

105 FERC ¶ 61,132
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Public Utility District No. 1 of Chelan County,
Washington

Project No. 2145-054
Project No. 943-082

ORDER AMENDING LICENSES
AND DISMISSING REHEARING REQUESTS AS MOOT

(Issued October 27, 2003)

1. On January 16, 2003, the Commission denied rehearing of an order amending the licenses for the Rocky Reach Project No. 2145 and the Rock Island Project No. 943. The amendments authorized the licensee to install at each project a small turbine generator in an adult fishway attraction water conduit.¹ The projects are located on the Columbia River in Douglas and Chelan Counties, Washington. The Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, and Columbia River Inter-Tribal Fish Commission (collectively referred to as "Tribes") and the National Marine Fisheries Service (NOAA Fisheries) seek rehearing of that order, arguing that the Commission erred in issuing the license amendments before completing consultation under Section 7(a)(2) of the Endangered Species Act (ESA). American Rivers seeks rehearing of our denial of its motion for late intervention, as well as rehearing or reconsideration of the merits of our January 16, 2003 order. For the reasons discussed below, we dismiss the pending requests for rehearing on grounds of mootness, and amend the licenses to incorporate the conditions of a recently-completed biological opinion.

BACKGROUND

2. A more detailed procedural history appears in our order of January 16, 2003. The Commission issued a new license for the Rock Island Project in 1989.² The 622.5-megawatt (MW) project includes a dam, a 21-mile-long reservoir, and two powerhouses containing 18 generating units with total average annual generation of 2.7 million megawatt hours (MWh). The upstream limit of the project reservoir reaches the tailwaters of the Rocky Reach Project.

¹98 FERC ¶61,279 (2002), reh'g denied, 102 FERC ¶ 61,043 (2003).

²46 FERC ¶ 61,033.

3. The Commission licensed the 1,236.6-MW Rocky Reach Project in 1957.³ The project includes a dam, a 43-mile-long reservoir, and a powerhouse containing 11 generating units with total average annual generation of 6.3 million MWh.
4. The Public Utility District No. 1 of Chelan County, Washington (Chelan), licensee for both projects, filed its amendment application on May 1, 2001. At the Rocky Reach Project, Chelan proposed to install a 0.8-MW, fixed-blade propeller turbine generator within the attraction water conduit that provides flow to the spillway entrance of the adult fishway. At Rock Island, Chelan proposed to install a 0.7-MW Kaplan turbine generator in the attraction water conduit of the left bank adult fishway. Neither installation would occur within the fishway itself.
5. The Commission issued a joint public notice of the applications and prepared an environmental assessment (EA), including a Biological Assessment (BA) that analyzed the effects of the proposed amendments on three anadromous fish species listed as endangered pursuant to the ESA. The staff found in the BA that the proposed amendments, with additional staff-recommended environmental measures, were not likely to adversely affect any of the listed species. On July 27, 2001, staff provided its BA to both NOAA Fisheries and the U.S. Department of the Interior's Fish and Wildlife Service (FWS). Shortly thereafter, FWS concurred with the staff's finding for bull trout, making formal ESA consultation with FWS unnecessary. However, NOAA Fisheries did not concur with the staff's findings for the remaining two species.
6. By letter filed August 27, 2001, NOAA Fisheries informed the Commission staff that it did not concur with the BA's findings and requested additional information. The Commission staff responded by providing the additional information that was available, and requested that NOAA Fisheries file its biological opinion by January 9, 2002, within 135 days of its non-concurrence letter. On January 9, 2002, NOAA Fisheries responded that, because other work had priority, it would be unable to provide a biological opinion until some time after the summer of 2002. On January 24, 2002, staff responded that, in light of the Commission's interest in processing all cases in a timely manner, it would be helpful if NOAA Fisheries could provide its biological opinion by the end of February. On March 14, 2002, NOAA Fisheries had not yet submitted its biological opinion, and the Commission proceeded to issue the requested license amendments.⁴ The Tribes

³18 FPC 25.

⁴98 FERC ¶ 61,279.

sought rehearing, and American Rivers requested late intervention in order to seek rehearing. The Commission denied both requests in its order of January 16, 2003. The Tribes and NOAA Fisheries filed requests for rehearing of our January 16 Order. With its rehearing request, NOAA Fisheries filed additional information contesting our finding that the amendments would not result in a taking of listed species. American Rivers filed a request for rehearing of our denial of its motion for late intervention.

7. In mid-August, the Commission staff learned that NOAA Fisheries had completed its biological opinions and had posted them on its web site. The biological opinions for the license amendments were included as parts of two much larger biological opinions for the proposed issuance of Section 10 incidental take permits in connection with an anadromous fish agreement and habitat conservation plan for the two projects. NOAA Fisheries subsequently filed its biological opinions with the Commission on September 26, 2003.

