

139 FERC ¶ 61,231  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

PPL Montana, LLC

Project No. 2188-201

ORDER ON REHEARING

(Issued June 21, 2012)

1. On February 1, 2011, Commission staff issued a letter (February 2011 letter) addressing concerns raised in previous letters and at an on-site meeting with Mr. Thomas Andersen regarding erosion along the shoreline of Lake Helena, part of the Missouri-Madison Project No. 2188. The project is located on the Madison and Missouri Rivers in Gallatin, Madison, Lewis and Clark, and Cascade Counties in southwestern Montana. Mr. Andersen owns property adjacent to Lake Helena, which he alleges is adversely affected by ice heaving (also known as ice dozing)<sup>1</sup> during the winter. He has requested repeatedly that the licensee for the project, PPL Montana, LLC (PPLM) be required to monitor and control erosion along the shoreline of Lake Helena as part of the project's approved Shoreline Erosion Monitoring Plan (erosion plan). Commission staff determined in the February 2011 letter that project operations were not causing or contributing to ice movement and ice heaving along Lake Helena, which is a natural phenomenon. Commission staff also determined that the project's approved erosion plan does not require PPLM to address shoreline erosion along Lake Helena adjacent to Mr. Andersen's property. In addition, the letter noted that PPLM has voluntarily taken actions to monitor and control shoreline erosion adjacent to Mr. Andersen's property in an effort to respond to his concerns.

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<sup>1</sup> Ice heaving occurs as lake ice freezes and thaws; cracks form because of the different contraction rates at the top and bottom of the ice sheet. When the lake water rises in the cracks and freezes, the ice sheet expands slightly. Rising air temperatures warms the ice, which causes the additional expansion to exert a tremendous thrust against the shore, causing damage to the shoreline. *See* [http://files.dnr.state.mn.us/publications/waters/shoreline\\_alterations\\_ice\\_ridges.pdf](http://files.dnr.state.mn.us/publications/waters/shoreline_alterations_ice_ridges.pdf).

2. On January 10, 2012, Commission staff issued a second letter (January 2012 letter) responding to a complaint filed by Mr. Andersen on August 1, 2011, which asked the Commission to require PPLM to begin monitoring and controlling shoreline erosion on Lake Helena and other reservoirs that are part of the project. The second letter determined that Mr. Andersen presented no new information that would cause Commission staff to change its conclusions in the February 2011 letter. On January 31, 2012, Mr. Andersen filed a request for rehearing of both the February 2011 letter and the January 2012 letter. The Commission finds that the request for rehearing is untimely. In addition, the Commission finds that the substantive arguments in the request for rehearing are without merit.

### **Background**

3. The Missouri-Madison Project consists of nine hydroelectric developments located along a 324-mile stretch of the Madison and Missouri Rivers in Gallatin, Madison, Lewis and Clark, and Cascade Counties, in southwestern Montana. Portions of the project are located on federal lands, including lands within the Gallatin and Helena National Forests. The project has a total generating capacity of 326.9 megawatts. Eight of the project's nine developments were constructed between 1906 and 1930. The original license for the project was issued in 1956, when Montana Power Company, the original licensee, sought authorization to add a ninth development.<sup>2</sup> The original license expired on November 30, 1994, with the project operating pursuant to annual licenses thereafter, until the project was relicensed in 2000 (2000 relicense order).<sup>3</sup>

4. The Hauser Development, one of the project's nine developments and the one at issue in this proceeding, consists of a 700-foot-long, 80-foot high dam that impounds two connected bodies of water, Hauser Reservoir and Lake Helena.

5. Among other license terms, Article 402 requires the licensee to file, within one year of the date of issuance of the license, for Commission approval, a plan to monitor and control reservoir shoreline erosion at the project (erosion plan). Article 403 provides that the Hauser development be operated as a baseload, run-of-river project and placed limits on changes to daily and hourly flows. In addition, Article 403 requires that the elevation of Hauser Reservoir and Lake Helena be maintained between 3,634.4 and 3,635.4 feet (normal full pool).

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<sup>2</sup> The Commission approved transfer of the license to PP&L Montana, LLC in 1999. *See Montana Power Co. and PP&L Montana, LLC*, 88 FERC ¶ 62,018 (1999).

<sup>3</sup> *See PP&L Montana, LLC*, 92 FERC ¶ 61,261 (2000).

6. Pursuant to Article 402, PPLM filed its proposed erosion plan on May 10, 2002. The plan was approved by Commission staff on November 26, 2002.<sup>4</sup> The plan, which was based on the 1991 Shoreline Bank Erosion Assessment (SBEA), requires (1) annual monitoring of shoreline sites identified as being in an active erosion condition to determine whether or not control measures need to be implemented and provisions for implementing such control measures and (2) photographic monitoring of moderate and minor erosion sites on a five-year basis. The plan initially listed 20 active erosion sites occurring on state or federal public trust lands, including one site at the Hauser Development.<sup>5</sup>

7. In compliance with the approved plans, PPLM filed its Five-Year Erosion Monitoring Status Reports (Five-Year Monitoring Report) with the Commission on September 27, 2004, and January 15, 2009. These reports included the updated status of all minor, moderate, and active erosion sites identified in the SBEA.

