

157 FERC ¶ 61,089
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Merimil Limited Partnership
Brookfield White Pine Hydro, LLC

Project Nos. 2574-081
2322-061
2325-093

ORDER DISMISSING REHEARING

(Issued November 7, 2016)

1. On May 19, 2016, the Commission issued an order amending the licenses for three hydroelectric projects on the Kennebec River in Maine licensed to Brookfield White Pine Hydro, LLC (Brookfield) and Merimil Limited Partnership (Merimil).¹ The amendments required an interim species protection plan (Interim Plan) for endangered Atlantic salmon at Merimil's Lockwood Project No. 2574, and Brookfield's Shawmut Project No. 2322 and Weston Project No. 2325, as well as a sturgeon handling and protection plan at the Lockwood Project.

2. On June 17, 2016, the Maine Council of the Atlantic Salmon Federation, the Natural Resources Council of Maine and the Kennebec Valley Chapter of Trout Unlimited timely requested rehearing of the Commission's May 19, 2016 Order Amending Licenses to Require Interim Species Protection Plan for Atlantic Salmon and Handling and Protection Plan for Shortnose and Atlantic Sturgeon.² The rehearing request fails to comply with the Commission's rehearing rules and is thus dismissed, as explained further below.³

¹ *Merimil Limited Partnership*, 155 FERC ¶ 61,185 (2016) (May Order).

² 155 FERC ¶ 61,185 (2016).

³ 18 C.F.R. § 385.713(c) (2016). *See also Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs. ¶ 31,193 (2005).

3. The rehearing request fails to satisfy the requirement in Commission rules, established in Order No. 663, that a request for rehearing set forth with specificity the grounds on which the rehearing application is based.⁴ To that end, the Commission's regulations require that parties requesting rehearing provide the basis, in fact and law, for each alleged error, including representative Commission and court precedent.⁵ Rule 713(c)(2) of the Commission's Rules of Practice and Procedure further specifies that a rehearing request must include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph. Under Rule 713, any issue not so listed will be deemed waived.⁶ The rehearing request does not comply with these requirements and is therefore dismissed.

4. In any event, Maine Council's rehearing request is without merit. Maine Council argues that the Commission erred by adopting measures to minimize harm to endangered fish species provided in a National Marine Fisheries Service (NMFS) Biological Opinion under the Endangered Species Act (ESA)⁷ while its complaint seeking judicial review of the Biological Opinion was pending in the United States District Court for the District of Maine.⁸ But this matter is no longer pending in federal district court. On August 18, 2016, the court dismissed the Maine Council challenge to the Biological Opinion finding that, when a Biological Opinion is prepared in the course of a FERC licensing proceeding, the only means of challenging the substantive validity of the Opinion is on review of the Commission's licensing order in the court of appeals.⁹ There is thus no basis for Maine Council's further claim that, unless the Commission waits for the conclusion of the district court litigation, the disputed Biological Opinion "will

⁴ *Tenn. Gas Pipeline Co., LLC*, 156 FERC ¶ 61,007, at P 7 (2016).

⁵ 18 C.F.R. § 385.713(c)(2).

⁶ *Id.*

⁷ 16 U.S.C. §§ 1531-1544 (2012).

⁸ Request for Rehearing at 3.

⁹ *Maine Council of the Atl. Salmon Fed'n v. National Marine Fisheries Service*, No. 2:15-cv-00261-JAW, 2016 WL 4401987, at *16 (D. Me. Aug. 18, 2016). *See also City of Tacoma, Wa. v. FERC*, 460 F.3d 53, 56 (D.C. Cir. 2006) ("when a BiOp is prepared in the course of a FERC licensing proceeding, the *only* means of challenging the substantive validity of the BiOp is on review of FERC's decision in the court of appeals") (emphasis in original).

forever escape any independent review.”¹⁰ Maine Council also contends that the “evolution of the [Interim] Plan and its approval by NMFS undermined the rights” of Maine Council under the Kennebec Hydro Developers Group Agreement (Kennebec Agreement).¹¹ Maine Council argues that the Commission should not have adopted the Interim Plan because it was developed, studied, and filed with the Commission before the December 2014 consultation triggering date in the Kennebec Agreement and therefore gave NMFS and the licensees “an advantage over” Maine Council.¹² This view reflects Maine Council’s apparent preference that the Kennebec Agreement be the primary forum regarding the Interim Plan as well as related permanent measures.

5. But, as explained in the May Order, the Interim Plan identifies measures necessary to avoid and minimize the effects of the Lockwood, Shawmut and Weston Projects on the federally-listed Atlantic salmon.¹³ The Interim Plan does not preclude parties from seeking “fish passage improvements at any hydro projects on the Kennebec River” nor consulting and developing additional measures for other fish species addressed in the Kennebec Agreement.¹⁴ Moreover, the Commission must give priority to the protection of endangered species like the Atlantic salmon, and must prioritize developing protection measures in a timely manner regardless of any perceived conflict with the Kennebec Agreement.¹⁵ It would be imprudent for the Commission to indefinitely delay implementation of the Interim Plan to minimize adverse project impacts until there is a consensus by the parties to the Kennebec Agreement on permanent mitigation measures.

