

153 FERC ¶ 61,234
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Seneca Generation, LLC

Project No. 2280-020

ORDER DENYING REHEARING AND STAY

(Issued November 19, 2015)

1. On July 22, 2015, Commission staff issued a new license (July 22 license order) to Seneca Generation, LLC (Seneca Generation) to continue operation and maintenance of the Kinzua Pumped Storage Project No. 2280, located on the Allegheny River in Warren County, Pennsylvania.¹ On August 19, 2015, the U.S. Department of the Interior (Interior) filed a request for rehearing. Seneca Generation filed a request for rehearing on August 21, 2015. Seneca Generation requests that the Commission issue a partial stay in the event that we deny rehearing. As discussed below, we deny the requests for rehearing and stay.

I. Background

2. On December 28, 1965, the Federal Power Commission, the Commission's predecessor, issued a 50-year original license for the Kinzua Project.²

¹ *Seneca Generation, LLC*, 152 FERC ¶ 62,045 (2015).

² *Pennsylvania Electric Co. and Cleveland Electric Illuminating Co.*, 34 FPC 1567 (1965). Pennsylvania Electric Company was removed from the license on July 9, 1999. *Cleveland Electric Illuminating Co. and Pennsylvania Electric Co.*, 88 FERC ¶ 62,028 (1999). The Project was transferred to FirstEnergy Generation on June 5, 2001. *Cleveland Electric Illuminating Co. and FirstEnergy Generation Corp.*, 95 FERC ¶ 62,201 (2001).

3. The Kinzua Project is located at the U.S. Army Corps of Engineers' (Corps) Kinzua dam,³ located at river mile 198 on the Allegheny River, and occupies 14.6 acres of federal land administered by the Corps and 212.1 acres of federal land administered by the U.S. Department of Agriculture's Forest Service (Forest Service) as part of the Allegheny National Forest. The Corps manages Kinzua dam for flood control, water quality, and low-flow augmentation.⁴ In 1992, several segments of the Allegheny River downstream of Kinzua dam were designated as a component of the national wild and scenic rivers system under the Wild and Scenic Rivers Act.⁵

4. The Kinzua Project uses the Allegheny Reservoir as its lower reservoir. The project includes: an intake tower located in Allegheny Reservoir on the upstream side of Kinzua dam; a 2,480-foot-diameter upper reservoir located on a plateau adjacent to Kinzua dam created by an earth and rockfill dike with a crest elevation of 2,078.1 feet and a maximum height of 115 feet, completely encircling the reservoir that includes an emergency spillway; a powerhouse located about 300 feet downstream of the southern abutment of Kinzua dam that houses two reversible pump-turbines (unit 1 and unit 2) and one conventional hydro unit (unit 3); and water conveyance tunnels and penstocks between the powerhouse and the upper reservoir, between Allegheny Reservoir and the powerhouse, and between the powerhouse and the Allegheny River downstream of the dam. The project's authorized capacity is 452.35 megawatts.

5. In general, during non-peak electricity demand periods, water is pumped from Allegheny Reservoir through the powerhouse to the project's upper reservoir using one or both of units 1 and 2. During peak demand periods, power is generated when water flows back through unit 1 and/or unit 2 to the Allegheny Reservoir or through unit 2 and/or unit 3 to the Allegheny River downstream of Kinzua dam. The project pumps and generates every day, except during certain powerhouse or unit outages. Current project

³ The Corps' 179-foot-high Kinzua dam has four crest gates, eight discharge sluice gates, and an earthen embankment section. The impoundment, known as Allegheny Reservoir, extends upstream from the dam approximately 24.2 miles.

⁴ *Seneca Generation, LLC*, 152 FERC ¶ 62,045 at P 11.

⁵ Pub. L. No. 102-271, § 1, 106 Stat. 108 (1992) (codified at 16 U.S.C. § 1274(a)(133) (2012)).

operation⁶ causes mixing of the water column immediately upstream of the Kinzua dam, resulting in the release of cooler waters from the Kinzua dam to the Allegheny River during summer months.⁷

6. On November 24, 2010, FirstEnergy filed a notice of intent (NOI) and preliminary application document (PAD) in accordance with the Commission's Integrated Licensing Process (ILP) for a new license to continue to operate the Kinzua Project.⁸

7. On January 28, 2011, the Commission issued notice⁹ of FirstEnergy's PAD and commencement of the ILP and scoping, and designated FirstEnergy as the non-federal representative for carrying out informal consultation pursuant to section 7 of the Endangered Species Act (ESA).¹⁰ FirstEnergy's PAD included a Preliminary Draft Mussel Survey Plan, which proposed sampling for mussels in the area downstream of the project between the Kinzua dam and the Route 6 Bridge in Warren, PA.

