

152 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Southeast Alaska Power Agency

Project No. 2911-039

ORDER AMENDING LICENSE

(Issued August 18, 2015)

1. On July 21, 2014, the Southeast Alaska Power Agency (Agency), licensee for the Swan Lake Project No. 2911, filed an application to amend its license in order to install spillway gates on the project dam and raise the project reservoir. As discussed below, this order approves the Agency's amendment application.

Background

2. The license for the Swan Lake Project was issued on July 17, 1980, and expires on June 30, 2030.¹ The project is located on Falls Creek on Revillagigedo Island, Alaska, and occupies federal lands managed by the U.S. Forest Service (Forest Service) within the Tongass National Forest. Project works include: a 174-foot-high, 480-foot-long concrete arch dam that includes a 100-foot-long uncontrolled ogee spillway² with a crest elevation of 330 feet mean sea level (msl); a reservoir (Swan Lake) that is 1,474 acres at normal maximum elevation of 330 feet mean sea level (msl) with a usable storage capacity of 81,704 acre-feet; a 2,200-foot-long, 11-foot-diameter power tunnel bifurcating into two 5.5-foot-diameter steel-lined penstocks; a concrete powerhouse containing two turbine-generator units with a total installed capacity of 22 megawatts (MW); a 13.8/115-kilovolt (kV) substation located adjacent to the powerhouse; and a

¹ *Ketchikan Public Utilities*, 12 FERC ¶ 61,331 (1980).

² An ogee spillway is a control weir that is S-shaped in profile and allows a large magnitude of water to safely flow over it.

30.5-mile-long, 115-kV transmission line. The project has an average annual generation of 75,700 megawatt-hours (MWh).

3. The licensee operates the Swan Lake Project to support other interconnected hydroelectric projects and help minimize the use of diesel generation. Since late 2009, when the Swan Lake Project was intertied with the licensee's Tyee Lake Project No. 3015 and the municipalities of Wrangell and Petersburg, Alaska, the licensee conducts a substantial drawdown of Swan Lake in the late autumn and winter and refills the reservoir in the spring and summer, aiming to reach full pool by mid-autumn. The minimum operational elevation of the reservoir is 271.5 feet msl. However, the licensee generally maintains the reservoir above an elevation of 280 feet msl.

Proposed Action

4. The licensee proposes to install one 20-foot-wide vertical operating gate and a 78-foot-wide flashboard system across the top of the existing 100-foot-wide, uncontrolled, ogee spillway. The gate would be located on the right side of the spillway and would be sealed against two piers, the existing pier on the right side of the spillway and a new pier that would be installed on the spillway crest. The gate would be operated by wire rope hoist drums located on a new steel deck spanning the top of the piers, and would be sized to pass flows in excess of the largest flood recorded since project operation began. The flashboard system would be installed between the new pier and the existing pier on the left side of the spillway. The flashboards would consist of wood panels placed on vertical wide flange-beam columns supported by angled compression members on the downstream side. The flashboards would be designed to automatically fail when flows exceed the capacity of the vertical gate, but the flashboard system would also include a manual failure mechanism, so that project operators could release the flashboards when deemed necessary. A new equipment enclosure, located on the right abutment, would house mechanical and electrical equipment for the new gate.

5. The proposed gate system on the spillway would raise the maximum surface elevation of Swan Lake by 15 feet, to 345 feet msl. The added elevation would increase the surface area of Swan Lake to 1,567 acres, inundating an additional 93 acres that are within the project boundary, including approximately 26 acres of federal lands within the Tongass National Forest.

6. To prevent flooding of the intake gate house and controls, the licensee proposes to raise the floor and ceiling of the gate house equipment room and gate support beam by 15 feet. The licensee would also upgrade equipment where appropriate and install a longer gate stem to connect the gate with the elevated gate control equipment.

7. The licensee proposes no changes to the power tunnel, powerhouse, generating equipment, or transmission line. Because the current project boundary follows the 350-foot contour, which is above the proposed maximum reservoir level, the licensee

does not request to alter the project boundary or the amount of federal lands the project occupies.

8. The project's authorized installed capacity of 22 MW would remain the same; however, the proposal would allow the licensee to curtail generation and store more inflow during the spring, summer, and fall when hydroelectric facilities in the region are typically underutilized. Due to the increase in storage capacity, the licensee would be able to generate for longer periods during the winter drawdown, increasing annual generation at the Swan Lake Project by an estimated 2,237 MWh, to approximately 77,937 MWh. During the period when the project would be storing additional flows rather than generating, other hydroelectric projects on the same isolated electrical grid would be able to increase their generation by a projected 5,537 MWh. If the Swan Lake Project could not store the flows, it would instead use them to generate, thus making the 5,537 MWh from the other projects unneeded and forcing the other projects to spill more water over their dams. Accordingly, the proposed action would increase generation efficiency in the local grid.

Consultation

9. Prior to filing the license amendment application, the licensee consulted with federal and state agencies, Alaska Natives likely to have an interest in the project, and nongovernmental organizations.³ The licensee prepared an initial consultation document in April 2013 and held a joint agency and public meeting on May 22, 2013. The agencies requested that the licensee perform field studies in the area of Swan Lake and its major tributaries. The licensee prepared several resource reports after conducting the field studies, and provided the reports to the agencies for review and comment before including them in the license amendment application.

Public Notice

10. On August 26, 2014, the Commission issued public notice that the amendment application was accepted for filing, that the project was ready for environmental analysis, and that the deadline was October 27, 2014, for filing motions to intervene, comments, recommendations, terms and conditions, and fishway prescriptions. In response, the

³ For a complete list of consulted parties, see Appendix K of Exhibit W of the licensee's July 21, 2014 application.

Forest Service filed a notice of intervention on September 2, 2014,⁴ and terms and conditions for inclusion in the amended license on October 23, 2014.

11. On October 27, 2014, the City of Saxman, Alaska (Saxman), Alaska Power and Telephone Company (Alaska Telephone), and Cape Fox Corporation (Cape Fox) (collectively, Mahoney Lake Parties) each filed timely motions to intervene⁵ and protests, arguing that the application should be denied or rejected. Saxman is the licensee for the Mahoney Lake Project No. 11393;⁶ Cape Fox and Alaska Telephone each have invested funds in the Mahoney Lake Project. Cape Fox, a Village Corporation formed under the Alaska Native Claims Settlement Act,⁷ states that the Mahoney Lake Project represents one of few local economic and community development opportunities for its shareholders.

12. On May 18, 2015, Commission staff issued an Environmental Assessment (EA) for the proposed action, as well as a public notice soliciting comments on the EA. The Alaska Department of Fish and Game (Alaska DFG) and Alaska Telephone filed comments on the EA.⁸ Alaska DFG stated that it agrees with Commission staff's finding that the proposed action, with the additional mandatory conditions, would not constitute a major federal action significantly affecting the quality of the human environment. Alaska

⁴ Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, the Forest Service became a party to the proceeding upon the filing of its notice of intervention. 18 C.F.R. § 385.214(a) (2015).

