

125 FERC ¶ 61,304
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Symbiotics, LLC

Project No. 11945-003

ORDER DENYING REHEARING

(Issued December 18, 2008)

1. The National Marine Fisheries Service (NMFS) has filed a request for rehearing of Commission staff's October 17, 2008 order issuing an original license to Symbiotics, LLC to construct, operate, and maintain the 8.3-megawatt Dorena Lake Project No. 11945, located at the U.S. Army Corps of Engineers' Dorena Lake Dam, on the Row River, in Lane County, Oregon.¹ NMFS' sole objection is to the term of the license. As discussed below, we deny rehearing.

Background

2. On June 30, 2004, Symbiotics filed an application for an original license to construct, operate, and maintain the Dorena Lake Project.

3. By letter dated July 7, 2004, NMFS commented on a draft license application that Symbiotics had sent it for its review.² NMFS did not discuss the license term of the proposed project. The same was true in NMFS' August 27, 2004 request for additional studies.

4. On May 20, 2005, NMFS filed a notice of intervention in the licensing proceeding. Again, it made no mention of the license term.

¹ *Symbiotics, LLC*, 125 FERC ¶ 62,065 (2008).

² See letter from Keith Kirkendall (NMFS) to Brent L. Smith (Symbiotics) (filed July 13, 2004).

5. On June 3, 2005, NMFS filed comments responding to Commission staff's draft environmental scoping document. NMFS stated that "NMFS agrees with FERC's proposed temporal scope of 30 to 50 years into the future as an appropriate evaluation interval, consistent with the duration of most FERC licenses,"³ but did not suggest a particular license term.
6. In response to a Commission notice requesting comments and proposed license terms and conditions regarding Symbiotics' license application, NMFS filed on March 27, 2006 (and supplemented April 21 and May 17, 2006) an extensive set of comments, recommendations, and preliminary terms and conditions, and asked the Commission to consult with it with respect to Essential Fish Habitat and Endangered Species Act (ESA) issues regarding the Dorena Lake Project. NMFS asked that the Commission reserve the authority to require any future fishway prescribed by NMFS under Federal Power Act (FPA) section 18,⁴ and to reserve authority to take any future action that might be required under the ESA. The comments and recommendations did not mention the license term.
7. On September 1, 2006, Commission staff issued for public comment a draft environmental assessment. The draft stated that the temporal scope of the proposed action was from 30 to 50 years.⁵
8. On September 29, 2006, Commission staff requested that NMFS concur with staff's conclusion that the proposed action was not likely to adversely affect the Upper Willamette River Chinook salmon – a species listed as threatened under the ESA – and would have no effect on its designated critical habitat.⁶
9. NMFS filed comments on the draft environmental assessment on October 3, 2006. The comments repeated NMFS' previous statement that it was "reasonable" for Commission staff to look at project impacts for a period of 30 to 50 years,⁷ but otherwise made no reference to license term.

³ NMFS scoping comments at 3.

⁴ 16 U.S.C. § 811 (2006).

⁵ Draft environmental assessment at 19.

⁶ See letter from Jennifer Hill (Commission staff) to Keith Kirkendall.

⁷ NMFS comments at 10.

10. On November 17, 2006, NMFS filed a letter stating that it could not concur with the Commission's conclusions that the Dorena Lake Project was not likely to adversely affect the Upper Willamette River Chinook salmon or its designated critical habitat, and asked Commission staff to prepare a biological assessment, as a prelude to formal consultation under section 7 of the ESA.⁸ NMFS did not suggest that the consultation was to be based on any particular license term.

11. On January 19, 2007, the Commission issued notice of the availability of Commission staff's final environmental assessment. On February 6, 2007, Commission staff sent NMFS the final environmental assessment as the requested biological assessment. Commission staff concluded that the proposed action may affect, but would not likely adversely affect, the Upper Willamette River Chinook salmon and would have no effect on the salmon's designated critical habitat. Commission staff therefore suggested that formal consultation was not necessary.⁹

12. On March 9, 2007, NMFS replied that it could not agree with Commission staff's conclusion, and that it would treat the February 6, 2007 letter as a request to enter into formal consultation.¹⁰ Once again, NMFS did not suggest that consultation would be based on a particular license term. On August 8, 2007, NMFS requested additional time, until October 1, 2007, to complete consultation.¹¹

13. On August 21, 2008, NMFS filed with the Commission its final biological opinion. NMFS concluded that the project was not likely to jeopardize the continued existence of the Upper Willamette River Chinook salmon or to cause adverse modification or destruction of the species' designated critical habitat. NMFS included in the biological opinion an incidental take statement identifying the amount and effect of take of the salmon expected from construction, operation, and maintenance of the project, along with what it described as "nondiscretionary" reasonable and prudent measures necessary to minimize the likelihood of incidental take. In the biological opinion, NMFS for the first time referenced a license term: it stated that the Commission would authorize the licensee to operate the project "for a license term that NMFS estimates to be of 40 years duration."¹²

⁸ 16 U.S.C. § 1536 (2006).

⁹ *See* letter from Jennifer Hill to Keith Kirkendall.

¹⁰ *See* letter from Keith Kirkendall to Magalie R. Salas (Commission Secretary).

¹¹ Commission staff granted the extension by letter dated September 7, 2007.

¹² Biological Opinion at 58. NMFS provided no basis for this estimate.