8. On March 30, 2011, the U.S. Fish and Wildlife Service (FWS) filed initial scoping comments for the Kinzua Project. Regarding the mussel survey, FWS stated that, "with

⁶ Operation of the Kinzua Project is governed by the conditions of the existing license and a Memorandum of Agreement that a prior licensee developed with the Corps in 1976 (1976 MOA). The 1976 MOA governs operation of the project until a new MOA has been approved by the Corps and filed with the Commission, as required by Article 303 of the July 22 license order. *Seneca Generation, LLC*, 152 FERC ¶ 62,045 at Article 303.

⁷ November 21, 2014 USDA Forest Service Wild and Scenic River (WSR) Section 7 Determination, at 8.

⁸ The Seneca Nation of Indians filed a competing NOI and PAD for the Seneca Pumped Storage Project No. 13889 on November 30, 2010. The Seneca Nation of Indians permanently withdrew its NOI for the project on November 26, 2013, after concluding a comprehensive settlement agreement with FirstEnergy. *See* Seneca Nation of Indians, Project No. 13889, Notice of Permanent Withdrawal of Notice of Intent to File License Application (November 26, 2013).

⁹ January 28, 2011 Notice of Intent to File Competing License Applications, Filing of Pre-Application Documents (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PADs and Scoping Document, and Identification of Issues and Associated Study Requests.

¹⁰ 16 U.S.C. § 1536 (2012).

respect to threatened and endangered species, the applicants should extend the study area to include the areas of all direct and indirect effects of the proposed project. In this instance, the study area would be eight miles below the dam”¹¹ FWS added that “the applicants should extend the study area to include anywhere the project has the potential to change the flow regime, habitat quantity and quality...or water quality.”¹² FWS also requested a conservation flow study, including an instream flow model suitable for evaluating mussel habitats, again asserting that “[e]ffects can be seen up to eight miles downstream of the dam with a zone of depleted mussel productivity.”¹³

9. FirstEnergy filed proposed mussel survey and water quality study plans on May 16, 2011. The proposed mussel survey plan listed seven rare, threatened, and candidate mussel species potentially occurring in the project area: northern riffleshell, snuffbox, sheepnose, clubshell, round pigtoe, rabbitsfoot, and rayed-bean.¹⁴ FirstEnergy proposed conducting an initial mussel assessment from the Kinzua dam downstream approximately eight miles to the confluence of the Allegheny River and Conewango Creek in Warren, Pennsylvania. FirstEnergy proposed to conduct water quality and temperature modeling studies to determine the effect of the project on the Allegheny River.

10. In response, FWS filed comments, which included the recommendation that the mussel survey plan “should be expanded to include all Project impact areas, including the Allegheny Reservoir, as requested by the Service and other stakeholders,” and that FirstEnergy should closely consult with FWS and other stakeholders. FWS reiterated its request for a conservation flow study with an emphasis on mussels.¹⁵

11. FirstEnergy filed a Revised Study Plan and Response to Comments on September 12, 2011. FirstEnergy stated that the Reservoir Operations Study would define the effects of the project on the Allegheny Reservoir. FirstEnergy also noted that it did not propose a conservation flow study because it has no control over the downstream flows from the project, which are determined by the Corps. On September 26, 2011, FWS filed additional comments but did not address the proposed

¹¹ FWS March 30, 2011 Comment, at 10.

¹² *Id.*

¹³ *Id.* at 12-13.

¹⁴ *See* May 16, 2011 filing, Mussel Survey Plan, at 2, Table 3-1.

¹⁵ FWS August 12, 2011 Comments on Study Plan, at 5.

mussel survey or water temperature modeling study. On October 11, 2011, Commission staff issued a study plan determination for the Kinzua Project, approving both the mussel survey and water quality study without major changes.¹⁶

12. On September 7, 2012, FirstEnergy sent a letter to FWS requesting information about federally listed endangered and threatened species within the area affected by the Kinzua Project. In correspondence dated October 25, 2012 (October 25 letter), Interior identified three federally listed, endangered mussel species (northern riffleshell, clubshell, and rayed bean) and a federal candidate species (rabbitsfoot) in the area of the project.

13. On January 7, 2013, FirstEnergy filed its Initial Study Report, which included a completed mussel survey (2012 Mussel Survey)¹⁷ and water quality report (2012 Water Quality Report).¹⁸ The 2012 Mussel Survey recognized the potential for federally listed endangered (clubshell, northern riffleshell, rayed bean, sheepnose, snuffbox) and candidate (rabbitsfoot) mussel species, and one federal species of concern (salamander mussel) to occur in the Allegheny River, but did not detect any of these species in the surveyed area. FWS filed comments in response to FirstEnergy's initial study report,¹⁹ expressing concern that the Rare, Threatened, and Endangered Species Study Report did not include the Allegheny Reservoir. However, FWS did not specifically mention endangered mussels or the 2012 Mussel Survey in its comments.

