

131 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Eugene Water and Electric Board

Project No. 2496-219

ORDER GRANTING REHEARING

(Issued June 17, 2010)

1. The Oregon Department of Fish and Wildlife (Oregon DFW) and the National Marine Fisheries Service (NMFS) have filed requests for rehearing of an April 15, 2010 Commission staff order approving a fish screen hydraulic evaluation report with the respect to the Leaburg-Waltermville Hydroelectric Project No. 2496. As discussed below, we grant rehearing.

Background

2. In 1997, the Commission issued a new license to the Eugene Water and Electric Board (Eugene), authorizing the continued operation and maintenance of the 22.5-megawatt Leaburg-Waltermville Project.¹ The project includes two developments, Leaburg and Waltermville, both located on the McKenzie River, in Lane County, Oregon. Both developments include fish protection devices, including fish screens.

3. Fish screens are devices that prevent fish from being drawn, or from swimming, into water intake structures. One issue regarding fish screens is approach velocity: screens must be designed such that as fish approach them, high water velocities do not force the fish to be impinged against (collide with) the screen, lest the fish be injured. A related issue is deviation in water velocity at different portions of a screen. Ideally, approach velocity would be completely consistent across a screen. In practice, however, there may be some variation in velocity due to factors such as debris clogging in portions of a screen. It is not desirable to allow too much variation, because, in some circumstances, as where a substantial portion of a screen is clogged, water pressure through the remaining portion of the screen may increase such that it speeds up approach

¹ *Eugene Water and Electric Board*, 78 FERC ¶ 62,207 (1997).

velocity, with resultant increased fish injury. One method for keeping screens clean, and thus maintaining consistent approach velocities, is to install cleaners (such as brushes or sprays), which sweep across the face of the screens, removing debris. Baffles installed behind the screens can be adjusted to help regulate flows and thus approach velocity. The effectiveness of fish screens can be tested on both a hydraulic and a biological basis. Hydraulic tests involve measuring water velocity, while biological tests involve examination of fish.

4. The screens at the Leaburg Dam are intended to protect juvenile fish, while allowing the licensee to divert its full water right of 2,500 cubic feet per second.² These screens, which are located in the Leaburg Canal, downstream of the canal's headgate, include a combination of older and new panels. The new panels are fully baffled, while the older ones are only partially baffled.³

5. Article 418 of the project license required the licensee to file for Commission approval a plan (to be prepared in consultation with the U.S. Department of Commerce, within which NMFS is located, the U.S. Department of the Interior, and Oregon DFW) to conduct hydraulic and biological evaluations of a number of the project's fish protection devices, including the Leaburg fish project's fish screens. The article stated that "[e]valuation of the adult and juvenile fish passage shall form the basis for modifications to the facilities or mitigation, if needed, to reduce injury or excessive delay to adult fish and to minimize injury or mortality to juvenile fish. The plan shall also include operating criteria for each component of the passage facilities."⁴ In addition, because the order authorized the licensee to raise the level of Leaburg Lake, the impoundment of the Leaburg development, license Article 420 required the licensee, again after consultation with the federal and state resource agencies, to file a plan for testing juvenile fish mortality at the Leaburg screen after the lake raise, to monitor the "fish screens' effectiveness and to modify operational procedures or physical components as necessary to minimize screen-induced juvenile fish mortality throughout the term of the license."⁵

6. Following judicial review of the license order, the Commission issued an order amending the license.⁶ The order amended Articles 418 and 420 to require that the fish

² *Eugene Water and Electric Board*, 111 FERC ¶ 62,058, at 64,090 (2005).

³ *Id.* at 64,090; 64,092.

⁴ 78 FERC at 64,713.

⁵ *Id.*

⁶ *Eugene Water and Electric Board*, 91 FERC ¶ 61,111 (2000).

screens and other listed facilities be consistent with the specifications of fishway prescriptions filed by NMFS and U.S. Fish and Wildlife Service (FWS),⁷ which were attached to the order as appendices.

7. Eugene, Commerce, and Interior subsequently entered into a settlement resolving fishway issues. By order dated December 18, 2001, Commission staff amended the project license in accordance with the settlement.⁸ As requested by the settling parties, the order deleted from the license the appendices containing the fishway prescriptions, and revised a number of license articles. License Article 416, which had previously not dealt with the Leaburg fish screens, now required that the licensee

[m]odify, operate and maintain the Leaburg fish screen cleaning system and/or modify system operations and maintenance in accordance with a facilities plan to provide [a] clean, submerged screen area adequate to protect juvenile fish passing through this facility. The plan shall include modifications to clean the entire submerged screen area or other measures that provide equivalent or better protection of juvenile fish passing through the facility.

