

138 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

James B. Boyd and Janet A. Boyd

Project No. 7269-029

ORDER DENYING REHEARING

(Issued February 2, 2012)

1. On August 8, 2011, Commission staff issued an order terminating a license held by James B. Boyd and Janet A. Boyd (Boyd) by implied surrender and denying a license transfer application filed by the Boyds and Boyd Hydro, LLC.¹ The August 8 Order found that the Boyds had surrendered the license for the Jim Boyd Project No. 7269, located on the Umatilla River in Umatilla County, Oregon, by abandonment of the project and denied the license transfer application. On September 7, 2011, American Rivers, Inc. (American Rivers) and the National Marine Fisheries Service (NMFS) filed separate requests for rehearing of the August 8 Order. For the reasons discussed below, the Commission denies the requests for rehearing.

Background

2. In 1984, the Commission issued a minor license to Mrs. Janet A. Boyd and her husband, Mr. James B. Boyd, for the construction, operation, and maintenance of the Jim Boyd Project.² The project includes a 3.5-foot-high concrete diversion weir; a canal intake structure equipped with trashracks, fish screens, and flowbays; a 5,350-foot-long power canal; a penstock headworks; four 60-inch-diameter, 280-foot-long penstocks; a powerhouse containing four 300-kW propeller turbine-generating units; and a quarter-mile-long, 12.47-kilovolt transmission line to a Pacific Power & Light Company

¹ *James B. Boyd and Janet A. Boyd*, 136 FERC ¶ 62,119 (2011) (August 8 Order).

² *James B. Boyd & Janet A. Boyd*, 28 FERC ¶ 62,026 (1984).

substation.³ Given the river flows, the project as licensed is able to operate for at most six months of the year, from December to June.

3. The project has not operated since June 2002 when its power purchase agreement expired. Sometime prior to that, Mr. Boyd passed away and Mrs. Boyd sold the project to Mr. Dennis B. Logan, without prior Commission approval as required by section 8 of the Federal Power Act (FPA).⁴ Mr. Logan was a project representative working on behalf of the licensee, but after he bought the project from Mrs. Boyd, he assumed primary responsibility for the operation and maintenance of the project.

4. After numerous attempts over several years by Commission staff to get Mrs. Boyd and Mr. Logan to file a license transfer application, they finally did so on October 25, 2006.⁵ After review of the application, on March 13, 2009, Commission staff issued an order dismissing the transfer application and initiated this implied surrender proceeding, on the grounds that Mrs. Boyd's and Mr. Logan's efforts to maintain the project were insufficient, the project had not operated since its power sales contract had been terminated in 2002, and the licensee had failed to perform the major repairs necessary to bring the project back into operation. Finally, the order found that the project was no closer to being able to resume operation in 2009 than it was in 2002, when the power sales contract was terminated.⁶

5. As explained in the order dismissing the license transfer application, Commission staff identified multiple compliance issues during inspections of the project since operation ceased in 2002. In addition to power generation shutdown and the unauthorized transfer of project property, the licensee failed to control vegetative

³ See *id.* at 63,043; *James B. Boyd and Janet A. Boyd, order approving design of diversion and intake structures* at 33 FERC ¶ 62,010 (1985); and *James B. Boyd and Janet A. Boyd, order approving "as-built" exhibits and amending license*, 41 FERC ¶ 62,252 (1987).

⁴ 16 U.S.C. § 801 (2006).

⁵ Commission staff's attempts over the years to get Mr. Logan to bring the project into compliance and file a license transfer application are described in more detail in the Order Dismissing Application to Transfer License and Implied Surrender Proceeding. See *James B. Boyd & Janet A. Boyd*, 126 FERC ¶ 62,192, at P 2-10 (2009).