¹⁶ The Commission-approved study plan did not include a study of the mussel species in the Allegheny Reservoir because it was not clear that the project had a discernible effect on the environmental resources upstream of Kinzua dam. *See* October 11, 2011 Study Plan Determination for the Kinzua Pumped Storage Hydroelectric Project, at 3-4. The Reservoir Operations Study subsequently demonstrated that the project has no reasonably discernible effect on environmental resources, including mussel species, in the Allegheny Reservoir. *See* FirstEnergy January 7, 2013 Initial Study Report, Allegheny Reservoir Operations Study Environmental Analysis, at 47 (Kleinschmidt 2013).

¹⁷ FirstEnergy January 7, 2013 Initial Study Report, Mussel Survey Report (Kleinschmidt 2013).

¹⁸ FirstEnergy January 7, 2013 Initial Study Report, Water Quality Report (Kleinschmidt 2013).

¹⁹ FWS February 20, 2013 Comment.

14. On July 3, 2013, FirstEnergy filed a preliminary licensing proposal (PLP). FWS filed comments on the PLP on August 20, 2013. With regard to mussels, FWS stated only that,

Due to the current intake designs and, in part, to the conflicting resources uses downstream (the salmonid fishery vs. the warmer water needed for mussel production), it is not practical to alter the operations of either the Project or the Corps. Therefore, the waters immediately below the dam are likely to remain colder than those located a few miles downriver.

Accordingly, FirstEnergy concluded in its December 2, 2013 Final License Application that “no further consultation is necessary with the [FWS] under the ESA because no species protected by the ESA were found within the Project boundary or in the area of the Allegheny River influenced by Project operations.”²⁰

15. On January 16, 2014, the Commission approved the transfer of the existing license and substitution of applicants for relicensing from FirstEnergy to Seneca Generation.²¹

16. On June 20, 2014, in response to the Commission’s notice that FirstEnergy’s application had been accepted for filing and was ready for environmental analysis,²² FWS filed comments, recommendations, preliminary terms and conditions, and preliminary prescriptions (FWS June 20 letter). FWS identified two additional federally listed mussel species “known to inhabit the mainstem Allegheny River” (snuffbox and sheepnose), but acknowledged that none of the listed mussel species were found in the 2012 Mussel Survey.²³ However, FWS opined that the low numbers and lack of diversity of mussels is

²⁰ FirstEnergy December 2, 2013 Final License Application at 1-4.

²¹ *FirstEnergy Generation, LLC, et al.*, 146 FERC ¶ 62,040 (2014).

²² April 29, 2014 Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions (hereinafter, April 29, 2014 Notice of Application Accepted for Filing).

²³ The FWS June 20 letter states that “Five Federally-listed endangered mussel species—the northern riffleshell (*Epioblasma torulosa rangiana*), snuffbox (*E. triquetra*), clubshell (*Pleurobema clava*), sheepnose (*Plethobasus cyphus*), and the rayed bean (*Villosa fabalis*), and one Federal candidate species, rabbitsfoot (*Quadrula cylindrica cylindrica*), are known to inhabit the mainstem Allegheny River.” However, the rabbitsfoot (*Quadrula cylindrica cylindrica*) was listed as threatened under the ESA on

likely due to the cold water release from the project, stating that “it believes that the reach surveyed for relicensing does not include the entire reach affected by the cold water release.” FWS concluded that “adverse effects to Federally-listed mussels are occurring in the Allegheny River as a result of the cold water release from the Project[,]” and that “[a]n expansion of mussel diversity and densities, including Federally-listed species, would likely result from an increase in water temperatures to mimic a more natural regime.”

17. The FWS June 20 letter also acknowledged the infeasibility of modifying project intakes, and that an increase in warm temperature to benefit mussels could cause harm to salmonid fisheries downstream. FWS stated that it would consider a Habitat Improvement Plan, developed in consultation with the resource agencies, to indirectly mitigate for project effects on fish and wildlife. Finally, FWS noted that, “[s]hould the [Commission] choose to designate Seneca Generation as a non-Federal representative, the [Commission] should send the Service that designation in writing.”

18. Seneca Generation responded to the FWS June 20 letter on August 12, 2014 (August 12 Response), asserting that “many variables other than water temperature can affect or have affected mussel distribution in the Allegheny River,” and stating that “there is no evidence that the Project affects water temperatures beyond 8 miles.” Seneca Generation also noted that it had been designated as the non-federal representative for ESA section 7 consultation when the Commission approved the substitution of Seneca Generation for FirstEnergy as the applicant for the project.

