

125 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Utility District No. 1 of Cowlitz County,
Washington

Project No. 2213-024

ORDER ON REHEARING

(Issued October 16, 2008)

1. Public Utility District No. 1 of Cowlitz County, Washington (Cowlitz), filed a request for rehearing of the June 26, 2008 Commission staff order issuing a new license for the continued operation and maintenance of the 66.8-megawatt (MW) Swift No. 2 Project No. 2213, located on the North Fork Lewis River in Cowlitz and Skamania Counties, Washington.¹ Cowlitz seeks modification or clarification of the project's water quality certification, license Articles 401, 402, and 405, and spending caps. On July 25, 2008, the National Marine Fisheries Service (NMFS) filed a request for clarification and correction of the order issuing license. For the reasons discussed below, we clarify the license order and grant rehearing in part.

Background

2. The Swift No. 2 Project operates with flows released into the canal from PacifiCorp's Swift No. 1 powerhouse and includes a 3-mile-long canal, powerhouse, tailrace, and substation. The project occupies 3.27 acres of Forest Service land² administered by the U.S. Department of Agriculture's Forest Service (Forest Service).

¹ 123 FERC ¶ 62,259 (2008).

² On May 14, 2008, Cowlitz filed a revised Exhibit G, which showed the acres of Forest Service land to be 3.27, not 3.79 as stated in the license order.

3. Cowlitz's license is one of four licenses issued on June 26, 2008, to Cowlitz and PacifiCorp for four projects located on the North Fork Lewis River.³ The licenses incorporate almost all of the provisions of a comprehensive Settlement Agreement (Agreement) related to the relicensing of the four projects.⁴ The provisions of the Agreement that are common to all four projects are discussed in the Order on Offer of Settlement and Issuing New License for the Swift No. 1 Project (Master Order).⁵

Discussion

A. Water Quality Certification

4. Appendix B to the license order attaches, and makes a condition of the license, the water quality certification for the project issued by Washington Department of Ecology (Ecology) on October 9, 2006, and amended December 21, 2007, and January 17, 2008. Cowlitz explains that, on November 3, 2006, Ecology issued another amendment, which is not reflected in the certification attached to the license. We will revise the certification to include the November 2006 amendment, which modifies certification condition 4.3.5., relating to total dissolved gas limitations. In addition, as pointed out by Cowlitz, we will revise an informational exhibit included in the certification (and in Appendix B to the license order) to delete a section (6.1.5) that is not included in the certification as issued by Ecology.⁶

B. License Article 401

5. Article 401(a) requires that the licensee submit for Commission approval various plans required by the conditions contained in the several appendices to the license,⁷ but

³ See 123 FERC ¶¶ 62,257 through 62,260 (2008).

⁴ The Agreement was filed on December 3, 2004.

⁵ 123 FERC ¶ 62,260 (2008).

⁶ We also amend Appendix B to correct the issuance date of the certification.

⁷ See Appendix A – Forest Service conditions under section 4(e) of the Federal Power Act (FPA), Appendix C – Department of Commerce fishway prescription under FPA section 18, Appendix D – Department of Interior fishway prescription, and Appendix E – National Marine Fisheries Service Biological Opinion.

which do not provide for Commission approval. It also establishes deadlines for submitting the required plans to the Commission.

6. Article 401(a)(1) requires that Cowlitz file an upstream fish transport plan within 18 months of license issuance. Cowlitz asks that we change the deadline to be consistent with other conditions of the license, which do not require the upstream transport plan until year 17 of the license, and then only if certain conditions are met. We will grant the request and revise Article 401(a)(1).

7. Article 401(a)(2) requires Cowlitz to file an annual bull trout collection and transport plan within six months of license issuance (i.e., by December 28, 2008) and annually thereafter. Cowlitz asserts that there is not enough time between the end of the monitoring and transport season and late December to prepare the plan and requests that the due date for the plan be annually from date of license issuance, beginning June 2009. This request is reasonable, and we will modify the requirement.

8. As noted by the licensee, the license does not require Cowlitz to prepare the habitat preparation plan referenced in Article 401(a)(3), so we will correct the table by deleting the reference.