⁶ *Id.* P 12-13.

growth,⁷ failed to remove concrete panels from the dam to expedite fish passage during shutdown, and failed to fix an oil leak from the project's hydraulic hoses.⁸

6. During the pendency of the transfer application, Mr. Logan was required to file progress reports, which he filed on December 27, 2006, and on January 26, February 14, March 20, April 16, June 19, July 17, and October 25, 2007, but he showed little or no progress toward returning the project to operation. The October 25, 2007 report was the last progress report filed by Mr. Logan and on March 13, 2009, Commission staff issued the order dismissing the application to transfer the license and initiating this implied surrender proceeding.

7. The County of Umatilla (County) acquired the project and property from Mr. Logan in March 2009 due to delinquent property taxes.

8. On April 15, 2009, Commission staff issued a Notice of Termination of License by Implied Surrender and Soliciting Comments, Protests, and Motions to Intervene. The notice set June 1, 2009, as the deadline for filing comments, protests, and motions to intervene. NMFS filed a late motion to intervene.⁹ NMFS and other intervenors expressed concern that leaving the existing project facilities in place could harm fishery resources, riparian habitats, and water quality in the Umatilla River. American Rivers did not file to intervene in the license termination proceeding.

9. On March 25, 2011, Mrs. Boyd and Boyd Hydro filed an application to transfer the license for the project to Boyd Hydro. The Commission issued a Notice of Application for Transfer of License, and Soliciting Comments and Motions to Intervene on May 4, 2011, and set June 3, 2011, as the deadline for submitting motions to intervene and comments on the application.

⁷ This issue was temporarily corrected in 2004. *See* May 7, 2004 letter from the Commission's Portland Regional Office (Regional Office) to Mr. Logan; Mr. Logan's letter to the Regional Office, filed July 7, 2004; the Regional Office's July 22, 2004 letter to Mr. Logan, and Mr. Logan's letter to the Regional Office, filed October 4, 2004.

⁸ *See* Commission staff environmental inspection report (dated July 7, 2006). Following the inspection report, the concrete dam panels were removed and the oil leak was repaired. *See* August 15, 2006 letter from Mr. Logan to the Regional Office and September 21, 2006 letter from the Regional Office to Mr. Logan.

⁹ By notice issued March 19, 2010, NMFS's motion for late intervention was granted.

10. NMFS filed a timely notice of intervention and comments in the transfer proceeding. In addition, WaterWatch of Oregon and American Rivers jointly filed a timely, unopposed motion to intervene and comments.

11. On August 8, 2011, Commission staff issued an order terminating the license for the Jim Boyd Project No. 7269 by implied surrender and denying the application for a license transfer.¹⁰ The August 8 Order found that it was in the public interest to terminate the license by implied surrender instead of approving the transfer of the license from Mrs. Boyd to Boyd Hydro. The August 8 Order determined that Mrs. Boyd had abandoned the project and wished to divest herself of the license. In addition, the August 8 Order found that a transfer of the license was not appropriate, where, as here, a project was allowed to deteriorate for nine or more years and the project works were unlawfully transferred and then seized by government action. With respect to disposition of the project facilities, the August 8 Order determined that the Commission has no jurisdiction to require the County, a non-licensee, to undertake actions with respect to the abandoned property. Nor could the Commission require Mrs. Boyd, the licensee, to undertake actions regarding the project facilities, since she longer had any ownership interest in the project. The August 8 Order concluded that terminating the license by implied surrender and leaving the project facilities in place was an administrative action that would have no effect on the environment; therefore, an environmental analysis was not required.

12. On September 7, 2011, American Rivers and NMFS filed separate requests for rehearing of the August 8 Order. American Rivers argues that (1) the Division of Hydropower Administration and Compliance (DHAC) did not have authority to issue the August 8 Order, since the proceeding was contested; (2) the August 8 Order was not best adapted to a comprehensive plan of development, as required by sections 10(a)(1) and 15(f) of the FPA; (3) the Commission erred in failing to condition the license surrender to protect the public interest, as required by FPA section 6; (4) the Commission erred in failing to require the County to comply with the requirements of FPA sections 8 and 23(b); (5) the August 8 Order was not supported by substantial evidence; and (6) the Commission erred in relying on the categorical exclusion from the National Environmental Policy Act (NEPA) for administrative actions.¹¹ NMFS argues that

¹⁰ August 8 Order, 136 FERC ¶ 62,119 (2011).