19. On June 26, 2014, in response to the Commission’s notice that FirstEnergy’s application had been accepted for filing and was ready for environmental analysis,²⁴ the Forest Service filed comments, recommendations, and 27 preliminary terms and conditions under section 4(e) of the Federal Power Act (FPA).²⁵ Seneca Generation commented on the terms and conditions on August 12, 2014.

20. The Commission issued the Environmental Assessment (EA) for the Kinzua Project on October 24, 2014. The EA, acknowledging the information presented in the FWS June 20 letter and Seneca Generation’s August 12 Response, stated that “there is no specific information to indicate that this reach has unusually low [mussel] species

October 17, 2013. 78 Fed. Reg. 57,076 (2013). Therefore, the FWS June 20 letter identified six federally listed mussel species (five endangered, one threatened).

²⁴ See April 29, 2014 Notice of Application Accepted for Filing.

²⁵ 16 U.S.C. § 797(e) (2012).

diversity.”²⁶ The EA further stated that, “[w]hile Interior speculates that a warmer thermal regime from Kinzua dam may increase mussel diversity, it makes no specific recommendations to increase water temperatures in the releases from the dam.”²⁷ Based on the mussel surveys completed by FirstEnergy in 2012, Commission staff concluded that the “relicensing of the Kinzua Project, as proposed with staff-recommended measures, would have no effect on any federally-listed or candidate mussel species.”²⁸

21. In the Notice of Availability of Environmental Assessment, Commission staff requested that comments on the EA be filed within 30 days from the date of the notice.²⁹ The FWS did not file comments on the EA. The Forest Service filed 27 final 4(e) license conditions on January 22, 2015.

22. On July 22, 2015, the Commission issued a new 50-year license to Seneca Generation to continue operation of the Kinzua Project, effective December 1, 2015.³⁰ The license order referenced the October 25 letter identifying the northern riffleshell, clubshell, rayed bean, and rabbitsfoot mussels, but did not mention the June 20 letter identifying the additional two species (snuffbox and sheepnose).³¹ However, the order did reference the EA’s conclusion that relicensing the Kinzua Project, as proposed with staff-recommended measures, would have no effect on any federally listed or candidate mussel species.³² The license order included all 27 section 4(e) conditions recommended by the Forest Service,³³ but expressed Commission staff’s disagreement with Condition

²⁶ EA at 56.

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ *See* October 24, 2014 Notice of Availability of EA at 1.

³⁰ *Seneca Generation, LLC*, 152 FERC ¶ 62,045.

³¹ *Id.* P 47.

³² *Id.*

³³ *Id.* at Appendix A. The final conditions are virtually identical to the preliminary conditions, with the exception of some deadlines for filing certain plans.

No. 26, requiring Seneca Generation to implement an aquatic habitat improvement plan.³⁴

23. Interior and Seneca Generation filed timely requests for rehearing of the license order on August 19 and 21, 2015, respectively. Seneca Generation filed an Answer to Interior's request for rehearing on September 4, 2015.³⁵

II. Discussion

A. Seneca Generation's Request for Rehearing

24. Section 4(e) of the FPA requires that Commission licenses for projects located within federal reservations "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."³⁶ As noted above, the Kinzua Project occupies 212.1 acres of the Allegheny National Forest administered by the Forest Service, and the Forest Service timely filed, for inclusion in the license, 27 section 4(e) conditions that it found necessary for the protection and utilization of the Allegheny National Forest. The 27 conditions were included in the project license.³⁷

25. Condition No. 26 of the license requires Seneca Generation to fund and prepare an Aquatic Habitat Improvement Plan to "mitigate for project induced effects to aquatic biota and their habitat."³⁸ The Forest Service stated that "[t]he purpose of the Aquatic Habitat Improvement Plan is to improve aquatic habitat to restore aquatic species diversity and abundance, and compensate for the loss of sport fish and resulting angling

³⁴ *Id.* P 41; EA at 6.

³⁵ Commission regulations provide that an answer may not be made to a request for rehearing, unless the decisional authority orders otherwise. 18 C.F.R. §§ 385.213(a)(2), 385.713(d) (2015). We will allow Seneca Generation's answer here because it is helpful in establishing the procedural history of the applicant's consultation with FWS.

³⁶ 16 U.S.C. § 797(e) (2012).

³⁷ *Seneca Generation, LLC*, 152 FERC ¶ 62,045 at Appendix A.

³⁸ *Id.*

opportunity due to entrainment losses.”³⁹ The condition states that the Aquatic Habitat Improvement Plan is also intended to help mitigate the ongoing negative effect to water quality in the Allegheny River below the Kinzua Dam.⁴⁰

26. Condition No. 27 of the license requires Seneca Generation to file within 12 months of license issuance a water quality management and monitoring plan (water quality plan). Seneca Generation must “describe operational and/or structural measures to be taken to minimize project-induced variance from natural daily water temperature oscillations and to ensure compliance with State of Pennsylvania and EPA water quality standards.”⁴¹ The water quality plan must also “describe monitoring and adaptive management strategies to meet the water quality objectives,” and must be developed in consultation with federal and state resource agencies.