Article 418 continued to require hydraulic and biological evaluation of the Leaburg fish screens, but added a requirement that “[t]he licensee shall consult with Interior and Commerce with respect to any deficiencies identified as a result of the evaluations and undertake corrective actions in a time and manner appropriate to the scope and nature of the deficiencies.”⁹ A similar provision was added to Article 420.¹⁰

8. In addition to the revised license articles, the order appended to the project license the terms and conditions jointly submitted by NMFS and FWS as the result of consultation under the Endangered Species Act with respect to the impacts of the revised license on Upper Willamette River Chinook salmon and Columbia River bull trout.¹¹

⁷ Pursuant to section 18 of the Federal Power Act, 16 U.S.C. § 811 (2006), the Commission must include in licenses fishways prescribed by the Departments of Commerce and the Interior.

⁸ *Eugene Water and Electric Board*, 97 FERC ¶ 62,248 (2001).

⁹ 97 FERC at 64,475.

¹⁰ *See id.* at 64,477.

¹¹ The two agencies submitted eight “reasonable and prudent measures” to reduce incidental take of these species, as well as eight terms and conditions to implement the measures. *See* 97 FERC at 64,472.

The terms and conditions relevant to the Leaburg fish screens were Condition No. 1.d, which requires implementation of Article 420's requirement for a study of the impact of the lake raise on the screens; Condition No. 2.a, which, in 2.a.(1) reiterates the portion of Article 416 dealing with the Leaburg fish screens, and, in 2.a(7), requires plans for the monitoring and operation of fish passage facilities "to ensure that they will continuously function according to the[ir] design objectives;" and Condition No. 2.c., which reiterates Article 418's requirement for post-installation evaluation, modification, operation and maintenance of the Leaburg fish screens, including hydraulic and biological evaluation.¹²

9. On June 16, 2003, Commission staff issued an order approving the licensee's design plans for the Leaburg fish screens.¹³ Staff then approved the monitoring and maintenance plans for the fish screens, as required by license Article 416.¹⁴ The licensee thereafter constructed the new fish screens.¹⁵

10. In 2004, Eugene filed a plan for the hydraulic evaluation of the Leaburg fish screens.¹⁶ The licensee proposed to test using a maximum approach velocity of 0.53 feet per second over the entire screen, and 0.67 feet per second over cleared areas. While this would exceed the maximum test velocity normally used by NMFS (0.40 feet per second), the licensee asserted that the screens were designed before establishment of the current criteria, and had been shown through biological testing to provide excellent fish protection. The licensee also stated that NMFS had accepted the proposed criteria. The licensee originally proposed to use an allowable approach velocity deviation (a difference in approach velocity at different portions of the screens) of plus or minus 20 percent, but, in response to comments from NMFS, agreed to use a deviation of plus or minus 10 percent on the new, fully-baffled portions of the screens, and plus or minus 20 percent on the older sections. The licensee proposed to conduct one round of tests in the fall of 2005 and another in early 2007, after the lake raise. Commission staff approved the plan by order dated April 18, 2005.¹⁷

¹² See 97 FERC at 64,477-81.

¹³ *Eugene Water and Electric Board*, 103 FERC ¶ 62,149 (2003).

¹⁴ *Eugene Water and Electric Board*, 107 FERC ¶ 62,060 (2004).

¹⁵ See *Eugene Water and Electric Board*, 114 FERC ¶ 62,298 (2006) (approving as-built exhibits).

¹⁶ The fish screens at the Walterville development were tested separately, with satisfactory results, and are not at issue here.

¹⁷ *Eugene Water and Electric Board*, 111 FERC ¶ 62,058 (2005).

11. On September 25, 2007, Eugene filed the required biological evaluation assessing the modified fish screen facility. The evaluation, with which NMFS, FWS, and Oregon DFW concurred, showed that the Leaburg fish screen posed little risk to juvenile salmonids, under either pre- or post-lake raise conditions.¹⁸

12. On October 30, 2009, Eugene filed its Leaburg fish screen hydraulic evaluation report. Eugene acknowledged that the study results showed that approach velocities and flow distribution at individual points (“hot spots”) on the screens did not meet the established criteria, but asserted that the overall averages were reasonable.¹⁹ The licensee concluded that because screen performance met the standards on average, and because the biological evaluation had shown acceptable survival rates among the tested fish, no further adjustments need be made to the screens. Appended to the report were comments from NMFS, FWS, and Oregon DFW, all of which noted that the fish screens were not operating within their design parameters and asked Eugene to further adjust and balance the screens to meet the parameters and create more uniform flows.