8. Mr. Andersen first contacted the Commission in March and April 2007 regarding erosion along the shore of Lake Helena from ice expansion on the lake. Mr. Andersen suggested that if the water level of Lake Helena could be lowered during the ice period, the erosion damage from the ice expansion effects would be reduced. Mr. Andersen also asked questions regarding the water levels specified in the license for the Hauser Dam and assignment of responsibility for monitoring those water levels.<sup>6</sup> Commission staff responded to Mr. Andersen on April 19, 2007, explaining that Article 403 of the license only allows the licensee to vary the elevation of the Hauser Reservoir and Lake Helena by one foot during all months of the year. In certain limited circumstances, the flows and water surface elevation requirements may be temporarily modified upon mutual agreement among the licensee and federal and state resource agencies.<sup>7</sup> In addition, Commission staff stated that the licensee verified the Hauser Reservoir elevations during

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<sup>4</sup> See *PP&L Montana, LLC*, 101 FERC ¶ 62,127 (2002).

<sup>5</sup> See PPL Montana Shoreline Erosion Monitoring Plan filed May 10, 2002. Since the initial plan was filed, PPLM has reclassified as active one additional site at the Hauser Development. In addition, the number of active sites at all the developments has been reduced from 20 to 14 sites. See 2009 Five-Year Monitoring Report.

<sup>6</sup> See March 26 and April 18, 2007 Letters from T. Andersen to the Commission.

<sup>7</sup> See April 19, 2007 Letter from Commission staff to T. Andersen.

the winter months since 2004 and determined there were no deviations from the reservoir elevations required by Article 403.<sup>8</sup>

9. On March 13, 2009, Mr. Andersen, through U.S. Senator Max Baucus, contacted the Commission again, stating that erosion at Lake Helena had continued. Mr. Andersen asked whether the Final Environmental Impact Statement conducted for the relicensing proceeding (relicensing EIS) considered the erosion issue, and, if not, whether the Commission would conduct a supplemental analysis.<sup>9</sup> The Chairman of the Commission responded on April 9, 2009, explaining that the relicensing EIS prepared in 1999 addressed shoreline erosion and slope instability.<sup>10</sup> The Chairman enclosed copies of the relevant parts of the analysis, as requested by Mr. Andersen. The Chairman also stated that Commission staff requested from the licensee information regarding the operation of the project and compliance with the license requirements, as well as whether changes to the project operation were possible to address Mr. Andersen's concerns.<sup>11</sup> That letter was sent to PPLM on April 3, 2009.

10. PPLM responded to Commission staff on April 30, 2009.<sup>12</sup> Included in the response were Hauser Reservoir and Lake Helena elevation data for the period December 1, 2008, through April 12, 2009, which showed that PPLM operated the reservoir and Lake Helena within one foot of normal full pool, as required by Article 403.<sup>13</sup> PPLM also stated that it met with Mr. Andersen on April 21, 2009 to evaluate and discuss Article 403 operational and shoreline erosion issues.<sup>14</sup> PPLM stated further that potential shore erosion effects were considered and addressed through the license constraints established by the Commission in Article 403 for Hauser Reservoir and Lake Helena and that PPLM continued to support the analysis and conclusions in the

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<sup>8</sup> *Id.*

<sup>9</sup> *See* March 13, 2009 Letter from Senator Baucus to Chairman Wellinghoff, transmitting March 11, 2009 Letter from T. Andersen to the Commission.

<sup>10</sup> *See* April 9, 2009 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>11</sup> *Id.*; *see also* April 3, 2009 Letter from Commission staff to PPLM.

<sup>12</sup> *See* April 30, 2009 Letter from PPLM to Commission staff.

<sup>13</sup> *Id.*, Exhibit 1.

<sup>14</sup> *Id.*

relicensing EIS and current operational requirements.<sup>15</sup> However, PPLM proposed to test, on a temporary basis, the effectiveness of further reducing winter shoreline erosion by voluntarily operating Hauser Reservoir and Lake Helena at 6 inches below normal full pool during January, February, and March 2010 and 2011. In addition, PPLM proposed to establish new Lake Helena shoreline erosion monitoring sites on or near Mr. Andersen's property to evaluate the effectiveness of its voluntary winter operation.<sup>16</sup> On June 3, 2009, Commission staff accepted PPLM's proposal, including the filing of an update as to the effectiveness of the two-year test by August 1, 2011.<sup>17</sup>

11. Mr. Andersen (through Senator Baucus) continued his correspondence with the Commission during 2009, 2010, and 2011. On June 24, 2009, Senator Baucus forwarded to the Chairman two letters dated May 26, 2009, from Mr. Andersen.<sup>18</sup> Mr. Andersen stated that he had received a copy of PPLM's April 30, 2009 letter to Commission staff and that a representative from PPLM had made a site visit to his property.<sup>19</sup> He asked whether certain recommendations in the relicensing EIS with respect to shoreline erosion were included in the licensing decision for Hauser Reservoir or Lake Helena.<sup>20</sup> The Chairman responded on July 27, 2009, enclosing Commission staff's June 3, 2009 letter to PPLM.<sup>21</sup> The Chairman explained that the relicensing EIS is not a decision document, but rather a supporting document to comply with the National Environmental Policy Act (NEPA).<sup>22</sup> The Chairman directed Mr. Andersen to the agency's website to view

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* PPLM also provided several reasons for not operating Hauser Reservoir and Lake Helena below the proposed 6-inch winter draft for any extended period of time, including adverse impacts on fisheries and waterfowl.

<sup>17</sup> *See* June 3, 2009 Letter from Commission staff to PPLM. On June 22, 2011, PPLM proposed to file its update by October 1, 2012 to better document the results of PPLM's voluntary winter draw downs.

