City of Tacoma, Wash.*, 101 FERC ¶ 61,198 at PP 6, 18 (2002) (approving licensee’s request to discontinue whitewater releases at the project because of safety concerns, evidenced by a drowning incident, the heavy burden placed on local rescue agencies, and the limited demand for whitewater boating). The SRAs have previously detailed the lack of demand for whitewater recreation at the Project. *See* Response to Comments at 9-17.

¹¹⁹ *See id.*

SRAs can agree to continue to allow informal access to the spillway channel, the SRAs are willing to submit a plan, as discussed below, to clarify the circumstances under which the site can be informally accessed.

b. Spillway Channel Access

Although the SRAs object to formalizing the spillway channel as a Project-sponsored recreation site, the SRAs do not object to developing a plan to identify the conditions of the spillway channel access site, clarify the threshold at which the site must be closed, and provide a protocol for notifying anyone present in the spillway channel before releases occur to ensure public safety. The SRAs object, however, to Article 412's recommendation for the plan to "ensure[] access for boaters to moderate spill flows not typically available during normal operations."¹²⁰ Although the DEIS appropriately recognizes that the SRAs do not restrict access to the spillway during times of normal operations,¹²¹ Staff's recommendation for the plan is premised on the erroneous notion that there are "small" or "moderate" spill events when the SRAs can safely allow spillway access to whitewater recreationists.¹²² This is simply not the case.

In the DEIS, Staff purports to quantify the number of days that spillway flows have been in the "moderate" range of 500 cfs and 3,000 cfs.¹²³ The SRAs have not been able to duplicate the estimated days provided and cannot support Staff's estimates. In fact, the SRAs are concerned that Staff's estimated flows are based on *mean daily flow* values, which are completely misleading when evaluating boating opportunities in the

¹²⁰ DEIS at A-11.

¹²¹ *Id.* at 139.

¹²² *Id.* at 138.

¹²³ *Id.* at 138-39.

Project spillway, because of the rapid changes in flow during times of spill that occur on a real time basis in minutes and not over a daily time step. When reservoir levels exceed 172.5 feet msl, the SRAs must open the gates to spill. The SRAs' spillway operating guide, which has been reviewed and accepted by the Commission,¹²⁴ details specific and well-established steps for operation of the spillway gates, which the SRAs operate based purely on reservoir levels. In Step 1, between reservoir levels 172.5 and 172.7, five gates are opened to a setting of one foot. This equates to an estimated discharge of 5,000 cfs in a matter of minutes, which, when added to powerhouse flows of 15,000 cfs, equates to a total discharge of 20,000 cfs. The discharge increases dramatically from there. In Step 2, between reservoir levels 172.7 and 172.9, all 11 gates are opened to a setting of one foot, which equates to an estimated discharge of 11,000 cfs, which, when added to powerhouse flows, equates to an estimated total discharge of 26,000 cfs. Additional steps dictate the number of feet at which all of the gates are opened, which increases incrementally as the reservoir rises. Use of mean daily flows to represent spillway operating conditions gives a dangerously false impression of spillway conditions during the management of spill events at the Project.

Because the spillway channel and the entire floodplain below the dam can be quickly inundated when the gates are opened, the SRAs restrict access to the channel before opening the gates under operating guide Step 1, and sound sirens to notify anyone present that the spillway area must be evacuated immediately. Boating during spill events is strictly forbidden; it is inherently dangerous and contrary to the overriding interest of public safety.

¹²⁴ See Letter order from Robert W. Crisp, P.E., FERC, to M.E. Nelson, Sabine River Authority of Texas, Project No. 2305-000 (issued Aug. 2, 1994).

