

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426
October 15, 2009

OFFICE OF ENERGY PROJECTS

Project No. 2305-020-TX/LA
Toledo Bend Hydroelectric Project
Sabine River Authority of Texas and
Sabine River Authority, State of
Louisiana

20091015-3046 FERC PDF (Unofficial) 10/15/2009

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

Re: Findings and Recommendations of the Study Dispute Resolution Panel for
the Toledo Bend Hydroelectric Project (P-2305)

Dear Mrs. Bose:

On August 26, 2009 the U.S. Department of Agriculture- Forest Service (Forest Service) filed with the Federal Energy Regulatory Commission (Commission) a Notice of Study Dispute (Dispute) concerning the Commission staff's August 6, 2009, Study Plan Determination (SPD) on the Sabine River Authorities' (SRA) Revised Study Plan (RSP). In its Dispute, the Forest Service identified six studies which they indicated were not adequately accommodated by SRA's RSP and Commission staff's SPD. These studies included: (1) Encroachment and Trespass; (2) Non-Native Invasive Plant Species (Noxious Weeds); (3) Project Boundary; (4) Terrestrial Special Status Species Assessment; (5) Soil Erosion; and (6) Cultural Resources. In response to the Forest Service's Dispute, the Commission convened a three-person Dispute Resolution Panel on September 15, 2009, as directed by 18 C.F.R. § 5.14(d). On September 24, 2009, the Commission issued a notice informing the parties that a panel had been convened and that a technical conference was to be held in Houston, TX on October 6, 2009, pursuant to 18 C.F.R. § 5.14(j).

Subsequently, on September 18, 2009, the Forest Service filed a letter clarifying their concerns and providing specific conditions to the Commission and Authorities for resolving the disputed studies. The letter also agreed to drop the Project Boundary dispute and the Noxious Weeds dispute, if certain contingencies were met. In a letter filed with the Commission on September 21, 2009, as directed by 18 C.F.R. § 5.14(i), SRA responded to the Forest Service's Disputes. In that letter, SRA responded to the Forest Service's Disputes, explained that they continued to meet with the Forest Service in an attempt to address the Forest Service's concerns, and stated that they believed many

of the Forest Service's proposed conditions already were fully accommodated by the Commission-approved study plan. SRA further stated that they believed the Noxious Weeds study and the Encroachment and Trespass issue were no longer in dispute. In a letter issued October 2, 2009, the Commission responded to the Forest Service and SRA, concluding that the Encroachment and Trespass and Noxious Weeds disputes had been resolved, and stating that four studies remain unresolved and would continue to be addressed by the Panel.¹

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On October 6, 2009, the Panel² held a technical conference in Houston, TX, pursuant to 18 C.F.R. § 5.14(j). The conference was recorded by a court reporter and included representatives from the Forest Service, SRA, and the Commission. The Panel notes that in many cases, the Toledo Bend study disputes did not arise from whether studies should or should not be conducted, nor were they disputes on study scope or objective. In many cases, the dispute arose because the studies were not as detailed as the Forest Service would prefer (and the Forest Service wanted to ensure that its specific concerns were included in the proposed studies), or in some cases a misunderstanding of the study method and how it addressed the common study objectives. During the Dispute Resolution Process, the Forest Service, the Commission, and SRA continued to actively negotiate to resolve these issues outside of the formal dispute process. As a result, on October 9, 2009, SRA filed revised Terrestrial Special Status Species and Cultural Resource plans with the Commission. By letter dated October 14, 2009, the Forest Service agreed to withdraw its disputes regarding the Terrestrial Special Status Species Assessment and Cultural Resources study, contingent on the Commission approving the revised studies filed by SRA. Moreover, the Forest Service agreed to withdraw the disputes concerning the Soil Erosion and Project Boundary studies because it will have an opportunity to provide input on the content of the erosion study methods and will be consulted during preparation of the Exhibit G (project boundary) drawings. On October 14, 2009, the Commission issued a letter amending the approved study plan to incorporate the modifications proposed by SRA and agreed to by the Forest Service. With the Commission's letter, the Dispute Resolution Panel was dissolved.

Although the Panel has been dissolved, we note that the Dispute Resolution Process was responsible for moving the parties toward resolution of the issues. As such, we believe it is important to file our finding for the public record; therefore, after careful review of the record of information for the Toledo Bend Project, and in consideration of the procedures set forth under 18 C.F.R. § 5.14(k), the Panel presents, in Attachment A, comments and recommendations with regard to the disputed matters.

¹ The Commission issued another letter, dated October 2, 2009, modifying the approved study plan to address the proposed amendments.

² The Panel members are: Emily Carter, Commission (Panel Chair); Raymond Johns, U.S. Department of Agriculture, and Robert Gray, RH Gray and Associates.

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Questions regarding the Panel's recommendations, which were unanimous, may be directed to the Panel Chair, Emily Carter, at 202-502-6512 or Emily.Carter@ferc.gov.

