

UNITED STATES OF AMERICA FERC 107 ¶ 61,288
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

City of Tacoma, Washington

Project Nos. 460-026
460-021

ORDER ON REMAND AMENDING NEW LICENSE,
PARTIALLY LIFTING STAY PENDING JUDICIAL REVIEW,
AND DENYING MOTION FOR RECONSIDERATION

(Issued June 21, 2004)

1. In this order, we amend the subsequent license for the 131-megawatt Cushman Hydroelectric Project No. 460 in response to a court remand to include conditions to protect several species of fish listed as threatened under the Endangered Species Act (ESA). We also grant in part a motion filed by the Skokomish Indian Tribe to partially lift the stay of the subsequent license pending judicial review, to require the project's licensee, City of Tacoma, Washington, to release a minimum flow of 240 cubic feet per second to benefit the listed fish species. Finally, we deny the licensee's motion to reconsider the terms of the subsequent license.

I. Background

2. The Commission issued a subsequent major license for the Cushman Project on July 30, 1998, and issued an order on rehearing on March 30, 1999.¹ Tacoma, the Tribe, and the National Marine Fisheries Service (NOAA Fisheries) filed petitions for judicial review. On May 21, 1999, in response to Tacoma's request, the Commission stayed the

¹City of Tacoma, Washington, 84 FERC ¶ 61,107 (1998), on reh'g, 86 FERC ¶ 61,311 (1999). The project is located on the North Fork of the Skokomish River in Mason County, Washington, in part on federal lands in the Olympic National Forest. The Commission issues a "subsequent" license (as distinguished from a "new" license) for a hydroelectric project after the expiration of a minor or minor part license that is not subject to sections 14 and 15 of the Federal Power Act (FPA). See 18 C.F.R. §§ 16.2(a) and (d). The original license for the Cushman Project, issued in 1924, was for a minor part of a complete project and authorized the flooding of 8.8 acres of U.S. lands. See 84 FERC ¶ 61,107 at 61,535. In essence, a subsequent license is a particular type of new license, and we have used these terms interchangeably in this order.

new license pending judicial review.² Evolutionarily significant units of two salmon species were subsequently listed as threatened under the ESA, and the Commission entered into formal consultation with NOAA Fisheries concerning the effects of relicensing the Cushman Project on those species. On October 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for completion of formal consultation under section 7 of the ESA.³ At that time, it appeared that a biological opinion from NOAA Fisheries was imminent.

3. Shortly after the court's remand, the Commission entered into formal consultation with the U.S. Fish and Wildlife Service (FWS) concerning the effects of relicensing the Cushman Project on bull trout, another fish species that was listed as threatened after issuance of the Commission's order on rehearing.

4. On March 3, 2003, the Tribe filed a motion to partially lift the stay to require interim conditions to protect the listed fish species pending judicial review. The Tribe requested that Tacoma be required to operate the Cushman Project in accordance with four articles of the new license: Article 407, which requires a minimum flow of 240 cubic feet per second (cfs) in the North Fork Skokomish River; Article 404, which requires periodic flushing flow releases to help maintain the channel conveyance capacity of the mainstem Skokomish River; Article 418, which requires Tacoma to monitor the tailrace during operation of Powerhouse No. 2; and Article 408, which requires coordination of water releases to maintain flood control and recreation levels in Lake Cushman. Tacoma filed a response opposing the Tribe's motion. NOAA Fisheries, Washington Ecology, Washington DFW, and American Rivers filed responses in support of the Tribe's motion.

5. On September 24, 2003, we issued an order holding the Tribe's motion in abeyance and directing the appointment of a settlement judge to conduct a proceeding on interim conditions.⁴ We directed that the presiding judge conduct an expedited

²87 FERC ¶ 61,197 (1999).

³City of Tacoma, Washington, et al. v. FERC, Nos. 99-1143 et al. (D.C. Cir. Oct. 30, 2000).

⁴104 FERC ¶ 61,324 (2003). In the same order, we denied the Tribe's petition for a declaratory order and motion for summary disposition regarding the validity of Tacoma's certifications for the project under the Coastal Zone Management Act and the Clean Water Act. The Tribe sought rehearing of that portion of our order, which we denied on December 22, 2003. 105 FERC ¶ 61,333 (2003).

proceeding to develop a factual record and assist the parties in evaluating possible interim solutions to benefit threatened fish species pending completion of the remanded relicensing proceeding and any subsequent judicial review. We further directed the presiding judge to file a written report with the Commission incorporating the factual record, evaluating possible interim solutions, and including the parties' comments.

6. While that proceeding was underway, NOAA Fisheries and FWS filed their draft biological opinions on December 1, 2003, and December 8, 2003, respectively. On December 23, 2003, the presiding judge issued his report, including an impact assessment and recommended interim remediation plan. As directed, the report included the presiding judge's evaluation of the parties' comments. NOAA Fisheries and FWS subsequently filed their final biological opinions on February 7, 2004, and March 4, 2004, respectively.

7. Meanwhile, on March 2, 2004, Tacoma filed what it styled a "Motion on Remand To Reconsider De Facto Decommissioning Orders and for Other Appropriate Relief." In that motion, Tacoma urges that we reconsider our balancing of the public interest factors in support of the subsequent license, asserting that the costs imposed on the Cushman Project will force Tacoma "to reject such a grossly uneconomic license."⁵ Among other things, Tacoma further requests that the Commission reconsider the application of its Decommissioning Policy Statement⁶ and Mead⁷ decision on project economics in this case. Federal and state resource agencies (U.S. Departments of the Interior and Commerce, Washington Ecology, and Washington DFW), Save the Lakes Coalition, and the Tribe and American Rivers (jointly) filed answers in opposition to Tacoma's motion.

8. More recently, on May 4, 2004, Tacoma filed a motion requesting that the Commission take official notice of a federal district court decision requiring that NOAA Fisheries decide by May 28, 2004, whether delisting is warranted of certain salmon species, including the two principal species at issue in this case. The next day, on May 5, 2004, the Tribe filed an answer opposing Tacoma's motion. On May 28, 2004, NOAA Fisheries issued its decision, determining that these species should remain listed as threatened.

⁵Tacoma's motion for reconsideration at 1.

⁶Project Decommissioning at Relicensing; Policy Statement (December 14, 1994), 18 C.F.R. § 2.24, 60 Fed. Reg. 339 (January 4, 1995), FERC Stats. & Regs. Preambles 1991-1996 ¶ 31,011.

⁷Mead Corp., 72 FERC ¶ 61,027 at 61,068-70 (1995).