For those reasons, there is no “flow threshold (in cfs) for ‘high flows’ (i.e., flows that would trigger closure of the site)” and no “moderate spill flows not typically available during normal operations” to ensure safe access to the spillway, as contemplated by Article 412 and the DEIS.¹²⁵ No level of spill flows can make the area safe for boaters or potential rescuers; the 5,000 cfs flows at the first operating guide step are nearly twice the upper limit (3,000 cfs) of the Staff-defined “moderate” range of flows. Only under “normal” operations—that is, when there is continuous flow only and no spill—is the area safe for public access. Despite Staff’s acknowledgment in the DEIS that the threshold for closing access to the spillway site was unclear,¹²⁶ Staff nonetheless appropriately recognized that the SRAs’ “policy to restrict access is sensible . . . [g]iven the potential for extremely high flows in the spillway channel.”¹²⁷ The FEIS should recognize the real-time nature of spillway operations at the Project and the overriding concern for public safety.

Although the SRAs cannot agree, for public safety purposes, to provide spillway access during spill conditions, the SRAs will agree to formalize the conditions under which the spillway channel can be accessed during normal operating conditions. Such plan will also set forth the current protocol for notifying the public before releases occur, and clarify the reservoir levels which trigger closure of the site.

¹²⁵ DEIS at 138-139, A-11.

¹²⁶ *Id.* at 139.

¹²⁷ *Id.*

c. Plan Updates

The SRAs also object to Staff's recommendation in Article 412 to provide a schedule for updating the RMP every 12 years,¹²⁸ without any regard for whether such updates are actually necessary or even appropriate. The RMP as proposed already provides a reasoned and deliberate process for revisions—if appropriate—based on the monitoring, consultation, reporting, and review protocol set forth therein. Specifically, the RMP provides for the SRAs to: collect and compile annual use estimates; submit data, trends, and proposed recreation changes in a Recreation Report to be filed in conjunction with the Commission's Form 80 filings every six years; and develop and file a Recreation Monitoring Report in consultation with the LDCRT, LDWF, TPWD, NPS, and USFWS every 12 years to determine if existing recreation facilities and opportunities are adequate to meet user preference and demand.¹²⁹ The RMP further commits the SRAs to reviewing, updating, and/or revising the RMP in the appropriate circumstances: that is, if they determine the data collected indicates significant changes in recreation use and conditions or substantial differences in use versus capacity of Project-sponsored recreation.¹³⁰ The SRAs do not object to updating the RMP every 12 years, but only if the results of the use estimates, Recreation Reports, and Recreation Monitoring Reports indicate that updates are warranted.

¹²⁸ *Id.* at A-11.

¹²⁹ RMP at 14-16.

¹³⁰ *Id.* at 16.

d. SNF Recreation Facilities

Finally, the SRAs do not object to adding to the RMP “brief descriptions and locations” of the six recreation sites within the SNF, as recommended in the DEIS.¹³¹ However, because of the internal inconsistency within the language of Article 412—which also requires a “comprehensive inventory and description” of those same six SNF recreation sites, it appears that Commission Staff may be recommending that these sites be included with the other Project-sponsored recreation sites.¹³²

Commission Staff presents no rationale for including the six SNF recreation sites—deliberately addressed in their own recreation plan as part of the SNF Settlement Agreement—as Project-sponsored recreation sites in the RMP. In fact, Commission Staff recognizes that the SNF Recreation Plan would appropriately guide SRA-TX in its operation and management of the six recreation sites located within the SNF, and that the operation and maintenance measures provided therein would “ensure that the popular SNF recreation sites are in good working order and that visitors are provided high-quality recreation facilities while recreating at Toledo Bend reservoir throughout the length of the license term.”¹³³

Importantly, the FPA section 4(e) condition requiring the SNF Recreation Plan, SNF Relicensing Agreement USFS Condition 13, includes a sunset provision for the six SNF recreation sites in the event an agreement is reached for a land exchange involving the United States lands associated with the sites. In the event of such agreement, the

¹³¹ DEIS at 184, A-11.

¹³² Because there were 13 recreation sites included in the RMP, 10 sites which Commission Staff recommends be included in the RMP, and six SNF recreation sites, there can be no other interpretation of the 29 recreation sites referenced in Article 412. *See id.* at 123-125.

¹³³ *Id.* at 135.