⁵ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (c) (2015).

⁶ The license for the Mahoney Lake Project was issued in 1998. *City of Saxman, Alaska*, 82 FERC ¶ 62,041 (1998). Due to circumstances explained below, the project has not yet been constructed.

⁷ Pub. L. No. 92-203, § 2, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1601 (2012)).

⁸ On July 13, 2015, the Agency filed a motion to strike Alaska Telephone's comments on the EA, alleging that the comments address legal issues that do not pertain to the Commission's environmental review, or raise issues that have no basis in fact. On July 28, 2015, Alaska Telephone filed a response opposing the motion. In the interest of encouraging public participation in our proceedings, we generally allow commenters significant latitude, and see nothing in the comments that requires striking them. Accordingly, we deny the Agency's motion.

Telephone disagrees with several conclusions in the EA and states that Commission staff did not perform an adequate analysis of the proposed action. We discuss Alaska Telephone's comments below.

13. We have considered the comments, interventions, and protests in considering whether, and under what conditions, to authorize the amendment.

Water Quality Certification

14. Under section 401(a) of the Clean Water Act (CWA),⁹ the Commission may not authorize construction or operation of a hydroelectric project that may result in a discharge from the project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.¹⁰

15. On August 10, 1999, the Alaska Department of Environmental Conservation filed a letter with the Commission waiving all water quality certifications for FERC jurisdictional hydroelectric projects.¹¹ As a result, we consider the certification for the proposed amendment to be waived.

Threatened and Endangered Species

16. Section 7(a)(2) of the Endangered Species Act of 1973¹² requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

17. In March 2014, the licensee completed a Biological Assessment/Evaluation (BA),¹³ which evaluates the impact of the proposed action on federally listed threatened

⁹ 33 U.S.C. § 1341(a) (2012).

¹⁰ 33 U.S.C. § 1341(d) (2012).

¹¹ Commission staff placed this letter in the record of this proceeding on July 16, 2015.

¹² 16 U.S.C. § 1536(a) (2012).

¹³ This document was prepared for the Forest Service and the licensee, who labeled it as a combined Biological Assessment and Biological Evaluation. The licensee

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and endangered species. The species discussed in the BA are the humpback whale and Chinook salmon, sockeye salmon, and steelhead originating from the Columbia River basin. Based on the analysis in the BA, Commission staff concluded that the proposed action would not be likely to adversely affect federally listed threatened or endangered species and issued a letter on May 28, 2015, requesting that the National Marine Fisheries Service (NMFS) concur with its determination. On June 9, 2015, NMFS filed a letter concurring with Commission staff's determination.

National Historic Preservation Act

18. Under section 106 of the National Historic Preservation Act¹⁴ and its implementing regulations,¹⁵ federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Officer (SHPO) to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

19. The licensee provided the Forest Service a cultural resources report determining that no historic properties would be affected by the proposed amendment. The Forest Service reviewed the report and agreed with the licensee's findings. The Forest Service sent a letter to the Alaska SHPO on June 13, 2013, outlining the licensee's survey and tribal consultation findings and asking the Alaska SHPO to concur with the determination that the proposal would not affect historic properties. The Alaska SHPO concurred in a communication dated June 28, 2013.¹⁶

20. The licensee proposes to develop and implement measures to protect tribal or cultural resources, if they are identified or discovered during construction. To ensure that these resources would be protected, we include Article 405 to require the licensee to

filed it as appendix D to the Applicant-Prepared EA included in the July 21, 2014 license amendment application.

¹⁴ Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, Pub. L. No. 113-287, 128 Stat. 3188 (2014). (The National Historic Preservation Act was recodified in Title 54 in December 2014).

¹⁵ 36 C.F.R. part 800 (2014).

¹⁶ July 21, 2014 Application at Appendix I.

follow specific procedures in the event it discovers historical, cultural, or tribal resources during construction, operation, and maintenance activities.

Section 18 Fishway Prescriptions

21. Section 18 of the Federal Power Act (FPA)¹⁷ provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. No fishway prescriptions or reservations of authority were filed.

Coastal Zone Management Act

22. Under section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA),¹⁸ the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the license applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within 180 days of its receipt of the applicant's certification.

23. On July 1, 2011, by operation of Alaska State law, the federally-approved Alaska Coastal Zone Management Program expired, resulting in the state's withdrawal from participation in the CZMA's National Coastal Management Program. Therefore, section 307 of the CZMA does not currently apply in Alaska.¹⁹

¹⁷ 16 U.S.C. § 811 (2012).

¹⁸ 16 U.S.C. § 1456(3)(A) (2012).

¹⁹ 2005 Alaska Sess. Laws. Ch. 31.

Magnuson-Stevens Fishery Conservation and Management Act

24. The Magnuson-Stevens Fishery Conservation and Management Act²⁰ requires federal agencies to consult with NMFS on all actions that may adversely affect Essential Fish Habitat (EFH). In the EA, Commission staff determined that there would be no significant change to the frequency or duration of spill events that could adversely affect the small amount of EFH in Falls Creek below the dam. Additionally, Commission staff concluded that the licensee's plans to prevent and control sedimentation and fuel and oil spills during construction would protect fish habitat and prevent any adverse effect on EFH.²¹ We agree. Therefore, no further consultation in regards to the Magnuson-Stevens Fishery Conservation and Management Act is required.

Section 4(e) of the FPA

25. Section 4(e) of the FPA²² provides that the Commission may issue a license for a project on a federal reservation only if it finds that the license would not interfere or be inconsistent with the purpose for which the reservation was created or acquired. In addition, section 4(e) requires that any license for which we make this finding must include conditions prescribed by the Secretary under whose supervision the reservation falls. The Swan Lake Project occupies lands of the Tongass National Forest administered by the Forest Service.

26. Commission staff has reviewed the Organic Administration Act of 1897,²³ which established the purposes for forest reservations, and the presidential proclamations and executive orders that created and expanded the Tongass National Forest.²⁴ There is no

²⁰ 16 U.S.C. § 1855(b)(2) (2012).

²¹ See section 3.3.3.2 of the EA.

²² 16 U.S.C. § 797(e) (2012).

²³ 16 U.S.C. § 473 *et seq.* (2012).

²⁴ The Tongass National Forest was established by Presidential Proclamation of September 10, 1907 (35 Stat. 2152), and expanded by Executive Order No. 908, July 2, 1908; Presidential Proclamation of February 16, 1909 (35 Stat. 2226); and Presidential Proclamation of June 10, 1925 (44 Stat. 2578). At the time the national forest was established, the Organic Administration Act of 1897, 16 U.S.C. § 475 (2012), stipulated that all national forest lands were established and administered only for watershed protection and timber production. These are the only purposes that are relevant for a Commission determination under section 4(e) as to whether a project will interfere or be

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evidence or allegation in this proceeding to indicate that the Swan Lake amendment will interfere with the purposes of the Tongass National Forest. We find that this amendment will not interfere or be inconsistent with the purposes for which the reservation was created.