¹¹ As noted above, American Rivers did not intervene in the license surrender proceeding. Therefore, American Rivers was not a party to that proceeding and does not have standing to request rehearing with respect to the issues raised therein. *See* 18 C.F.R. §§ 385.214 and 385.713 (2011). In any event, the Commission herein addresses all of American Rivers' arguments.

(1) the Commission erred by not including measures in the August 8 Order to ensure adequate protection of anadromous fish and their habitat; (2) the Commission erred by failing to conduct an environmental analysis and consultations before issuing the August 8 Order; and (3) the Commission erred in failing to require the licensee to address the issues raised in the Commission's project inspections.

Discussion

A. Notice of Termination and License Transfer Application

13. The August 8 Order determined that it was in the public interest to terminate the license for the Jim Boyd Project by implied surrender instead of approving the transfer of the license from Mrs. Boyd to Boyd Hydro.

14. Standard Article 16 of the license for Project No. 7269 provides:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission ... the Commission will deem it to be the intent of the Licensee to surrender the license.... [T]he Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.¹²

15. Section 6 of the FPA provides that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission...."¹³ When the licensee accepts a license, including the implied surrender article, it thereby agrees to implied surrender if the conditions described in the article are met. In addition, section 6.4 of the Commission's regulations provides, among other things, that it is

¹² Form L-15 (October 1975), entitled, "Terms and Conditions of License for Unconstructed Minor Project Affecting the Interests of Interstate and Foreign Commerce," incorporated by reference in the license, *A.W. Brown co., Inc.*, 38 FERC ¶ 62,282, at 63,511 (1987).

¹³ 16 U.S.C. § 799 (2006).

deemed to be the intent of a licensee to surrender a license, if the licensee abandons its project or discontinues good faith operation of the project for a period of three years.¹⁴

16. The doctrine of implied surrender has typically been invoked where, as here, a licensee, by action or inaction, has clearly indicated its intent to abandon the project, but has not filed a surrender application (e.g., the licensee has physically abandoned the project property, sold the project property without Commission authorization, dissolved its corporate or other legal identity, or has failed for several years to operate or maintain the project with no indication of doing so in the reasonably foreseeable future).¹⁵

17. Under section 8 of the FPA, “no voluntary transfer of any license ... shall be made without the written approval of the Commission...”¹⁶ Approval by the Commission of a license transfer is contingent upon, among other things, a showing that the transfer is in the public interest.¹⁷ The transfer application regulations require that a licensee seeking approval to transfer its license “certif[y] that it has fully complied with the terms and conditions of its license, as amended, and that it has fully satisfied and discharged all of its liabilities and obligations thereunder...”¹⁸

18. In the instant proceeding, American Rivers asserts that DHAC did not have delegated authority to issue the August 8 Order.¹⁹ American Rivers argues that DHAC, a division within the Commission’s Office of Energy Projects (OEP), has authority under section 375.308(b)(2) of the regulations to issue orders only in “uncontested” surrender

¹⁴ 18 C.F.R. § 6.4 (2011).

¹⁵ See, e.g., *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (2008), *reh’g denied*, 125 FERC ¶ 61,195 (2008), *aff’d*, *Lichoulas v. FERC*, 606 F.3d 769 (D.C. Cir. 2010). See also *New England Fish Co.*, 38 FERC ¶ 61,106 (1987); *Pinedale Power & Light Co.*, 38 FERC ¶ 61,036 (1987); and *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986).

¹⁶ 16 U.S.C. § 801 (2006).

¹⁷ 18 C.F.R. § 9.3(a) (2011).