<sup>18</sup> *See* June 24, 2009 Letter from Senator Baucus to Chairman Wellinghoff, enclosing May 26, 2009 letters from T. Andersen to Senator Baucus and the Commission.

<sup>19</sup> *See* May 26, 2009 Letter from T. Andersen to Senator Baucus.

<sup>20</sup> *See* May 26, 2009 Letter from T. Andersen to the Commission.

<sup>21</sup> *See* July 27, 2009 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>22</sup> *Id.*

PPLM's erosion plan, the Commission's order approving the plan, and PPLM's Five-Year Monitoring Reports filed in 2004 and 2009.<sup>23</sup>

12. On August 24, 2009, Senator Baucus forwarded to the U.S. Department of Energy an August 10, 2009 letter from Mr. Andersen, alleging that shoreline erosion along Lake Helena violates the Clean Water Act (CWA) and that the Commission had failed to implement mitigation measures included in the relicensing EIS and the licensing order for the Missouri-Madison Project.<sup>24</sup> That letter was in turn forwarded by the U.S. Department of Energy to the Commission on September 22, 2009, for response. The Chairman responded to Senator Baucus on October 22, 2009.<sup>25</sup> The Chairman reiterated that the licensing EIS is not a decision document, whereas the record of decision is the 2000 relicense order. The Chairman further stated that the Water Quality Certification (certification) under CWA section 401 was issued on September 9, 1993, and was included in the 2000 relicense order.<sup>26</sup> The Chairman explained that Conditions 5 and 7 of the certification require water quality monitoring and bank erosion monitoring, respectively, and are also required under Articles 404 and 402 of the 2000 relicense order, respectively.<sup>27</sup> Condition 7 requires PPLM, following written notice from the Montana Department of Environmental Quality (Montana DEQ), to submit a plan for its approval if monitoring shows that erosion is causing violations of state law. The Chairman stated that, to date, he was unaware of any written notice from Montana DEQ to PPLM; however, the Chairman understood that the U.S. Environmental Protection Agency (EPA) was working with Mr. Andersen regarding his concerns.<sup>28</sup> The Chairman added that PPLM had been implementing the approved erosion plan since 2002 and continued to file periodic reports with the Commission, as required. Thus, PPLM remained in compliance with the shoreline erosion and water quality monitoring terms of its license.<sup>29</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *See* August 24, 2009 Letter from Senator Baucus to U.S. Department of Energy, enclosing August 10, 2009 Letter from T. Andersen to U.S. Department of Energy.

<sup>25</sup> *See* October 22, 2009 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

13. On November 23, 2009, Senator Baucus forwarded to the Chairman Mr. Andersen's November 18, 2009 letter in response to the Chairman's October 22, 2009 letter. Mr. Andersen stated that he and other landowners on Lake Helena disagreed with the Chairman's statement that PPLM was in compliance with its license, which, in his view, required all shoreline erosion to be controlled.<sup>30</sup> In addition, Mr. Andersen asked questions regarding Montana DEQ's responsibilities to report erosion problems to PPLM.<sup>31</sup> The Chairman responded on December 16, 2009, stating that, as demonstrated in its most recent Five-Year Monitoring Report filed on January 16, 2009, PPLM continued to document and monitor erosion activity at various sites in Hauser Lake, as required by the erosion plan.<sup>32</sup> PPLM stated that, based on 2009 monitoring results, it would determine if any additional erosion control measures would need to be implemented in 2010.<sup>33</sup> The Chairman noted that PPLM provided its five-year reports to Montana DEQ, as well as several other state and federal resource agencies, for comment prior to filing with the Commission, and that those resource agencies had not indicated any concerns with regard to Hauser Reservoir and Lake Helena erosion monitoring or control measures.<sup>34</sup> The Chairman stated that, in order to further address Mr. Andersen's concerns, the Commission would request photo documentation from Mr. Andersen regarding his erosion concerns and would continue working with PPLM to address erosion concerns that may be a direct result of project operations.<sup>35</sup> Finally, the Chairman noted that PPLM had agreed voluntarily to (1) minimize Hauser Reservoir and Lake Helena elevations during the 2010 and 2011 winter seasons to address Mr. Andersen's concerns and to further minimize shoreline erosion and slope instability potential, and (2) provide additional erosion monitoring at sites adjacent to Mr. Andersen's property and monitor these sites for two years.<sup>36</sup>

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<sup>30</sup> See November 23, 2009 Letter from Senator Baucus to Chairman Wellinghoff, enclosing November 18, 2009 Letter from T. Andersen to the Chairman.

<sup>31</sup> *Id.*

<sup>32</sup> See December 16, 2009 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

14. On January 20, 2010, Senator Baucus forwarded to the Chairman Mr. Andersen's December 31, 2009 letter in response to the Chairman's December 16, 2009 letter. Mr. Andersen enclosed photos showing the effects on his and neighboring property of ice dozing on Lake Helena and a description of the photos.<sup>37</sup> Mr. Andersen reiterated his view that the license requires controlling all shoreline erosion. He acknowledged that minimization of Hauser Reservoir and Lake Helena surface elevations may be helpful, but contended that it would not be sufficient to control shoreline erosion.<sup>38</sup> Mr. Andersen also requested that the Commission review PPLM's Five-Year Monitoring Reports and request that PPLM provide a plan to complete the control of shoreline erosion on Lake Helena in 2011.<sup>39</sup> The Chairman responded on February 16, 2010, stating that Commission staff completed its review of PPLM's 2009 Five-Year Monitoring Report on February 9, 2009. Commission staff's review of the report, the record of consultation with the resource agencies, along with the ongoing shoreline erosion monitoring, did not indicate the need for a shoreline erosion control plan for Lake Helena.<sup>40</sup> The Chairman further stated that PPLM and Montana DEQ would arrange a meeting in the near future with Mr. Andersen to address his concerns.<sup>41</sup> The Chairman reiterated that on January 1, 2010, PPLM voluntarily began to reduce Hauser Reservoir and Lake Helena elevations in an effort to minimize shoreline erosion and slope instability potential as a result of ice heaving.<sup>42</sup>