6. Maine Council also alleges that FERC has denied their contractual right to resolve their dispute with Brookfield and NMFS regarding the Interim Plan through the FERC process.¹⁶ Maine Council intervened in this proceeding and submitted numerous comments raising its objections to the Biological Opinion and Interim Plan.¹⁷ In

¹⁰ Request for Rehearing at 5.

¹¹ *Id.* at 3. For an overview of the Kennebec Agreement, *see* May Order, 155 FERC ¶ 61,185 at PP 3-4, 31-34.

¹² Request for Rehearing at 3.

¹³ May Order, 155 FERC ¶ 61,185 at P 40.

¹⁴ *Id.* P 74.

¹⁵ *Id.*

¹⁶ Request for Rehearing at 4.

¹⁷ *See, e.g.*, May Order, 155 FERC ¶ 61,185 at PP 18, 19, 22, 23, 27.

addition, Maine Council engaged in consultations under the Kennebec Agreement.¹⁸ Subsequently, Maine Council filed further comments in the proceeding but never requested that the Commission resolve any particular dispute under the terms of the Kennebec Agreement. Consequently, there is no basis for Maine Council's claim that the May Order violated their rights under the Kennebec Agreement.

7. Further, Maine Council argues that the Commission failed to adequately explain why it declined to adopt three conservation recommendations from NMFS that broadly addressed operation of all Commission-licensed hydroelectric projects in Maine that are within the range of federally-listed Atlantic salmon.¹⁹ As the Commission explained, it "considers project-specific recommendations in its licensing and amendment proceedings" and thus is "unable to adopt general recommendations for a broad class of projects such as those within the range of a particular fish species in Maine, as suggested by NMFS."²⁰ The projects at issue in this proceeding are the Lockwood, Shawmut, and Weston Projects and the adopted recommendations are limited to operations at those three projects.

8. Maine Council asserts that the Commission erred by deferring to NMFS's assessment that the Interim Plan would adequately protect the Atlantic salmon.²¹ This is incorrect. The Commission is entitled to reasonably rely on NMFS, the expert agency charged with implementing the ESA for Atlantic salmon.²² Moreover, the Commission independently reviewed and adopted Brookfield's Biological Assessment and consulted

¹⁸ May Order, 155 FERC ¶ 61,185 at P 22.

¹⁹ Request for Rehearing at 4.

²⁰ May Order, 155 FERC ¶ 61,185 at P 60.

²¹ Request for Rehearing at 4.

²² *See Bennet v. Spear*, 520 U.S. 154, 170 (1997) ("The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril"); *City of Tacoma*, 400 F.3d at 76 ("if the law required the action agency to undertake an independent analysis, then the expertise of the consultant agency would be seriously undermined").

with NMFS on the Atlantic salmon.²³ Based on that assessment, the Commission found that there was no basis to second-guess the expert agency's determination.²⁴

9. Maine Council argues that the Commission's failure to adopt the recommended conservation measures "compounds the inadequacy of FERC's responsibility to ensure that the Biological Opinion complies with the requirements of the National Environmental Policy Act ('NEPA')." ²⁵ In support, Maine Council mentions the need to consider "alternative actions, such as dam removal" and to ensure that all reasonable alternatives receive a "hard look." We are not aware of any requirement for NMFS to prepare a NEPA analysis for its Biological Opinion or conservation recommendations. Nor was the Commission required to undertake a NEPA review in this case. The amendments at issue here concern only the nature and timing of fish passage measures already required by the license terms. The Commission reviewed these fish passage measures and alternatives in 1998 when it included them in the project licenses and again in 2005 when it relicensed the Lockwood Project.²⁶ No party has suggested any significant environmental issues apart from the need to consider possible dam breach or removal, and the Commission found no basis to consider that alternative in the May Order.²⁷ In any event, Maine Council never raised the issue of dam removal in any of its comments in this proceeding prior to filing its rehearing request.

²³ May Order, 155 FERC ¶ 61,185 at PP 11, 65.

²⁴ *Id.* P 70 ("we have no basis for concluding that the Interim Plan is inadequate to protect Atlantic salmon").

²⁵ Request for Rehearing at 5.

²⁶ See *Edwards Manufacturing Co., Inc., et al.*, 84 FERC ¶ 61,227, at 62,095-96 (1998) (environmental assessment and basin-wide environmental impact statement); *Merimil Limited Partnership*, 110 FERC ¶ 61,240, at PP 12-13 (2005) (draft and final environmental assessment). In the Lockwood relicensing proceeding, the Commission considered and rejected the alternative of dam removal. *Id.* at PP 33-38.

²⁷ May Order, 155 FERC ¶ 61,185 at PP 75-76.

The Commission orders:

The Maine Council of the Atlantic Salmon Federation, the Natural Resources Council of Maine and the Kennebec Valley Chapter of Trout Unlimited request for rehearing is dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.