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U. S. Nuclear Regulatory Commission
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Edwin I. Hatch Nuclear Power Plant
License Renewal and Maintenance Dredging Permit Modification
Response to National Marine Fisheries Service letter dated May 24, 2002

Ladies and Gentlemen:

On May 24, 2002, the National Marine Fisheries Service ("NMFS") sent a letter to the Office of Nuclear Reactor Regulation ("NRC") and the United States Corps of Engineers ("COE") concerning the renewal of Southern Nuclear Operating Company Inc.'s ("Southern Nuclear") operating licenses for Units 1 and 2 at the Edwin I. Hatch Nuclear Power Plant ("HNP"). NMFS's letter implies that NRC's license renewal was done without satisfying NRC's interagency consultation obligations pursuant to section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. NMFS states specifically that: (i) NRC renewed the HNP operating licenses without concluding its consultation obligations pursuant to section 7 of the ESA; (ii) NRC failed to consider the effects of the expanded dredging at the HNP intake in the context of the renewed licenses; (iii) Southern Nuclear's request for a permit modification to double the dredge volume in front of the intake indicates a potential expansion; and (iv) new surveys describing the current status of the endangered shortnose sturgeon in the Altamaha River are required prior to determining potential impacts upon the population. However, as explained below, it is our opinion that the NRC has fully satisfied its consultation obligations under the ESA and has accordingly properly renewed Southern Nuclear's operating licenses for HNP. Further, NMFS has raised these issues in the context of a request by Southern Nuclear for COE's approval of a revision to its dredging operations, which is both factually and legally distinct from any question concerning the renewal of the HNP operating licenses. NMFS' effort to link the two proceedings is inappropriate and not warranted under the ESA or the Atomic Energy Act. Accordingly, we offer the following analysis for NRC's consideration in connection with its response to NMFS.

- I. NRC renewed the operating licenses after satisfying the consultation obligations under section 7 of the ESA.

NMFS wrongly implies that NRC renewed the HNP operating licenses without meeting its section 7 consultation obligations and therefore violated section 7(d)'s prohibition against a

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federal agency taking action on a project that may preclude the development of reasonable and prudent alternatives. Section 7(d) of the ESA provides that a federal agency or a license applicant shall not make any “irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” until the section 7(a)(2) consultation requirements have been satisfied. 16 U.S.C. § 1536 (d); 50 C.F.R. § 402.9. NRC, however, not only satisfied, but actually exceeded its section 7(a)(2) consultation obligations, and therefore was not bound by section 7(d)’s prohibition.

Section 7(a)(2) of the ESA generally requires a federal agency to consult with the applicable Service--in this case NMFS--to insure that its agency action is “not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01. One avenue for determining whether an action is likely to adversely affect listed species or critical habitat is through an optional informal consultation with NMFS. 50 C.F.R. § 402.13. A federal agency may also submit a biological assessment to help determine whether its agency action is likely to adversely affect listed species or its critical habitat. 50 C.F.R. § 402.12(b). Although a biological assessment is not required unless the agency action constitutes a “major construction activity,” NMFS must nonetheless respond to a biological assessment in writing within 30 days as to whether or not it concurs with its findings. 50 C.F.R. § 402.12(b)(j). If a federal agency determines through either the informal consultation or the biological assessment that the proposed action is not likely to adversely affect listed species or its critical habitat, and NMFS concurs with that conclusion in writing, the federal agency is under no further consultation obligations. 50 C.F.R. § 402.13(a); 50 C.F.R. § 402.14(b). Only if the federal agency determines that its action is likely to adversely affect listed species or critical habitat, is formal consultation required. 50 C.F.R. § 402.14(a).