15. On January 26, 2010, Senator Baucus forwarded to the Chairman Mr. Andersen's January 19, 2010 letter to the Chairman, which in turn forwarded a December 21, 2009 letter from Montana DEQ to Senator Baucus.<sup>43</sup> In its letter, Montana DEQ explained its role in issuing the water quality certification for the Missouri-Madison project, which

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<sup>37</sup> See January 11, 2010 Letter from Senator Baucus to the Chairman, enclosing December 31, 2009 Letter from T. Andersen to the Chairman.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See February 16, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See January 26, 2010 Letter from Senator Baucus to Chairman Wellinghoff, enclosing January 19, 2010 Letter from T. Andersen to the Chairman and December 21, 2009 Letter from Montana DEQ to Senator Baucus.

requires PPLM to monitor all minor, moderate, and active erosion sites.<sup>44</sup> Montana DEQ explained that it had worked directly with PPLM and local landowners to resolve the problem. Montana DEQ confirmed that PPLM had voluntarily agreed to lower the lake levels during the winter months to reduce shoreline erosion caused by ice heaving. In addition, Montana DEQ stated that it was working with the local conservation district and residents to apply for a state grant to fund willow plantings to stabilize the shoreline.<sup>45</sup> Montana DEQ stated that it would coordinate a meeting with EPA and PPLM to work out the details for modifying the operation of the Hauser Dam and to monitor the outcome.<sup>46</sup> The Chairman responded on March 8, 2010, stating that PPLM and Montana DEQ met with Mr. Andersen on February 16, 2010.<sup>47</sup> In addition to reducing surface elevations for Hauser Reservoir and Lake Helena, PPLM agreed to monitor erosion rates at established survey points along Lake Helena, including Mr. Andersen's property, and to partner with the state resource agencies to provide a demonstration of willow bundle erosion control technology along Mr. Andersen's shoreline.<sup>48</sup>

16. On June 1, 2010, Senator Baucus forwarded to the Chairman Mr. Andersen's May 26, 2010 letter to the Chairman, which responded to the Chairman's February 16, 2010 letter.<sup>49</sup> Mr. Andersen disagreed with Commission staff's conclusion that there was no need for a shoreline erosion control plan on Lake Helena and alleged that PPLM's 2009 Five-Year Monitoring Report incorrectly categorized erosion on Lake Helena as minor.<sup>50</sup> Mr. Andersen also alleged that PPLM had inaccurately monitored the Lake Helena shoreline erosion and that Montana DEQ refused to require erosion control, because state law provides that erosion on reservoirs caused by ice dozing or wind is considered natural.<sup>51</sup> Mr. Andersen acknowledged PPLM's efforts to reduce surface

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<sup>44</sup> See December 21, 2009 Letter from Montana DEQ to Senator Baucus.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See March 8, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>48</sup> *Id.*

<sup>49</sup> See June 1, 2010 Letter from Senator Baucus to the Chairman, enclosing May 26, 2010 Letter from T. Andersen to the Chairman.

<sup>50</sup> See May 26, 2010 Letter from T. Andersen to the Chairman.

<sup>51</sup> *Id.*

elevations in the winter months, its payment for part of an experimental erosion control project using willow bundles, and Mr. Andersen's receipt of a state grant to finish the erosion control project, but asserted that all of these efforts demonstrate that active erosion is occurring and the need for an erosion control plan.<sup>52</sup> The Chairman responded on July 7, 2010, explaining that, while Mr. Andersen's desires for immediate results were understandable, it could take several years to determine the effectiveness of the erosion control measures implemented voluntarily by PPLM.<sup>53</sup> The Chairman encouraged Mr. Andersen to work with PPLM and Montana DEQ regarding implementation of additional measures and monitoring.<sup>54</sup> Finally, the Chairman stated that Commission staff would conduct an environmental compliance inspection of the project in August 2010, which would include a site visit and meeting with Mr. Andersen.<sup>55</sup>

17. On July 13, 2010, Senator Baucus forwarded to the Chairman Mr. Andersen's response to the Chairman's July 7, 2010 letter. Mr. Andersen stated that, although PPLM's modifications to the elevation of Hauser Reservoir and Lake Helena had helped to slow the rate of erosion, there were still problems with ice dozing.<sup>56</sup> The Chairman responded on August 5, 2010, noting Mr. Andersen's acknowledgment that PPLM's reduced reservoir operating range has helped slow the rate of erosion and advising that Commission staff would meet with Mr. Andersen on August 11, 2010, at the project, during a regularly scheduled environmental inspection.<sup>57</sup>

18. On August 25, 2010, Senator Baucus forwarded to the Chairman an August 17, 2010 letter from Mr. Andersen, which summarized the August 11, 2010 meeting with Commission staff, Montana DEQ, PPLM, and several Lake Helena landowners.<sup>58</sup> Mr. Andersen stated that, at the meeting, he requested that the 2009 Five-Year

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<sup>52</sup> *Id.*

<sup>53</sup> *See* July 7, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See* July 13, 2010 Letter from Senator Baucus to the Chairman, enclosing July 13, 2010 Letter from T. Andersen to the Commission.