¹⁸ See 18 C.F.R. § 131.20 (2011) (approved form for transfer applications) and 18 C.F.R. § 9.1 (requiring that transfer applications conform to section 131.20).

¹⁹ See American Rivers Rehearing Request at 4-5.

proceedings.²⁰ American Rivers argues that several parties filed comments in the implied surrender proceeding “contesting unconditional abandonment of the project” due to continuing adverse impacts on steelhead and other aquatic resources.

19. We disagree. Section 375.301(c) of the regulations provides that, for purposes of the delegation regulations (sections 375.302 through 375.515), “*uncontested* and *in uncontested cases* means that no motion to intervene, or notice of intervention, in opposition to the pending matter . . . has been received by the Commission.” An application is contested only if a party opposes the entire action for which Commission authorization is sought. As the Commission has explained, intervention to assure the resolution of a particular issue, such as a project’s impact on fishery resources, is not equivalent to opposing issuance of a license or, as in the case here, surrender of a license.²¹

20. No party to the implied surrender proceeding opposed termination by implied surrender. The comments identified by American Rivers merely asserted that the Commission should impose certain conditions on the surrender. Thus, American Rivers’ assertion that the Commission’s April 15, 2009 Notice of Termination was “contested” is without merit.²²

21. Moreover, we find that the August 8 Order did not err in its determination that termination of the license by implied surrender was in the public interest. American Rivers concedes that the Commission uses a public interest standard in both license surrender and transfer proceedings.²³ American Rivers argues, however, that because the instant proceeding involves a comparison of license surrender versus license transfer, the Commission was obligated to consider a comprehensive plan of development under FPA

²⁰ 18 C.F.R. § 375.308(b)(2) (2011), which provides, in relevant part, that OEP is authorized to “take appropriate action on uncontested applications for . . . [s]urrenders of licenses” under Part I of the FPA.

²¹ See, e.g., *Elkem Metals Co.*, 45 FERC ¶ 61,044, at 61,157 (1988); *Robert W. Shaw*, 19 FERC ¶ 61,153, at 61,293 (1982).

²² Similarly, we find that the license transfer proceeding was uncontested, although section 375.308(c)(2) of the delegation regulations, 18 C.F.R. § 375.308(c)(2) (2011), gives OEP the authority to act on both contested and uncontested license transfer proceedings.

²³ American Rivers states that section 6 of the FPA itself requires a public interest determination for surrenders. It does not. See 16 U.S.C. § 799 (2006).

section 10(a)(1),²⁴ which governs license applications, in addition to its ordinary public interest standard.²⁵ American Rivers cites no precedent or other authority to support this assertion. We are not persuaded that the Commission should have applied a new standard in this case.

22. In addition, American Rivers asserts that the August 8 Order does not comply with the public interest because it does not make any finding concerning how license surrender advances the public interest in the affected lands and waters.²⁶ We disagree. The August 8 Order expressly considered whether it was in the public interest to terminate the license by implied surrender or instead to approve the transfer of the license from Mrs. Boyd to Boyd Hydro.²⁷ The August 8 Order found that the facts in this case, which were undisputed, left no doubt that the licensee's actions satisfied the doctrine of implied surrender, i.e., that the licensee had abandoned the project and wished to divest herself of the license.²⁸ The August 8 Order further found that transfer of the project license from Mrs. Boyd to Boyd Hydro was not in the public interest.²⁹ The facts cited by the August 8 Order in support of this finding were also uncontested, i.e., the deterioration of the project for nine years or more, Mrs. Boyd's unauthorized sale of the project works, and seizure of the project by the County.³⁰ As explained in the August 8 Order,

²⁴ 16 U.S.C. § 803(a)(1) (2006).

²⁵ See American Rivers Rehearing Request at 7.

²⁶ See American Rivers Rehearing Request at 8.

²⁷ August 8 Order, 136 FERC ¶ 62,119 at P 16.

