

167 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

City of Port Angeles, Washington

Project No. 6461-027

ORDER DENYING REHEARING

(Issued April 18, 2019)

1. On November 29, 2018, Commission staff issued an order approving surrender of the City of Port Angeles, Washington's (Port Angeles's), license for the Morse Creek Hydroelectric Project No. 6461.¹ On December 31, 2018, the Public Utility District No. 1 of Clallam County, Washington (District) filed a timely request for rehearing of the surrender order, contending that Commission staff's September 12, 2018 safety inspection of the project was inadequate and the Commission staff erred in granting a surrender based on that inspection.

2. For the reasons stated below, we deny rehearing.

I. Background

3. The Morse Creek Project, located on Morse Creek in Clallam County, Washington, was originally licensed in 1985.² The project facilities include a concrete diversion weir (low-head dam), concrete tunnel, and steel pipeline, all three of which were originally built in 1924,³ as well as a penstock, a powerhouse containing a single generator with a capacity of 465 kilowatts, a transmission line, and an access road. The powerhouse and transmission

¹ *City of Port Angeles, Washington*, 165 FERC ¶ 62,124 (2018) (Surrender Order).

² *City of Port Angeles, Washington*, 32 FERC ¶ 62,618 (1985) (Order Issuing Minor License).

³ *Id.* at 63,753. These facilities were constructed in 1924 by Port Angeles and used by it to provide water from Morse Creek to its residents until 1977. *Id.*

line are approximately two miles downstream from the diversion weir. Water reaches the powerhouse by flowing from an intake structure at the diversion weir through the concrete tunnel, portions of the steel pipeline, and penstock. The project first generated power in 1989 and ceased generating power in 2012.

4. Port Angeles filed an application to surrender its license on February 23, 2018 because the project's maintenance and operational expenses exceed the value of the power generated.⁴ In its decommissioning plan, Port Angeles proposed to remove the generating equipment from the powerhouse, plug the penstock, and fill in the tailrace to pre-project conditions to prevent fish from becoming stranded during low-flow periods.⁵ Port Angeles also proposed to leave in place the diversion weir and all other project facilities for continued use for water supply.⁶ Port Angeles has stated that it will conduct periodic inspections of the project after the termination of the Commission's jurisdiction to detect any future safety issues.⁷

5. The District timely filed a motion to intervene and comments on the proposed surrender. The District owns and operates public water supply systems within Clallam County. Since 1983, the District has used project facilities to divert water to the District's water treatment plant on Morse Creek about six miles southeast of Port Angeles.⁸ The District's primary point of diversion from Morse Creek to its water treatment plant is the diversion weir at the Morse Creek Project.⁹ The intake structure is a screened diversion

⁴ City of Port Angeles, February 23, 2018 Surrender Application at 2.

⁵ Surrender Order at P 6.

⁶ *Id.* at P 9. Though Port Angeles stopped using the Morse Creek Dam as a permanent water supply in 1977, it maintains the right to use it as an emergency water supply. Surrender Application at 3. In 1988, the District obtained the right to withdraw water at the diversion weir, subject to the condition that the diversion will cease if the streamflow in Morse Creek drops below 25 cubic feet per second. District's Motion to Intervene and Comments at 3-4.

⁷ City of Port Angeles, February 23, 2018 Surrender Application at 4.

⁸ *See id.* at 2-3. *See also City of Port Angeles*, 89 FERC ¶ 62,049 (1999) (explaining that Port Angeles used the diversion weir and intake structure, concrete tunnel, and steel pipeline for sourcing municipal water until 1977, but that Port Angeles retained the facilities to serve as an emergency water supply).