<sup>57</sup> *See* August 5, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>58</sup> *See* August 25, 2010 Letter from Senator Baucus to the Chairman, enclosing August 17, 2010 Letter from T. Andersen to the Chairman.

Monitoring Report be corrected and that a plan to control erosion be developed for Lake Helena.<sup>59</sup> The Chairman responded to Mr. Andersen's August 17, 2010 letter on September 29, 2010, stating that Commission staff was gathering information to determine whether ice-related erosion along Lake Helena's shoreline is caused by project operations or is a result of natural processes.<sup>60</sup> The Chairman noted that, in the meantime, PPLM had voluntarily taken several measures to monitor and control erosion on Lake Helena, i.e., keeping Lake Helena 6-9 inches lower during winter months, establishing new monitoring sites on or near Mr. Andersen's property to evaluate the effectiveness of PPLM's voluntary winter operations, and installing willow bundles as a shoreline erosion control demonstration project.<sup>61</sup>

19. On October 5, 2010, Senator Baucus forwarded to the Chairman an October 3, 2010 letter from Mr. Andersen, questioning the need to determine whether the ice-related erosion is caused by natural processes or by the project, since the license requires shoreline erosion to be controlled without any exceptions for cause.<sup>62</sup> Mr. Andersen also asked questions regarding the additional survey pins and willow plantings referenced in the Commission's September 29, 2010 letter.<sup>63</sup> The Chairman responded on November 8, 2010, explaining that the determination of whether ice-related erosion along Lake Helena was due to the project was necessary if the Commission was to consider requiring PPLM to implement any shoreline erosion control measures.<sup>64</sup> The Chairman also provided information concerning PPLM's installation of survey pins and willow plantings, noting that such measures were voluntarily implemented by PPLM and were not required by the license.<sup>65</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *See* September 29, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>61</sup> *Id.*

<sup>62</sup> *See* October 5, 2010 Letter from Senator Baucus to the Chairman, enclosing October 3, 2010 Letter from T. Andersen to the Chairman.

<sup>63</sup> *Id.*

<sup>64</sup> *See* November 8, 2010 Letter from Chairman Wellinghoff to Senator Baucus.

<sup>65</sup> *Id.* The Chairman recommended that Mr. Andersen contact PPL Montana directly with any additional questions concerning these measures.

20. On February 1, 2011, Commission staff issued a letter in which it determined that ice heaving on Lake Helena is a natural phenomenon and that the ice-related erosion along the shoreline of Lake Helena is not the result of project operations (February 2011 letter).<sup>66</sup> Commission staff explained that, since PPLM had maintained Lake Helena within the one-foot fluctuation in accordance with Article 403 of the license, the lake had not been subjected to wide fluctuations in surface elevations during the winter that could have contributed to ice movement and heaving along Lake Helena's shoreline. Thus, Commission staff concluded, project operations had not contributed to ice heaving and related erosion along the shoreline of Lake Helena.<sup>67</sup> Commission staff further explained that the project's approved erosion plan does not include monitoring any eroding sites along the shoreline of Lake Helena nor does it contain any provisions that would require PPLM to add newly identified sites during the term of the license.<sup>68</sup> Finally, Commission staff reiterated the voluntary actions PPLM had taken in an effort to monitor and minimize erosion at Lake Helena, including adjacent to Mr. Andersen's property, in an effort to respond to Mr. Andersen's concerns.<sup>69</sup>

21. Mr. Andersen filed a complaint with the Commission on August 1, 2011, requesting that the Commission require PPLM to begin monitoring and controlling shoreline erosion on Lake Helena and other reservoirs that are part of the Missouri-Madison Project.<sup>70</sup> Mr. Anderson alleged that, by failing to control shoreline erosion along Lake Helena, PPLM and the Commission violated Article 402 of the license, which requires monitoring and control of shoreline erosion.<sup>71</sup> Mr. Andersen disagreed with Commission staff's conclusion in the February 2011 letter that the ice-related erosion along Lake Helena was not caused by project operations.<sup>72</sup> He asserted that the license does not specify that monitoring and controlling shoreline erosion is only required when erosion is caused by project operations.<sup>73</sup> He also claimed that, since the Hauser

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<sup>66</sup> See February 1, 2011 Letter from Commission staff to T. Andersen.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Complaint dated July 8, 2011, filed August 1, 2011.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.*

Reservoir and Lake Helena are part of the Missouri-Madison Project, and these reservoirs create the conditions that contribute to ice heaving, the erosion is a result of project operations.<sup>74</sup> In addition, Mr. Andersen argued that Article 402 does not except from its monitoring and control requirements erosion sites that are not specifically addressed in the erosion plan. Alternatively, he asserted that, in its order approving the erosion plan, the Commission reserved the right to require changes to include new erosion sites.<sup>75</sup>

22. On August 17, 2011, PPLM filed its answer to the complaint, requesting summary denial, on the bases that (1) the complaint failed to allege facts that would constitute a violation of the license, the Federal Power Act (FPA), or any rule or regulation of the Commission; and (2) the complaint was procedurally defective as an untimely request for rehearing of the February 2011 letter.<sup>76</sup> PPLM asserted that Commission staff had already thoroughly examined the allegations in the complaint and determined in the February 2011 letter that PPLM was not responsible under the FPA or the project license for shoreline erosion adjacent to Mr. Andersen's property along Lake Helena; the complaint failed to provide any new evidence that was not already considered.<sup>77</sup>

23. On January 10, 2012, Commission staff issued a letter responding to the complaint (January 2012 letter). The January 2012 letter stated that no new information was presented in the complaint that would cause Commission staff to change its conclusions in the February 2011 letter. The letter reiterated that project operations are not responsible for shoreline erosion along Lake Helena and the project's approved erosion plan does not require PPLM to address shoreline erosion at the lake.<sup>78</sup> Commission staff explained that the specific requirements in the license regarding erosion are contained in the project's approved erosion plan, not the licensing EIS or the 2000 relicensure order.