On February 29, 2000, Southern Nuclear (SNC) submitted its application for its renewed operating licenses to NRC after having already provided extensive information to NMFS that the renewed licenses would not likely adversely affect listed species, in this instance, the shortnose sturgeon. In accordance with section 7 of the ESA, NRC submitted a voluntary biological assessment (the action was not a major construction activity, so the biological assessment was voluntary) to, and initiated informal consultation with, NMFS on August 31, 2000. NRC requested NMFS’s concurrence with its conclusion in the biological assessment that “the proposed action . . . may affect, but is not likely to adversely affect the shortnose sturgeon.” See Letter from Cynthia Carpenter, Office of Nuclear Reactor Regulation to Charles Oravetz, NMFS (August 31, 2000). NMFS, however, failed to respond within the 30-day time period as provided for in the regulations. NMFS’ next correspondence concerning potential impact to the shortnose sturgeon was nearly five months later in a letter dated January 29, 2001 responding to the draft NUREG-1437, Supplement 4 (Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding HNP). NMFS’ January 29, 2001 letter nonetheless stated: “[NMFS] concur[s] with your staff’s determination that the project’s effects on diadromous fishery resources are not significant at this time.” NMFS’ letter further requested that NRC consider how ongoing and future restoration efforts of fish populations during the license renewal term may impact the low levels of impingement and entrainment of diadromous species life and consider the impact HNP’s cooling water system could have on the entrainment of sub-adult fish if the restoration efforts elevate the entrainment of eggs and larvae of diadromous species. This concern for future population changes is not supported by any study or data that would indicate that the information provided on the current operation of the plant would not be applicable if the population were to increase. NMFS’ suggestions to NRC, however, did not detract from NMFS’

written concurrence that the action would not likely adversely affect listed species under the ESA, particularly considering the possibility of future increases of species populations.

Despite NMFS' concurrence, which effectively concluded even a broad reading of NRC's obligations under the ESA, NRC continued participating in the optional informal consultation process with NMFS to address any further NMFS concerns before issuing the renewed licenses. NMFS, however, unnecessarily prolonged the process, as evident by NRC's letter to NMFS on February 20, 2001, requesting an estimate for the completion of the informal consultation, and stating that NRC planned to complete the final environmental impact statement in April. See letter from Cynthia Carpenter, Office of Nuclear Regulatory Regulation to Charles Oravetz, NMFS (Feb. 20, 2001). NMFS once again failed to respond to NRC's request. In the meantime, on April 26, 2001, Southern Nuclear updated its biological status information further supporting the conclusions previously drawn by NRC in the biological assessment, offered to participate in the existing Shortnose Sturgeon Recovery Team and included a description of the shortnose sturgeon in its plant training for the intake structure screen operation. NRC ultimately published NUREG-1437, Supplement 4 in May of 2001.

Because of NMFS' failure to respond in a timely manner, and because NMFS had previously concurred in writing with NRC's assessment, NRC renewed the HNP operating licenses in January 2002. NMFS' suggestion that NRC somehow violated section 7 of the ESA by renewing the HNP operating licenses is clearly without merit where both NRC and Southern Nuclear have repeatedly attempted to work with NMFS and have repeatedly determined that the license renewal would not likely adversely affect listed species. Accordingly, NRC should consider the consultation process closed for the purposes of issuing the renewed licenses.

II. Any expanded dredging at the HNP intake structure is not interrelated to the renewed licenses and does not have to be considered by NRC.

NMFS incorrectly presumes that the expanded dredging permit request from COE is interrelated or interdependent upon the renewed operating licenses and therefore that NRC should have considered Southern Nuclear's request for an expanded dredging permit in conjunction with issuing Southern Nuclear's renewed licenses. However, Southern Nuclear's modified dredging permit request and renewed operating licenses are not interdependent or interrelated. Clearly, any permitted modification to the dredge activities will begin during the original 40 year license term and is independent of the additional 20 year renewal term, which will not take effect at Unit 1 until 2014 and at Unit 2 until 2018.

Nor does Southern Nuclear's expanded dredging permit impact NRC's renewal of Southern Nuclear's pre-existing operating licenses. As explained in Southern Nuclear's permit application to COE and subsequent correspondence to COE, Southern Nuclear requested a modification to an existing permit from COE to enlarge its dredge permit footprint to conduct maintenance dredging in the Altamaha River near HNP. See letter from W.C. Carr, Southern Nuclear, to Dr. Joseph H. Patti, COE (Dec. 20, 2001). The enlargement of the dredging permit footprint provides efficiency increases and economies that actually result in long-term decreases in dredge activities by making the profile more amenable to natural flushing during high flow events. Moreover, dredging activities in the permit are strictly limited to periods when no anadromous fish showing activities are occurring, and in COE's opinion, will not likely adversely impact the shortnose sturgeon. See letter from Colonel Roger Gerber, District Engineer, COE, to Georgia Cranmore, NMFS, Southeast Regional Office (March 2002). Thus, the change to the dredge permit has no potential to change the conclusions drawn by NRC.