9. With the final biological opinions in hand, we are now in a position to issue our decision in response to the court's remand. For the reasons discussed below, we amend the subsequent license as needed to protect the listed fish species, in response to those biological opinions. We grant in part the Tribe's motion to partially lift the stay, thus requiring that Tacoma release a minimum flow of 240 cfs as an interim protective measure to benefit listed species during the two- to three-year period that will likely be needed for judicial review. We deny Tacoma's motion for reconsideration of our relicensing orders, Decommissioning Policy Statement, and Mead decision, finding that there is no basis in the record to support Tacoma's request. Finally, we grant Tacoma's motion to take official notice of the federal district court decision in Building Industry Ass'n v. NOAA,⁸ but conclude that no further action is required at this time in connection with that decision.

II. Discussion

A. Amendments to Implement Biological Opinions

10. Under section 7 of the ESA, the Commission must ensure, in consultation with NOAA Fisheries or FWS, as appropriate, that its proposed action is not likely to jeopardize the continued existence of any listed species, or destroy or adversely modify any designated critical habitat for those species. As noted, the threatened fish species at issue in this case were listed after we had issued a subsequent license for the Cushman Project. Consequently, for purposes of ESA consultation, both NOAA Fisheries and FWS have defined the proposed action as operation of the Cushman Project under the terms and conditions of the subsequent license. Both agencies find that the proposed action is not likely to jeopardize the continued existence of the listed species (evolutionarily significant units of Puget Sound chinook and Hood Canal summer chum salmon for NOAA Fisheries, and Coastal-Puget Sound distinct population segment of bull trout for FWS). Neither agency has designated critical habitat for these species.

11. Pursuant to section 9 of the ESA and regulations issued pursuant to section 4(d) of that act, no person may take any individual member of a threatened or endangered species. A "take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. Incidental take is defined as

⁸No. CS-03-0303-RHW (E.D. Wash., April 28, 2004). A copy of the decision is attached to Tacoma's motion of May 3, 2004. Information concerning NOAA Fisheries' decision of May 28, 2004, that the species at issue in this case should remain listed as threatened, as well as its revised policy concerning fish hatcheries, is available at the following site: <http://www.nwr.noaa.gov/AlseaResponse/20040528/index.html>.

a taking that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Incidental taking is authorized, but only if it is in compliance with the terms and conditions of an incidental take statement included in a biological opinion. To ensure that any incidental taking will be authorized, NOAA Fisheries and FWS have identified reasonable and prudent measures to avoid or minimize incidental taking, as well as terms and conditions to implement those measures.

**1. Puget Sound Chinook and Hood Canal
Summer Chum Salmon**

12. For Puget Sound chinook and Hood Canal summer chum salmon, NOAA Fisheries states that it is unable to estimate a specific amount of incidental taking of individual fish or incubating eggs from project activities under the subsequent license. NOAA Fisheries finds that direct harm could occur during project operation, adjustment of instream flows, operation of fish passage systems, and other activities that result from false attraction at Potlatch, flow fluctuations and redd and fish stranding in the North Fork Skokomish River, habitat reduction due to the continued presence of the project, and entrainment due to expected fish passage inefficiencies. NOAA Fisheries also finds that short-term construction impacts may take small numbers of juvenile fish or reduce habitat utilization by blockage or sediment release. However, in light of the reasonable and prudent measures and incidental take conditions to implement them, NOAA Fisheries determines that the extent of anticipated take is not likely to result in jeopardy to the species' survival and recovery.

13. NOAA Fisheries observes that direct taking of juvenile chinook salmon by entrainment at both dams is expected to continue until a barrier is installed and operated at Dam No. 1 as part of the downstream fishway. The incidental take statement explains that it covers incidental taking that occurs only after that barrier is installed and operating.

14. The incidental take conditions, which we adopt as license conditions, are set forth in Appendix C.⁹ For the most part, they track specific license conditions, making it unnecessary to amend the license to incorporate them. Where necessary or appropriate, we have amended specific license articles, as explained below.

15. Condition 1 of the incidental take statement requires a minimum flow of 240 cfs or inflow. This is required by Article 407 of the license, so no amendment is needed.

16. Condition 2 requires an annual water budget of up to 25,000 acre-feet for sediment flushing, channel maintenance, and habitat-forming processes in the lower North Fork Skokomish River, as generally described in Articles 404 and 407 of the license. Article 404 requires that this annual water budget be provided for only the first five years of the 40-year license term. We have therefore amended Article 404 to reflect this change.

17. Condition 3 requires the licensee to provide upstream and downstream passage as generally described in Articles 414 and 415. No change is needed for this condition. Condition 4 requires the licensee to provide the fish enhancement programs generally described in Article 417. For clarity, we have amended Article 417 to provide that the fish restoration plan shall be developed in a manner that is consistent with Condition 4 of the incidental take statement.

18. Condition 5 requires the licensee to limit daily amplitude down-ramping to no more than 50 percent of maximum flow. Article 411 requires the licensee to implement seasonal ramping rates based on a schedule of inches per hour. Because these ramping rates do not address the down-ramping issue of flow amplitude and associated fish stranding, we have amended Article 411 to reflect this change.

19. Condition 6 requires the licensee to monitor the effects of false attraction at Potlatch tailrace and make any necessary structural and operational modifications to protect listed chinook salmon and summer chum salmon, as described in Article 418. No change is needed for this condition.

⁹Our relicense order included water quality conditions in Appendix A and the Forest Service's section 4(e) conditions in Appendix B. To avoid confusion, we have designated Appendix C for the incidental take conditions of NOAA Fisheries, and Appendix D for those of FWS. As is our practice, we have made minor, non-substantive revisions to the incidental take conditions to make clear that they are requirements imposed on the licensee, rather than the Commission.

20. Condition 7 requires the licensee to perform the estuarine improvements generally described in Article 412. This appears to be a typographical error, because Article 412 of the license requires a fish habitat and restoration plan, whereas Article 422 requires the estuarine improvements referred to in Condition 7. We have therefore construed Condition 7 to apply to Article 422. No change to the license is required to implement this condition.

21. Condition 8 requires the licensee to minimize the taking of listed species associated with in-water work for construction of physical structures and facilities through appropriate timing restrictions and construction practices. This condition applies to all construction work undertaken pursuant to the new license, and is potentially applicable to as many as ten different license articles. Where it clearly applies, we have amended the license articles to include a reference to it (Articles 401, 402, 412, 414, 415, and 422). For other license articles, this condition will apply to the extent that circumstances warrant, without the need for specific amendments.