27. On rehearing, Seneca Generation requests that the Commission remove Condition Nos. 26 and 27 from the project license. In the alternative, Seneca Generation requests that the Commission grant rehearing to issue findings with respect to the two disputed conditions, confirming that the conditions are “irrational, unnecessary, and not supported by substantial evidence.”

28. Seneca Generation asserts that Condition Nos. 26 and 27 should be removed from the license because they are arbitrary and capricious, unnecessary for the protection and utilization of the Allegheny National Forest, and are not supported by substantial evidence in the record. In support of its position, Seneca Generation cites numerous statements and conclusions in the record made by Commission staff, the Pennsylvania Department of Environmental Protection (Pennsylvania DEP), and the Pennsylvania Fish and Boat Commission (Pennsylvania FBC).

29. As acknowledged by Seneca Generation in its request for rehearing, the Commission has no authority to reject mandatory conditions as unreasonable. If the Commission believes that a particular condition is inconsistent with the comprehensive development standard of FPA section 10(a)(1),⁴² or is not supported by substantial

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 16 U.S.C. § 803(a)(1) (2012). It should be noted that the Commission has determined that, even with the disputed conditions included in the license, the Kinzua Project is best adapted to a comprehensive plan for improving or developing the waterway for all beneficial public uses, in accordance with sections 4(e) and 10(a)(1) of

evidence as required by FPA section 313(b),⁴³ the Commission may express its disagreement with the condition, but cannot remove the condition from the license on its own accord.⁴⁴ Accordingly, we deny Seneca Generation's request to remove Condition Nos. 26 and 27 from the license.⁴⁵ We do, however, recognize the value in expressing our disagreement with mandatory conditions and prescriptions, and do so in this order.⁴⁶

30. As explained in the license order, Condition No. 26 is unnecessary because: (1) project effects on downstream water temperatures are beneficial to the trophy trout fishery downstream of Kinzua dam; (2) fish lost to entrainment would be mostly young fish that typically experience high rates of natural mortality during their first year of life,

the FPA. If the Commission were unable to make this finding as a result of including the Forest Service's Condition Nos. 26 and/or 27, we could not have issued a new license for the project.

⁴³ 16 U.S.C. § 825l(b) (2012).

⁴⁴ See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778 n. 20 (1984). Seneca Generation also argues that the Forest Service exceeded its authority in requiring Condition No. 27 because (1) the Forest Service cannot use its conditioning authority to mandate benefits that would not have occurred under "natural conditions;" and (2) the Forest Service's authority under FPA section 4(e) to impose mandatory conditions applies only to the extent that the conditions are necessary to protect the "federal reservation" on which the project is located, and the Allegheny River is outside the Allegheny National Forest. As discussed below, we believe that the requirements of Condition No. 27 are reasonable and should be included in the license. Thus, we need not address Seneca Generation's arguments regarding the scope of the Forest Service's authority under FPA section 4(e).

⁴⁵ We note, however, that the Commission can only enforce Condition No. 27 to the extent that it requires action at the privately-owned facilities that we licensed. The Commission cannot enforce a condition that interferes with or imposes requirements on the Corps' with respect to operation of its facilities. See, e.g., *Blue Heron Hydro LLC*, 140 FERC ¶ 61,049, at PP 10-14 (2012).

⁴⁶ If the disputed conditions are challenged in court, they will stand or fall on their own merits, and the Forest Service—not the Commission—will have the responsibility of defending the conditions in court. See, e.g., *Bangor Hydroelectric Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996).

and fish populations are typically able to compensate for such losses; and (3) Allegheny Reservoir continues to support a robust sport fishery.⁴⁷ For these reasons, the EA

⁴⁷ *Seneca Generation, LLC*, 152 FERC ¶ 62,045 at P 41.

concluded, and we agree, that there is “little basis for requiring an [aquatic habitat improvement plan] that would include unspecified habitat improvement projects of unknown costs.”⁴⁸

31. With respect to Condition No. 27, we disagree with Seneca Generation’s interpretation of the condition as requiring changes to project operation that would result in warmer water being released into Allegheny River. Although Seneca Generation’s interpretation of the plain language of Condition No. 27 is not unreasonable, we believe that interpreting the condition in the context of the record leads to a different outcome. In providing its rationale for imposing Condition No. 27, the Forest Service states that “[t]he licensee is proposing changes from current operations[,]” and that “[a]nalysis through studies was not adequate to assess potential effects to water quality.” Furthermore, in its Wild and Scenic Rivers Act determination for the Allegheny River, the Forest Service states that “[p]reliminary 4(e) condition no. 27 (Water Quality Management and Monitoring Plan) is needed to ensure that current water quality is maintained via adjustment of project operations if monitoring indicates warmer water temperatures or reduced [dissolved oxygen] levels are present.”⁴⁹ Thus, the record makes clear that the Forest Service is concerned with changes to project operation that would alter the current coldwater releases created by the project.