²⁸ *Id.* P 20.

²⁹ As a general matter, we favor efforts to restore nonoperating hydropower projects to operation. However, where, as here, Commission staff has informed us that the project has been non-operational for many years; that Boyd Hydro did not file its transfer application until almost two years after the deadline for intervening in and commenting on the implied surrender; that the option agreement between Boyd Hydro and Umatilla County for purchase of the project property expired in June 2011; that Boyd Hydro's proposed repair plan contained cost estimates that staff believes to be low by an order of magnitude, and would not have brought the project back into full compliance for four years; and where Boyd Hydro did not seek rehearing of the order accepting implied surrender, issuing the implied surrender order was appropriate.

³⁰ *Id.* P 23.

termination of the license by implied surrender will not authorize any action or alter the current condition of the project or surrounding environment.³¹ The August 8 Order's determination that, as an administrative action, termination of the license by implied surrender will have no effect on the environment sufficiently addresses any public interest concern related to the surrounding lands and waters. Where, as here, a project has become non-operational, with no prospect of repair, and the project works have been seized by a local governmental entity for tax delinquency, we conclude that it is in the public interest to terminate the license so that the licensee has no further authorization to operate the project, and the site can be released for other purposes.

23. American Rivers further argues that the Commission failed to comply with the requirements of FPA section 15(f)³² for issuance of a nonpower license, including consideration of a comprehensive plan and assurance of regulatory jurisdiction.³³ This proceeding does not involve an application under FPA section 15 for relicensing a hydroelectric project. Thus, the requirements of FPA section 15(f) are not applicable here. As the August 8 Order explained, following surrender, an entity wishing to operate the project should start afresh by filing a new application for an original license, so that the Commission can conduct a broad public interest inquiry, which the Commission does not do in a transfer proceeding.³⁴

B. Disposition of Project Facilities

24. American Rivers argues that the basis for the Commission's decision to allow the project works to be left in place is contrary to FPA sections 8 and 23(b)³⁵ and is not supported by substantial evidence, as required by FPA section 313(b)³⁶ and section 706(2) of the Administrative Procedure Act.³⁷ Neither of these arguments has merit.

³¹ *Id.* P 27.

³² 16 U.S.C. § 808(f) (2006).

³³ *Id.*

³⁴ August 8 Order, 136 FERC ¶ 62,119 at P 23.

³⁵ 16 U.S.C. §§ 801 and 817 (2006), respectively.

³⁶ 16 U.S.C. § 825l(b) (2006).

³⁷ 5 U.S.C. § 706(2) (2006).

25. The August 8 Order explained that the Commission cannot require the County, the current owner of the project lands and facilities and a non-licensee, to take any action or implement measures with respect to the abandoned project, including removal of the project facilities, because the Commission has jurisdiction only over its licensees.³⁸ The August 8 Order further explained that the Commission cannot require the licensee, Mrs. Boyd, to take any action, including the removal of the project facilities, because she no longer has any ownership interest in the project.³⁹ American Rivers asserts that, because FPA section 8 applies to a foreclosure sale, the County automatically assumed the conditions of the license and became subject to the Commission's jurisdiction when it acquired the project lands and facilities.⁴⁰ This assertion ignores the plain language of FPA section 8, which provides that "any successor or assign of the *rights*" (emphasis added) granted to a licensee by a license, not merely the project lands and facilities, is subject to the license conditions. Here, the County did not acquire either the license or the rights granted thereunder. American Rivers also ignores the language of section 8, which states that "[n]o voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission." As the August 8 Order found, the County has not even sought to acquire the license, much less been granted such approval. Thus, the Commission did not err in concluding that it had no jurisdiction over the County.