22. NOAA Fisheries also notes that the proposed action would adversely affect designated essential fish habitat (EFH) for chum salmon and chinook salmon pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. NOAA Fisheries therefore recommended that the incidental take conditions for ESA purposes be adopted as EFH conservation measures. We adopt that recommendation.

2. Coastal-Puget Sound Bull Trout

23. For Coastal-Puget Sound bull trout, FWS provides detailed information on the amount of incidental taking that is authorized for the proposed action. Taking may result from construction and operation of the trap-and-haul fish passage facility, operation of the downstream fish passage facility, entrainment over the spillways, entrainment through the power facilities before construction of downstream passage facilities, false attraction at the powerhouse No. 2 tailrace, rapid down-ramping after spill events before flow regulation equipment is installed, placement of spawning gravel, excavation of side channels, placement of woody debris, excavation and removal of the Nalley Ranch dikes, stocking of cutthroat trout in Lake Cushman, and increased sport fishing. Specified amounts of incidental taking are authorized for these activities. Taking may also result from the diversion of flows to Hood Canal and the continued reduction of flow in the lower North Fork to a rate of 60 cfs. The incidental take statement exempts this taking until the minimum flow of 240 cfs is released, as required by Article 407.

24. Reasonable and prudent measures (RPMs) require the licensee to minimize incidental taking of bull trout that will result from: (1) the annual stocking of 140,000 catchable cutthroat trout; (2) elevated sediment levels; and (3) entrainment at Cushman Dam No. 2. The incidental take conditions to implement these measures, which we adopt, are set forth in Appendix D.

25. For RPM 1, the licensee is required to modify the plan for stocking of resident fish in Lake Cushman to eliminate the use of cutthroat trout; substitute rainbow trout for cutthroat trout; limit the annual stocking of rainbow trout; and require the plan to be developed in consultation with FWS, NOAA Fisheries, Washington DFW, and the Skokomish Tribe. Article 417 requires that Lake Cushman be stocked with 140,000 catchable sea-run cutthroat trout annually. To reduce the extent of predation on, and competition with, bull trout, we have amended Article 417 to eliminate the mandatory use of cutthroat trout in Lake Cushman and to allow the use of other salmonid species (such as rainbow trout) in the stocking program. This change provides some flexibility in the stocking program and is consistent with the incidental take condition.

26. For RPM 2, the licensee is required to establish and monitor background turbidity levels upstream of the project; monitor downstream turbidity levels during construction activities; establish and monitor background turbidity levels upstream of the project; consult with FWS to discuss means of assuring no violation of the incidental take statement if turbidity levels begin to approach specified limits; and cease sediment-generating activities and reinitiate consultation if project-induced sediment levels exceed background levels by specified amounts and durations. The new license does not include specific requirements for monitoring turbidity in the North Fork Skokomish River. This provision can be implemented as part of the fish-habitat and population-monitoring plan required by Article 413 with little additional effort or expense. Therefore, we have amended Article 413 to require turbidity monitoring in accordance with the terms and conditions of the incidental take statement for bull trout.

27. For RPM 3, the licensee is required to determine whether suitable spawning gravel and sufficiently cold water temperatures exist between October and April in tributaries to Lake Kokanee for successful bull trout reproduction; develop and implement a plan to salvage bull trout from Lake Kokanee if conditions are not suitable for bull trout spawning and incubation; and develop the salvage plan in coordination with FWS. The license issued in 1998 does not require a survey of bull trout habitat in tributaries to Lake Kokanee or the development of a salvage plan for the lake.

28. This condition would first require a survey of tributary habitat to determine its suitability for bull trout spawning and rearing. If the survey of tributaries to Lake Kokanee shows a lack of suitable habitat for bull trout spawning and rearing, the condition requires that Tacoma develop and implement a bull trout salvage plan to relocate bull trout collected from Lake Kokanee. Article 414 of the license requires the development of downstream fish passage at Cushman Dam No. 1. This will involve collecting downstream migrants from Lake Cushman and releasing them to the North Fork below Cushman Dam No. 2, bypassing Lake Kokanee. This is expected to reduce (or effectively eliminate) passage of bull trout into Lake Kokanee. However, some bull trout might continue to enter the lake by other means. Thus, the salvage plan would require continual removal of these bull trout from Lake Kokanee. FWS concludes that, with the implementation of downstream fish passage, the local population of bull trout in Lake Kokanee would decline and possibly become extirpated if suitable conditions for reproduction do not exist in tributaries to Lake Kokanee. We have amended Article 417 to require bull trout habitat surveys and, if necessary, a bull trout salvage plan in accordance with the terms and conditions of the incidental take statement.

B. Tribe's Motion for Interim Protective Measures

29. As noted, the subsequent license has been stayed pending judicial review and further order of the Commission. In our May 1999 decision granting Tacoma's motion for a stay, we found that the costs of the new license are substantial, and would be largely unrecoverable if the license requirements were significantly altered on judicial review. We also noted Tacoma's assertion that, in the absence of a stay, Tacoma would have no choice but to reject the new license and immediately shut down the project, thus foreclosing any meaningful opportunity for judicial review. Because Tacoma had offered to provide an increased minimum flow of 60 cfs, and could not safely release higher minimum flows without first installing a new flow release valve (which could take up to nineteen months), we determined that granting Tacoma's request would result in better environmental conditions for the listed fish species than would otherwise be available under the new license, at least for the near term.

30. When the Tribe filed its March 2003 motion, the stay of the new license had been in effect for nearly four years, and the Commission was still awaiting biological opinions from both NOAA Fisheries and FWS. The delay that had occurred in completing ESA consultation had far exceeded the time that we originally anticipated might be required for judicial review. We were therefore concerned about the possibility that continued operation of the Cushman Project without any environmental measures other than the 60-cfs minimum flow might be having an adverse effect on the endangered fish species. To address this concern, we directed the appointment of an administrative law judge to conduct an expedited, non-adversarial fact-finding proceeding on interim measures to

protect threatened fish species affected by operation of the Cushman Project. In particular, we directed the presiding judge to assist the parties in developing a factual record that considered the near-term effects of the project on the listed species, the parties' views on interim protective measures that may be needed to address those effects, the cost of implementing those measures, and whether there was any basis for agreement on possible solutions.