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<sup>74</sup> *Id.* at 6-7.

<sup>75</sup> *Id.* at 7. Mr. Andersen also asked to be reimbursed for expenses and damages; he asked that the Commission prepare a supplemental EIS to assess erosion-related effects; and he asserted that the Commission is in violation of NEPA, the Fifth Amendment to the Constitution, the Endangered Species Act, and the Clean Water Act for failing to require monitoring and erosion control on Lake Helena.

<sup>76</sup> *See* Answer of PPL Montana, LLC to Complaint.

<sup>77</sup> *Id.*

<sup>78</sup> *See* January 10, 2011 Letter from Commission staff to T. Andersen.

24. On January 31, 2012, Mr. Andersen filed a request for rehearing of the February 2011 and January 2012 letters. Mr. Andersen argued that the Commission erred in failing to implement recommendations regarding erosion in the relicensing EIS, in determining that project operations are not the cause of ice heaving-related erosion along Lake Helena's shoreline and in finding that PPLM's approved erosion plan does not require PPLM to monitor and control shoreline erosion on Lake Helena.<sup>79</sup> Mr. Andersen further asserted that the Commission erred in failing to comply with its public notice requirements for complaints.<sup>80</sup> Finally, Mr. Andersen argued that the Commission erred in failing to provide a meaningful response to his claims regarding violations of the Fifth Amendment, the Endangered Species Act, and the Clean Water Act.<sup>81</sup>

## **Discussion**

### **A. Procedural Issues**

25. Mr. Andersen seeks rehearing of both the February 2011 and the January 2012 letters. As a threshold matter, Mr. Andersen's January 31, 2012 request for rehearing of the February 2011 letter is untimely. Pursuant to section 313(a) of the FPA,<sup>82</sup> an aggrieved party must file a request for rehearing within 30 days after the issuance of a Commission decision, in this case no later than March 3, 2011. Mr. Andersen stated in his complaint that he did not respond to the February 2011 letter, because it "was clear that FERC would not require PPL to do erosion control on Lake Helena shorelines."<sup>83</sup> Because the 30-day rehearing deadline is statutorily based, it cannot be extended, and the request must be rejected as untimely.<sup>84</sup>

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<sup>79</sup> See Request for Rehearing at 2-5, 6-10.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Id.* at 5-6, 10-12.

<sup>82</sup> 16 U.S.C. § 8251 (2006).

<sup>83</sup> See Complaint at 6.

<sup>84</sup> See *Appalachian Power Co.*, 133 FERC ¶ 61,135 (2010); *James and Polly Lyons v. FERC*, 2012 U.S. App. LEXIS 5039 (4th Cir. 2012) (unpublished opinion).

26. In addition, the arguments in the complaint represent an untimely collateral attack on the February 2011 letter.<sup>85</sup> In any event, as explained below, Mr. Andersen's rehearing request is substantively without merit.

## **B. The Merits**

### **1. Notice of the Complaint**

27. Mr. Andersen asserts that the Commission erred in failing to comply with its regulations requiring formal public notice of complaints.<sup>86</sup> We disagree.

28. The Commission was not required to treat Mr. Andersen's allegations as a formal complaint.<sup>87</sup> In this instance, the complaint was referred to Commission staff, which responded to Mr. Andersen's allegations regarding PPLM's compliance with the terms of its license. Such treatment was appropriate, particularly given the extensive previous correspondence and meetings on this subject. Moreover, the complaint was entered in the Commission's public record via the agency's online e-Library system, which

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<sup>85</sup> See, e.g., *Appalachian Power Company*, 137 FERC ¶ 61,065, at P 17 n.22 (2011) (citing *City of Wadsworth, Ohio, et al.*, 123 FERC ¶ 61,272 (2008)).

<sup>86</sup> See Complaint at 5 (citing 18 C.F.R. § 385.206(d) (2011)).

<sup>87</sup> The Commission has discretion to determine the best procedures to address the issues before it. See, e.g., *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem"); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload."); see also *ISO New England, Inc.*, 130 FERC ¶ 61,236, at P 12 n.9 (2010) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures)); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case). See also *Pacific Gas and Electric Company*, 115 FERC ¶ 61,324, at 62,155-56 (2006) (Chairman Kelliher concurring) ("It would be inconsistent, and a waste of administrative effort, for us to treat differently those allegations of license non-compliance that are styled 'formal complaint' and those that are not. It is only those complaints that raise substantial legal or policy issues that warrant immediate Commission consideration as formal complaints, rather than being handled at the initial stage by our compliance staff.").

provided adequate public notice of Mr. Andersen's claims.<sup>88</sup> Mr. Andersen does not explain what harm, if any, occurred from the lack of formal public notice. Regardless of whether the Commission treated his pleading as a formal complaint or as a challenge to the Commission's February 2011 letter, Mr. Andersen's allegations received full and fair consideration.