26. Similarly, FPA section 23(b)(1) does not provide any authority to the Commission to compel the County to remove the project facilities. American Rivers' argument is based on the claim that the August 8 Order disclaimed jurisdiction because it assumed that the County does not intend to operate the project for power generation.⁴¹ There is no support for this claim. The August 8 Order makes no assumption as to whether the County intends to operate or maintain the project for power generation; it merely states the undisputed fact that to date the County has not sought to acquire the license and bring the project back into operation.⁴² If the County decides to bring the project back into

³⁸ August 8 Order, 136 FERC ¶ 62,119 at P 27. The Order noted that, once the Commission's jurisdiction over the license ends, the County will be free to alter the project facilities as appropriate, subject to whatever state or local jurisdiction may exist. *Id.* n.33.

³⁹ *Id.* P 27.

⁴⁰ *See* American Rivers Rehearing Request at 9.

⁴¹ *See id.*

⁴² August 8 Order, 136 FERC 62,119 at P 27.

operation, section 23(b)(1) requires that it first apply for and receive a license to do so. If that occurred, the County would be a licensee and would be subject to the Commission's jurisdiction.

27. In addition, American Rivers argues that the Commission was obligated to investigate whether the Boyds or Mr. Logan had any residual ownership interest that would permit the imposition of conditions on them.⁴³ This argument is speculative and has no merit. There is no indication in the record that either the Boyds or Mr. Logan retained any ownership interest in the project. Even assuming the existence of some residual obligation to address liabilities associated with property conditions, the enforcement of that obligation would be a matter between the parties to the property transfer transactions. It would not confer any authority on the Commission under the license to require the Boyds or Mr. Logan to remove the project facilities.

28. The Commission also disagrees with American Rivers' assertion that the August 8 Order erred in not reaching the merits of the transfer application. The August 8 Order found that Boyd Hydro's attempt to secure the project license through a transfer request, which was filed almost two years after the Notice of Termination, was an eleventh-hour attempt that was too late and unreasonable under the circumstances.⁴⁴ The August 8 Order further found that a transfer of the license was not appropriate where, as here, a project was allowed to deteriorate for nine or more years and the project works were unlawfully transferred and then seized by government action. Thus, the August 8 Order provided a reasonable justification, based on the record, to deny the transfer application; it was not necessary for the Commission to reach the merits of the transfer application.⁴⁵

⁴³ See American Rivers Rehearing Request at 10-11.

⁴⁴ August 8 Order, 136 FERC ¶ 62,119 at P 23.

⁴⁵ Additionally, the Order explained that, because the license was terminated by implied surrender and the transfer application was denied, it would not address comments filed by parties, including American Rivers and NMFS, on the transfer application concerning the effects of resumption of operations at the project. However, if someone files a development application for the site, the Commission will analyze the environmental effects of the proposal at that time. *Id.* n.28.

29. Finally, American Rivers and NMFS argue that the Commission erred in failing to prepare an environmental analysis under NEPA⁴⁶ before issuing the August 8 Order.⁴⁷ They contend that leaving the existing project facilities in place would likely cause harm to the environment, and that the categorical exclusion⁴⁸ from NEPA in section 380.4(a)(1) of the regulations for administrative actions was not proper authority for foregoing an environmental analysis.⁴⁹

30. The August 8 Order explained that terminating the license by implied surrender and leaving the project facilities in place will not authorize any action or alter the current condition of the project or surrounding environment.⁵⁰ The August 8 Order further explained that its decision was an administrative action designed to terminate an authorization for a license that is, for all practical purposes, no longer in effect. As such, it has no effect on the environment and an environmental analysis is not required, citing to section 380.4(a)(1) of the regulations.

⁴⁶ 42 U.S.C. § 4321 *et seq.* (2006).

⁴⁷ NMFS also asserts that the Commission erred in not requiring the licensee to address issues raised in the Commission's project inspections. NMFS Rehearing Request at 4. The Commission notes that the two items identified in its June 2006 inspection, removal of diversion dam concrete panels and repair of leaking diversion gate hoses and lines, were corrected. *See* August 15, 2006 Letter from Mr. Logan to the Regional Office and September 21, 2006 Letter from the Regional Office to Mr. Logan, confirming such corrections.