27. The Forest Service filed 12 final 4(e) conditions for inclusion in the amendment order on October 23, 2014. The final terms and conditions are set forth in Appendix A of this order, incorporated into this license by ordering paragraph (C), and summarized below.

28. The Forest Service 4(e) conditions require the licensee to: (1) seek Forest Service approval on final designs; (2) seek Forest Service approval of changes after initial construction; (3) allow for the revision of Forest Service conditions following issuance of a Biological Opinion or Water Quality Certificate; (4) obtain a special use authorization;²⁵ (5) comply with revised conditions following a special use authorization administrative appeals process; (6) consult with the Forest Service annually to protect National Forest lands; (7) comply with applicable federal, state, and local laws; (8) restore, and guarantee that any future transferee could restore Forest Service lands in the event of license surrender; (9) self-insure itself and indemnify the United States for any acts related to the licensee's use of federal lands; (10) prepare an Invasive Plant Management Plan; (11) restrict the use of pesticides and herbicides on Forest Service lands; and (12) avoid disturbing, or replace, any survey monuments, private property corners, and National Forest boundary markers.

29. In the EA, Commission staff recommended all of the Forest Service's 4(e) environmental conditions. Condition 10 does not require Commission approval of the

inconsistent with the purpose for which the reservation (national forest) was created or acquired. *See Rainsong Company v. FERC*, 106 F.3d 269 (9th Cir. 1997).

²⁵ Section 2401 of the Energy Policy Act of 1992 prohibits the Commission from requiring a licensee to obtain a special use permit for continued operation of a hydroelectric project unless the Commission determines that the project involves the use of additional federal lands or the licensee previously obtained a special use permit. Pub. L. No. 102-486, 106 Stat. 3096 (1992). Appendix C to the licensee's July 21, 2014 application includes a statement that the power line for the project was originally authorized under a special use permit in 1984. Accordingly, we include conditions 4 and 5 regarding a special use permit in Appendix A. However, these conditions are only enforceable if the licensee in fact held a special use permit prior to the effective date of section 2401.

Invasive Plant Management Plan. Article 403, added to the license by this order, requires such approval.

Recommendations of Federal and State Fish and Wildlife Agencies Pursuant to Section 10(j) of the FPA

30. Section 10(j)(1) of the FPA²⁶ requires the Commission, when issuing a license, to include conditions based on recommendations submitted by federal and state fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act,²⁷ to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

31. No section 10(j) recommendations were filed for the proposed amendment.

Section 10(a)(1) of the FPA

32. Section 10(a)(1) of the FPA²⁸ requires that any project for which the Commission issues a license be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes. No recommendations were filed pursuant to section 10(a)(1).

33. The licensee proposes a number of measures to protect resources during and following the proposed construction activities.

34. To protect soils and prevent the degradation of water quality through sedimentation, the licensee proposes to implement best management practices (BMPs) as specified by the Forest Service. These practices described by the Forest Service include identifying riparian or wetland areas that need specific protection measures, properly collecting solid wastes and materials contaminated with fuel or oils, and seeding disturbed soils following construction. The licensee also proposes its own construction-specific BMPs, which include site grading and spill prevention to control and protect stormwater, as well as the use of settling basins and sediment filters. These measures will be included in the Soil Erosion and Sediment Control Plan required by Article 301.

²⁶ 16 U.S.C. § 803(j)(1) (2012).

²⁷ 16 U.S.C. §§ 661 *et seq.* (2012).

²⁸ 16 U.S.C. § 803(a)(1) (2012).

35. To protect rare plants, the licensee proposes to avoid populations of known rare plant populations during construction activities, salvage populations of bog St. John's-wort in areas inundated by the reservoir raise, and notify the Forest Service upon discovery of any unknown populations of rare plants to determine the appropriate avoidance or salvage procedures. To implement these proposed measures and protect rare plant populations near the project, we are requiring the licensee to file a Rare Plant Salvage and Protection Plan under Article 402.

36. To prevent the spread of invasive plant species, the licensee proposes seven measures, which include treating existing infestations, using clean fill, and washing construction vehicles before transporting them. The Invasive Plant Management Plan required by Forest Service condition 10 and filed for Commission approval under Article 403 will ensure that the licensee implements these measures.

37. For timber resources, the licensee proposes to: (1) on Alaska Department of Natural Resources (Alaska DNR) lands, conduct a timber cruise²⁹ and develop a logging plan to cut merchantable trees, and (2) on Forest Service lands, to not remove any trees but conduct a timber cruise and enter into a settlement with the Forest Service to compensate it for the lost timber. Article 404 requires the licensee to conduct a timber cruise for state lands, develop a timber plan for affected state lands for review and approval by the Alaska DNR, and file the plan with the Commission. We will not, however, require the licensee to compensate the Forest Service for merchantable timber lost due to inundation. Requiring such monetary compensation would constitute the assessment of damages, and it is well-established that the Commission has no authority to adjudicate claims for, or require payment of, damages.³⁰ The licensee and the Forest Service are free to settle the matter outside the license, but the Commission will not include monetary compensation as a license condition.

²⁹ A timber cruise is a form of tree inventory.

³⁰ See, e.g., *Ohio Power Co.*, 71 FERC ¶ 61,092, at 61,313 (1995).

Other Issues

A. Mahoney Lake Project

38. The Mahoney Lake Project No. 11393 has a licensed capacity of 9.6 MW and would be constructed on Revillagigedo Island, approximately 6 miles northeast of Ketchikan, Alaska, and 16 miles southeast of the Swan Lake Project. Although the Commission issued a license for the Mahoney Lake Project on January 22, 1998,³¹ the project is, as yet, unconstructed.³²

39. The Mahoney Lake Parties generally argue that the Commission should reject the amendment application because they believe the Mahoney Lake Project is better adapted than the proposed amendment to fulfill the electrical needs of the area. The Mahoney Lake Parties support this claim by stating that the Mahoney Lake Project is included in the Southeast Alaska Integrated Resource Plan (Integrated Resource Plan),³³ while the Swan Lake Project expansion is not. Furthermore, the Mahoney Lake Parties state that the Mahoney Lake Project is capable of accommodating all increased electrical demand in the area and that the Swan Lake amendment is based only on the speculative assumption that future power projects may require storage and peaking service.

40. The Mahoney Lake Parties argue that inclusion of the Mahoney Lake Project and omission of the Swan Lake expansion in the Integrated Resource Plan indicates that the Mahoney Lake Project is better adapted to a comprehensive plan to improve the

³¹ *City of Saxman, Alaska*, 82 FERC ¶ 62,041 (1998).