32. As Commission staff explained, lower temperatures created by project operation are beneficial for the trophy trout fishery downstream of the Kinzua dam.⁵⁰ Furthermore, there is no evidence that current operation causes an overall adverse effect on water quality downstream of the Kinzua dam.⁵¹ However, as stated in the EA, “changes in project operation do affect water temperatures over a relatively short time period,” and “[c]hanging Unit 2 operation to discharge more flow downstream of the dam may also increase water temperatures, which could adversely affect the existing downstream trophy trout fishery.”⁵² For these reasons, Commission staff recommended, and the license order properly required, that Seneca Generation implement real-time monitoring of water temperature and dissolved oxygen as recommended by the Corps, and specified

⁴⁸ EA at 53.

⁴⁹ November 21, 2014 USDA Forest Service Wild and Scenic River (WSR) Section 7 Determination.

⁵⁰ EA at 44.

⁵¹ *Id.* at 45.

⁵² *Id.*

by the Forest Service in Condition No. 27. The Commission is confident that “[d]evelopment of the plan in consultation with the Forest Service, Pennsylvania DEP, Pennsylvania FBC, the Corps, as specified by the Forest Service, would ensure that the plan includes appropriate monitoring techniques and adaptive management processes that are compatible with agency management objectives and Corps’ operations.”⁵³

B. Seneca Generation’s Request for Stay of Condition Nos. 26 and 27

33. Seneca Generation requests that if Condition Nos. 26 and 27 are not removed from the license, the Commission issue a stay of both conditions, pending judicial review. Seneca Generation maintains that issuance of a stay is in the public interest because compliance with Condition No. 27 “could have the effect of modifying temperatures below the Kinzua Dam and thus harm the trout fishery.” Seneca Generation also states that it “will suffer significant economic loss in the event that the conditions are not stayed and a court ultimately rejects these conditions.” Seneca Generation estimates that the irreparable economic loss attributable to the disputed conditions could exceed \$1 million during the course of its appeal.

34. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act; that is, the stay will be granted if the Commission finds that “justice so requires.”⁵⁴ Under this standard, the Commission considers several factors, which typically include: (1) whether the movant will suffer irreparable injury in the absence of a stay; (2) whether issuance of a stay would substantially harm other parties; and (3) whether a stay is in the public interest.⁵⁵ In order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical.⁵⁶ Our general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.⁵⁷

⁵³ *Id.* at 117.

⁵⁴ 5 U.S.C. § 705 (2012). *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992).

⁵⁵ *See, e.g., Catamount Metropolitan District*, 149 FERC ¶ 61,242, at P 35 (2014); *Public Utility District No. 1 of Snohomish County, Washington*, 147 FERC ¶ 61,215, at P 31 (2014).

⁵⁶ *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,870 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

⁵⁷ *See, e.g., Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,170 (2000).

35. We find that a stay is not appropriate under these circumstances. Seneca Generation's concern that implementation of Condition No. 27 could harm trout fisheries downstream of the Kinzua dam is unfounded. Condition No. 27 requires development of a water quality management and monitoring plan in consultation with the resource agencies and seeks to mitigate harm from potential changes to project operation. Nothing in the record suggests that the Forest Service intends to require the cessation of coldwater releases created from Kinzua dam. As stated in the EA, "[d]evelopment of the plan in consultation with the [resource agencies], as specified by the Forest Service, would ensure that the plan includes appropriate monitoring techniques and adaptive management processes that are compatible with agency management objectives and Corps' operations."⁵⁸ Given the consultation process with resource agencies and apparent consensus in the record that coldwater releases are beneficial to downstream fisheries, we find the likelihood for environmental harm to be, at most, speculative. Accordingly, because we find that Condition No. 27 is unlikely to cause environmental harm, we conclude that granting Seneca Generation's stay request is not in the public interest.

36. We are also unable to find that the costs incurred by Seneca Generation in complying with Condition Nos. 26 and 27 would cause irreparable injury in the event that the conditions are not stayed and a court ultimately rejects them. Pecuniary loss, without more, is not considered irreparable harm.⁵⁹ Furthermore, judicial review at this time is entirely speculative. Therefore, we conclude that Seneca Generation will not suffer irreparable injury in the absence of a stay.