31. The presiding judge devoted the first part of the proceeding to establishing a stipulation of non-disputed essential facts, as well as identifying disputed essential facts. The remainder of the proceeding dealt with remediation proposals. As the presiding judge's report makes clear, the parties were unable to agree on many essential facts and presented widely divergent remediation proposals. Tacoma continued to question the need for any interim protective measures beyond the 60-cfs minimum flow that it had agreed to provide in exchange for a stay. However, Tacoma offered to implement several non-flow-related measures to improve fish habitat. Tacoma proposed the following measures: (1) gravel augmentation in the canyon reach of the North Fork Skokomish River above Little Falls; (2) streambed modifications at Little Falls to improve fish passage to upstream spawning areas; (3) removal of the McTaggart Creek diversion dam and restoration of natural flows to the creek and into the North Fork; (4) assistance to the Tribe in its ongoing enhancement efforts at Tacoma's Nalley Ranch property near the Skokomish estuary; and (5) continuous documented monitoring to assess the effectiveness of these measures. Several of these measures (gravel augmentation, removal of the McTaggart Creek diversion, and dike removal at Nalley Ranch) are requirements of the stayed license.

32. The Resource Parties (the Tribe, NOAA Fisheries, FWS, Washington Ecology, Washington DFW, and American Rivers) argued that a minimum flow of 240 cfs is required, even as an interim measure. Accordingly, the presiding judge found no basis for agreement among the parties.

33. The presiding judge found, based on the record both before him and in the remanded relicensing proceeding, that the minimum requisite water flow for viability of endangered salmon is 240 cfs, even on an interim basis. 105 FERC ¶ 63,049 at P 24 (2003). He relied primarily on the draft biological opinion submitted by NOAA Fisheries as the "best scientific evidence available," finding that there is scant, if any, record support for any water-flow figure between the current 60-cfs voluntary release and a 240-cfs minimum flow release. He therefore found that endorsing any compromise figure would be arbitrary. He recommended that the Commission find that the Cushman Project adversely affects the two listed salmon strains, that the interim minimum flow required for viability of listed salmon is 240 cfs, and that this interim minimum flow should be implemented as soon as possible. *Id.* at P 25.

34. The presiding judge acknowledged that Tacoma continues to assert that a permanent minimum flow release of 240 cfs would “effectively destroy the Cushman Project’s economic value, compelling the City to shut it down.” *Id.* at P 28. He found substantial evidence in the record to suggest that the project generated total revenues between 1927 and 1997 that were significantly in excess of Tacoma’s capital investment and operating costs. He added that Tacoma’s relatively low rates have been artificially suppressed to some indeterminate extent for many years at the direct expense of the endangered species and the Tribe, because the Cushman Project effectively dewatered the North Fork. *Id.* at P 29. He concluded that the costs of providing a 240-cfs minimum flow should be viewed as a necessary cost of operating the project and an appropriate component of Tacoma’s rates. *Id.* at P 49-50. Using Tacoma’s estimates of capital costs and the replacement cost of foregone generation, the presiding judge found that the economic costs that Tacoma would pass on to its ratepayers from implementing the 240-cfs minimum flow was negligible. *Id.* at 65,261-62.

35. The Resource Parties presented information on several alternative means of providing a minimum flow of 240 cfs. They were: (1) installing a new 24-inch cone valve on an existing outlet pipe at the base of the dam; (2) discharging water over the Cushman Dam No. 2 spillway through the use of an existing spillway gate, either with or without an added support structure; and (3) cutting a notch in the top of Cushman Dam No. 2 and installing a floating weir to regulate flows through the notch. The presiding judge examined these alternatives and found them technologically and economically feasible. He found the spillway discharge alternative to be the most attractive because of its lower cost and immediate availability. The floating weir was the next best, but had been inadequately developed in terms of potential costs and implementation time. He viewed the new 24-inch cone valve, the Resource Parties’ preferred alternative, as the least attractive, primarily because of the time that would be required for implementation (approximately nine months).

36. Based on our staff’s independent analysis, however, we have concluded that there are problems with each of these alternatives. In order to safely release a minimum flow of 240 cfs, a larger, 78-inch discharge-regulating valve will be needed. Discharge over the spillway drum gate presents a number of concerns. Drum gates can be difficult to operate and maintain, and are designed to be operated either fully closed or fully open. A partially-opened gate would be in a hydraulically unstable condition, and constant adjustment of the gate would cause increased wear on the gate seals, which are critical to safe operation. Personnel would likely have to be stationed at the dam continuously to control releases and to avoid a sudden drop of the gate, which would release up to 7,900 cfs into the river downstream without warning, presenting a risk of erosion and flooding.

37. To address this risk, the Resource Parties proposed the installation of a steel-support/lifting cable assembly: essentially a beam across the gate opening and a cable holding the gate in position to keep it from dropping without warning. This proposal presents significant and costly structural engineering problems. The gate structure is fragile and is not designed for individual loads on the top or sides of the gate. Significant structural modifications would be required, and any exterior supports would have to be readily removable to allow the gates to pass large flood events. Assuming that these concerns could be overcome, the resulting flow would be somewhat variable, and the 240 cfs flow would be more of an average than a minimum flow.

38. Cutting a notch in Cushman Dam No. 2 presents serious safety concerns and thus should not be considered. Because Cushman Dam No. 2 is an arch dam, its structure transfers the load from the reservoir through the dam to the sides (abutments) and bottom of the rock foundation. Any changes to the continuity of the structure would, therefore, disrupt the structural safety of the dam.

39. The proposal to install a new 24-inch cone valve seemingly ignores the need for controls at the valve. Without these controls, the project cannot be reliably operated to change power generation. Although the 24-inch cone valve would not reduce the project's ability to operate reliably for flood control, it addresses only the minimum flow requirement and does not provide for the need to meet any ramping-rate or flushing-flow requirements. The two sets of existing 78-inch-diameter butterfly valves are similarly deficient for ramping rate purposes.

40. In light of these concerns, we conclude that the best means of providing a minimum flow of 240 cfs would be to replace the butterfly valves with a new 78-inch discharge regulating valve, leaving an upstream butterfly valve in place as a guard valve. This configuration would enable a continuous discharge of flows from 100 cfs to 240 cfs, and would also allow flows of up to 2,000 cfs during a flood. The valve could be readily automated into Tacoma's plant control system and would operate regardless of reservoir level, thus providing a consistent 240-cfs minimum flow without the problems of the other proposals. The overall cost and construction time would be similar to that for the 24-inch cone valve, but this would be a permanent installation instead of a temporary fix. Therefore, this would provide the best option for releasing a 240-cfs minimum flow.

41. Using Tacoma's estimates of \$1 million in capital costs and \$2,027,000 in replacement power costs, the proposal to install the 78-inch regulating valve could be implemented for about \$2.4 million annually. See 105 FERC ¶ 63,049 at 65,244-45.