DISCUSSION

8. All of the pending requests seek rehearing or reconsideration of our decision to issue the license amendments without awaiting a biological opinion from NOAA Fisheries.⁵ Ordinarily, we would first consider whether the parties could properly file a second request for rehearing, and then proceed either to dismiss or to address the rehearing requests. However, because NOAA Fisheries has now completed its biological opinions, we conclude that the appropriate course of action is to amend the licenses to incorporate the conditions of the biological opinions. As a result, the pending requests for rehearing are moot, and we dismiss them on that ground.

9. In its biological opinions, NOAA Fisheries concludes that construction and operation of the small turbine units is not likely to jeopardize the continued existence of the listed species. Included in the biological opinions are incidental take statements for construction of the small turbine units, reasonable and prudent measures to minimize incidental taking, and terms and conditions to implement the reasonable and prudent measures. As explained in the biological opinions, any taking that may result from operation of the turbine units is addressed in the Section 10 incidental take permits for operation and maintenance of the projects in accordance with the anadromous fish agreement and habitat conservation plan.

⁵American Rivers seeks rehearing of our denial of its motion for late intervention. However, it seeks party status in order to request rehearing of our January 16 Order.

10. The incidental take statement for construction of the small turbine units provides that the likelihood of lethal taking is extremely low or nil, based on the fact that construction activities are expected to occur outside the juvenile migration period at a time when only adult steelhead will be migrating. Thus, NOAA Fisheries limits the allowable lethal take from construction activities to no more than 5 individual juveniles of listed species and 1 individual adult steelhead.

11. The reasonable and prudent measures, terms, and conditions require that the licensee: (1) coordinate with NOAA Fisheries to ensure that the proposed construction activities occur outside the migration period for listed species; (2) report all observations of construction-related injury or mortality of listed species, including a description of any corrective actions taken to eliminate the potential for additional taking; (3) cease all construction activities if the allowable take of listed species is exceeded; (4) implement all of the proposed environmental measures for construction and maintenance of the small turbine units, including plans for responding to spills of oils or solvents; (5) visually inspect the diffuser screens annually, and replace the screens or hardware as necessary to ensure that they will not fail during the adult migration period; and (6) develop and implement an operations and maintenance plan for the turbine units and auxiliary water supply system, including screens. The proposed environmental measures referred to in condition (4) above require that the licensee: (1) use biodegradable and non-toxic vegetable-based oil to lubricate the turbines; (2) implement filed plans for responding to lubricant leaks or spills; (3) assure that all construction-related materials and fluids are removed before the turbines start operating; (4) install an automated valve or gate system that will redirect flows into the bypass system whenever the main system is incapable of providing the necessary attraction flows; (5) conduct hydraulic monitoring at the diffuser gratings during operation and testing of the bypass system; (6) conduct hydraulic monitoring at the diffuser gratings when the new turbines are operating, adjusting them if necessary to ensure that they are operating properly; and (7) screen the attraction flow conduit intakes to prevent juvenile salmonids from entering the attraction flow systems. All of these measures, terms, and conditions are either already required by our order of March 14, 2002, or can be implemented with the licensee's approved Adult Fishway Attraction Water Conduit Turbine Plan.⁶

⁶Ordering paragraph (I) of our order of March 14, 2002, required the licensee to file, for Commission approval, plans to: (1) clean up any major spills of oil or other lubricants from the fishway attraction water conduit turbines; (2) conduct hydraulic monitoring at diffuser gratings in the fishway attraction flow conduits of each project under normal operations and during periods when the flows are passed via the bypass systems; (3) install an automated valve or gate system at each project to redirect flows from attraction flow conduits into the bypass system during unscheduled outages of the
(continued...)

12. Section 7(b)(4) of the ESA provides that an incidental take statement shall set forth the terms and conditions that “must be complied with by the Federal agency or applicant (if any), or both, to implement the [reasonable and prudent] measures.”⁷ Further, Section 7(o)(2) of the ESA provides that “any taking that is in compliance with the terms and conditions specified in [an incidental take statement] shall not be considered to be a prohibited taking of the species concerned.”⁸ Therefore, to ensure that any incidental taking of listed species will not be considered prohibited, we will require that the licensee implement its approved plan in accordance with the small turbine unit incidental take measures, terms, and conditions of the biological opinion, as set forth in Appendix A to this order.⁹

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attraction flow conduit turbines; and (4) install at the attraction flow water intakes, wedge-wire, flat-plate screens suitable to exclude juveniles from entering the systems. The plans were required to be prepared in consultation with NOAA Fisheries, FWS, and the Washington Department of Fish and Wildlife. To address these requirements, the licensee filed its Adult Fishway Attraction Water Conduit Turbine Plan on October 30, 2002, and the Commission staff approved it by order issued on March 14, 2003. Public Utility District No. 1 of Chelan County, Washington, 102 FERC ¶ 62,171 (2003).