Accordingly, when Southern Nuclear submitted an application to COE for the expanded dredging in August 2001, COE acted within the scope of section 7(a)(2)'s consultation obligations applicable to "[e]ach" federal agency. 16 U.S.C. § 1536(a)(2). COE sent a letter to NMFS requesting an informal consultation and seeking concurrence that the proposed dredging would not likely adversely affect the shortnose sturgeon in March 2002. It is within the context of this consultation between COE and NMFS that NMFS should be addressing any current concerns. It is improper and unnecessary for NMFS to request NRC take up consultation once again and determine the impact of the expanded dredging upon license renewal.

III. Southern Nuclear's request for a permit change to double the dredging volume in front of the intake does not indicate a potential expansion

NMFS' concerns that NRC's statement during the consultation process that the operation of the intake would proceed *status quo* is somehow invalid because Southern Nuclear's expanded dredging permit from COE would double the dredge volume in front of the intake is likewise without merit. The primary purpose of dredging is to ensure adequate water depth for the river water intake pumps and to minimize the amount of silt entrained by pump operation. As stated in the response to Issue II, the nature of the changes to the dredge permit is to modify the profile of the dredge area and allow natural flushing during high flow events. While the change in profile would improve the efficiency and economy of dredging activities and thus reduce the environmental impact that current dredging has on the river, it has no relationship to the amount of water withdrawn by HNP. In fact, no expansion beyond the currently permitted withdrawal has occurred or is planned for the future. Accordingly, NRC's statement that the operation of the intake would proceed *status quo* is still valid.

IV. NRC has met its obligations to provide the best available scientific and commercial data.

NMFS further takes issue with the data referenced by NRC in NUREG -1437, Supp. 4, and argues that such data is outdated because it was gathered twenty-five years ago. Specifically, NMFS requests that NRC undertake additional surveys describing the current status of the shortnose sturgeon in the Altamaha River to determine the potential impacts of the renewed licenses on the fish population.

Although NMFS may generally request additional studies during the biological assessment stage or during formal consultation, the applicable regulations make it clear that such requests are "not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the [ESA]." 50 C.F.R. § 402.12(d)(2); 50 C.F.R. § 402.14(f). Section 7(a)(2) consultations only require a federal agency to provide NMFS the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2) (emphasis added).

NMFS discredits NRC's reliance on impingement and entrainment studies conducted in support of HNP's original licenses. These studies, however, were directed at the effects of the HNP intake structure operation, after determining the river population through sampling, on the entrainment of larvae, fish and other organisms and the impingement of juvenile or adult organisms and clearly demonstrate that both entrainment and impingement impacts are extremely small. Moreover, these studies' conclusions that no sturgeons were impinged by HNP are not likely to change as a result of any changes in the river population--particularly when there has been no change in plant operations.

In reaching its conclusion in the biological assessment, NRC's August 31, 2000 letter stated that NRC relied on information provided by Southern Nuclear, on the geographical information system database information provided by Georgia Natural Heritage Program, on research performed by NRC staff and on current listings of species provided by the St. Petersburg, Florida office of NMFS. NRC also provided NMFS all available commercial and scientific information on the Altamaha River shortnose sturgeon, as well as selected plant information from 1975 until 1999. The plant intake structure design was evaluated and determined to be a low impact design and accordingly, was deemed by NRC and EPA to be the best available technology. The combination of this information provided the basis for NRC's conclusions in NUREG 1437, Supp. 4 and assisted NRC in determining that the continued operation of HNP is not likely to adversely affect the shortnose sturgeon. To that extent, NRC has fully met its obligations under section 7 of the ESA to provide NMFS with the best scientific and commercial data available. See 51 Fed. Reg. 19926, 19947 (1986) (recognizing that additional studies or surveys are not necessary to complete an assessment using best scientific and commercial data available).

Southern Nuclear is confident that NRC's obligations pursuant to section 7 of the ESA have been fully satisfied and that NRC properly issued Southern Nuclear its renewed operating licenses. As it has been throughout the process, SNC is prepared to discuss NMFS' concerns regarding the shortnose sturgeon.

If you have any questions, please feel free to call Charles Pierce at 205-992-7872.

Sincerely,



H. L. Sumner, Jr.

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