9. Article 401(a)(4) requires Cowlitz to file for Commission approval an aquatics fund strategic plan and annual plans proposing measures to be implemented under the aquatics plan before those measures can be implemented. Cowlitz argues that filing these plans is unduly burdensome and asks the Commission to eliminate the requirement for prior Commission approval. To ensure that the license requirements are properly carried out, we need to be able to review and approve the proposed measures prior to their implementation.⁸ Therefore, we deny Cowlitz's request.

10. Article 401(b) requires Cowlitz to file applications to amend its license prior to implementing "unspecified long-term changes to project operations, requirements, or facilities for the purpose of protecting and enhancing environmental resources." Cowlitz and NMFS assert that this is unnecessary because the Agreement resolves all issues

⁸ The Commission cannot delegate management of license requirements to another party or parties. As the agency charged with the administration of hydropower licenses, the Commission must approve licensees' post-licensing plans. That authority cannot be ceded to other entities. Approval of plans or operational changes outside of the parameters approved in the license by other entities, but not the Commission, is not acceptable. *See Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 (2006).

regarding the relicensing of the project, and that the parties to the Agreement do not contemplate any measures that are not already included in the Agreement and the conditions of the license.⁹ We agree that if the measures are contemplated in the Agreement and incorporated in the license, then minor changes or adjustments to those requirements would not require an application to amend the license. However, in the event that the licensee wishes to implement unspecified, long-term, material changes to project operations, requirements, or facilities (i.e., not contemplated in the Agreement and not evaluated by staff prior to issuing the license order), then an amendment would be required. If the licensee is uncertain of whether an action requires an amendment, it should consult with Commission staff prior to undertaking the action.

11. Article 401(b)(1) requires that Cowlitz file an application to amend the license for any “adjustments” to the upstream fish passage facility required by the license. Cowlitz states that this will place an unnecessary burden on it to seek an amendment for any change to the facility, however minor. We clarify that this is not meant to require an amendment for minor changes to the facility, but rather to those material changes that were not contemplated by the license.

12. As noted by the licensee, the license does not require Cowlitz to implement any downstream fish passage measures or construct any stress release ponds, so we will correct Article 401(b) by deleting the references to downstream passage in (3) and (4) and the reference to stress release ponds in (5). In addition, we will correct Article 401(b)(6) to cite to section 18 condition 8 (instead of condition 11) and Article 401(b)(8) to cite to section 18 condition 12 (instead of condition 15); and delete Article 401(b)(9), which is a requirement of PacifiCorp’s Swift No. 1 Project No. 2111, and Article 401(b)(10), with which the licensee has already complied.

C. Article 402

13. Article 402 requires that Cowlitz (1) net bull trout from the project’s tailrace and haul them to a location determined by FWS, and (2) partially fund the operation of the Speelyai Hatchery. Cowlitz contends that Article 402 should be deleted as unnecessary. These two measures are already covered by other conditions of the license, respectively, the bull trout collection and transport plan required by NMFS’s Biological Opinion

⁹ In its filing, NMFS states that, if we do not make the requested clarification, its filing should be considered as a request for rehearing. While we are granting the requested clarification, we note that, as a request for rehearing, the filing would be deficient and subject to dismissal because it lacks the statement of issues section required by section 385.713 of our regulations, 18 C.F.R. § 385.713(c)(2) (2008).

(condition 1, which incorporates section 4.9 of the Agreement) and the hatchery and supplementation program that is also required by the Biological Opinion (condition 1, which incorporates section 8 of the Agreement). We agree that those requirements of the article should be deleted, but that Article 402 is necessary for requiring evaluation of bull trout annually and for managing the Devil's Backbone Conservation Covenant to benefit bull trout. Accordingly, we will revise Article 402.

D. Article 405

14. Article 405 requires that Cowlitz construct a barrier-free bank fishing facility at the Swift No. 2 canal bridge. Cowlitz constructed such a facility in 2005, so we will revise the article to instead require the licensee to operate and maintain the facility.