SRAs are obligated to prepare a plan to address the orderly continuation or retirement of the sites, which may result in an amendment to the RMP to include one or more of the sites. At this time, however, it is inappropriate to include the SNF recreation sites—all of which are almost entirely outside of the Project boundary on federal lands—as Project-sponsored recreation sites under the RMP.

e. Proposed Revision to Article 412

Based on the foregoing analysis, the SRAs believe that in the event the Commission decides to include Draft License Article 412 in the new license, it should be amended as follows:

Article 412. Revised Recreation Management Plan. The licensees shall, within 1 year of license issuance, revise the Recreation Management Plan filed with the Commission on March 6, 2012, and file a revised plan for Commission approval, to include the following: (1) ~~comprehensive inventory and a general overview~~ descriptions of all ~~29~~ identified public recreation facilities within the project boundary including tailrace and spillway areas; (2) ~~a discussion of planned improvements at each site;~~ (3) ~~a schedule for when those improvements would be completed;~~ (4) a spillway channel recreation access plan that: (a) identifies the ~~amenities and~~ conditions of the spillway channel access site and uses; (b) establishes ~~the reservoir levels~~ a flow threshold (in cfs) for “high flows” (i.e., flows that would trigger closure of the site); (c) ~~ensures access for boaters to moderate spill flows not typically available during normal operations;~~ and (d) provides a protocol for notifying recreationists who are present in the spillway channel before releases occur (e.g., sounding a siren) for public safety; ~~(53)~~ a schedule for proposed recreation and visitor survey monitoring reports that would include provisions to file Recreation Management Plan updates every 12 years if the results of the use estimates, recreation reports, and recreation monitoring reports indicate that updates are warranted; and ~~(64)~~ brief descriptions and locations of the six recreation sites within the Sabine National Forest.

The revised plan shall be developed in consultation with the U.S. Forest Service, U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, Louisiana Department of Wildlife and Fisheries, Louisiana Department of Culture, Recreation and Tourism, American Whitewater, and the Sabine Whitewater Club. The plan filed with the Commission shall include documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consultation list, and a specific description of how comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for agencies and other entities to

comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on site-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

13. Revised Shoreline Management Plan (Draft License Article 413)

Draft License Article 413 would require the SRAs to revise their SMP to include:

“(1) measures to address control of Chinese tallow in Public Access and Conservation lands; and (2) include specific measures and guidelines for the protection of bald eagles and migratory birds that are consistent with U.S. Fish and Wildlife Service’s guidelines.”¹³⁴ The SRAs have no objection to including in the SMP measures and guidelines for the protection of bald eagles and migratory birds. However, the SRAs strongly object to the addition of new Chinese tallow measures outside of the parameters of the SNF Agreement and Article 409.

As the DEIS acknowledges, Chinese tallow commonly occurs within the Project boundary and vicinity.¹³⁵ The species “is an aggressive invader of riparian and bottomland habitats, and it thrives in open, disturbed areas, as well as mature forests with a developed canopy.”¹³⁶ The DEIS recognizes non-Project means of potential seed dispersal of the species, including by birds, non-Project related traffic, commercial land uses, timber harvesting, and residential development.¹³⁷ Given the aggressive nature of this species and its prevalence in the Project vicinity, the SRAs cannot reasonably control

¹³⁴ DEIS at A-12.

¹³⁵ *See id.* at 101.

¹³⁶ *See id.*

¹³⁷ *See id.* at 101, 110.

the spread of Chinese tallow at the Project, and there is no evidence that Project operations are perpetuating the spread of this species. It occurs throughout the region, and indeed the entire Southeast United States.¹³⁸ The funding for Chinese tallow under the SNF Agreement was a settlement provision with the USFS, to aid in its program to treat the species on National Forest System lands. An additional FERC requirement to control the species outside of SNF lands substantially deviates from the Offer of Settlement and is unduly burdensome on the SRAs.

In the DEIS, Commission Staff justifies the new requirement to control Chinese tallow on Project lands classified as Public Access and Conservation in the proposed SMP by stating that it “would help protect wildlife habitat.”¹³⁹ The SRAs contest any suggestion that the presence of Chinese tallow is causing an adverse effect on Project resources, or that the control of Chinese tallow would protect or improve Project resources. There is no record evidence to suggest that Chinese tallow within the Project boundary is adversely affecting wildlife habitat. Therefore, Staff’s recommendation to control Chinese tallow outside the SNF—in areas that can only be accessed by boat, in some cases—bears no nexus to the Project. Moreover, the high cost¹⁴⁰ and enormous effort associated with treatment measures would have limited and fleeting benefits, given the aggressive nature of the species, and is not worth what incremental enhancement may be gained.