## 2. Compliance with License Article 402

29. Mr. Andersen further asserts that the Commission failed to implement Article 402 of the new license for the Missouri-Madison Project. He argues that Article 402 requires PPLM to monitor and control all shoreline erosion, regardless of cause.<sup>89</sup> In addition, he claims that the erosion plan approved in 2002, which did not include any active erosion sites on Lake Helena, cannot change the 2000 relicensing order's requirement to control all shoreline erosion.<sup>90</sup> Moreover, he claims that the Commission erred in determining that project operations have not contributed to ice heaving and ice heaving-related erosion along Lake Helena.<sup>91</sup> The Commission disagrees with these claims.

30. As explained in Commission staff's letters, Article 402 required PPLM to file for Commission approval a plan to monitor and control reservoir shoreline erosion at the project.<sup>92</sup> The plan was to be prepared in consultation with federal and state resource agencies. The article required that the plan be based on the Shoreline Bank Erosion Assessment (SBAE), prepared in 1991 and filed by PPLM with its relicensing application in 1993. Article 402 further required that the plan include:

- (1) annual monitoring of reservoir shoreline sites identified in the SBAE as being in an active erosion condition to determine whether or not control measures need to be implemented, and provisions for implementing necessary control measures as their need is identified;
- and (2) a schedule for visual inspection on a 5- to 7-year basis of the reservoir shorelines identified in the SBAE as experiencing minor to

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<sup>88</sup> The adequacy of public notice was confirmed by the fact that PPLM filed an answer to the complaint on August 17, 2011.

<sup>89</sup> See Rehearing Request at 6.

<sup>90</sup> *Id.* at 8-9.

<sup>91</sup> *Id.* at 7-8.

<sup>92</sup> See *PP&L Montana, LLC*, 92 FERC ¶ 61,261, at 61,845-46 (2000).

moderate erosion, and provisions for determining whether specific sites should be reclassified and added to the “active” sites in (1) above; and (3) provisions for periodic review and modification of the plan.

31. The SBEA evaluated 76 sites along the 58 miles of shoreline comprising Hauser Reservoir and Lake Helena and classified them as being in active, moderate, or minor erosion conditions. Of the 76 sites, only 6 sites covering a total of 1.83 miles (3.2 percent) of the shoreline were classified as active erosion sites. Three of these sites were on the northeast shore of Lake Helena.

32. PPLM filed its proposed Article 402 plan on May 10, 2002. The plan explained that, since it conducted the SBAE in 1991, it had continued to monitor erosion at the sites along the reservoir shorelines, including conducting a photographic evaluation in 1996, and determined that five years of monitoring was a sufficient period of time to arrive at a more accurate assessment of the cause, effect, and extent of erosion at individual sites. As a result, some of the sites in the SBAE were reclassified in 1996, based on the monitoring data. For the Hauser development, PPLM identified one active erosion site that would be monitored annually. In addition, PPLM would conduct a photographic inspection of all 76 of the identified sites every five years, compare the results to the previous studies, and submit a report to the Commission on the results. Moreover, PPLM explained that the monitoring program is intended to be dynamic so that sites can be reclassified if they exhibit signs of increased or decreased erosion in accordance with the plan’s definitions of active, moderate, and minor erosion.

33. The Commission approved the plan on November 26, 2002.<sup>93</sup> As noted in the plan approval order, PPLM monitored active erosion sites along the entire shoreline of all project reservoirs for six consecutive years beginning in 1993 to determine if erosion was occurring and the rate of erosion.<sup>94</sup> In addition, erosion sites were monitored to identify factors other than reservoir operations that contribute to shoreline erosion.<sup>95</sup> All of the consulted state and federal resource agencies accepted PPL Montana’s proposed plan, which listed 20 active erosion sites for future monitoring and possible remediation,

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<sup>93</sup> See *PP&L Montana, LLC*, 101 FERC ¶ 62,127 (2002).

<sup>94</sup> *Id.* at 64,297.

<sup>95</sup> *Id.* at 64,297-98.

including one site for the Hauser Development.<sup>96</sup> The approval order determined that implementation of the plan should help identify erosion sites and “help remediate project-induced erosion.” (emphasis added)<sup>97</sup>

34. Mr. Andersen’s assertion that Article 402 required PPLM to monitor and control all shoreline erosion, regardless of cause, is incorrect. By its terms, Article 402 required PPLM to file a plan to monitor and control reservoir shoreline erosion at the project, based on the SBAE and after consultation with state and federal resource agencies, to include, among other provisions, “annual monitoring of reservoir shoreline sites identified in the SBAE as being in an active erosion condition to determine whether or not control measures need to be implemented, and provisions for implementing necessary control measures as their need is identified.” (emphasis added)<sup>98</sup> If Article 402 required control measures for all shoreline erosion, regardless of cause, as Mr. Andersen argues, the additional requirement that PPLM Montana determine whether or not control measures need to be implemented at active erosion sites would contradict such an intent. As confirmed in the approval order, PPLM’s proposed erosion plan complied with the terms of Article 402 and its intent to help identify sites of active erosion and, where appropriate, remediate project-induced erosion.

