

109 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

City of Tacoma, Washington

Project No. 2016-086

ORDER DENYING REHEARING

(Issued November 22, 2004)

1. In this order, we deny rehearing of our order of July 9, 2004, which amended the new license for the Cowlitz River Project to include conditions to protect several species of fish listed as endangered under the Endangered Species Act (ESA).¹ The Cowlitz Indian Tribe, Friends of the Cowlitz, and CPR-Fish (Intervenors) argue that the amendment does not go far enough to protect the fish, and maintain that we must reinitiate formal consultation and request a new biological opinion. For the reasons discussed below, we find that the amendment is based on substantial evidence and that further consultation is not required. This order is in the public interest because it clarifies the Commission's ESA responsibilities and affirms measures needed to protect endangered fish.

Background

2. The Commission approved a settlement agreement and issued a new license for the Cowlitz Project on March 13, 2002.² To accommodate a state-issued stay of the water quality certification for the project, the Commission issued the new license with an effective date of April 12, 2002, and later stayed the new license in response to the state's extension of the stay pending completion of the certification appeal. On July 18, 2003,

¹ *City of Tacoma, Washington*, 108 FERC ¶ 61,031 (2004).

² *City of Tacoma, Washington*, 98 FERC ¶ 61,274 (2002). The 462-megawatt project is located on the Cowlitz River in Lewis County, and in part on lands within the Gifford Pinchott National Forest.

the Commission issued an order denying rehearing and lifting the stay.³ Several parties filed petitions for judicial review, and the case is currently pending before the U.S. Court of Appeals for the Ninth Circuit.⁴

3. When we issued the new license in March 2002, the Commission staff had already completed consultation pursuant to section 7 of the ESA with the U.S. Fish and Wildlife Service (FWS), but was still awaiting a biological opinion from the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries). After NOAA Fisheries filed a draft biological opinion for comment, the Commission staff filed a motion with the court for leave to amend the new license as needed to implement the final biological opinion.⁵ NOAA Fisheries filed its final biological opinion on March 25, 2004, and the court granted the staff's motion for leave to amend on April 26, 2004. Shortly thereafter, on July 9, 2004, we amended the new license to incorporate conditions of the biological opinion's incidental take statement to protect the listed fish species (Lower Columbia River Chinook salmon, Lower Columbia River steelhead, and Columbia River chum salmon, all of which are listed as threatened).

4. Intervenors filed timely requests for rehearing, arguing that the biological opinion is inadequate to protect the listed species and that the Commission must therefore reinstate formal consultation and request a new biological opinion from NOAA Fisheries. Intervenors also request certain changes to the license conditions that they believe will better protect the endangered fish species while a new biological opinion is prepared. For the reasons explained below, we deny rehearing.

³ *City of Tacoma, Washington*, 104 FERC ¶ 61,092 (2003).

⁴ *Cowlitz Indian Tribe et al. v. FERC*, No. 03-73225 (9th Cir. filed Sept. 10, 2003).

⁵ Under section 313(b) of the Federal Power Act (FPA), the court of appeals has exclusive jurisdiction to affirm, modify, or set aside a Commission order after the record has been filed with the reviewing court. However, any party may request that the court grant the Commission leave to take additional evidence and modify its findings. *See* 18 U.S.C. § 8251(b).

Discussion

5. On rehearing, Intervenors urge us to take action to request NOAA Fisheries to withdraw its finding of no jeopardy in the biological opinion, reinitiate consultation, and issue a new opinion. They assert that our reliance on the final biological opinion was unreasonable because the no-jeopardy finding of NOAA Fisheries was arbitrary and capricious, both on its face and as a result of subsequent developments that call the finding into question. In the alternative, and pending completion of further consultation, Intervenors request that we modify several provisions of our order that they maintain do not fully implement the incidental take statement.

6. Intervenors first argue that the Commission violated a mandatory duty under the ESA to avoid jeopardy to the fish by adopting NOAA Fisheries' biological opinion, which they contend was arbitrary and capricious. In support, they cite *Northwest Environmental Advocates v. EPA*.⁶ In that case, a federal district court held that EPA violated a mandatory duty to avoid jeopardy under section 7(a)(2) of the ESA by approving a state's water quality standards, despite extensive evidence in the record that the no-jeopardy finding in the biological opinion was scientifically unsound and the state standards were harmful to threatened fish species.