⁹ The District has an emergency backup diversion, the River Pump Intake, located at the site of its water treatment plant.

located about 25 feet upstream of the weir crest at the east bank and is an integral part of the diversion weir. From the screened diversion, water flows through a concrete encased pipeline, downstream control building, and into the 750-foot-long concrete tunnel that carries the water through the mountain. The water exits the tunnel into an 11,400-foot-long steel pipeline. On the steel pipeline past the connection with the tunnel, there is a tee tap connection to the District's pipeline that sends water to its water treatment plant.¹⁰

6. Just downstream from the District's connection, there is a butterfly valve that, when open, allows water to continue to flow through the steel pipeline to a blow-off valve on the southeast overbank of Morse Creek.¹¹ At times, the butterfly valve and blow-off valve are opened to clear the pipeline of sediment.¹² When the butterfly valve is closed, the water flows through the penstock for approximately two miles to the penstock and into the powerhouse.¹³

7. The District did not object to Port Angeles's decommissioning plan and supported the surrender proposal, provided it could continue to use the diversion weir, screened diversion, concrete tunnel, and steel pipeline to collect and transport water to its plant. The District also requested that the Commission conduct a safety inspection of the project and address any safety requirements prior to surrendering its license.

8. The Division of Dam Safety and Inspections, Portland Regional Office, inspected the project on September 12, 2018. As described in the November 7, 2018 inspection report, the inspector found the project features to be stable and in satisfactory condition. No problems or concerns were observed at the diversion weir and intake structures, except a lack of vegetation management and minor scour¹⁴ along the concrete encased flowline. The inspection report noted a downed tree and transmission line at the project, but did not identify any safety issues that must be addressed before the license surrender became effective.

¹⁰ District's Motion to Intervene and Comments at 3. The District's pipe is not a project work.

¹¹ District's Motion to Intervene and Comments at 3.

¹² *Id.*

¹³ *Id.*

¹⁴ Scour is the removal of sediment such as sand and silt from around an object like a dam resulting in a local depression, due to an increase of water flow velocity around the dam.

9. On November 29, 2018, Commission staff issued the Surrender Order. The order concluded that the surrender of the Morse Creek license would not result in any significant environment impacts¹⁵ and approved Port Angeles's proposed plan to keep the diversion weir and intake structures in place.¹⁶ The Surrender Order requires Port Angeles to disconnect and remove all generating equipment from the powerhouse, including the control switchboard; plug both ends of the penstock; and ensure that the tailrace channel matches pre-project condition within 120 days.¹⁷

10. On December 31, 2018, the District filed a timely request for rehearing of the Surrender Order. The District contends that Commission staff erred in approving surrender of the project because the September 12, 2018 inspection was inadequate to ensure that the project works were safe and operational to support the District's continued use of the diversion facilities. The District requests that the recommendations made by the inspector concerning vegetation management, minor scour, and a downed tree and transmission line be addressed as a condition of surrender. Finally, the District also requests that Commission staff conduct an additional safety inspection and, if any other safety or maintenance issues are identified, require Port Angeles to address those issues prior to the termination of the Commission's jurisdiction.

II. Discussion

11. Section 6 of the Federal Power Act (Act) provides that a license "may be... surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice." Because the Act does not contain any further statutory standard, the Commission applies a broad "public interest" standard to surrender applications.¹⁸ Commission regulations provide that licenses may be surrendered only upon the fulfillment of "such obligations under the license as the Commission may prescribe" and "upon such conditions with respect to the disposition of such works as

¹⁵ Surrender Order, 165 FERC ¶ 62,124 at P 11. The District does not challenge the Commission's environmental review.

¹⁶ Surrender Order, 165 FERC ¶ 62,124 at P 10.

¹⁷ Surrender Order, 165 FERC ¶ 62,124 at P 9-11, ordering para. (B).

¹⁸ *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069, at P 61 (2008) (citing *Arizona Pub. Serv. Co.*, 109 FERC ¶ 61,036, 61,140 (2004)). The public interest standard for surrender applications is not the same as the public interest/comprehensive development standards of FPA Section 4(e) and 10(a)(1). *Id.* at P 60.

may be determined by the Commission.”¹⁹ Pursuant to these standards, the Commission conditions surrenders to ensure public safety and to provide for the environmental restoration of project lands and the mothballing or removal of some or all of the project works as appropriate.²⁰ Public safety, in the context of a hydropower license surrender, relates to the safety and stability of the dam (diversion weir) itself at the time the license is surrendered.²¹ Where public safety and the environment are not at issue, the Commission does not require the licensee to repair or maintain works upon surrender.²² Thereafter, the state or other local authorities may regulate the safety of the dam, and can take the necessary steps to address any future regulatory issues that may arise.