This annual cost would result in a one-percent increase in consumer rates, or an average residential rate of 5.96 cents per kilowatt-hour, resulting in an average monthly bill increase of 50 cents and an average annual increase of \$6.05. See id. at 65,261-62.¹⁰

42. By way of comparison, Tacoma's proposed interim measures would cost between \$668,000 and \$1,025,000, using Tacoma's lowest and highest estimates for capital costs and annual expenditures over a three-year period. Tacoma provided no information on rate impacts, but stated its belief that "the capital cost and rate impacts of its own proposed interim remediation measures are acceptable."¹¹

43. Tacoma nevertheless continues to insist that, if the Commission requires the release of a 240-cfs minimum flow, even on an interim basis, Tacoma will have no choice but to immediately reject the new license as economically prohibitive, thus effectively precluding any opportunity for meaningful judicial review. Tacoma further argues that interim measures are not needed, it should not be required to make substantial investments while the license is on appeal, and there is no new information in support of lifting the stay.

44. We disagree. The need for interim measures is clearly established not only by the presiding judge's report and the proceeding on interim conditions, but also by the recently-completed biological opinions, the record for the relicensing proceeding, and the information in support of the decisions of NOAA Fisheries and FWS to list the endangered fish species in question. The Commission has already found that a minimum flow of 240 cfs is needed for the new license term, and both final biological opinions support this conclusion. Thus, it appears that, under any reasonable scenario for continued operation of the Cushman Project, a minimum flow of 240 cfs will likely be required. The stay of the new license has now been in effect for five years. If the Cushman Project is to continue operating, it must also provide some additional interim protection for the endangered fish species that are currently being affected by its operation. As discussed above, the costs can be passed on to Tacoma's ratepayers with minimal effects on consumers' monthly and annual electric bills. In these circumstances, we find that the public interest no longer supports a continued stay of Article 407 of the license. We therefore grant the Tribe's motion to lift the stay of Article 407, so as to

¹⁰The presiding judge noted that Tacoma's ratepayers currently enjoy some of the lowest rates in the region, let alone the nation as a whole. 105 FERC ¶ 63,049 at P 29.

¹¹Comments of the City of Tacoma on the Recommendations of the Presiding Administrative Law Judge at 18 n. 24 (filed December 22, 2003).

require a minimum flow release of 240 cfs. We also lift the stay of Article 408, which requires a plan describing the method for releasing minimum flows, and that portion of Article 406 that requires development and implementation of a plan for monitoring minimum flow releases

45. Tacoma has already filed, on April 26, 1999, a plan for installing the required minimum-flow release valve, as required by Article 408. We have reviewed this conceptual plan and find it acceptable. We therefore approve the conceptual plan, subject to any modifications that staff may require. Ordering paragraph B requires Tacoma to inform the Commission, within 15 days of the date of this order, of any needed changes, the current implementation status, and the schedule for installing the valve. The Commission's Division of Dam Safety and Inspections Portland Regional Office (PRO) will require Tacoma to file plans and specifications prior to authorizing construction under ordering paragraph B. Tacoma may not start construction until the PRO so authorizes. Tacoma previously estimated that the new valve could be installed within 19 months of an order to do so. Tacoma should take whatever steps it can to reduce the amount of time required, so that it can begin releasing 240 cfs as soon as possible.¹²

¹²Increasing flows to 240 cfs will inundate two river fords on Richert Ranch that are currently used for crossing the North Fork Skokomish River. Accordingly, we required in Article 412 that, as part of its fish habitat and restoration plan, Tacoma provide funding for the design, construction, and maintenance of two bridges at river fords on Richert Ranch to protect water quality and aquatic resources. To address this issue in the proceeding on interim conditions, the Resource Parties presented information on a bridge design that involved placing tow flatbed railroad cars across the lower North Fork. The bridge would have a clearance of 3 feet above the channel bed and 1.7 feet above the water surface when flows are at 240 cfs. The presiding judge found that if interim flows of 240 cfs are required, a bridge is needed, and the record supports the design that the Resource Parties suggested. Based on our staff's independent review, however, we conclude that the solution of using two flatbed railroad cars is not feasible, because the cars will likely be damaged or washed away during high-water events. Because no feasible bridge design has been identified, we will partially lift the stay of Article 412 to require that Tacoma file a plan to replace one wet crossing on Richert Ranch with an appropriately designed bridge. The bottom of the bridge should be at least 2 feet above the 100-year flood level (9,000 cfs), and a qualified bridge engineer must review the plan before Tacoma files it with the Commission.

46. Tacoma also filed an instream-flow monitoring plan, as required by Article 406. This monitoring plan included measures to monitor flows below Cushman Dam No. 2 (at USGS gage 12058800), and proposed a means of determining inflow to the project. We find the licensee's proposed flow-monitoring plan acceptable for purposes of determining inflow and discharge below Cushman Dam No. 2 on an interim basis. However, the plan lacks other items required by Article 406 (such as measuring water-surface elevations and flows on the South Fork Skokomish River) that will need to be included once the stay is lifted and the entire new license is in effect. Thus, a supplemental flow-monitoring plan will be required at some point. This will be addressed in a future Commission order after completion of judicial review.

C. Tacoma's Motion for Reconsideration

47. In its motion for reconsideration, Tacoma requests that, before issuing any order on remand, the Commission consider how best to avoid a shut-down of the Cushman Project. Tacoma maintains that shut-down will be the inevitable result if the Commission does not reconsider its previous orders and reassess its balancing of public interest factors under the FPA. Tacoma argues that, because these orders would increase its power costs by over \$5 million per year, and would result in an annual cost of over \$2 million compared to its cost of replacement power, Tacoma would be forced to reject such a "grossly uneconomic license."¹³

48. To avoid this result, Tacoma urges that the Commission reconsider its Decommissioning Policy Statement and Mead decision on project economics as applied to the Cushman Project, reevaluate the public interest factors pursuant to section 10(a) of the FPA, and review whether a supplement to the final EIS is required. Tacoma further requests an adjudicatory hearing to explore workable long-term solutions and evaluate key disputed issues of material fact. If, after this reevaluation, the Commission is unable to issue a license that allows the project to operate economically, Tacoma maintains that the Commission should rescind the license and refer the matter to Congress for federal takeover of the project under sections 7, 14, and 15 of the FPA.

49. Tacoma acknowledges that it has made these arguments before.¹⁴ Nevertheless, Tacoma states that its motion is prompted by the recently filed biological opinions of NOAA Fisheries and FWS, which "signal the train wreck of Project shut-down on the

¹³Request for reconsideration at 1.