13. On April 15, 2010, Commission staff issued an order approving the report. Staff noted that the screens did not meet design parameters with respect to approach velocity and distribution of flows, but concluded that

[t]he licensee appears to have fulfilled its obligations to ensure the reduction of adverse impacts to listed fish species, as it has adjusted screens to best ensure protection of migrating fish, despite the presence of hotspots. Further, the biological evaluation results were accepted by agencies and demonstrate that the modified Leaburg Canal fish screens facility provides safe passage conditions for juvenile salmonids.

14. On May 17, 2010, Oregon DFW and NMFS filed requests for rehearing, arguing that Eugene should be required to adjust the fish screens to provide additional protection to aquatic species by meeting the standards for approach velocities and for the uniform distribution of flows. In addition, on May 25, 2010, FWS filed comments supporting the requests for rehearing.

¹⁸ See *Eugene Water & Electric Board*, 121 FERC ¶ 62,116 (2007).

¹⁹ Leaburg fish screen hydraulic evaluation report at 5-1 through 5-4.

Discussion

A. Procedural Matters

15. Pursuant to section 313 of the Federal Power Act,²⁰ as well as the Commission's regulations,²¹ a party to a proceeding may file a request for rehearing within 30 days of the date of the order in question. In order to become a party, an entity must intervene.²² Intervention in a licensing proceeding does not carry over to post-licensing proceedings.²³ Rather, each post-licensing proceeding is a separate matter requiring separate intervention.²⁴ Moreover, the Commission does not allow intervention to all entities in all post-licensing proceedings. To give rise to an opportunity to intervene, the licensee's filing or the Commission's order must involve (1) a material change in the plan of project development or in the terms and conditions of the license, (2) an adverse effect on the rights of a property holder in a manner not contemplated by the license, or (3) an appeal by an agency or other entity specifically given a consultation role with respect to the filing at issue.²⁵

16. Here, both Oregon DFW and NMFS were given consultation roles in the implementation of Article 418. Thus, they were eligible to intervene in this proceeding. On May 17, 2010, the last day of which rehearing of the April 15, 2010 order could be sought,²⁶ Oregon DFW filed a timely request for rehearing, accompanied by a motion to intervene.²⁷ Thus, Oregon's DFW's request for rehearing is properly before us.

²⁰ 16 U.S.C. § 3251 (2006).

²¹ 18 C.F.R. § 385.713(b) (2009).

²² See 18 C.F.R. § 385.212(a)(3) (2009).

²³ See e.g., *Merimil Limited Partnership*, 115 FERC ¶ 61,087 (2006).

²⁴ See e.g., *City of Tacoma, Washington*, 89 FERC ¶ 61,058 (1999); *Indiana-Michigan Power Company*, 87 FERC ¶ 61,278 (1999).

²⁵ See e.g., *Puget Sound Energy, Inc.*, 112 FERC ¶ 61,116 at P 6 (2005).

²⁶ The 30th day from the date of the order was May 15, a Saturday. Therefore, the deadline for seeking rehearing become the next Monday, May 17.

²⁷ Where, as in this proceeding, a notice seeking interventions is not issued, we consider motions to intervene filed within 30 days of the date of the order in question to be timely. See e.g., *Flambeau Hydro, L.L.C.*, 113 FERC ¶ 61,236 (2005).

17. NMFS, on the other hand, filed a timely request for rehearing on May 17, 2010, but did not file a timely motion to intervene. Instead, it filed a late motion to intervene, dated May 18. To justify a late motion to intervene, an entity must show good cause why the motion should be granted.²⁸ NMFS has participated in many Commission proceedings and is thus on notice of the statutory and regulatory requirements that only a party (one who has intervened in a proceeding) can file a request for rehearing, and that participation in licensing or other post-licensing proceedings does not make an entity a party to different post-licensing matters. NMFS nonetheless states that it was “unclear after reviewing FERC rules and regulations as to whether our May 17, 2010 request for rehearing required NMFS to file a Motion to Intervene.”²⁹ This does not represent good cause, so we deny the motion. Accordingly, because NMFS was not a party at the time it filed its request for rehearing, we must reject that pleading. As discussed below, however, we are granting the relief requested by NMFS, in response to Oregon DFW’s request for rehearing. Moreover, given that we are requiring Eugene to file an additional fish screen report, following consultation with NMFS and other agencies, NMFS will have a future opportunity to intervene, should it so choose, with regard to Commission review of that report.