³² On August 5, 2004, the Commission issued an order granting stay of the Mahoney Lake Project license, as required by Public Law No. 108-7. *City of Saxman, Alaska*, 108 FERC ¶ 61,153 (2004). Under section 314(b) of the law, the Commission must lift the stay upon request of the City of Saxman, Alaska, but not later than six years after the Commission receives written notice of the completion of the Swan-Tyee transmission line. By letter filed October 4, 2011, the Southeast Alaska Power Agency, which built the transmission line in question, reported that the Swan-Tyee transmission line was operational on October 21, 2009.

³³ The Integrated Resource Plan, prepared in 2012 for the Alaska Energy Authority, is a comprehensive review and prediction of the energy capabilities and needs within southeast Alaska intended to be used by the State of Alaska, municipalities, industry, and citizens for planning purposes. Black & Veatch Corp., *Southeast Alaska Integrated Resource Plan* (July 2012), available at <http://www.akenergyauthority.org/Content/Publications>.

waterway or waterways within the region. We disagree. After reviewing the screening process for the Integrated Resource Plan, it appears that the contractors who prepared the document listed all potential projects of which they were aware, even those which they summarily rejected due to the expectation of significant environmental impacts and adamant agency and public opposition. In finalizing the plan, the authors gave special consideration to projects that had been licensed by the Commission. Therefore, the Mahoney Lake Project was included in the Integrated Resource Plan, not necessarily based on a conclusion that it was best adapted for the region, but rather because it was licensed at the time the plan was prepared. It appears the Swan Lake Project was omitted from the document not because of its merits, but rather because the amendment application had not yet been filed with the Commission.

41. In the EA, Commission staff noted the prediction in the Integrated Resource Plan that energy use in the area may rise by up to 35 percent.³⁴ In addition, Commission staff referenced the Agency's plans to intertie its grid with the towns of Kake and Metlakatla, Alaska, which, as of 2012, had a combined annual energy consumption of approximately 24,187 MWh.³⁵ The Mahoney Lake Project is expected to produce approximately 46,000 MWh per year,³⁶ and the expansion of the Swan Lake Project would result in an increased annual generation of 7,774 MWh, for a combined total of approximately 53,775 MWh per year.

42. Based on the Integrated Resource Plan, a 35 percent rise in energy use would lead to an additional 105,000 MWh annually of needed generation by the year 2030. Additionally, the Integrated Resource Plan does not contemplate the addition of Kake and Metlakatla, Alaska, to the Southeast Alaska Power Agency's system. Even if actual future electrical demand in southeast Alaska falls short of expectations, the combined generation of both the Mahoney Lake and expanded Swan Lake projects appears needed to meet the likely increase in demand. Therefore, approving the Agency's proposal would not impair the feasibility of the Mahoney Lake Project.

43. The Mahoney Lake Parties also state that they stand ready, willing, and able to provide power to the Agency and its members. However, because the Mahoney Lake Project is not yet constructed, this is not the case. In fact, Saxman has had 17 years to commence project construction but has not done so. Indeed, Saxman has not started construction of its project in the nearly six years since completion of the Swan-Tyee

³⁴ EA at 3.

³⁵ *Id.*

³⁶ Integrated Resource Plan at 10-11.

transmission line, which significantly expanded the market potentially available to the Mahoney Lake Project. Based on this history, and the fact that the Agency expects its spillway gates to be operational in 2016, the Swan Lake Project expansion appears likely to be complete even before construction commences on the Mahoney Lake Project. We will not deny the amendment based on speculation as to the future of the Mahoney Lake Project.

44. We also find the argument put forth by the Mahoney Lake Parties that the amendment for the Swan Lake Project should be denied because it only increases annual generation and not capacity and that it serves a speculative need for storage and peaking services to be without merit. The grid in southeast Alaska is unique in that diesel generators provide a significant portion of generation capacity in the region. These diesel generating plants are relatively easy to site and construct; thus, adding capacity is comparatively straightforward. However, diesel generators are expensive to operate, and hydroelectric generation can often be several times less expensive by comparison. Although the proposed action does not increase capacity, it would diminish the need to use diesel generation and reduce rates for end users in the region. Furthermore, as previously explained, the Swan Lake expansion would result in a reduction in generation from the Swan Lake Project when stream flow throughout the region is high, thereby allowing other projects in the area to generate rather than spill excess flow. However, if peak loads exceed the capacity of those other projects, the additional storage at the Swan Lake Project could be called upon to meet that demand. Thus, the proposed action would increase the combined dependable capacity of hydroelectric generating assets within the region.

45. The Mahoney Lake Parties also claim that the Agency's proposal is an attempt to exclude the Mahoney Lake Project from access to the southeast Alaska electric market in violation of the Public Utility Regulatory Policies Act (PURPA).³⁷ In particular, they assert that the Agency, as a regional joint action agency under PURPA, is legally obligated to contract with the Mahoney Lake Project, a competing qualifying project, under PURPA's mandatory purchase obligations. They also argue that the Agency has failed its obligation to retain and make available data relevant to the calculation of avoided cost.

46. On October 30, 2014, Alaska Telephone filed a petition for enforcement against the Agency pursuant to section 210(h) of PURPA. The Commission issued a Notice of Intent Not to Act on December 18, 2014,³⁸ declining to initiate an enforcement action and

³⁷ 16 U.S.C. § 2601 *et seq.* (2012).

³⁸ *Alaska Power & Telephone Company and City of Saxman, Alaska*, 149 FERC ¶ 61,234 (2014).

explaining that Alaska Telephone may bring an enforcement action against the Agency in the appropriate court. We again find that this is not the appropriate forum to consider the Agency's alleged PURPA violations and will not address the issue further here.

B. Sufficiency of the EA

47. On June 18, 2015, Alaska Telephone filed comments in response to the EA, asserting that the EA fails to meet statutory standards. Alaska Telephone argues that the EA fails to adequately consider: (1) the need for power; (2) the existence of alternative projects, including the Mahoney Lake Project; (3) project risks related to the structural integrity of the dam; (4) Native American Interests; and (5) the licensee's fitness to hold a license.

48. Alaska Telephone states that Commission staff took a perfunctory look at the need for power and inappropriately found that power was needed in the region. Alaska Telephone cites the Agency's November 20, 2014 filing, made under docket EL15-12, in which it states that growth in the Southeast Alaska energy market appears to be declining. As noted above, the need for power analysis in the EA used data obtained from the Integrated Resource Plan. Commission staff's review of this data found that the region is in need of additional generation resources.³⁹ In its November 20, 2014 filing, the Agency referenced several sections of the Integrated Resource Plan to show that growth in the market appears to be declining. However, the Integrated Resource Plan and the Agency indicate that total load will continue to increase, though the rate at which it does may decline for the near future.