¹⁴Request for reconsideration at 5.

horizon.”¹⁵ Tacoma asserts that, if the Commission adopts these biological opinions and incorporates them into a final license without reevaluating the license, Tacoma will be forced once again to seek judicial review of license orders that effectively decommission the project. Instead, Tacoma urges that the Commission look for alternative license conditions and reinitiate ESA consultation on those conditions.

50. Save the Lakes Coalition, an intervenor in the relicensing proceeding, requests that the Commission consider the interests of homeowners and business owners who live and work around the lakes created by the Cushman Project’s two dams, Lake Kokanee and Lake Cushman. Save the Lakes notes that there are now over 700 full-time residents who live around the two lakes, as well as over 58 businesses serving these homeowners and recreational visitors, with properties that together are valued in excess of \$140 million. Save the Lakes regards as “unassailable” Tacoma’s claim that the Commission’s license orders will result in a shutdown of the Cushman Project. Save the Lakes urges the Commission to consider the interests of homeowners and business owners in its reconsideration of the public interest factors that Tacoma identifies. Save the Lakes also joins Tacoma in requesting that the Commission supplement its final EIS to consider the growth that has occurred of communities around the Lakes, as well as the likely effect on these communities of project shut-down.

51. Gerald Richert, an intervenor, reiterates Tacoma’s arguments and requests that the Commission consider the damage that project decommissioning will cause for property owners around the Cushman lakes and residents of the Skokomish Valley. He specifically requests that the Commission supplement the final EIS to consider recent increases in salmon runs, as well as to revisit the decisions to require minimum flow of 240 cfs and flushing flows of 2,500 cfs, which he asserts will have a negative effect on his ranch and the rest of the valley.

52. In comment letters, the Lake Cushman Maintenance Company and several area residents express concern that the effects on the community of project shut-down have not been fully considered. They also express concern that the recent proceeding on interim conditions did not address this issue. They request that, if the final EIS is reopened or supplemented, they be afforded an opportunity to provide information for the Commission’s consideration.¹⁶

¹⁵Request for reconsideration at 4.

¹⁶See letters to the Commission Secretary from Dennis Rohn (filed March 18, 2004), Lake Cushman Maintenance Company (filed March 29, 2004), Judith and Jerry and Rohn (filed April 21, 2004), and Karin Weaver (filed May 4, 2004).

53. The Tribe and American Rivers (jointly), as well as the Resource Agencies,¹⁷ oppose Tacoma's motion. They argue that Tacoma does not meet the Commission's threshold requirements for reconsideration, because Tacoma does not demonstrate that the Commission misunderstood facts or arguments on rehearing, and presents no new information that clearly compels or persuades to a contrary result in the proceeding. They therefore urge the Commission to deny Tacoma's motion outright, without reaching the merits of Tacoma's arguments.

54. We have carefully considered Tacoma's motion, the parties' responses, and the comments filed by area residents and businesses. Although we are reluctant to issue an order that may prompt Tacoma to reject a new license for the Cushman Project, we are convinced that the new license terms are not only reasonable but necessary to serve the public interest and meet the requirements of the FPA. We have already considered Tacoma's arguments before in some detail, both in response to comments on the final EIS, and in our relicensing and rehearing decisions. There is nothing in Tacoma's motion to suggest that we have overlooked or misunderstood facts or arguments on rehearing. Moreover, Tacoma provides no new information that would compel or persuade us to reach a contrary result. We therefore conclude that Tacoma's motion does not meet the Commission's threshold requirements for reconsideration.¹⁸ Nevertheless, we examine Tacoma's arguments again below to emphasize for all concerned that we have seriously considered them in light of the recently-filed biological opinions.

55. As discussed above in connection with the proceeding on interim conditions, there is evidence in the record to suggest that Tacoma could pass the costs of the new license on to its ratepayers without a substantial impact on rates. In light of the considerable benefits that will continue under a properly-conditioned new license for the project, we hope that Tacoma will reconsider its decision and continue to operate the Cushman Project. We recognize, however, that this is a business decision that Tacoma alone may make. Our responsibility is to ensure that the new license reflects an appropriate balance of power and environmental values, and meets the public interest standard of the FPA. This we have done, and we are unable to do anything differently in the circumstances of this case.

¹⁷The Resource Agencies are Interior, Commerce, Washington Ecology, and Washington DFW.

¹⁸See Great Northern Paper, Inc., 86 FERC ¶61,184 at 61,635 (1999).

56. To gain some perspective on this issue, it should be recognized that this relicensing proceeding is now nearly thirty years old. Tacoma filed its relicense application in 1974, when its original 50-year license was about to expire. The controversies and delays that followed are described in some detail in our prior orders, and we need not repeat them here. However, because the original license was for a minor part of a complete project, it authorized only the flooding of 8.8 acres of federal land. The project works were not included in the original license as licensed project works, and there were no environmental requirements of any kind. The new license requires a range of environmental measures that reflect an appropriate balance of power and non-power values. However, the new license has been stayed since 1999 pending judicial review. Therefore, Tacoma has operated the Cushman Project for the past 80 years with virtually no measures to benefit environmental resources.¹⁹

57. Given this background, it is easier to appreciate why the costs of operating the Cushman Project under the new license are so much greater than the costs of operating the project under the original license. Basically, if the Cushman Project is to continue in operation, Tacoma must be willing to accept the change from a complete lack of environmental conditions in the 1924 license to an appropriate range of environmental measures that are necessary to address current conditions, as reflected in the 1998 license.

58. The recently-filed biological opinions of NOAA Fisheries and FWS track very closely the conditions of the 1998 license. Thus, they provide little if any basis for reconsidering the terms of the license or the public interest balancing of power and non-power values under section 10(a)(1) of the FPA. As discussed above, they reflect an analysis of the effect of the new license on the threatened fish species at issue, and include conditions to avoid or minimize incidental taking of those species. Because many of the license articles are now reflected in the incidental take conditions, we could not consider rebalancing those conditions without risking the possibility of an unauthorized taking of listed species.

¹⁹Tacoma began releasing a minimum flow of 30 cfs in 1988 as a condition of a settlement of its appeal of the project's water quality certification for relicensing. Later, in 1999, Tacoma began voluntarily releasing a minimum flow of 60 cfs in consideration of our issuance of a stay of the new license pending judicial review.