14. With respect to the impact of the project on Chinook salmon, NMFS stated that “NMFS anticipates . . . that operation of the proposed project would cause very minor injury and mortality to [Upper Willamette River] Chinook salmon or loss of habitat because of the status of the population in the action area and the proposed conservation measures that FERC would require Symbiotics to carry out.”¹³ Further,

the protective measures that FERC would require Symbiotics to carry out, together with the low likelihood of individual juvenile and adult fish being present in the action area, would minimize the likelihood that the Proposed Action would have a detectable effect on the abundance, distribution, diversity or productivity of the [Upper Willamette River] Chinook salmon at the population level. Adverse impacts would be expected to be short-term in nature and would be minimized by protective measures [T]he risk of harm to individual fish is extremely low because few [Upper Willamette River] Chinook salmon are likely to be present in the action area. . . . Overall, short-term localized negative effects will kill, harm, and harass few, if any, [Upper Willamette River] Chinook salmon and will have minimal effects on spawning and rearing in the action area.^[14]

NMFS added that “[t]he adverse effects on listed species will be relatively short term and the likelihood that [Upper Willamette River] Chinook salmon will be exposed to adverse effects is very small.”¹⁵

15. The biological opinion called for the reinitiation of consultation if, among other things, “the agency action is subsequently modified in a manner that causes an effect to the listed species not considered in this Opinion”¹⁶

¹³ *Id.* at 59.

¹⁴ *Id.* at 66. The biological opinion also stated that there was no designated critical habitat for the upper Willamette River Chinook salmon in the action area. *Id.*

¹⁵ *Id.* at 69.

¹⁶ *Id.* at 70.

16. Near the beginning of the Incidental Take Statement, NMFS stated that it “anticipates that, over the 40-year term of this Opinion, Project operation and maintenance would kill or harm a very small number of [Upper Willamette River] Chinook salmon adults, juveniles, and incubating eggs within the Row River Basin.”¹⁷

17. On October 17, 2008, Commission staff issued a license to Symbiotics to construct, operate, and maintain the Dorena Lake Project. The license included all of the reasonable and prudent measures proposed by NMFS.¹⁸ Standard license Article 15, attached to the license, reserves the Commission’s authority to require changes in project facilities and operations to protect fish and wildlife resources, and license Article 410 reserves the Commission’s authority to require the licensee to construct, operate, and maintain any fishway prescribed by NMFS. With respect to the term of the license, the order noted that the Commission’s policy is to issue a 50-year license for a project located at a federal dam, and accordingly established a 50-year term for the Dorena Lake license.¹⁹

18. On November 17, 2008, NMFS filed a timely request for rehearing, asserting that the license term should be 40 years.

Discussion

19. NMFS asks the Commission “to reconsider its decision to issue the license for 50 years because of the uncertainty of the effect of the license and its protective measures over the next 50 years on listed fish resources.”²⁰ If the Commission does not alter the license term, NMFS states, the Commission “will need to reinitiate ESA consultation with NMFS . . . because NMFS issued its Opinion basing its effects analysis and incidental take statement on a 40-year license term.”²¹

20. First, it is unclear why NMFS concluded that the proposed action was for a 40-year license term. None of the documents issued by the Commission in the course of the proceeding suggested that term, and, as noted above, NMFS, in its many filings, never indicated that the term of the license was an issue. The two oblique references in the Biological Opinion to a presumed 40-year license term certainly did not suffice to put the

¹⁷ *Id.* at 72.

¹⁸ *See* 125 FERC ¶ 62,065 at P 30.

¹⁹ *Id.* P 103.

²⁰ NMFS request for rehearing at 2.

²¹ *Id.*

Commission or the licensee and other parties on notice that NMFS was raising the matter. On the contrary, as explained in the license order, the Commission has for many years had the policy of establishing 50-year terms for projects at federal dams.²² Thus, NMFS, which has participated in a number of licensing proceedings involving federal dams, was on notice that the license for the Dorena Lake Project likely would be a 50-year license.

21. Second, NMFS provides no support (and we are aware of none) for the proposition that there is any environmental significance here to a 40-year, as opposed to a 50-year, license. NMFS itself concluded in its biological opinion that the project would have “very small” and “short term” impacts on Chinook salmon, that the likelihood that the project would have even a “detectable effect” on the species would be “minimized by protective measures,” and that “the risk of harm to individual fish is extremely low because few [Chinook] are likely to be present in the action area.” It is not possible to conclude from the biological opinion that these conclusions were limited to a 40-year period. NMFS does not assert, or provide evidence, that the project’s impacts on Chinook salmon in years 41-50 of the license will vary from those in years 1-40.

22. NMFS’ suggestion that the Commission would have to reinitiate consultation if the license term were to remain at 50 years is at odds with the language of the biological opinion. The biological opinion requires the reinitiation of consultation if “the agency action is subsequently modified in a manner that causes an effect to the listed species not considered in this Opinion” The Commission never suggested issuing a license with a 40-year term, so it cannot be fairly said that the Commission’s action has been modified. Moreover, given NMFS’ own conclusions that the project will have minimal, short-term impacts on Chinook salmon, and the absence of evidence that those impacts will differ over time, we cannot discern how, even if the license term were viewed as having been changed, it would cause an impact not considered in the biological opinion.²³

²² See *City of Danville, Va.*, 58 FERC ¶ 61,318, at 62,020 (1992); *Little Falls Hydroelectric Associates*, 27 FERC ¶ 61,376, at 61,727 (1984).

²³ To the extent that NMFS appears to argue that its biological opinion will expire after 40 years, thus leaving the Chinook salmon with no protection, NMFS misapprehends the nature of our license. We have required the licensee to comply with the reasonable and prudent measures contained in the incidental take statement for the entire license term. Thus, even if the biological opinion were somehow to expire, our license would nonetheless require continued compliance with the terms of the incidental take statement. Moreover, the license reserves the Commission’s authority to require fishways and to impose additional fish protection measures, if they prove necessary.

The Commission orders:

The request for rehearing filed by the National Marine Fisheries Service on November 17, 2008 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.