⁷16 U.S.C. § 1536(b)(4).

⁸16 U.S.C. § 1536(o)(2).

⁹In its biological opinions, NOAA Fisheries did not distinguish the reasonable and prudent measures to minimize incidental take from the terms and conditions to implement the reasonable and prudent measures. Instead, NOAA Fisheries simply listed what it termed “Small Turbine Unit Measures, Terms, and Conditions.” These are set forth in Appendix A, with minor editorial and clarifying revisions, but no substantive changes. Specifically, we omitted unnecessary references to the Commission, thus placing the obligations directly on the licensee; and we replaced numeric references to specific sections of the biological opinions with descriptions of the subject matter addressed in those sections. We also added the Commission to the reporting requirements in condition (2) and the approval requirements in condition (6).

The Commission orders:

(A) The licensee shall implement its Adult Fishway Attraction Water Conduit Turbine Plan, as approved on March 14, 2003, in accordance with the incidental take measures, terms, and conditions set forth in Appendix A to this order.

(B) The requests for rehearing filed in this proceeding by the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, and Columbia River Inter-Tribal Fish Commission on February 18, 2003; by NOAA Fisheries on February 19, 2003; and by American Rivers on February 18, 2002; are dismissed as moot.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

Appendix A

Take of Permit Species Resulting from Construction of the Small Turbine Unit

The likelihood of lethal take resulting from the construction of a small turbine unit in the attraction water conduit of the adult fishway at the Project is extremely low or nil, based on the fact that these construction activities are expected to occur outside the juvenile migration and at a time when only adult steelhead will be migrating. Thus NOAA Fisheries limits the allowable lethal take as a result of small turbine unit construction activities to no more than 5 individual juvenile ESA-listed Permit Species and 1 individual adult steelhead. Any take resulting from the future operation of the turbine unit (including mortalities due to screen failures) will be included in the allowable lethal take of juvenile and adult Permit Species in the incidental take permit issued by NOAA Fisheries to Chelan PUD for the operation and maintenance of the Project.

Small Turbine Unit Measures, Terms, and Conditions

1. Chelan PUD shall coordinate with NOAA Fisheries to ensure that the proposed construction activities occur outside the migration period of ESA-listed adult or juvenile Permit Species.
2. Chelan PUD shall report to the Commission and to NOAA Fisheries all observations of construction-related ESA-listed Permit Species injuries or mortalities within two days of the incident, and Chelan PUD shall include a concise description of the causative event (if known) and a description of any resultant corrective actions taken at the construction site to eliminate the potential for additional take.
3. Chelan PUD shall immediately cease all construction activities in the event that the allowable take of ESA-listed Permit Species for juveniles or adults specified for construction of the small turbine unit is exceeded.
4. Chelan PUD shall implement all of the proposed environmental measures listed below, and follow the proposed spill plan in the event that oils or solvents are spilled during construction of the turbine unit or its subsequent operation.
5. Chelan PUD shall visually inspect, on an annual basis, the diffuser gratings and replace the screens or hardware as necessary to ensure that they will not fail during the adult migration period.
6. Chelan PUD shall develop an operations and maintenance plan for the turbine unit and auxiliary water supply system (including screens), obtain NOAA Fisheries' and the

Commission's approval of this plan, and implement this plan. This plan may be modified in future years with the approval of the Commission and NOAA Fisheries.

Proposed Environmental Measures

The following measures have been proposed to mitigate for any potential adverse impacts to anadromous fish species arising from the construction and maintenance of the small turbine unit.

1. Use biodegradable and non-toxic vegetable-based oil to lubricate the turbine in order to minimize adverse impacts of potential oil spills to migrating adults.
2. Implement filed plans for responding to lubricant leaks or spills.
3. Assure that all construction-related materials and fluids have been removed prior to the start of new turbine operation.
4. Install an automated valve or gate system that would redirect flows into the bypass system whenever the main system is incapable of providing the necessary attraction flows.
5. Conduct hydraulic monitoring at the diffuser gratings during operation and testing of the bypass system.
6. Conduct hydraulic monitoring at the diffuser gratings when the new turbines are operating, and make any necessary adjustments to ensure that the diffuser gratings are operating properly.
7. Screen the attraction flow conduit intakes to prevent juvenile salmonids from entering the attraction flow systems.