

144 FERC ¶ 61,209
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of
Douglas County, Washington

Project No. 2149-160

ORDER DENYING RECONSIDERATION

(Issued September 19, 2013)

1. On June 13, 2013, Public Utility District No. 1 of Douglas County, Washington (Douglas PUD), licensee of the 774.25 megawatt (MW) Wells Project No. 2149, filed a request for reconsideration of the Commission's May 16, 2013 order on rehearing.¹ The Rehearing Order addressed, among other issues, Douglas PUD's request for a 50-year license rather than the 40-year license granted by Commission staff in the Relicense Order issued on November 9, 2012.² Douglas PUD requests reconsideration of the conclusions in the rehearing order that Commission staff: (1) reasonably excluded Habitat Conservation Plan costs when it evaluated the extent of measures included in the new license; and (2) did not err by selecting a 40-year license term for the Wells Project. Douglas PUD states that these findings are based on erroneous conclusions.

I. Background

2. The Commission issued an original license for the Wells Project in 1962, and the license expired on May 31, 2012.³ The project, located in Douglas County, Washington,

¹ *Public Utility District No. 1 of Douglas County, Washington*, 143 FERC ¶ 61,130 (2013) (Rehearing Order).

² *Public Utility District No. 1 of Douglas County, Washington*, 141 FERC ¶ 62,104 (2012) (Relicense Order).

³ *Public Utility District No. 1 of Douglas County, Washington*, 28 FPC 128 (1962).

is one of six hydropower projects on a 200-mile stretch of the Columbia River, from river mile (RM) 597 to RM 397. These projects are known as the mid-Columbia projects, of which the Wells Project is an integral part. The two upstream-most projects are the federally-owned Grand Coulee and Chief Joseph Projects. The four projects downstream of the federal projects, stretching for more than 100 river miles, are under Commission license: (a) Douglas PUD's Wells Project; (b) Public Utility District No. 1 of Chelan County's (Chelan PUD) Rocky Reach Project No. 2145; (c) Chelan PUD's Rock Island Project No. 943; and (d) Public Utility District No. 2 of Grant County's (Grant PUD) Priest Rapids Project No. 2114.

3. In 1979, the Commission issued an order that initiated a trial-type proceeding (mid-Columbia Proceeding) to consider whether to modify the operations and flows of the mid-Columbia project licenses to provide “certain minimum flows and spills . . . for the protection of the chinook, sockeye, and coho salmon and steelhead trout resources” and “to consider what fish measures should be required for the remainder of the license terms.”⁴ The Commission directed the presiding Administrative Law Judge (ALJ) to hold hearings regarding a long-term solution to the fish passage issues and to establish interim operating measures for all four projects, i.e. Wells, Rocky Reach, Rock Island, and Priest Rapids. In the case of the Wells Project, the Commission explained that it was acting under the authority of Article 41 of its 1962 license.⁵

⁴ *Public Utility District No. 2 of Grant County, Washington, et al.*, 6 FERC ¶ 61,210, at 61,534-35 and 61,537 (1979).

⁵ Article 41 of the 1962 license provided:

Article 41. The Licensee shall construct, maintain and operate such protective devices and shall comply with such reasonable modifications of the project structures and operation in the interest of fish and wildlife resources, provided that such modifications shall be reasonably consistent with the primary purpose of the project, as may be prescribed hereafter by the Commission upon its own motion or upon recommendation of the Secretary of the Interior or the Washington State Departments of Fisheries and Game after notice and opportunity for hearing and upon a finding that such modifications are necessary and desirable and consistent with the provisions of the Act: Provided further, That subsequent to approval of the final design drawings prior

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4. On October 30, 1990, Douglas PUD filed a settlement agreement (1990 agreement) in the mid-Columbia proceeding, which was meant to establish Douglas PUD's "obligations with respect to the installation and operation of juvenile downstream migrant bypass facilities and measures; hatchery compensation for fish losses; and adult fishway operation at least until March 1, 2004."⁶ Douglas PUD explained that it was making the filing with the intention of implementing Article 41 of the license.⁷ The agreement had a term from its execution date to the expiration of the license in 2012.⁸ On January 24, 1991, the Commission approved the 1990 agreement, simultaneously terminating the Wells portion of the mid-Columbia proceeding.⁹

5. In 1997 and 1999, the National Marine Fisheries Service (NMFS) listed upper Columbia River steelhead and spring-run Chinook salmon, respectively, as threatened or endangered species under the Endangered Species Act of 1973 (ESA).¹⁰ In 1998, Douglas PUD submitted to NMFS a proposed Habitat Conservation Plan (HCP), along with an application for an incidental take permit pursuant to ESA section 10.¹¹ The HCP

to commencement of construction no modifications of project structures in the interest of fish and wildlife resources which involve a change in the location, height or main structure of a dam, or the addition of or changes in outlets at or through a dam, or a major change in generating units, or a rearrangement or relocation of a powerhouse, or major changes in a spillway structure shall be required.