12. As described below, the inspection conducted by Commission staff determined that the project works are stable and safe. Having made that determination, we are not required to ensure that project works are suited for non-project purposes on behalf of third parties that may wish to use project facilities after the surrender is effective; such matters are between the former licensee and any third party. Accordingly, we see no need for another safety inspection and will not require the licensee to perform maintenance that is not necessary to ensure public safety or protection of the environment.

¹⁹ 18 C.F.R. § 6.2 (2018).

²⁰ *Niagara Mohawk Power Corp.*, 85 FERC ¶ 61,420, 62,590-91 (1998) (noting that there is no requirement that a license surrender can only occur if the licensee leaves the project in good operating condition).

²¹ *Rochester Gas & Electric*, 99 FERC ¶ 61,012 at n.10-11, *on reh'g*, 100 FERC ¶ 61,113 (2002) (conditioning surrender on the completion of previously identified, outstanding masonry and concrete repairs to prevent water from flooding the historically significant powerhouse, but declining to require licensee to satisfy the state's dam safety criteria prior to surrender).

²² *El Dorado Irrigation District*, 94 FERC ¶ 61,031, n.14 (2001). *See Niagara Mohawk Power Corp.*, 83 FERC ¶ 61,226, 62,007-08 (1998), *reh'g denied*, 85 FERC ¶ 61,420, 62,590-91 (1998) (conditioning surrender on repair of longstanding issues with deteriorating pipelines beneath a road that may cause the road to collapse, but declining to require the licensee to restore the project to good operating condition); *Rochester Gas & Electric*, 99 FERC ¶ 61,012 at n.10-11, *on reh'g*, 100 FERC ¶ 61,113 (2002) (conditioning surrender on the completion of previously identified, outstanding masonry and concrete repairs to prevent water from flooding the historically significant powerhouse, but declining to require licensee to satisfy the state's dam safety criteria prior to surrender).

A. The inspection was adequate

13. Commission staff adequately inspected the project works to ensure public safety upon decommissioning. The inspection addressed all accessible, visible project works, including the diversion weir, intake, concrete encased flowline to the control building, and the powerhouse. The inspector concluded that project works used by the District are stable and in satisfactory condition.

14. The District contends that the inspector did not sufficiently inspect all upstream portions of the steel pipeline used to convey water from the concrete tunnel to the District's pipe to the water treatment plant. We disagree. The majority of the steel pipe is buried. The inspector inspected the visible, accessible portions of the pipeline. No safety issues were identified on the portions that were inspected, and there is no history of issues identified during previous inspections or of complaints concerning the steel pipeline. For these reasons, the inspection was sufficient. Nothing in the record indicates that we should require further inspections or require the licensee to make any repairs to ensure that the pipeline is left in condition suitable for the District's continued use, and the District has not provided any evidence on this matter.

15. The District states that it is unclear whether Commission staff inspected the valves on the steel pipeline. The District states that its worker was injured while manually operating a valve, although it did not specify which valve, and that the Commission must require Port Angeles to conduct maintenance on the valves prior to license surrender to prevent future injuries. Although we share the District's concern about worker safety, the maintenance and continued operation of the valves does not impact the safety and stability of the diversion weir itself. Accordingly, we will not require Port Angeles to undertake valve maintenance as a condition of surrender. Further, there is no history of issues identified during previous inspections or complaints concerning the valves. Last, we note that the District has access to the valves to perform any necessary maintenance itself.²³ Nothing more is required.