B. The Fish Screen Hydraulic Evaluation Report

18. Oregon DFW argues that the project license requires both hydraulic and biological evaluations, and that the Commission should not forego requiring the licensee to balance approach velocities simply because the biological evaluation yielded positive results. The agency contends that nothing in the record suggests that the hydraulic evaluation was to be subordinate to the biological evaluation or that the biological evaluation should preclude action to improve screen hydraulics.³⁰

19. We agree with Oregon DFW. It is clear from the record that the agencies, and the Commission, intended there to be separate hydraulic and biological evaluations, and that the licensee was required to take appropriate corrective actions should the result of either evaluation demonstrate deficiencies. Moreover, the terms and conditions jointly filed by NMFS and FWS and incorporated in the project license require that the evaluation plans ensure that the fish protection facilities will continuously function according to their design objectives.

²⁸ 18. C.F.R. § 385.215(d)(i) (2009). *See California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,057, *aff’d*, *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009).

²⁹ Motion for Late Intervention at 4.

³⁰ Oregon DFW Request for Rehearing at 4-5.

20. In its comments on the hydraulic evaluation report, NMFS pointed out that, although, in the interest of settlement, it had agreed to accept approach velocities of 150 percent of current standards, approach velocity would be limited to this higher number only under perfect conditions, and that the evaluation had shown areas where approach velocity was approximately 1 foot per second, or 250 percent of NMFS criteria. NMFS asserted that the testing was done with the screens cleaned, such that approach velocities would likely increase were debris present.³¹ Oregon DFW made the same point in its comments.³² FWS agreed, adding that moderate to high debris loads on the fish screens are most likely to occur when young salmonids and Pacific lamprey are entering the Leaburg Canal, so most outmigrating fish will experience velocities higher than those measures in the evaluation. FWS also explained that smaller fish are typically poorer swimmers, and thus the young fish will be most susceptible to injury.³³

21. The evidence provided by the agencies is convincing. As discussed above, the approved fish screen hydraulic evaluation plan includes specific targets for both maximum approach velocity and allowable approach velocity deviation. It is clear that the hydraulic evaluation report shows a failure to meet these standards in some respects. The positive results of the short-term biological testing cannot be said to obviate the need for compliance with specified hydraulic criteria, nor do those results demonstrate that those criteria are no longer relevant. The license requires successful completion of both hydraulic and biological testing, not just one of the two, and the hydraulic evaluation did not demonstrate compliance with the design criteria. In consequence, as required by its license, Eugene must work with the resource agencies to develop appropriate corrective actions. We therefore grant rehearing of the April 15, 2010 order, and order Eugene to consult with the agencies to develop measures to bring the Leaburg fish screen within the parameters established for it.

³¹ Letter from Keith Kirkendall (NMFS) to Kimberly Bose (Commission Secretary) at 2 (filed September 11, 2009). NMFS also states that its premise for not requiring Eugene to install completely new fish screens – thereby saving the licensee millions of dollars – was based on the assumptions that flows would be properly balanced.

³² See letter from Ken Homolka (Oregon DFW) to Suzanne M Adkins (Eugene) (appended to Eugene's October 30, 2009 Leaburg fish screen hydraulic evaluation report).

³³ See letter from Paul Henson (Oregon FWS) to Suzanne M Adkins (filed September 2, 2009).

The Commission orders:

(A) The request for rehearing filed on May 17, 2010 by the Oregon Department of Fish and Wildlife is granted.

(B) The motion for late intervention filed on May 18, 2010 by the National Marine Fisheries Service is denied, and the request for hearing filed on May 17, 2010 by the National Marine Fisheries Service is rejected.

(C) Eugene Water and Electric Board is required to file, for Commission approval, within 180 days of the date of this order, a plan, prepared in consultation with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Oregon Department of Fish and Wildlife in the manner specified in license Article 418, for operating the fish screens at Project No. 2496 in a manner consistent with the criteria established in the April 18, 2005 Order Modifying and Approving Hydraulic Evaluation Plan for Fish Screens Pursuant to License Article 418.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.