37. Based on the foregoing, we deny Seneca Generation's stay request.

C. Interior's Request for Rehearing

38. Interior asserts that the Commission failed to fulfill its consultation obligations under section 7 of the ESA. In particular, Interior states that the Commission failed to address the snuffbox and sheepnose mussels in the EA or license order, and omits any discussion of the FWS June 20 letter. Interior requests that the Commission complete the consultation process with respect to all mussel species identified by FWS.

⁵⁸ EA at 116.

⁵⁹ See, e.g., *Wisconsin Gas co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166 (2005); *Puget Sound Energy, Inc.* 82 FERC ¶ 61,142 (1998); *Pennsylvania Power and Light Co. v. Schuylkill Energy Resources Inc.*, 84 FERC ¶ 61,060 (1998).

39. Interior also asserts that the Commission improperly limited the geographical area to be considered for consultation purposes, alleging that the area of influence of the project extends well downstream of the 8.75-mile reach examined in the 2012 Mussel Survey and analyzed in the EA, and that there are mussels within the area of temperature influence of the project. Interior requests that, on rehearing, the Commission address the complete record and consult on all species found within the properly defined action area.

40. Section 7(a)(2) of the ESA⁶⁰ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat. In order to ensure compliance with the ESA, federal agencies are required to consult with the appropriate federal fish and wildlife agency whenever their actions “may affect an endangered or threatened species.”⁶¹ However, if the federal agency carrying out the action (action agency) determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.⁶² The no effect determination is solely within the discretion of the action agency.⁶³

41. The scope of the geographic area that must be examined by the action agency (action area) includes “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”⁶⁴ The determination of the scope of an action area requires application of scientific methodology and, as such, is

⁶⁰ 16 U.S.C. § 1536(a) (2012).

⁶¹ See 50 C.F.R. § 402.14(a) (2015).

⁶² See, e.g., *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994).

⁶³ See, e.g., *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070-1071 (9th Cir. 2005) (affirming the district court’s ruling that “the ‘no effect’ determination was a decision for the [action agency] to make, not the [FWS]”); FWS, *Interagency Cooperation under the Endangered Species Act*, Final Rule, 51 Fed. Reg. 19926, 19949 (June 3, 1986) (“The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.”); FWS, *Interagency Cooperation under the Endangered Species Act*, Final Rule, 73 Fed. Reg. 76,272, 76,280-81 (Dec. 16, 2008); *American Forest Resource Council v. Caswell*, 631 F.Supp.2d 30, 32 (D.D.C. 2009).

⁶⁴ 50 C.F.R. § 402.02 (2015).

within the action agency's discretion.⁶⁵ The action agency must explain the "scientific methodology, relevant facts, or rational connections linking the project's potential impacts" to the action area boundaries to enable a reviewing court to determine whether the action area was properly conceived.⁶⁶

42. Here, Commission staff determined that the relicensing of the Kinzua Project, as proposed with staff-recommended measures, would have no effect on any federally listed or candidate mussel species. Although the EA and license order did not cite the FWS June 20 letter, it is clear that the Commission's "no effect" determination applied to both the snuffbox and sheepnose mussels. Both mussel species were identified as federally endangered species in the EA⁶⁷ and were included in FirstEnergy's 2012 Mussel Survey, which did not find either species in the surveyed area.⁶⁸ Because Commission staff concluded that relicensing the Kinzua Project would have no effect on any of the federally listed mussel species, including the snuffbox and sheepnose, no further consultation with the FWS regarding federally listed mussels was necessary under the ESA.⁶⁹

43. We also disagree that Commission staff improperly limited the action area. FirstEnergy's 2012 Water Quality Report concluded that the temperature effects from the project in the Allegheny River dissipate before reaching Conewango Creek, approximately 6.75 miles downstream of the Kinzua dam.⁷⁰ FirstEnergy nevertheless

⁶⁵ *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)).

⁶⁶ *Id.*

⁶⁷ EA at 42, Table 3.

⁶⁸ FirstEnergy January 7, 2013 Initial Study Report, Mussel Survey Report (Kleinschmidt 2013).

⁶⁹ The absence of a federally listed species in the project area is sufficient to justify a no effect finding by the action agency. *See, e.g., Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (2005) (holding that "the decision rested on the firm foundation that no pygmy-owls had been found to live within either project area").

⁷⁰ *See* FirstEnergy December 2, 2013 Final License Application at 3-22; FirstEnergy January 7, 2013 Initial Study Report, Water Quality Report at section 3.1.2.4 (Kleinschmidt 2013).

surveyed for mussels 8.75 miles downstream from the project, finding no federally listed mussel species.