¹³⁸ USDA, National Invasive Species Information Center, Chinese Tallow, *available at* <http://www.invasivespeciesinfo.gov/plants/chintallow.shtml> (last modified Mar. 29, 2013).

¹³⁹ *See* DEIS at xxv.

¹⁴⁰ The SRAs believe that Staff’s estimated levelized annual cost of \$1,880 to “control” Chinese tallow in these areas is grossly underestimated. *Id.* at 164.

In the event that the Commission adopts Staff's analysis, the SRAs believe that a more targeted program for addressing the invasive species would be commensurate with the Project's contribution to the proliferation of this invasive species and better balance the high costs of control with the minor benefit, if any. Under the program, the SRAs should be required to take measures to limit the spread of Chinese tallow *only* in the event that the SRAs engage in ground-disturbing activities in Public Access and Conservation lands. If the SRAs engage in a ground-disturbing activity, they will simultaneously take preventative measures to help limit the spread of Chinese tallow at that site. This program, in combination with the SRAs' proposal under the SMP to require permit holders to control Chinese tallow on permitted and leased lands,¹⁴¹ as well as the Chinese tallow treatments under the SNF Agreement, is sufficient to address any Project related contribution to the spread of this invasive species.

Based on the foregoing analysis, the SRAs believe that Article 413, if the Commission decides to include it in the new license, should be amended as follows:

Article 413. Revised Shoreline Management Plan. The licensees shall, within 1 year of license issuance, revise the Shoreline Management Plan filed with the Commission on February 3, 2012, and file a revised plan for Commission approval, to include the following: (1) ~~measures to address control~~ long-term programs of suppression of Chinese tallow in Public Access and Conservation lands in the event that the licensees engage in ground-disturbing activities on such lands; and (2) include specific measures and guidelines for the protection of bald eagles and migratory birds that are consistent with U.S. Fish and Wildlife Service's guidelines.

The Revised Shoreline Management Plan shall be developed after consultation with the U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, Louisiana Department of Wildlife and Fisheries, and Louisiana Department of Culture, Recreation and Tourism. The licensee shall include with the plan documentation of consultation, copies of recommendations on the completed plan after it has been prepared and provided to the entities above, and

¹⁴¹ See *id.* at 110.

specific descriptions of how the entities' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the entities to comment and to make recommendations prior to filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval the licensees shall implement the plan, including any changes required by the Commission.

14. Programmatic Agreement and Historic Properties Management (Draft License Article 414)

The SRAs have no objections to this draft license article.

15. Design of Proposed Minimum Flow Unit Powerhouse (Draft License Article 415)

The SRAs have no objections to this draft license article.

16. Use and Occupancy (Draft License Article 416)

The SRAs have no objections to this standard license article.

17. American Eel Fishway Prescription

NMFS and the USFWS submitted identical section 18 fishway prescriptions for the passage of American eel at the Project consistent with the ARA fishway prescription. The prescription provides for the upstream and downstream passage of American eel at Toledo Bend Dam, as well as the opportunity to cease such fish passage operations if monitoring results indicate American eels are not present in sufficient numbers to justify the considerable effort and expense of an ongoing upstream and downstream passage program.¹⁴² Commission Staff recommends inclusion of the fishway prescription as submitted by the agencies,¹⁴³ with two exceptions. While the SRAs acknowledge that

¹⁴² ARA, App. B.

¹⁴³ DEIS, App. B.

these changes to the prescription may have been inadvertent, the fishway prescription should be restored to its original text as filed by the resource agencies.