7. Intervenors argue that this case is similar, because the biological opinion makes a no-jeopardy finding despite significant adverse effects to an already highly-degraded habitat, based on "proposed future studies, as yet unplanned monitoring, and yet-to-be-determined or assured mitigation."⁷ They maintain that there is insufficient evidence that the improvements contemplated by the new license and the incorporated settlement agreement "are likely or even probable to occur."⁸ They therefore assert that the biological opinion is arbitrary and capricious, and that the Commission may not rely on it.

⁶ 268 F. Supp. 2d 1255 (D. Or. 2003).

⁷ Request for rehearing at 5.

⁸ Request for rehearing at 7.

8. ESA section 7(a)(2) imposes both substantive and procedural responsibilities. However, Intervenor overstate the independence of federal agencies acting under that section. Although a federal agency must ensure that its action will not jeopardize the continued existence of listed species or destroy or modify their designated critical habitat, it must do so in consultation with NOAA Fisheries or FWS, as appropriate. Because those agencies are charged with implementing the ESA, they are the recognized experts with regard to matters of listed species and their habitat. Thus, the Supreme Court has observed that, while a biological opinion “theoretically serves an ‘advisory function,’ . . . in reality it has a powerful coercive effect on the action agency.”⁹ The statutory framework is based on the assumption that the biological opinion will play a central role in the action agency’s decision making, and an agency that disregards a biological opinion and proceeds with its proposed action “does so at its own peril.”¹⁰ It is therefore unreasonable to expect that an action agency must perform a detailed substantive review of a biological opinion before deciding whether to implement its conditions in connection with a proposed action.¹¹

9. In *Northwest Environmental Advocates*, the case on which Intervenor rely, the district court found substantial evidence in the record that NOAA Fisheries’ staff experts had concluded that the state’s water quality standards would not meet the biological requirements of the listed species and that a no-jeopardy finding was scientifically unsound. The court therefore concluded that it was unreasonable for NOAA Fisheries and EPA to rely on “plans for future actions” that were not “reasonably certain” to occur.¹² In this case, however, there is ample support in the record for the biological opinion and the conditions of the new license.

⁹ *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (internal citation omitted).

¹⁰ *Id.* at 170.

¹¹ See *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (even when a biological opinion is based on admittedly weak information, a federal agency’s reliance on it will satisfy its ESA obligations if the record contains no new information or other data which seriously undermines the opinion’s conclusions).

¹² 268 F. Supp. 2d at 1273.

10. As NOAA Fisheries recognized in its biological opinion, the settlement agreement that we approved and incorporated in the new license for the Cowlitz Project represents the culmination of nearly four years of negotiations among multiple parties. The negotiating parties explored many alternatives, and the Commission staff prepared both draft and final environmental impact statements that examined the settlement agreement in the context of a wide range of issues, including fish passage, fish production, fish habitat, water quality, instream flows, wildlife recreation, and cultural and historic resources. Although not all parties involved in the relicensing proceeding were able to agree, the settlement garnered broad support, as represented by the signatories: Tacoma Power, Washington Department of Fish and Wildlife, Washington Department of Ecology, Washington State Parks and Recreation Commission, FWS, NOAA Fisheries, U.S. Forest Service, Interagency Committee for Outdoor Recreation, Confederated Tribes and Bands of the Yakama Nation, Washington Council of Trout Unlimited, and American Rivers. Commission staff also reviewed the draft biological assessment, which Tacoma prepared as the Commission's non-federal representative for purposes of informal ESA consultation, and concurred in its conclusions before forwarding the biological assessment to NOAA Fisheries in support of the staff's request for formal consultation concerning chinook salmon, chum salmon, and steelhead trout. Commission staff concluded in the final EIS that relicensing the project in accordance with the terms of the settlement agreement would benefit the listed fish species and would improve the probability of their recovery. The staff nevertheless concluded, based on the biological assessment, that the proposed action was likely to have some adverse effects on the species. In its biological opinion, NOAA Fisheries agreed, but concluded that those adverse effects would not jeopardize the continued existence of the species.

11. Intervenors' concerns regarding the settlement agreement have been fully considered throughout this proceeding, not only in preparation of the draft and final EIS, but also in connection with the biological assessment, the order approving the settlement and issuing a new license, the order denying rehearing, and the biological opinion. Thus, there is an extensive record in support of the provisions of the new license, as well as a thorough analysis of the likely effects of those provisions on the listed fish species. We find nothing in the record to suggest that the biological opinion is arbitrary and capricious or that we may not rely on it, as Intervenors assert.