44. FWS first objected to the downstream reach of the mussel survey in its June 20 letter, nearly two years after completion of the 2012 Water Quality Report and 2012 Mussel Survey. In fact, during the study plan stage, FWS stated that “the study area would be eight miles below the dam”⁷¹ Furthermore, in the June 20 letter, the FWS asserted only that “the low numbers and diversity of mussels in the 8-mile surveyed reach is likely due to the cold water release from the Project” and that “it is the opinion of the [FWS] that adverse effects to federally listed mussels are occurring in the Allegheny River as a result of the cold water release from the Project.” In sum, FWS did not dispute the results from the 2012 Mussel Survey that indicated no listed mussels in the surveyed reach, but asserted that the effects of the project are felt further downstream and that the mussel survey should be extended to include such area.

45. Setting aside the lateness of FWS’ request to expand the scope of the mussel survey, the Commission disagrees that the Kinzua Project’s effects extend beyond the confluence of Conewango Creek and the Allegheny River. Interior cites three studies⁷² in support of its position: (1) a 2006 U.S. Geological Survey mussel survey in the Allegheny River from below Warren to Kennerdell, Pennsylvania (USGS Survey); (2) a 2003 biological assessment for the Hickory Street Bridge replacement project prepared by Michael Baker Jr., Inc. (Hickory Bridge Study);⁷³ and (3) a 1999 Vaughn and Taylor study, *Impoundments and the Decline of Freshwater Mussels: a Case Study of an Extinction Gradient* (Vaughn and Taylor study).

⁷¹ FWS March 30, 2011 Comment, at 10.

⁷² These studies are included in FWS September 1, 2015 Supplemental Information filing.

⁷³ In its June 20 letter and request for rehearing, FWS cites a biological assessment for the Fifth Avenue Bridge replacement project, conducted by EnviroScience in 2000 (EnviroScience Study), as support for its assertion that there is “a strong habitat partitioning” between the left and right banks of the Allegheny River. However, the EnviroScience Study only analyzed Conewango Creek prior to its intersection with the Allegheny River, and therefore is not relevant to the Kinzua Project’s effect on the Allegheny River. It appears that the FWS intended to cite a biological assessment for the Hickory Street Bridge replacement project, prepared by Michael Baker Jr., Inc. in 2003, which is included in the FWS September 1, 2015 filing.

46. The USGS Survey contains the following discussion:

The density difference *could possibly* be correlated with the close proximity of the upper sites to the Kinzua Dam which is a cold water release dam. A preliminary glance of the phase one survey results shows mussel populations becoming more diverse and abundant as the survey has moved downstream from the dam. *Though not a strong linear relationship* (F=25.74, P≤0.0001), more mussels were found per person hour searched as the survey moves further from the Kinzua Dam.⁷⁴

Interior states that this study and "...other anecdotal information indicate a temperature influence from the Kinzua coldwater release downstream to the Town of Tionesta."⁷⁵ The Hickory Street Study observed "a strong habitat partitioning between the left bank (Kinzua cold water influence) and the right bank (Conewango Creek warm water influence)."⁷⁶ Finally, the Vaughn and Taylor study, which does not analyze mussels in the Allegheny River, provides data regarding the response of mussels located downstream from mainstem reservoirs.

47. As stated in the EA,⁷⁷ Interior's comments provide, at most, speculative evidence that the project has an effect on temperature beyond 6.75 miles. While we do not dispute the Vaughn and Taylor study's assertion that mussel diversity and abundance may be affected downstream of an impoundment, none of the studies cited by FWS were conducted for the purpose of (1) determining the extent of the Kinzua Project's effect on mussel populations in the Allegheny River; or (2) analyzing water temperature data downstream of the 2012 Mussel Survey study reach. Ultimately, none of the studies provide direct evidence that the Kinzua Project is affecting federally listed mussels beyond the reach studied during the 2012 Mussel Survey.

48. Moreover, as explained above, it is within the Commission's discretion to define the geographical scope of the action area (subject to the ESA and its implementing regulations), which Commission staff did here by relying on FirstEnergy's 2012 Water Quality Report. The Water Quality Report was designed specifically to determine the project's area of effect, which the study concluded to be 6.75 miles downstream from

⁷⁴ USGS Survey at 38 (emphasis added).

⁷⁵ FWS June 20 letter at 5.

⁷⁶ Hickory Bridge Study at 2.

⁷⁷ EA at 56.

Kinzua dam. FWS never challenged or suggested alternatives to the methodology used in the Water Quality Report, and the Commission approved the methodology when it issued a study plan determination for the Kinzua Project. Thus, based on the best scientific evidence available, Commission staff concluded that the area affected by the project does not extend beyond 6.75 miles downstream, an area which contains none of the federally listed mussel species identified by FWS. Accordingly, we deny Interior's request for rehearing.

The Commission orders:

(A) Seneca Generation, LLC's request for rehearing and stay of the July 22, 2015 license order is denied.

(B) The U.S. Department of the Interior's request for rehearing of the July 22, 2015 license order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.