49. Alaska Telephone states that Commission staff failed to consider other hydropower projects in the region, including the Mahoney Lake Project, as action alternatives. We disagree with this argument. The action alternatives analyzed in an EA are up to the Commission's discretion⁴⁰ and do not need to be exhaustive; rather, the discussion of alternatives need only provide sufficient information to permit a reasoned choice of alternatives.⁴¹ Additionally, the Mahoney Lake and Swan Lake Projects are in

³⁹ As explained previously in response to similar arguments regarding the Mahoney Lake Project and its effect on the Commission's need for power analysis, the Commission does not look at specific sources of power but rather the need for power in the area. *Ketchikan Public Utilities*, 126 FERC ¶ 62,205, at P 83 (2009).

⁴⁰ See *Idaho Power Co.*, 110 FERC ¶ 61,242, at P 80 (2005) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-52 (1978)).

⁴¹ *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976), citing *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Alabama Power Co.*, 141 FERC ¶ 61,127, at

(continued...)

different watersheds and affect separate environmental resources, making a comparison of the two actions of little value. Commission staff has analyzed the Mahoney Lake Project in an EA issued November 13, 1997. Analyzing the Mahoney Lake Project as an action alternative to the expanded Swan Lake Project, as Alaska Telephone requests, would simply be a comparison of the proposed action from the November 13, 1997 EA for Mahoney Lake to the no-action alternative analyzed in the May 18, 2015 EA for Swan Lake. Commission staff's analysis of these two actions is on the public record. As for Alaska Telephone's statement that Commission staff should have analyzed as alternatives all potential sites identified by the Agency, an alternative is not reasonable if it is speculative.⁴²

50. Alaska Telephone also contends that Commission staff disregarded the best adapted standard under section 10(a) of the FPA, asserting that the Swan Lake Project cannot possibly meet the best adapted standard because the Commission already determined that the Mahoney Lake Project met that criterion by issuing a license for the project. Alaska Telephone once again cites the fact that the Mahoney Lake Project was included in the Integrated Resource Plan while the amendment to the Swan Lake Project was not. We do not read section 10(a) as requiring the Commission to choose only one project that it determines to be best adapted; rather, the Commission must consider all information on the record and find that each project is best adapted to a comprehensive plan for beneficial uses of the waterway before issuing a license.⁴³ We have previously discussed why the two projects were or were not reviewed in the Integrated Resource Plan. Furthermore, although the Integrated Resource Plan is authorized by a state agency, is based on a comprehensive study of the beneficial uses of waterways, and articulates the standards, data, and methodology used, it was not filed with the Secretary of the Commission and is not a comprehensive plan as defined under section 2.19 of the Commission's regulations.⁴⁴

51. Alaska Telephone additionally states that the EA is incomplete because it does not analyze the environmental or economic impacts of a dam failure. The Commission's Division of Dam Safety and Inspections – Portland Regional Office (Portland Regional

PP 77-85 (2012).

⁴² *Pacific Gas & Electric Company*, 106 FERC ¶ 61,065, at P 56, *reh'g denied*, 107 FERC ¶ 61,232, at P 29 (2004).

⁴³ *See, e.g., Northern Lights, Inc.*, 39 FERC ¶ 61,352, at 62,102 (1987); *Nockamixon Hydro Associates*, 53 FERC ¶ 61,303, at 62,127 & n.5 (1990).

⁴⁴ 18 C.F.R. § 2.19 (2015).

Office) has reviewed the licensee's proposal and determined that it is safe. Accordingly, there is no reason to study the impacts of dam failure.

52. Finally, Alaska Telephone argues that the licensee failed its consultation obligation by not consulting with the Cape Fox Corporation or Sealaska, regional corporations that represent Native American interests. Alaska Telephone states that the EA failed to consider the economic harm that would be caused to Native Americans by the Swan Lake amendment and again asserts that the amendment is not in the public interest. Neither Cape Fox nor Sealaska appear on the list of federal recognized tribes⁴⁵ and thus are not treated as Indian Tribes under the Commission's regulations.⁴⁶ However, Cape Fox has been involved in the proceeding since it filed its intervention and protest on October 27, 2014, and the Commission has considered its concerns. Nevertheless, as previously explained, the Commission has determined that there is a need for power in the region and that the Swan Lake amendment is in the public interest.

Comprehensive Plans

53. Section 10(a)(2)(A)⁴⁷ of the FPA requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving waterways affected by the project.⁴⁸ Commission staff identified seven comprehensive plans that address resources relevant to the Swan Lake Project.⁴⁹ No conflicts were found.

Applicant's Plans and Capabilities

A. Conservation Efforts

54. Section 10(a)(2)(C) of the FPA requires the Commission to consider the electricity consumption improvement program of the applicant, including its plans, performance, and capabilities for encouraging or assisting its customers to conserve electricity cost effectively, taking into account the published policies, restriction, and requirements of

⁴⁵ *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942 (Jan. 14, 2015).

⁴⁶ 18 C.F.R. § 4.30(10).

⁴⁷ 16 U.S.C. § 803(a)(2)(A) (2012).

⁴⁸ Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2015).

⁴⁹ See section 4.4 of the EA for a complete list of all relevant comprehensive plans.

state regulatory authorities. The project provides power directly to the licensee's utility members.

55. The licensee's electric system is isolated with no interconnection to other systems and must supply the power needs of its utility customers with its own, or locally available, generating resources. Because the licensee delivers power to utilities and not the end user, it cannot readily influence conservation efforts made by the final customer. However, each of the three utilities that comprise the licensee's membership provides useful information and assistance to aid their customers in conserving energy. We conclude that, given its members' efforts to persuade customers to reduce energy usage and improve efficiency, the licensee complies with section 10(a)(2)(C) of the FPA.

B. Safe Management, Operation, and Maintenance of the Project

56. We have reviewed the licensee's management, operation, and maintenance of the Swan Lake Project pursuant to the requirements of 18 C.F.R. Part 12 of the Commission's regulations and the Commission's Engineering Guidelines and periodic Independent Consultant Safety Inspection Reports. We have determined that the amendment application, which includes the addition of a spillway gate and flashboards, should not affect the licensee's ability to safely operate and maintain the project. However, to ensure that the amended project is maintained in such a way to protect public safety in the future, we will require the licensee to prepare and file a Public Safety Plan in Article 304.

Administrative Conditions

A. Project Description

57. The licensee submitted, with its July 21, 2014 amendment application, a revised Exhibit M that describes the entire project, as proposed. The revised Exhibit M conforms to the Commission's rules and regulations and is approved in ordering paragraph (D).