59. Tacoma argues that, in this case, application of the Commission's Decommissioning Policy Statement²⁰ and Mead²¹ decision to the Cushman Project results in a de facto decommissioning that violates the FPA. The policy statement explains that, at relicensing, the Commission will determine what environmental and other conditions are needed for the new license term in order to meet the comprehensive development standard of the FPA, and will leave to the licensee the business decision of whether to continue operating the project in light of the economic cost of those conditions. The Commission recognized that, in some cases, the licensee may prefer to take the project out of service rather than continue operating it, because the costs of doing business in today's environment have become too high.²² However, the Commission determined that this possibility cannot preclude it from imposing the conditions it deems necessary to carry out its responsibilities under the FPA.

60. The Mead decision announced a change in the way the Commission approaches its analysis of project economics. In light of the significant competitive changes occurring in markets for new electric generation, as well as increasing competitive pressures on utilities to lower the costs of their electric service, the Commission determined that it would no longer use long-term, levelized cost estimates covering the term of the prospective license. The Commission reasoned that, even under the relatively stable conditions that have characterized the electric industry historically, such forecasts could never be more than a general guide, but the new era of competition increasingly called their usefulness into question. Instead, the Commission explained that it would use current costs to compare the costs of the project and likely alternative power, leaving it for the licensee to make a business judgment of whether it is prudent or reasonable to continue to operate the project. Viewed in this manner, an "uneconomic" project is simply one that generates power at a cost that is higher than the least costly source of replacement power. Depending on the circumstances, it could make sense for a licensee to continue operating a project that costs more than replacement power, even if it would not choose to build a new project that could operate at the same cost.²³

²⁰Project Decommissioning at Relicensing; Policy Statement (December 14, 1994), 18 C.F.R. § 2.24, 60 Fed. Reg. 339 (January 4, 1995), FERC Stats. & Regs. Preambles 1991-1996 ¶ 31,011.

²¹Mead Corp., 72 FERC ¶ 61,027 at 61,068-70 (1995).

²²Decommissioning Policy Statement, ¶ 31,011 at p. 31,228.

²³Mead Corp., 72 FERC ¶ 61,027 at 61,068-70.

61. Thus, these policies reflect the Commission's recognition of the importance of competitive market forces and the need for licensees to make business decisions based on those forces, as well as the Commission's responsibility to issue licenses that serve the public interest and meet the statutory requirements of the FPA. Tacoma argues that any application of these policies that results in an uneconomic license for the Cushman Project is per se unreasonable and thus a violation of the FPA. We disagree. In our relicensing order, we explained:²⁴

Sections 4(e) and 10(a)(1) require us to fully consider and balance all aspects of the public interest. These provisions neither expressly nor by reasonable implication limit the imposition of mitigation and enhancement measures based on market prices for power at the time of licensing, or guarantee the prospective licensee's profits. We understand that Tacoma may elect to surrender its license owing to competitive concerns, and that license surrender may negatively affect some of the benefits provided by the project. We have taken these possibilities into account in making our public interest determination.

62. Similarly, in our order on rehearing of the new license, we stated, "there is no merit to the suggestion that otherwise reasonable conditions become unreasonable per se whenever they would render a project uneconomic."²⁵ We also pointed out that Part I of the FPA does not guarantee that a licensee will make a profit.²⁶ Tacoma's motion provides no basis for reconsidering these determinations.

63. Tacoma next argues that, if the Commission is unable to fashion a license that preserves the economic viability of the Cushman Project, the Commission must refer the matter to Congress for Federal takeover of the project pursuant to sections 7(c), 14, and

²⁴84 FERC ¶ 61,107 at 61,571.

²⁵86 FERC ¶ 61,311 at 62,103.

²⁶Id. at 62,087, citing Wisconsin Public Service Corp. v. FERC, 32 F.3d 1165, 1170 (7th Cir. 1994) ("The FPA cannot be read to require the Commission to protect the economic viability of all hydroelectric projects.")

15 of the FPA.²⁷ In essence, Tacoma maintains that the FPA does not permit involuntary decommissioning, either through license denial or through issuance of a license that renders a project uneconomic. We rejected this argument in our relicense order, explaining, “Tacoma’s contentions regarding Sections 14 and 15 are misplaced inasmuch as the license which Tacoma received in 1924 for this project, and which it accepted, was a minor-part license that waived both sections.”²⁸ We added that, even if there were no waiver, the Federal takeover provision “grants a right, but imposes no obligation. The FPA nowhere provides that the Federal government is required to take over a project under any circumstances or that the Commission is ever obligated to recommend to Congress that it do so.”²⁹ Moreover, as the language of sections 14 and 15 make clear, the purpose of the Federal takeover provision is to preserve the right of the United States to take over, maintain, and operate a project for public purposes, not to take it over and decommission it at government expense.³⁰

64. Tacoma maintains that the conditions required by the new license and the biological opinions seek to create a pre-project environment, in violation of the Commission’s policy that the environmental baseline for relicensing proceedings is the existing environment. In our relicense order, we explained that, “where project works already exist and are part of the existing environment, we do not regard it as reasonable

²⁷Section 7(c) provides: “Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.” 16 U.S.C. § 800(c). Section 14 of the FPA provides that “the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects.” 16 U.S.C. § 807. Section 15(a)(1) of the FPA provides that, if the United States does not exercise its right to take over, maintain, and operate a project at the expiration of a license, the Commission may issue a new license to the existing licensee or a new licensee. 16 U.S.C. § 808(a)(1).

²⁸84 FERC ¶ 61,107 at 61,573.

²⁹*Id.* at 61,573-74.

³⁰See Southern California Edison Co., 106 FERC ¶ 61,212 at 61,716 n. 48 (2004).

to analyze the effects of relicensing using a pre-project environmental baseline.”³¹ We noted, however, that the final EIS appropriately examined “past environmental effects of the Cushman Project, to the extent possible, as part of a cumulative effects analysis, and also in determining what measures may be appropriate to protect, mitigate, and enhance environmental resources.”³² The new license conditions are based on an analysis of the existing environment and current resource needs based on that environment. The biological opinions evaluate the effect of those conditions on the listed fish species. Past and continuing environmental effects are relevant to an understanding of existing environmental conditions and what measures may be needed to address those conditions. Once again, we find no basis for reconsideration of the new license conditions.³³

65. Finally, Tacoma argues that, before issuing a license that will result in a shut-down of the Cushman Project, the Commission must supplement the final EIS to provide a more complete analysis of project decommissioning and any reasonable alternatives. We rejected this argument in our relicense order, stating: “CEQ regulations implementing NEPA require that a supplement to an EIS be prepared when an agency makes ‘substantial changes in the proposed action that are relevant to environmental concerns;’ or when there are ‘significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.’”³⁴ We found no basis for a supplemental EIS then, nor do we now. The changes that we have made to the new license as a result of ESA consultation are minor, and Tacoma has not provided any significant new information that would affect our environmental analysis of the proposed action. As we observed in our order on rehearing, the final EIS examined ‘decommissioning as an alternative, both with and without dam removal. This analysis

³¹84 FERC ¶ 61,107 at p. 61,545.