⁴⁸ "Categorical exclusion" means a category of actions that the Commission has found would not have "a significant effect on the human environment" and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. *See* 18 C.F.R. § 380.2(a) (2011).

⁴⁹ 18 C.F.R. § 380.4(a)(1) (2011). That section provides, in relevant part:

Except as stated in paragraph (b) of this section, neither an environmental assessment nor an environmental impact statement will be prepared for the following projects or actions: (1) Procedural, ministerial, or internal administrative and management actions, programs, or decisions. . . .

⁵⁰ August 8 Order, 136 FERC ¶ 62,119 at P 27.

31. The August 8 Order's interpretation of the Commission's NEPA regulations was reasonable. An environmental analysis is not required under NEPA where an agency's action will have no effect on the environment.⁵¹ Here, the August 8 Order reasonably applied the categorical exclusion in section 380.4(a)(1) in determining that termination of the license by implied surrender and leaving the project facilities in place terminated by administrative action a license authorization that is, for all practical purposes, no longer in effect, and that such termination will not authorize any action or alter the current condition of the project or the surrounding environment.⁵² Thus, the decision in this case has no effect on the environment and no environmental analysis is required under NEPA.⁵³

⁵¹ See, e.g., *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) ("An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious."); *Town of Norwood v. FERC*, 202 F.3d 392, 407 (1st Cir. 2000) (petitioner failed to indicate how license and asset transfers, as opposed to the projects themselves, would have an impact on the environment).

⁵² Indeed, section 6.4 of the regulations, 18 C.F.R. § 6.4 (2011), does not require site restoration for termination of a license by implied surrender. In contrast, the requirements for voluntary surrenders where project works have been constructed (18 C.F.R. § 6.2 (2011)) contemplate the possibility of site restoration activities as a condition of the surrender. Thus, we often will prepare an EA in cases involving voluntary surrender, because an active, involved licensee has requested Commission action, upon which the Commission can impose conditions, and it may be reasonable to consider alternatives, because the licensee may be willing to comply with environmental and safety measures in order to obtain the surrender it seeks. In contrast, this case presents a situation where the licensee has been inactive for years, has allowed the project to deteriorate, and, in fact, has lost legal control over the project works, and where the sole action proposed by the Commission is to administratively terminate the abandoned license, thereby maintaining the environmental status quo. Moreover, under these circumstances, where there is essentially no one home as a licensee, there are no reasonable alternatives for the Commission to study.

⁵³ Similarly, section 380.4(13) of the regulations provides a categorical exclusion from NEPA for (1) surrenders of licenses and exemptions where no project works exist or ground disturbing activity has occurred, and (2) for amendments to licenses and exemptions that do not require ground disturbing activity or changes to project works or operation.

32. In addition, the August 8 Order is consistent with Commission precedent regarding the disposition of project facilities and the preparation of an environmental analysis where a license is voluntarily surrendered or terminated by implied surrender.⁵⁴ In these decisions, the Commission determined either (1) that the acceptance of surrender of the license with no imposition of conditions with respect to disposition of the project works would not result in any change to the existing environment or (2) that termination by implied surrender leaving the project facilities in place would have no effect on the environment. Thus, in both circumstances, the Commission required no environmental analysis.

The Commission orders:

The requests for rehearing filed by American Rivers and NMFS on September 7, 2011 are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁴ See, e.g., *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986); *Pinedale Power & Light Co.*, 38 FERC ¶ 61,036 (1987); *New England Fish Co.*, 38 FERC ¶ 61,106 (1987); *Jerry McMillan and Christine Smith*, 134 FERC ¶ 62,065 (2011); *Roosevelt Hydro Electric Co.*, 135 FERC ¶ 62,125 (2011); *Miller and Miller*, 135 FERC ¶ 62,178 (2011).