⁶ Douglas PUD October 30, 1990 Settlement Agreement at 1.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Public Utility District No. 1 of Douglas County, Washington*, 54 FERC ¶ 61,056 (1991).

¹⁰ 16 U.S.C. § 1531 *et seq.* (2012). *See* 62 Fed. Reg. 43,937 (Aug. 18, 1997) (steelhead) and 64 Fed. Reg. 41,835 (Aug. 2, 1999) (spring-run Chinook).

¹¹ The ESA requires the protection of threatened and endangered species and promotes their recovery. Section 9 of the ESA, 16 U.S.C. § 1538, prohibits the take of endangered species. Section 3 of the ESA, 16 U.S.C. § 1532, defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." NMFS defines

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was designed to implement a long-term, comprehensive management plan to protect certain anadromous fish species (spring and summer/fall Chinook salmon, sockeye salmon, coho salmon, and steelhead) and their habitat as affected by the project. The objectives of the HCP are to achieve “no net impact” for each anadromous fish species and its habitat affected by the project through fish passage, hatchery programs, and fish habitat restoration work along tributary rivers and streams.

6. In 2003, Douglas PUD filed the HCP with the Commission, asking that it be included in its existing license. In 2004, the Commission approved the HCP and made it a part of the Wells license.¹² The HCP has a 50-year term and will expire in 2054.

7. On May 27, 2010, Douglas PUD filed an application for a new license pursuant to sections 4(e) and 15 of the Federal Power Act (FPA)¹³ for the continued operation and maintenance of the Wells Project. Douglas PUD’s application proposed continued implementation of the HCP.

“harm” to include “significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, feeding, and sheltering.” *See* Fish and Wildlife Service (FWS) and NMFS Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 8-3 (November 1996) (FWS and NMFS Handbook); 50 C.F.R. § 17.3 (2012) (FWS regulation with similar definition of harm). NMFS or FWS may issue permits, under limited circumstances, to authorize the take of listed species incidental to otherwise lawful activities (such as the operation of a hydroelectric project). These incidental take permits are issued for non-Federal actions under ESA section 10(a)(1)(B), 16 U.S.C. § 1539. The incidental take permits exempt the permittee from the ESA section 9 take prohibition and authorize the take of listed species subject to conditions. An HCP is a planning document under ESA section 10(a)(2)(A) “that is a mandatory component of an incidental take permit application.” FWS and NMFS Handbook at 8-1.

¹² *See Public Utility District No. 1 of Douglas County, Washington*, 107 FERC ¶ 61,283 (2004) (companion order specifically addressing HCP for Douglas PUD’s Wells Project license); *Public Utility District No. 1 of Chelan County, Washington*, 107 FERC ¶ 61,280 (2004) (master order addressing project-specific HCPs for Douglas PUD’s Wells Project and Chelan PUD’s Rocky Reach and Rock Island Projects).

¹³ 16 U.S.C. §§ 797(e) and 808 (2012).

8. Commission staff issued a new 40-year license for Douglas PUD's Wells Project on November 9, 2012. The new license required continued implementation of the HCP.¹⁴

9. Commission staff briefly summarized the new measures required in the relicense order and concluded that the measures amounted to a moderate amount of mitigation and enhancement.¹⁵ Commission staff cited to Commission precedent to the effect that when determining appropriate license terms, the Commission evaluates new measures to be included in the license, and does not consider requirements carried over from the prior license. Accordingly, Commission staff rejected Douglas PUD's argument that the HCP measures, first incorporated into the old license and subsequently included in the new license, should be counted in favor of issuing a 50-year license.¹⁶ The Commission staff explained that Chelan PUD's Rocky Reach license similarly excluded HCP measures from the license term analysis.¹⁷

10. The Relicense Order also discussed the policy in favor of coordinating to a reasonable extent the license expiration dates of projects in a river basin, such that subsequent relicense proceedings can also be coordinated. The order pointed to the relicenses issued in 2008 and 2009 for, respectively, the Priest Rapids Project and the Rocky Reach Project.¹⁸ The terms of those relicenses were coordinated to expire in 2052.¹⁹ Choosing a license term to coincide with the expiration of these other relicenses would allow future coordination among the Columbia River Basin projects.²⁰

¹⁴ Relicense Order, 141 FERC ¶ 62,104 at Ordering Paragraph (G), incorporating Appendix D, Reasonable and Prudent Measures and Terms and Conditions Included in the NMFS' Biological Opinion.

¹⁵ Relicense Order, 141 FERC ¶ 62,104 at P 140.

¹⁶ *Id.* P 141. See, e.g., *Public Utility District No. 1 of Chelan County, Washington*, 127 FERC ¶ 61,152, at P 10 (2009).

¹⁷ Relicense Order, 141 FERC ¶ 62,104 at P 141.

¹⁸ *Id.* P 143.