Sincerely,

Emily Carter, Panel Chair
West Branch 1
Division of Hydropower Licensing

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Raymond Johns, Panelist
U.S. Department of Agriculture

Robert Gray, Panelist
RH Gray and Associates

Cc: Enclosure
Attachment A

Mailing List
Public Record

Attachment A

Panel Recommendations for the Toledo Bend Project (P-2305) Dispute Resolution

Project Boundary

20091015-SRA provided more detailed topographic information in an effort to identify the project boundary more accurately. After further discussion, SRA clarified that studies in the Commission-approved study plan would not depend solely on the project boundary, but instead study areas would be determined by project effects. With this clarification, the Forest Service agreed to withdraw its dispute and request for a project boundary-specific study. The Forest Service also clarified that it had not intended this to be a full-fledged study, but was concerned that approved studies would rely upon an inaccurate boundary “line,” thereby excluding project-affected resources. SRA further clarified that the Forest Service would be consulted in the development of the preliminary Exhibit G drawings, and the associated Geographic Information Systems data would be available upon request (and through appropriate regulatory channels). The Forest Service stated that this would meet its information needs and alleviate its concerns.

The panel appreciates the clarifications made by the Forest Service and SRA and agrees that with consultation and development of Commission-approved Exhibit G drawings, the appropriate information will be obtained. The panel recommends this study be dropped.

Terrestrial Special Status Species Assessment

The Forest Service indicated that the initial study was too generic for its information needs, but some of staff’s concerns were alleviated after reviewing SRA’S September 21, 2009, letter. The Forest Service still expressed concern, however, about committing to studies that do not have fully developed methods and also had several editorial comments on the study plan. Specifically, the Forest Service requested that that word “critical” be removed when discussing habitat because it had a very specific Endangered Species Act connotation. The Forest Service also indicated that it would like the study plan to acknowledge that the project could be affecting special status species and would like the study area to be defined as “areas with project effects.” The Forest Service again requested it be consulted and involved throughout the process.

In response to Forest Service concerns, SRA modified the study with mutually agreed upon language, as filed with the Commission on October 9, 2009. SRA clarified the goals and objectives of the study to allow field surveys to be conducted where project

effects are established, instead of strictly within the project boundary. SRA also added a schedule for consultation and clarified that they would consult with the Forest Service and other appropriate agencies regarding any Special Status Species-specific habitat surveys that may be needed.

The panel reviewed the information and agrees that the changes, developed mutually between the parties, clarify the information needs of this study. We recommend that this study be modified with the proposed amendments.

Erosion

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The Forest Service acknowledged that its disputes related to the Erosion Study involve the study's as yet undeveloped methods. As stated in the Commission's October 2, 2009, letter, the criteria used to characterize current erosion have not yet been determined. Furthermore, SRA must develop a detailed method that outlines the techniques to be employed in identifying and prioritizing areas of erosion around Toledo Bend reservoir, and file this study with the Commission for approval. Also, the study method must be prepared after consultation with the appropriate agencies, including the Forest Service.

The panel finds that the Forest Service's dispute with regard to the erosion study is premature because it deals with study methods that have yet to be developed. The panel finds, therefore, that no issue to be resolved exists at this time and recommends the dispute be dropped.

Cultural Resources

The Forest Service clarified that, in general, the components of the cultural resources study were acceptable, but stated the dispute was related more to terminology and a concern that the process, as currently set forth, would exclude unidentified sites in areas with high probability of occurrence.

Regarding terminology, a misunderstanding existed regarding the definition of Phase I and Phase II field investigations. SRA did not plan to conduct shovel tests until Phase II, while the Forest Service's standard practices include shovel testing in Phase I of any archaeological survey. The Forest Service noted that waiting to do shovel tests until Phase II could limit the amount of information available to the Cultural Resources Working Group when determining sites to be surveyed during the next phase. SRA acknowledged that this was not their intent and agreed to work with the Forest Service to develop language to address this issue.

In response to the concern that unidentified sites might be excluded from study, SRA clarified that the literature review and desktop analysis completed at the beginning of the study would identify all existing sites, as well as areas that have a high probability

for sites to occur. This identification and prioritization of sites to ensure a more efficient field survey will be done in consultation with the Cultural Resources Working Group, which includes Forest Service representatives. Finally, SRA clarified that while sites assigned a lower priority may not be investigated during the relicensing study season, the Historic Properties Management (HPMP) plan will include an interactive approach to ensure that all remaining sites are evaluated during the term of the HPMP.

Following the technical conference, representatives from SRA, the Forest Service, and the Commission met to discuss the Cultural Resources Study and develop mutually agreed upon language to incorporate into the study that would address each parties' concerns. SRA filed this language with the Commission on October 9, 2009. In the proposed amendments, SRA agreed to modify the study to allow for the investigation of areas considered to have a high probability of containing archaeological material during Phase I field investigations, as a means for the Cultural Resources Working Group to determine which sites require more intensive field surveys. SRA also agreed to add language stating that, during Phase I investigations, appropriate forms will be completed for each site and that any discovered artifacts will be curated with the Forest Service in the Lufkin office.

The panel reviewed the information and agrees that the changes, developed mutually between the parties, clarify the information needs of this study. We recommend that this study be modified with the proposed amendments.

Document Content(s)

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