B. Exhibit Drawings

58. The licensee included 11 Exhibit L drawings in the application showing the existing conditions and the spillway gates and modifications to the dam and gate house. Four of these drawings show existing conditions and two of them show the one-line wiring diagram and a process flow schematic that do not meet the requirements of an Exhibit L drawing. However, the remaining five drawings adequately show the new facilities. We have reviewed these Exhibit L drawings and determined that they conform to the Commission's regulations and should be approved. In Article 201 we are requiring the licensee to file the exhibit drawings in electronic format.

59. In addition, Article 303 requires the licensee to submit as-built Exhibits M, L, and K, as appropriate, to reflect the construction of the facilities approved in this order, within 90 days following the completion of construction activities.

C. Review of Final Plans and Specifications

60. Article 301 requires the licensee to provide the Commission's Portland Regional Office with final contract drawings and specifications – together with a supporting design report consistent with the Commission's engineering guidelines. Article 302 requires the licensee to provide the regional office with cofferdam construction drawings.

Comprehensive Development

61. Sections 4(e) and 10(a)(1) of the FPA⁵⁰ require the Commission to give equal consideration to power development purposes and to the purposes of energy conservation; the protection, mitigation of damage to, and enhancement of fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. Any license issued must be such as in the Commission's judgment would be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to issue this license amendment, and the terms and conditions included herein, reflect such consideration.

62. The EA for the license amendment contains background information, analysis of effects, and support for related license articles. Based on the record of this proceeding, including the EA and the comments thereon, granting the licensee's amendment as described in this order would not constitute a major federal action significantly affecting the quality of the human environment. The project will be safe if operated and maintained in accordance with the requirements of this license amendment.

63. Based on staff's independent review and evaluation of the project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the EA, we have selected the licensee's proposal, with the staff-recommended measures, and find that it is best adapted to a comprehensive plan for improving or developing Falls Creek.

64. We selected this alternative because: (1) issuance of the amendment would serve to maintain a beneficial and dependable source of electric energy; (2) the additional generation comes from a renewable resource that does not contribute to atmospheric

⁵⁰ 16 U.S.C. §§ 797(e) and 803(a)(1) (2012).

pollution; and (3) the proposed and staff-recommended environmental measures would protect project resources.

Conclusion

65. For the above reasons, we conclude that the licensee's proposed amendment for the Swan Lake Project, as conditioned by this order, would be best adapted to a comprehensive plan for improving or developing Falls Creek. Therefore, we grant the amendment application, as conditioned herein.

The Commission orders:

(A) The license for the Swan Lake Project No. 2911 is amended as provided by this order, effective the day this order is issued.

(B) The first paragraph of Ordering Paragraph (B)(2) of the license is revised to read as follows:

(a) a concrete arch dam, 174 feet high and 480 feet long at its crest having a 20-foot-wide, vertical operating gate and a 78-foot-wide flashboard system across the top of the existing 100-foot-wide uncontrolled, ogee spillway resulting in a crest elevation of 345 feet mean sea level (msl); (b) Swan Lake Reservoir, with a surface area of 1,567 acres at normal maximum reservoir elevation of 345 feet msl and a usable storage capacity of 102,467 acre-feet between elevations 345 and 271.5 feet msl; (c) a power tunnel, 2,200 feet long and 11 feet in diameter, leading from an intake structure at the north abutment upstream of the dam to the powerhouse where it bifurcates into two steel-lined penstocks, 5.5 feet in diameter; (d) an indoor-type, remotely controlled, concrete powerhouse containing two generating units with a total installed capacity of 22,000 kilowatts and located on Carroll Inlet immediately north of the mouth of Falls Creek; (e) a 13.8/115-kilovolt (kV) substation located adjacent to the powerhouse; (f) access facilities comprised of port facilities 1,000 feet north of the powerhouse, a staging area adjacent to the port facilities, and access roads from the port facilities to the powerhouse and dam; (g) a 115-kV transmission line extending from the powerhouse substation 30.5 miles to the existing S.W. Bailey Substation; and (h) appurtenant facilities.

(C) The license is subject to the conditions submitted by the U.S. Forest Service on October 23, 2014, under section 4(e) of the Federal Power Act, as those conditions are set forth in Appendix A to this order.

(D) The Exhibit M filed with the amendment application on July 21, 2014, superseding the previous Exhibit M, is approved and made part of the license.

(E) The following exhibit drawings filed on July 21, 2014, for the Swan Lake Project conform to the Commission's rules and regulations and are approved and made part of the license. The superseded drawings are deleted from the license.

EXHIBIT	FERC DRAWING No.	SUPERSEDED FERC DRAWING No.	LICENSEE'S EXHIBIT No.	FERC DRAWING TITLE
L-1A	P-2911-31	P-2911-23	L-6	Dam Plan
L-1B	P-2911-32	P-2911-23	L-7	Dam Elevation and Sections
L-4	P-2911-33	---	L-8	Spillway Gate Plan and Elevation
L-5	P-2911-34	---	L-9	Spillway Gate Section
L-6	P-2911-35	---	L-10	Power Intake Plan and Sections

(F) The license is subject to the following additional articles:

Article 201. Approved Exhibit L Drawings. Within 45 days of the date of issuance of this order, as directed below, the licensee must file the approved exhibit drawings in electronic file format on compact disc.

Digital images of the approved exhibit drawings must be prepared in electronic format. Prior to preparing each digital image, the FERC Project-Drawing Number (i.e., P-2911-31, etc.) must be shown in the margin below the title block of the approved drawing. Exhibit L drawings must be identified as **Critical Energy Infrastructure Information (CEII) material under 18 C.F.R. § 388.113(c)**. Each drawing must be a separate electronic file, and the file name must include: FERC Project-Drawing Number, FERC Exhibit, Drawing Title, date of this order, and file extension in the following format [P-2911-31, L-1A, Dam Plan, MM-DD-YYYY.TIF].

All digital images of the exhibit drawings must meet the following format specification:

IMAGERY - black & white raster file
 FILE TYPE – Tagged Image File Format, (TIFF)
 CCITT T.6 (CCITT Group 4 fax encoding)
 RESOLUTION – 300 dpi desired, (200 dpi min)
 DRAWING SIZE FORMAT – 22” x 34” (min), 24” x 36” (max)
 FILE SIZE – less than 1 MB desired

Two sets of electronic drawings on compact discs must be filed with the Secretary of the Commission, ATTN: OEP/DHAC.

Article 301. Contract Plans and Specifications. At least 60 days prior to the start of any construction, the licensee must submit one copy of plans and specifications and any supporting design documents to the Commission's Division of Dam Safety and Inspections (D2SI) – Portland Regional Engineer, and two copies to the Commission (one of these must be a courtesy copy to the Director, D2SI). The submittal to the Regional Engineer must also include as part of preconstruction requirements: a Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, a Stormwater Pollution Prevention Plan, a Spill Prevention and Control Plan, and a Soil Erosion and Sediment Control Plan. The Soil Erosion and Sediment Control Plan must include all best management practices proposed by the licensee in section 2.2.3 of its July 21, 2014 license amendment application. The licensee may not begin construction until the Regional Engineer has approved in writing the plans and specifications and determined that all preconstruction requirements have been satisfied.