12. Although the biological opinion finds that environmental conditions would have to improve to meet the habitat needs of the listed species,¹³ the new license includes conditions designed to address these needs with measures for upstream and downstream fish passage, hatchery production, minimum flows, fish monitoring, sediment and spawning gravel augmentation, placement of large woody debris, and adaptive management. The biological opinion concludes that, although some adverse effects will continue, the measures required in the new license will reduce these effects to levels that are not likely to jeopardize the continued existence of the listed species.¹⁴

13. Because these measures are included as license conditions, Tacoma is required to undertake them. If they are not sufficient or do not work as intended, the license provides for a process of adaptive management to change them. Thus, these measures are not the sort of speculative and unenforceable commitments that the district court rejected in *Northwest Environmental Advocates*.¹⁵ Rather, under regulations implementing the ESA, these required measures are considered “effects of the action” and are “reasonably certain to occur.”¹⁶

14. Intervenors next argue that it is unreasonable for the Commission to accept the no-jeopardy finding of the biological opinion because Tacoma’s recently-filed plan for downstream fish passage and collection at Riffe Lake and Cowlitz Falls demonstrates that “the outcomes of the license measures are not known.”¹⁷ Tacoma filed this plan on July 19, 2004, pursuant to Settlement Agreement License Article 1.¹⁸ The Commission

¹³ See Table 10, Biological Opinion, at 5-44 to 5-46 (filed March 25, 2004).

¹⁴ See Table 18, Biological Opinion at 6-26 to 6-27. A jeopardy finding based on a habitat analysis is usually made if the proposed action will impair properly functioning habitat, appreciably reduce the functioning of already-impaired habitat, or retard the progress of impaired habitat toward properly functioning conditions. *Id.* at 6-23.

¹⁵ 268 F. Supp. 2d at 1273.

¹⁶ See 50 C.F.R. § 402.02 (2004).

¹⁷ Request for rehearing at 10.

¹⁸ See 98 FERC ¶ 61,274 at 62,112-13 (Appendix A).

staff is reviewing it, and questions regarding its adequacy are therefore premature.¹⁹ However, we need not consider the plan's adequacy in order to address Intervenors' argument, because the license article itself is based on the use of adaptive management as a reasonable response to scientific uncertainty.

15. Article 1 requires that the plan for downstream fish passage and collection at Riffe Lake and Cowlitz Falls include, among other things, "proposed facilities and measures most likely to achieve the goal" of 95 percent fish passage survival. Article 1 further requires a report on the effectiveness of downstream fish passage and collection facilities and measures, and provides that if the fish passage survival achieved has not reached 95 percent, the report shall include a plan and schedule providing for any further improvements that NOAA Fisheries and FWS determine are most likely to be successful in reaching that goal. The biological opinion requires, as an incidental take provision, that fish passage survival must be at least 75 percent with the best available technology within three years of issuance of the opinion, and we have included this provision in the license.²⁰ As we noted in our order amending the license, if the downstream passage performance standards cannot be met within three years, this condition would leave no avenue for further measures or modifications without reinitiating consultation. In our

¹⁹ We note that NOAA Fisheries has already approved the filed plan. *See* letter from Keith Kirkendall, NOAA Fisheries, to Debbie Young, Tacoma, dated July 15, 2004 (included as Appendix A to Tacoma's plan). In any event, although Intervenors made a generalized complaint about the Fisheries Technical Committee and public participation in their request for rehearing of the new license, they did not seek to be added as a consulted entity for purposes of Tacoma's preparation of the downstream fish passage and collection plan under Agreement Article 1. They will not, therefore, be afforded an opportunity to intervene and seek rehearing of the Commission staff's decision regarding the plan's adequacy. Under long-standing Commission precedent and policy, intervention and rehearing is permitted in post-licensing compliance matters only when the filing entails a material change in the plan of project development or terms of the license; would adversely affect the rights of property holders in a manner not contemplated by the license; or involves an appeal by an agency or entity specifically given a consultation role by the license article under which the compliance filing is made. *See Kings River Conservation District*, 36 FERC ¶ 61,365 (1986); *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 (1987).

²⁰ *See* 108 FERC ¶ 61,031 at P 14.

view, reliance on adaptive management does not render the biological opinion arbitrary and capricious. Rather, it reflects a reasonable response to scientific uncertainty by requiring a process of study, implementation of measures, further study, and implementation of further measures, if necessary, to achieve resource management goals.²¹

16. Finally, Intervenor argue that we should remove the requirement of prior Commission approval for measures under conditions 1(c), 1(f) and 4(a) of the incidental take statement. Intervenor maintain that, to the extent these operational changes are approved by NOAA Fisheries and are more protective of listed species, Commission approval of a license amendment should not be required before the licensee may undertake them. In their view, prior approval would defeat the concept of adaptive management, because it would introduce unnecessary delay.