16. The District states that it is unclear whether the intake gate was inspected. It was. As described in the inspection report, the inspector observed that the gate was in an open position and that it did not have power. The inspector was informed that the gate must be open to divert water to the District's water treatment plant and that the District has access to the gate and the ability to operate it manually if it needs to close it. The inspector appropriately concluded that the gate was in the position necessary for the District's use, and did not observe any safety issues with the gate. There is no history of safety or

²³ See District's Motion to Intervene and Comments at 3 ("The District occasionally opens the butterfly valve and the blow-off to flush the pipeline.").

maintenance issues identified during previous inspections or complaints concerning the intake gate.

17. The District contends that Commission staff should have inspected the concrete tunnel that carries water from the screened diversion through the mountain. There was nothing in the visual inspection of the project and no history of safety or maintenance issues or complaints concerning the tunnel that would indicate a need for further investigation.

18. Finally, the District states that it is unclear whether Commission staff inspected the structural integrity of the control building and its foundation. The inspector did observe the building and did not identify any apparent issues with its structural integrity. However, the building was not specifically evaluated for its structural integrity because the control building is not a water-retaining structure that could affect public safety in general, or the safety of the diversion weir specifically, after decommissioning.

19. As detailed above, the inspector conducted a safety inspection of the project works and did not identify any safety issues that needed to be addressed prior to decommissioning. We are satisfied that the project is safe at the time of surrender. Further, while the facilities will be outside of our jurisdiction after surrender, Port Angeles has stated that it will conduct periodic inspections of the project after the termination of the Commission's jurisdiction to detect any future safety issues that may arise.²⁴

B. The inspection did not identify any safety or environmental issues that must be addressed as a condition of surrender.

20. In its rehearing request, the District notes that the inspector made three recommendations in the September 12, 2018 inspection: (1) implement a vegetation management program; (2) visually monitor the scour for changes and take additional measures if needed, and; (3) remove a downed tree and restoring the project's transmission line. The District contends these issues must also be addressed prior to decommissioning. However, the above recommendations are maintenance issues, not public safety or environmental issues that must be addressed as a condition of surrender.²⁵

²⁴ City of Port Angeles, February 23, 2018 Surrender Application at 4. In general, Washington State's Department of Ecology would regulate the dam after the Commission ends jurisdiction, however in this case, the Morse Creek dam is too small to be regulated by that agency under its current regulations.

²⁵ See *supra* note 19 and accompanying text.

21. The lack of vegetation management is a minor maintenance issue that does not impact the stability or safety of the diversion weir. Accordingly, we decline to require the licensee to perform this maintenance.

22. The minor scour that was identified in previous inspection reports²⁶ and then observed again by the inspector was noted to be stable and it does not appear to have worsened. As it explained in its application, Port Angeles will conduct periodic inspections of project facilities after termination of the license.²⁷ We are satisfied that the scour does not pose a threat to public safety after the termination of our jurisdiction.

23. Finally, the inspector noted the downed tree and powerline in the inspection report. The inspector was informed that the powerline had been deactivated since the tree fell and that the District has the ability to restore it should the District desire power at the control building. Even if the District does not have this authority, whether the control building has power or not does not affect the safety and stability of the diversion weir after termination of Port Angeles's license. Accordingly, we will not requires restoration of the transmission line.

III. Conclusion

24. The Surrender Order, supported by Commission staff's dam safety inspection, properly considered the surrender application and imposed those measures needed to safely decommission the project. The District's concerns regarding the future maintenance of its water supply system are not public safety issues that must be addressed as a condition of surrender. Accordingly, we deny rehearing.

²⁶ June 30, 2005 Operation Report at 3; June 12, 2008 Dam Safety Inspection Report at 5; May 22, 2012 Dam Safety Inspection Report at 5, 14. The scour is also visible in pictures attached to inspection reports from 2015 and 2016. February 25, 2015 Dam Safety Inspection Report at 9; November 30, 2016 Dam Safety Inspection Report at 10.

²⁷ City of Port Angeles, February 23, 2018 Surrender Application at 4.

The Commission orders:

The request for rehearing filed in this proceeding by the District on December 31, 2018 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.