Article 302. Cofferdam Construction Drawings. Before starting any removal, construction, or stream restoration activities, the licensee must review and approve the design of contractor-designed cofferdams and deep excavations and must make sure construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI) – Portland Regional Engineer and two copies to the Commission (one of these copies must be a courtesy copy to the Commission's Director, D2SI), of the approved cofferdam construction drawings and specifications and the letters of approval.

Article 303. As-Built Drawings. Within 90 days of completion of construction of the facilities authorized by this license amendment, the licensee must file for Commission approval, revised exhibits M, L, and K, as applicable, to describe and show these project facilities as built. A courtesy copy must be filed with the Commission's D2SI – Portland Regional Office; the Director, D2SI, and the Director, Division of Hydropower Administration and Compliance.

Article 304. Public Safety Plan. Within 60 days from the issuance of this order, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI) - Portland Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, D2SI) of a Public Safety Plan. The plan must include an evaluation of public safety concerns at the project site, including designated recreation areas, and assess the need for the installation of safety devices or other safety measures. The submitted plan must include a description of all public safety devices and signage, as well as a map showing the location of all

public safety measures. For guidance on preparing public safety plans the licensee can review the *Guidelines for Public Safety at Hydropower Projects* on the FERC website.

Article 402. *Rare Plant Salvage and Protection Plan.* At least 60 days prior to ground-disturbing activity, the licensee must file, for Commission approval, a Rare Plant Salvage and Protection Plan to prevent the loss of rare plant species near the project.

The plan must include but is not limited to: (1) a map showing locations of known rare plant populations that may be affected by the project in relation to project features; (2) a description of the methods that would be used to remove, transport, and re-plant rare plant species; (3) potential locations to which salvaged rare plant populations would be relocated; (4) methods used to prevent damage to rare plant populations near construction sites, i.e. fencing or construction worker education; and (5) provisions for initiating consultation with appropriate agencies if unknown rare plant populations are discovered during construction.

The licensee must develop the plan in consultation with the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the Alaska Department of Natural Resources. When filing the plan with the Commission, the licensee must include documentation of consultation, copies of agency comments and recommendations, and a description of how the agency comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and make recommendations before filing the plan with the Commission. If the licensee does not adopt a proposal, the filing must include the licensee's reasons, based on project-specific information.

Article 403. *Invasive Plant Management Plan.* Within one year of the issuance date of this order or at least 60 days prior to ground-disturbing activity, whichever occurs first, the licensee must file, for Commission approval, the Invasive Plant Management Plan required by U.S. Forest Service 4(e) condition no. 10. This plan must include the seven invasive species control measures proposed by the licensee in section 2.2.3 of its July 21, 2014 license amendment application.

Article 404. *Timber Management.* Prior to operating the reservoir above an elevation of 330 feet mean sea level (msl), the licensee must: (1) conduct a timber cruise to survey timber resources on lands managed by the Alaska Department of Natural Resources (Alaska DNR) that would be inundated by the reservoir when it is at an elevation of 345 feet msl; (2) develop a Logging Plan based on the timber cruise of the affected state lands, for review and approval by the Alaska DNR, describing the location and methods for removing merchantable timber from lands owned by the State of Alaska, and remove trees as directed by the Alaska DNR; and (3) file the Logging Plan with the Commission within one year of the issuance date of this order or within 30 days after completing the plan, whichever occurs first.

Article 405. Inadvertent Discovery. If any cultural resources are discovered during construction, operation, and/or maintenance of spillway gates and reservoir raise, the licensee must immediately cease all work at the site. The licensee must consult with the Alaska State Historic Preservation Officer (SHPO) and any tribes that might attach religious or cultural significance to the cultural resources to determine what steps need to be taken to evaluate the discovered cultural resources. If the resource is found to be eligible for the National Register of Historic Places, the licensee, in consultation with the Alaska SHPO and tribes, if applicable, must develop measures to mitigate or to avoid any adverse effects. The licensee must file with the Commission, for approval, a report on the historic property and the effects of the undertaking. If the property would be adversely affected, the report must contain the proposed mitigation measures along with any comments received from the Alaska SHPO and tribes on the report. The licensee must allow 30 days for an agency to comment. If there are no comments, the licensee must include its request for comments in the filing to the Commission. The licensee must not resume work in the vicinity of the discovered site until instructed by the Commission.

(G) The licensee must serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(H) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2015). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

U.S. Department of Agriculture, Forest Service Final 4(e) Terms and Conditions

General

License articles contained in the Federal Energy Regulatory Commission's (Commission) Standard Form L-1 issued by Order No. 540, dated October 31, 1975, cover those general requirements that the Secretary of Agriculture, acting by and through the USDA Forest Service, considers necessary for adequate protection and utilization of the land and related resources of the Tongass National Forest. Under authority of section 4(e) of the Federal Power Act (16 U.S.C. 797(e)), the following terms and conditions are deemed necessary for adequate protection and utilization of Tongass National Forest lands and resources. These terms and conditions are based on those resources enumerated in the Organic Administration Act of 1897 (30 Stat. 11), the Multiple-Use Sustained Yield Act of 1960 (74 Stat. 215), the National Forest Management Act of 1976 (90 Stat. 2949), and any other law specifically establishing a unit of the National Forest System or prescribing the management thereof (such as the Wilderness Act or Wild and Scenic Rivers Act), as such laws may be amended from time to time, and as implemented by regulations and approved Land and Resources Management Plans prepared in accordance with the National Forest Management Act. Therefore, pursuant to section 4(e) of the Federal Power Act, the following conditions covering specific requirements for protection and utilization of the National Forest System lands shall also be included in any license amendment issued for the Swan Lake Hydroelectric Project.

Condition No. 1 - Forest Service Approval of Final Design

Prior to undertaking activities on National Forest System lands, the Licensee shall obtain written approval from the Forest Service for all final design plans for project components that the Forest Service deems as affecting or potentially affecting National Forest System lands and resources. As part of such prior written approval, the Forest Service may require adjustments in final design plans and facility locations to preclude or mitigate impacts and to assure that the project is compatible with on-the-ground conditions. Should the Forest Service, the Commission, or the Licensee determine that necessary changes are a substantial change; the Licensee shall follow the procedures of Article 2 of the license. Any changes to the license made for any reason pursuant to Article 2 or Article 3 shall be made subject to any new terms and conditions the Secretary of Agriculture may make pursuant to section 4(e) of the Federal Power Act.