¹⁹ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ 61,049 (2008); *Public Utility District No. 1 of Chelan County, Washington*, 126 FERC ¶ 61,138, *order on reh'g*, 127 FERC ¶ 61,152 (2009) (2052 expiration of Chelan PUD's relicense

11. Douglas PUD sought rehearing of the Relicense Order on several issues, and the Commission issued an order denying rehearing on the license term issue on May 16, 2013. The Rehearing Order included a discussion of FPA section 15(e) and the Commission's standard guidelines that differentiate between 30-, 40-, and 50-year licenses.²¹ With regard to the HCP and Douglas PUD's assertion that because the HCP measures were the result of proactive efforts to comply with the ESA and the FPA and thus should warrant a longer license term for the new license, the Commission stated that Douglas PUD proposed its HCP in 2003 for the purpose of settling the Wells portion of the 1979 mid-Columbia proceeding.²² The Rehearing Order stated that

Douglas PUD primarily entered into the HCP for purposes of resolving long-standing ESA issues, not for the purpose of resolving licensing issues early, meaning Douglas PUD had less discretion regarding the HCP than it implies. Douglas PUD was able to reap the monetary benefit of operating its project without these requirements for the more than 20 years that it took to develop appropriate protection measures for the fishery.²³

12. Like the Commission staff's Relicense Order, the Rehearing Order: (1) stated the policy that the Commission "evaluates new measures to be included in the license, and does not consider requirements carried over from the prior license;" and (2) emphasized the policy in favor of coordinating license expirations for projects within the same river basin.²⁴ Douglas PUD now seeks reconsideration of the May 16, 2013 rehearing order.

for the Rocky Reach Project set to coincide with the termination of its project-specific HCP and the expiration of the Priest Rapids relicense).

²⁰ Relicense Order, 141 FERC ¶ 62,104 at P 143.

²¹ Rehearing Order, 143 FERC ¶ 61,130 at P 9.

²² *Id.* P 7.

²³ *Id.* P 14.

²⁴ *Id.* P 9.

II. Discussion

13. Section 15(e) of the FPA provides that any new license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years.²⁵ Our general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or new environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.²⁶ When determining appropriate license terms, the Commission evaluates new measures to be included in the license, and does not consider requirements carried over from the prior license.²⁷ In addition, it is Commission policy to “coordinate the expiration dates of licenses [in the same river basin] *to the maximum extent possible*, to maximize future consideration of cumulative impacts at the same time in contemporaneous proceedings at relicensing.”²⁸

14. Douglas PUD states the Commission mischaracterized Douglas PUD’s motives for including the HCP in its prior license. Douglas PUD argues that, contrary to the statements in the Rehearing Order, it did not enter into the 2004 HCP to resolve fishery issues dating back to 1979. In fact, it explains, the 1990 agreement resolved those issues.²⁹

15. As demonstrated by the facts in the Background section of this order, Douglas PUD is correct that the 1979 mid-Columbia proceeding terminated as to the Wells Project upon the Commission’s approval of the 1990 settlement agreement, and that the rehearing order was mistaken on this point. However, Douglas PUD’s ultimate conclusion, i.e. that it is entitled to a 50-year license, does not follow. As stated above, long-standing Commission policy calls for consideration of only new measures to be included in the new license, regardless of the motivations behind amendments to the old

²⁵ 16 U.S.C. § 808(e) (2012).

²⁶ See *Consumers Power Co.*, 68 FERC ¶ 61,077, at 61,384 (1994).

²⁷ See, e.g., *El Dorado Irrigation District*, 117 FERC ¶ 61,284 (2006); *Georgia Power Co.*, 111 FERC ¶ 61,183 (2005); *Ford Motor Co.*, 110 FERC ¶ 61,236 (2005).

²⁸ 18 C.F.R. § 2.23 (2013) (emphasis added).

²⁹ Request for reconsideration at 6.

license. Accordingly, the reasons that Douglas PUD entered into the HCP provide no basis for us to revisit the license term.

16. In any event, in this case the determinative factor in setting the license term is our policy in favor of coordinating license expirations of projects in the same river basin. Douglas PUD recognizes this yet maintains that the potential for cumulative impacts resulting from the Wells Project is very limited due to high fish survival rates at the project and the project's location at the upstream terminus of the migration.

17. Douglas PUD's reasoning that resolution of certain past environmental issues predicts there will be no future environmental issues raising cumulative effects concerns is not persuasive. In the context of a 40-year license, it is difficult to predict the nature of environmental issues that might arise during the license term and any future relicensing proceeding. The central point here and behind the general policy in favor of coordination among projects in the same river basin is that, whatever issues do arise in the future, the geographical proximity and operationally coordinated nature of the mid-Columbia projects should allow such issues to be analyzed and dealt with in a comprehensive manner at relicensing. The extremely significant and sensitive nature of the environmental resources in the mid-Columbia make it particularly important that the licensing of the mid-Columbia projects be coordinated, rather than dealt with piecemeal at different times.

18. For the above reasons, we deny Douglas PUD's request for reconsideration.

The Commission orders:

The June 13, 2013 request for reconsideration filed by Public Utility District No. 1 of Douglas County, Washington, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.