One of the differences with Commission Staff's recommended fishway prescription concerns the description of the annual reports. As proposed by the resource agencies, the description of the annual reports reads: "Beginning with the 5th annual report, and every fifth year thereafter, the annual report will address whether to reduce or increase the number of ramp traps deployed, based on eel capture rates."¹⁴⁴ Commission Staff's recommended prescription in the DEIS deletes the phrase "deployed, based on eel capture rates."¹⁴⁵ Because this was part of the resource agencies' section 18 prescription and Commission Staff provides no explanation for its deletion,¹⁴⁶ the Commission should restore the language to its original form.

The other difference in Commission Staff's recommended prescription relates to the instructions for the upstream passage plan applicable to "All Years." While Commission Staff separated the first bulleted paragraph into two bulleted paragraphs, the settling parties in the ARA prescription intended for those first two paragraphs to be one continuous paragraph.¹⁴⁷ The Commission should therefore adopt the ARA prescription as set forth in the ARA.

Aside from the specific language of the fishway prescription, the SRAs object to Commission Staff's characterization in the DEIS that the Project adversely affects the American eel. For example, the DEIS concludes that "[t]he project dam currently blocks

¹⁴⁴ ARA at B-4.

¹⁴⁵ DEIS at B-4.

¹⁴⁶ Because Staff did not close this sentence with any punctuation, the SRAs believe the deletion of this clause may have been inadvertent.

¹⁴⁷ ARA at B-1 to B-2.

the upstream and downstream movement of American eel, preventing it from using upstream freshwater habitat. Providing the proposed upstream and downstream passage for the American eel would mitigate the project effect of obstructing migration and provide access to upstream habitat.”¹⁴⁸ The SRAs believe the evidence in the record and supporting scientific literature demonstrates that statements like these in the DEIS overstate the Project’s effects on American eel. In particular, there is insufficient evidence in the record to support this assertion. To the contrary, few eels reach the Project: after 16 months of ramp trap sampling during the study period, which was designed to capture eels at the base of the dam, only 17 eels were collected.¹⁴⁹ Moreover, the majority of these eels were caught in the spillway reach,¹⁵⁰ which Staff acknowledged was a unique habitat.¹⁵¹

Contrary to the conclusory statements in the DEIS, studies conducted in the relicensing do not demonstrate that eels are present in large numbers downstream of the Project, or that they are seeking to move to upstream habitat. If eels are present in the Project spillway, the SRAs believe it is because the spillway reach provides a unique habitat for the eel, but it does not demonstrate that eels are seeking access to upstream habitat. Again, very few eels were captured in the ramp traps, extensive habitat is available downstream of the Project, and it is well known that eels can and do spend their entire life cycle in brackish or marine waters without ever entering fresh water.¹⁵² That is

¹⁴⁸ See DEIS at xxv.

¹⁴⁹ *Id.* at 67.

¹⁵⁰ Lower Sabine River Fishery Study Report § 3.4, Project No. 2305-000 (filed Apr. 13, 2011).

¹⁵¹ DEIS at 67.

¹⁵² See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the American Eel as Threatened or Endangered, 72 Fed. Reg. 4967, 4974 (Feb. 2, 2007).

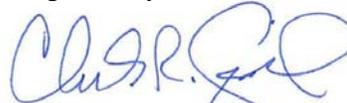
why the settling parties negotiated the prescription as essentially an adaptive management plan.

III. CONCLUSION

The DEIS appropriately recognizes the extensive commitments the SRAs have agreed to implement during the new license term under the ARA, SNF Relicensing Agreement, and as part of the final license application and resource management plans. The evidentiary record in this proceeding provides substantial evidence for the Commission to issue a new 50-year license to the SRAs consistent with the Settlement Agreements.

While the DEIS supports many of the SRAs' licensing proposals, there are a number of recommendations in the Staff alternative that diverge from the Settlement Agreements, and several Staff statements requiring clarification in the FEIS. The SRAs therefore believe that the Commission should: (1) revise Staff's recommendations that differ from the Settlement Agreements in the FEIS; (2) adopt the SRAs' proposed changes to Staff's draft license articles; and (3) issue a licensing order that is wholly consistent with the Settlement Agreements.

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DATED: August 5, 2013

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 5th day of August, 2013.

/s/ Mealear Tauch _____
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