²¹ Intervenor also criticize, without elaboration, Tacoma's filing of its plan six months after the original deadline in the license, upon which Intervenor assert the biological opinion's timeline was based. As noted earlier, the new license was stayed until July 18, 2003, in response to a state-ordered stay of water quality certification for the project. The Commission staff therefore established July 18, 2003, as both the issuance date and the effective date of the new license for compliance purposes. Tacoma requested, and the Commission staff granted, two 90-day extensions of time to file the plan required by Agreement Article 1. Condition 1(a) of the incidental take statement requires that downstream performance standards at Mossyrock Dam (which impounds Riffe Lake) must be 95 percent survival or at least 75 percent survival with best available technology within three years of March 23, 2004, the date of issuance of the biological opinion. In Article 401 of the new license, we changed this requirement to within three years of July 9, 2004, the date of issuance of our order amending the license. *See* 108 FERC ¶ 61,031 at 61,194 (ordering paragraph A). NOAA Fisheries did not seek rehearing of the change. The six-month delay in filing the plan does not affect the three-year period for compliance with the downstream passage performance standards. In any event, we find no basis for concluding that a six-month delay in filing the plan undermines NOAA Fisheries' no-jeopardy finding in the biological opinion. To the contrary, the biological opinion assumes that fish passage survival will continue at current levels for three years, and will then reach 75-95 percent as required by the license and settlement agreement. *See* Biological Opinion at 9-1.

17. Condition 1(c) of the incidental take statement requires Tacoma to follow the ramping rate restrictions of Article 14 of the settlement agreement, as reflected in Article 402 of the license. Article 14 sets forth specific ramping rate restrictions for various times of the day and year. For example, from November 1 to February 15 during daylight hours, at flows of less than 6,000 cubic feet per second (cfs), the allowable decline in river stage height measured at the gauge below Mayfield Dam must not exceed 2 inches per hour. The ramping rate restrictions are part of the license, and a license amendment would be needed to change them.

18. Intervenors are correct that, if Tacoma and the Fisheries Technical Committee agreed, the licensee could voluntarily implement the restrictions in a manner more protective of the listed species without prior approval, as long as this could be accomplished in a manner that complied with the license requirements. For example, Tacoma could agree to restrict the decline in river stage from November 1 to February 15 during daylight hours to not more than 1 inch per hour, even though the license specifies an allowable limit of 2 inches per hour. However, the Commission would have no power to enforce this agreement unless it was made part of the license through an amendment. Conversely, even if the Fisheries Technical Committee agreed, the licensee could not begin implementing the ramping rate restrictions in a less protective manner without first obtaining a license amendment, because doing so would violate the existing license requirements. Adaptive management does not negate the need for a license amendment for any changes in project facilities or operation. We therefore find no basis for deleting this requirement.

19. Similarly, we deny Intervenors' request to amend the other two license articles in question. Condition 1(f) of the incidental take statement requires Tacoma to develop a plan for monitoring the maintenance and use of side-channel habitat in the Cowlitz River downstream of Mayfield Dam, and provides that NOAA Fisheries and Ecology retain the authority to modify flow conditions or require other measures to preserve side channel habitat and function. Article 409 of the license requires that the plan, and any proposed changes to it, be submitted to the Commission for review and approval. Condition 4(a) of the incidental take statement provides that adaptive management will be implemented as described in section 6 of the biological opinion. Article 414 reflects this, and requires that the licensee file an amendment application before making any changes to project facilities or operation that are not already authorized by the license terms.

20. As we explained in our relicensing order, the comprehensive development standard of FPA section 10(a)(1) continues to govern regulation of a project throughout the license term, and the Commission must approve, through appropriate license amendments, all material changes to the project and its maintenance or operation. Although Intervenors assert that this is inconsistent with the incidental take statement,

they do not explain how this might be so, and we note that NOAA Fisheries did not seek rehearing of our order amending the new license to incorporate the incidental take conditions. In short, we find no basis for removing the requirement for prior Commission approval of any necessary license amendments for the Cowlitz Project.

The Commission orders:

The request for rehearing filed in this proceeding by the Cowlitz Indian Tribe, Friends of the Cowlitz, and CPR-Fish on August 9, 2004, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.