Condition No. 2 – Approval of Changes after Initial Construction

Notwithstanding any license authorization to make changes to the project, the Licensee shall obtain written approval from the USDA Forest Service prior to making any changes in any constructed project features or facilities, or in the uses of project lands and waters the USDA Forest Service deems as affecting or potentially affecting National Forest System lands and resources. Following receipt of such approval from the USDA Forest Service, and a minimum of 60-days prior to initiating any such changes, the Licensee shall file a report with the Commission describing the changes, the reasons for the changes, and showing the approval of the USDA Forest Service for such changes. The Licensee shall file an exact copy of this report with the USDA Forest Service at the same time it is filed with the Commission. This article does not relieve the Licensee from the requirement for license amendment or other requirements of Article 2 or Article 3 of this license. Any changes to the license made for any reason pursuant to Article 2 or Article 3 shall be made subject to any new terms and conditions the Secretary of Agriculture may make pursuant to section 4(e) of the Federal Power Act.

Condition No. 3 - Revision of Forest Service Conditions

The Forest Service reserves the right, after notice and opportunity for comment, to require changes in the Project and its operation through revision of the Section 4(e) conditions to accomplish protection and utilization of National Forest System lands and resources. The Forest Service also reserves the right to modify these conditions, if necessary, to respond to any significant changes that warrant a revision of these conditions, for example, a Final Biological Opinion issued for this Project by the National Marine Fisheries Service or United States Fish and Wildlife Service; or any Certification issued for this Project by the State Water Resources Control Board.

Condition No. 4 - Requirement to Obtain a Forest Service Special Use Authorization

The Licensee shall obtain a special use authorization from the Forest Service for the occupancy and use of National Forest System lands. The licensee shall obtain the executed authorization before beginning ground-disturbing activities on National Forest System lands and within one year of amendment issuance.

The Licensee may commence ground-disturbing activities authorized by the Amendment and special use authorization no sooner 60 days following the date the licensee files the Forest Service special use authorization with the Commission, unless the Commission prescribes a different commencement schedule.

In the event there is a conflict between any provisions of the license and Forest Service special-use authorization, the special use authorization shall prevail to the extent that the Forest Service, in consultation with the Commission, deems necessary to protect and utilize National Forest System resources.

Condition No. 5 – Implementation and Modification of Forest Service Conditions

(Applies only to issuance of Special Use Permit)

The Forest Service reserves the authority to modify Forest Service 4(e) terms and conditions if upon completion of the Forest Service administrative appeals process for issuance of a special use authorization under Code of Federal Regulations (CFR), 36 CFR §214, the Chief, USDA Forest Service, or Secretary of Agriculture directs that substantial changes to the terms and conditions submitted herein be made.

Condition No. 6 – Consultation

Each year during the 60-days preceding the anniversary of this license, or as arranged with the USDA Forest Service, the Licensee shall consult with the USDA Forest Service with regard to measures needed to ensure protection and utilization of the National Forest System lands and resources affected by the Project. Within 60-days following such consultation, the Licensee shall file with the Commission evidence of the consultation with any recommendations made by the USDA Forest Service. The USDA Forest Service reserves the right, after notice and opportunity for comment and administrative review, to require changes in the project and its operation through revision of the 4(e) conditions that require measures necessary to accomplish protection and utilization of National Forest lands and resources.

Condition No. 7 - Compliance with USDA Regulations and Other Laws

The Licensee shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations in regard to the area or operations covered by this license, to the extent federal law does not preempt ordinances or regulations.

Condition No. 8 - Surrender of License or Transfer of Ownership

Prior to any surrender of this license, the Licensee shall restore National Forest System lands to a condition satisfactory to the USDA Forest Service. At least 1 year in advance of the proposed application for license surrender, the Licensee shall file with the Commission a restoration plan approved by the USDA Forest Service. The restoration plan shall identify improvements to be removed, restoration measures, and time frames for implementation and estimated restoration costs. In addition, the Licensee shall pay for an independent audit to assist the USDA Forest Service in determining whether the Licensee has the financial ability to fund the surrender and restoration work specified in the plan.

As a condition of any transfer of the license or sale of the project, the Licensee shall guarantee or assure, in a manner satisfactory to the USDA Forest Service, that the Licensee or transferee will provide for the costs of surrender and restoration.

Condition No. 9 - Self Insurance

The Licensee shall indemnify, defend, and hold the United States harmless for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions of the Licensee in connection with the use and/or occupancy authorized by this license. This indemnification and hold harmless provision applies to any acts and omissions of the Licensee or the Licensee's heirs, assigns, agents, employees, affiliates, subsidiaries, fiduciaries, contractors, or lessees in connection with the use and/or occupancy authorized by this license which result in: (1) violations of any laws and regulations which are now or which may in the future become applicable, and including but not limited to environmental laws such as the Comprehensive Environmental Response Compensation and Liability Act, Resource Conservation and Recovery Act, Oil Pollution Act, Clean Water Act, Clean Air Act; (2) judgments, claims, demands, penalties, or fees assessed against the United States; (3) costs, expenses, and damages incurred by the United States; or (4) the release or threatened release of any solid waste, hazardous substances, pollutant, contaminant, or oil in any form in the environment.

Condition No. 10 – Invasive Plant Management Plan

Within 1 year of license amendment or prior to any ground-disturbing activity, the Licensee shall file with the Commission an Invasive Plant Management Plan that is approved by the USDA Forest Service. At a minimum the Plan shall:

- Identify methods for prevention and control of noxious weeds. Treatment of existing infestations of highest priority weeds shall be initiated immediately upon approval of the Invasive Plant Management Plan by the Commission,
- Develop a monitoring program to evaluate the effectiveness of invasive plant control measures, and
- Develop procedures for identification of additional measures that the licensee shall implement if monitoring reveals that invasive plant control is not successful or does not meet intended objectives.

Condition No. 11 – Pesticide and Herbicide Use Restrictions

Herbicides may not be used to control undesirable woody and herbaceous vegetation, aquatic plants, and pesticides may not be used to control undesirable insects and rodents on National Forest System lands without the prior written approval of the USDA Forest Service. The Licensee shall submit a request for approval of planned uses of herbicides and pesticides. The request must cover annual planned use and be updated as required by the USDA Forest Service. The Licensee shall provide information essential for review in the form specified. Exceptions to this schedule may be allowed only when unexpected

outbreaks of pests require control measures that were not anticipated at the time the request was submitted. In such an instance, an emergency request and approval may be made.

The Licensee shall use on National Forest System lands only those materials registered by the U.S. Environmental Protection Agency for the specific purpose planned. The Licensee must strictly follow label instructions in the preparation and application of pesticides and disposal of excess materials and containers.

Condition No. 12 – Surveys and Land Corners

The Licensee shall avoid disturbance to all public land survey monuments, private property corners, and forest boundary markers. In the event that any such land markers or monuments are destroyed by an act or omission of the Licensee, in connection with the use and/or occupancy authorized by the license, depending on the type of monument destroyed, the Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of the USDA Forest Service.

Further, the Licensee shall ensure that any such official survey records affected are amended as provided for by law.