E. Cost Caps

15. The Master Order recognizes that the Agreement and many of the conditions of the four licenses establish limits on the licensee's responsibility to fund various resource mitigation measures and studies, but concludes that it is nevertheless the licensees' obligation to complete the measures required by the license articles, in the absence of Commission authorization to the contrary.¹⁰

16. On rehearing, Cowlitz objects to this conclusion, and asks instead that the Commission approve the cost limits included in the Agreement.¹¹

17. We deny the request. We understand the licensee's desire to fix the costs that it may incur for resource protection and enhancement measures. As the order explains, it is likely that the specified funding will be sufficient for the measures in question. However, the Commission cannot constrain the fulfillment of its statutory responsibilities by agreeing to such spending caps.¹² We therefore affirm the conclusion in the Master Order that it is the licensee's obligation to complete the measures required by the license articles, in the absence of Commission authorization to the contrary. In addition, we are adding license Article 411 to so state.

¹⁰ 123 FERC ¶ 62,260 at P 21.

¹¹ Cowlitz states that it adopts PacifiCorp's argument on this issue, which PacifiCorp raises in its request for rehearing.

¹² See, e.g., *Public Utility District No. 1 of Chelan County, Washington*, 119 FERC ¶ 61,055, at P 12-17 (2007).

F. Corrections to Discussion Section of License Order

18. Cowlitz also seeks correction of some typographical errors and other items in the discussion section of the order. The requested corrections and edits are minor and do not affect the license articles or ordering paragraphs. Except as discussed below, we take note of them, but see no need to take any action.

19. Cowlitz contends that the order's description of the precise location of the federal lands within the project boundary is not accurate, and that the federal lands within the project boundary are not lands of the Gifford Pinchot National Forest. While the approved Exhibit G maps do not indicate whether or not the lands in question are located specifically within the Gifford Pinchot National Forest, these maps clearly indicate that these lands are federal lands. In any case, the location of lands and facilities in the approved Exhibit G maps would take precedence over any statement in the body of the license order. As to the nature of the federal lands within the project boundary, Cowlitz provides no information to support its contention. In addition, Cowlitz takes issue with the statement in the license order (P 88) that the amount of proposed new investment of environmental measures at Cowlitz's project is relatively modest (thus warranting a license term of less than 50 years). Cowlitz insists that the Agreement requires a significant investment in environmental measures, a finding that would result in a 50-year license term. While we agree with the Director that the license requires only a moderate investment, any distinction here is meaningless inasmuch as Cowlitz's license is for a 50-year term in order to coordinate its license expiration date with the other three Lewis River licenses.

The Commission orders:

(A) The request for rehearing and clarification filed on July 25, 2008, by the Public Utility District No. 1 of Cowlitz County, Washington, is granted to the extent discussed in this order and in Ordering Paragraphs (C) through (H) below, and is denied in all other respects.

(B) The request for clarification filed on July 25, 2008, by National Marine Fisheries Service is granted to the extent set forth in this order.

(C) The table in Article 401(a) is revised to read:

	Forest Service section 4(e) condition	Commerce/ Interior section 18 condition	NMFS BO condition (Settlement Agreement section)	Plan name	Due date
1		7.1	1 (4.8)	Upstream transport plan	Seventeen years after license issuance or prior to the completion of the Swift Upstream Facility if trucking is used
2		9	1 (4.9)	Bull trout collection and transport program	Within 1 year of license issuance and annually, thereafter
3					
4	9		1 (7.5.3.2)	Aquatics fund strategic plan	Within 1 year of license issuance; report annually thereafter
5			1 (8.2)	Hatchery and supplementation plan	Within 1 year of license issuance; updates every 5 years thereafter
6			1 (8.2.3)	Hatchery and supplementation operating plan	Annually, after approval of the hatchery and supplementation plan
7			1 (9.1)	Monitoring and evaluation plan	Within 2 years of license issuance

(D) The table in Article 401(b) is revised to read:

	Condition no.	Modification
1	Section 18 no. 4.5 and BO no.1	Modifications to passage facilities to achieve performance standards
2	Section 18 no. 7 and BO no. 1	Implementation of alternative fish transport technologies, should they be deemed

		necessary
3-5		
6	Section 18 no. 8 and BO no. 1	Construction of upstream fish passage facility
7	Section 18 no. 11 and BO no. 1	Modification to bull trout collection methods
8	Section 18 no. 12 and BO no. 1	Construction, operation, or modification of an upstream bull trout facility
9-10		

(E) Article 402 is revised to read:

Article 402. *Aquatic Resources Management Measures.* The licensee shall continue to implement the following aquatic resources management measure:

(a) evaluate bull trout annually; and

(b) manage the Devil's Backbone Conservation Covenant to benefit bull trout (section 5.2 of the Settlement Agreement filed on December 3, 2004).

The licensee shall include evidence of compliance with these measures in the annual reports filed with the Commission under section 14.2.6 of the Settlement Agreement.

(F) Article 405 is revised to read:

Article 405. *Barrier-free Canal Bank Fishing Facility.* The licensee shall operate and maintain the barrier-free bank fishing facility at the canal bridge that was constructed under section 11.3.1 of the Settlement Agreement.

(G) Appendix B of the order issuing license is revised to delete Section 6.1.5 from Exhibit A to the appendix, to correct the date of issuance of the water quality certification to October 9, 2006, and to replace the requirements of condition 4.3.5 with those set forth in the November 6, 2006 amendment to the water quality certification, which is attached to this order.

(H) The following Article 411 is added:

Article 411. Funding. Notwithstanding the limitation on expenditures as expressed in the mandatory conditions and included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

State of Washington, Department of Ecology
Water Quality Certification
November 3, 2006
Swift No. 2 Project No. 2213

First Amendment Order No. 3927, amending Order No. 3676

Condition 4.3.5 of the Certification is deleted and replaced with the following requirements:

4.3.5 The licensee shall manage water releases through the surge arresting structure to limit TDG production to 110% or less saturation.

- a) Within six (6) months of this Certification-Order Amendment, the Licensee shall submit a total dissolved gas (TDG) sampling plan for Ecology's review and approval. The purpose of this plan is to determine TDG production in the release water of the Surge Arresting Structure (SAS).
- b) During the testing of the operation of the SAS and by no later than one year after issuance of this Certification-Order Amendment, the Licensee shall sample water releases from the SAS to verify that the water released complies with the 110% TDG criterion. The Licensee shall submit sampling results to Ecology in the Annual Water Quality Monitoring Report as required by Condition 4.8.6 of the Certification.
- c) Sampling results shall be submitted to Ecology in the annual water quality monitoring report.
- d) Within six (6) months after the discovery of an exceedance of the 110% TDG criterion caused by water releases from the SAS, the Licensee shall submit a TDG Water Quality Attainment Plan (TDG WQAP) to Ecology for review and approval. The TDG WQAP shall include:
 - i. A description of operations with regard to minimizing TDG production resulting from water releases from the SAS;
 - ii. A description of how the operations will reduce TDG production from the Project to comply with the water quality criterion within 10 years;
 - iii. An evaluation of all reasonably available and preferred structural and operational improvements to reduce TDG production from the SAS to comply with the water quality criterion;
 - iv. A timeline showing when operational adjustments will occur;
 - v. A schedule for construction; and
 - vi. Sampling plans to further evaluate TDG production from the SAS and to test effectiveness of the structural and operational adjustments implemented pursuant to the TDG WQAP.

- e) The Project shall operate according to the approved TDG WQAP, with the objective of eliminating exceedances of the 110% TDG criterion.
- f) Upon approval of the TDG WQAP, the Licensee shall immediately begin the necessary steps identified in the TDG WQAP to eliminate TDG criterion exceedances.
- g) Sampling required in condition 4.3.5 (d) (vi) may reveal that TDG water quality criterion is not achieved within 10 years of discovery of a TDG water quality exceedance. If so, Ecology will require further activities to meet water quality criterion. Significant structural or operational revisions that may impose potentially unreasonable costs or create potentially unreasonable societal effects may be evaluated as part of a formal Use Attainability Analysis consistent with the federal and state water quality regulations after the 10 year compliance period has ended.