35. As explained in the letter orders, the approved plan does not require PPLM to control shoreline erosion along Lake Helena, nor was such a requirement necessary, given that the erosion is caused by ice heaving, which is a natural phenomenon and not a project-induced cause. Mr. Andersen argues that the ice-related erosion along Lake

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<sup>96</sup> That site is located along the shoreline of Hauser Reservoir. Mr. Andersen asserts that three of six active erosion sites identified in the SBEA for Lake Helena development also should have been included in the erosion plan. *See* Rehearing Request at 9. As noted above, these sites are located on the northeast shoreline of Lake Helena and are not adjacent to Mr. Andersen’s property. *See* Response to Request for Additional Studies, Application for New License, Attachment 4, Exhibit 3 at 9 and Soil Classification Map, Sheet 2. Moreover, as PPLM explained in its approved erosion monitoring plan, as a result of additional monitoring performed subsequent to the 1991 SBAE, PPLM’s erosion plan reclassified some of the sites. While annual monitoring of only one active erosion site at the Hauser development was proposed by PPLM and approved by Commission staff, PPLM will conduct a photographic assessment of all 76 sites at the Hauser development every five years.

<sup>97</sup> *See PP&L Montana, LLC*, 101 FERC at 64,297-98.

<sup>98</sup> *See PP&L Montana, LLC*, 92 FERC at 61,845.

Helena is caused by the project, because the lake itself was created by the project. However, the Commission generally has limited the responsibility of licensees to controlling and mitigating erosion caused by project operation and does not require licensees to control erosion caused by natural phenomena, such as ice heaving, associated with the presence of the project.<sup>99</sup>

36. In addition, evidence in the record confirmed that project operations have not contributed to ice-related erosion along Lake Helena.<sup>100</sup> As explained in the February 2011 letter, Article 403 in the license limits water level fluctuations in Lake Helena to one foot year-round, and PPLM's records indicate that the lake has been maintained within the one-foot fluctuation limit. Therefore, the lake has not been subjected to wide fluctuations in surface elevations during the winter that could have contributed to ice heaving along the shoreline. Mr. Andersen does not contest this finding.

37. Although PPLM is not required to control shoreline erosion along Lake Helena under the terms of the license or the approved erosion plan, PPLM nevertheless has taken several voluntary actions in an effort to respond to Mr. Andersen's concerns. As explained in Commission staff's February 2011 letter and several previous letters, these actions include: (1) keeping Lake Helena 6-9 inches lower from January through March so that any ice heaving that does occur is located further away from the shoreline; (2) conducting erosion surveys along the north shore of Lake Helena, including adjacent to Mr. Andersen's property; and (3) in conjunction with Montana DEQ, installing willow bundles adjacent to Mr. Andersen's property as a demonstration project to determine whether willow bundles can control this type of erosion.

### **3. Claims Regarding the Fifth Amendment, the Endangered Species Act, and the Clean Water Act**

38. Finally, Mr. Andersen claims that the Commission did not provide meaningful responses to his claims that the agency violated the Fifth Amendment to the Constitution, the Endangered Species Act, and the Clean Water Act.<sup>101</sup> All of these claims are based

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<sup>99</sup> See, e.g., *FirstLight Hydro Generation Company*, 126 FERC ¶ 61,025, at P 14 (2009); *Bangor Hydro Electric Company*, 83 FERC ¶ 61,037, at 61,090 (1998); *Duke Power Company*, 33 FERC ¶ 61,321 (1985).

<sup>100</sup> See *Eastern Niagara Public Power Alliance, et al. v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (Commission reasonably concluded that the project's contribution to shoreline erosion would be insignificant).

<sup>101</sup> See Rehearing Request at 5-6.

on Mr. Andersen's argument that the Commission failed to implement the requirement that PPLM monitor and control all shoreline erosion, regardless of cause, associated with the project. As discussed above, Mr. Andersen's interpretation of the relicensing order's and the approved erosion plan's requirements with regard to shoreline erosion lacks merit. Therefore, it is not necessary to address these additional claims in greater detail.

39. To the extent Mr. Andersen seeks reimbursement for certain expenses related to shoreline erosion adjacent to his property, section 10(c) of the FPA provides that licensees and not the federal government are responsible for project-caused damages.<sup>102</sup> A licensee is required to maintain projects in an adequate state of repair and must repair or replace damaged project works in a timely manner.<sup>103</sup> If Mr. Andersen feels he has been injured as a result of PPLM's operation of the Missouri-Madison Project, regardless of whether PPLM has violated its license terms, he may seek an appropriate remedy in court.

40. The Commission takes landowner concerns seriously and has communicated extensively with Mr. Andersen in an effort to address his concerns. The Commission expects licensees to comply with the license terms and to work with local landowners to address their concerns. Here, PPLM has complied with Articles 402 and 403 and its approved erosion plan and has also worked with Mr. Andersen to address his concerns. Although PPLM is not required by the license terms or the approved erosion plan to monitor and control shoreline erosion along Lake Helena, which is not project-induced, PPLM has taken voluntary actions, including monitoring such erosion, modifying project operations and, with Montana DEQ, implementing additional remediation measures to address Mr. Andersen's concerns. Mr. Andersen's request for rehearing, which raises no new issues, does not convince us that PPLM should be required to monitor and control all shoreline erosion on Lake Helena and all reservoirs within the Missouri-Madison Project, regardless of cause.

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<sup>102</sup> 16 U.S.C. § 803(c) (2006). *See also Pacific Gas and Electric Company*, 78 FERC ¶ 61,094, at 61,337 (1997) (citing *Citizens Utilities Company*, 68 FERC ¶ 61,310, at 61,286 (1994)).

<sup>103</sup> *El Dorado Irrigation District v. Pacific Gas and Electric Company*, 82 FERC ¶ 61,255, at 62,021 (1998).

The Commission orders:

The request for rehearing filed by Mr. Thomas Andersen on January 31, 2012, is denied as untimely.

By the Commission. Commissioner Clark voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.