³²Id.

³³For a more complete discussion of our environmental baseline approach, which has been upheld on judicial review, see *American Rivers v. FERC*, 201 F.3d 1186, 1195-99 (9th Cir. 1999). We note that the environmental baseline for ESA purposes is somewhat different, and “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area.” See 50 C.F.R. § 402.02 (definition of “effects of the action”).

³⁴84 FERC ¶ 61,107 at 61,543.

was sufficient to compare licensing the project with the range of environmental effects that could occur if the project is decommissioned.”³⁵ NEPA and the FPA require nothing more.

The Commission orders:

(A) The motion to partially lift the stay of Articles 406, 407, and 408 of the new license pending judicial review, filed in this proceeding by the Skokomish Indian Tribe on March 3, 2003, is granted to the extent discussed in this order, and denied in all other respects.

(B) The April 26, 1999, conceptual plan for installing a minimum-flow release valve at Cushman Dam No. 2, filed pursuant to Article 408 of the project license, is approved. Within fifteen (15) days from the date of this order, the licensee shall review its plan for installation of a 240-cfs minimum flow release valve and shall inform the Commission of whether any changes are needed, the current status of implementation, and a schedule for installing the valve and releasing the required minimum flows.

At least 60 days before starting construction, the licensee shall submit one copy to the Division of Dam Safety and Inspections – Portland Regional Engineer and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections) of the final contract plans and specifications. The Commission may require changes to the plans and specifications to assure the work is completed in a safe and environmentally sound manner.

At least 60 days before starting construction, the licensee shall submit one copy to the Division of Dam Safety and Inspections – Portland Regional Engineer and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections) of the Quality Control and Inspection Program (QCIP) for the Commission’s review and approval. The QCIP shall include a sediment and erosion control plan.

The licensee shall not begin construction until authorized to do so by the Commission’s Portland Regional Office. Upon fully implementing the requirements of Article 408, the licensee shall release a minimum flow of 240 cfs into the Lower North Fork of the Skokomish River, as required by Article 407.

³⁵86 FERC ¶61,311 at 62,073.

(C) The April 26, 1999, conceptual plan for determining project inflow and monitoring minimum-flow releases below Cushman Dam No. 2, filed pursuant to Article 406 of the project license, is approved. Within fifteen (15) days from the date of this order, the licensee shall review its plan and shall inform the Commission of whether any changes are needed. Provisions required by Article 406 not addressed in the licensee's filing of April 26, 1999, must be included in a supplemental flow-monitoring plan to be filed at a time to be determined by a future Commission order.

(D) Within 120 days from the date of this order, the licensee shall file with the Commission, for approval, a plan to replace the wet crossing on Richert Ranch with a bridge or some other appropriate structure. The purpose of the plan is to replace the existing wet crossing, as well as to protect water quality and aquatic resources in the lower North Fork of the Skokomish River. Construction of this bridge will satisfy the requirement to provide one of the two bridges required in item 3 of the fish habitat enhancement and restoration plan pursuant to Article 412 of the license.

The plan shall include, but not be limited to: (1) functional design drawings of any proposed bridge or other structure to be placed over the wet crossing on Richert Ranch; (2) any maps or other graphic illustrations/drawings of the proposed bridge's location on the lower North Fork; (3) a description of the licensee obligations regarding the maintenance of any structure built; and (4) an implementation schedule. The bottom of the bridge shall be at least 2 feet above the 100-year flood level (9,000 cfs), and a qualified bridge engineer must review any proposed design.

The licensee shall prepare the plan in consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Forest Service, the U.S. Army Corps of Engineers, the Washington Department of Fish and Wildlife, the Washington Department of Ecology, owners of Richert Ranch, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation with these entities and a qualified bridge engineer, copies of comments and recommendations on the completed plan after it has been prepared and provided to the aforementioned entities, and specific descriptions of how the consulted entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

When the plan is filed with the Commission, the licensee shall submit one copy of the plan to the Division of Dam Safety and Inspections – Portland Regional Engineer and a courtesy copy of the plan to the Director, Division of Dam Safety and Inspections. The

Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

(E) The motion for reconsideration, filed by the licensee in this proceeding on March 2, 2004, is denied.

(F) The motion to take official notice of the federal district court decision in Building Industry Ass'n v. NOAA, No. CS-03-0303-RHW (E.D. Wash., April 28, 2004), filed by the licensee in this proceeding on May 3, 2004, is granted.

(G) The license is subject to the terms and conditions of the incidental take statements set forth in Appendix C and Appendix D to this order.

(H) Articles 401, 402, 404, 411, 412, 413, 414, 415, 417, 422, and 423 of the license are amended as follows:

Article 401. At least 90 days before the start of any land-disturbing, land-clearing, or spoil-producing activities, the licensee shall file with the Commission for approval, and with the Portland Regional Office, a final construction control plan for the purpose of controlling erosion, bank stability, sedimentation, turbidity, and water pollutant effects resulting from removal of dikes at the Nalley Ranch.

The plan (a) shall encompass all activities associated with the dike removal, to also include stabilization of the river banks as well as site restoration activities; (b) shall be based on (i) actual-site geological, soil, slope, and groundwater conditions and (ii) the final project design for the dike removal, and for all associated temporary and permanent features; and (c) shall contain, at a minimum, the following five items:

- (1) a description of the actual site conditions;
- (2) measures proposed to control erosion, to prevent slope instability, and to minimize the quantity of sediment resulting from dike removal;
- (3) provisions to minimize the take of listed salmon stocks (*i.e.*, Puget Sound Chinook salmon and Hood Canal summer-run chum salmon) and bull trout associated with in-water work during development of any physical structures and facilities, consistent with the agencies' incidental take statements attached as Appendices C and D to this order.

- (4) detailed descriptions, final drawings and specifications, and specific topographic locations of all control measures;
- (5) specific details of site preparation and restoration including grading, revegetation, and fuel storage;
- (6) a specific implementation schedule and details for monitoring and maintenance programs for dike removal and site restoration.

The licensee shall prepare the plan after consultation with the Washington Department of Ecology, the Natural Resources Conservation Service, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation with the agencies and copies of agency comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the plan accommodates all agency comments and recommendations. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations prior to filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on geological, soil, and groundwater conditions at the site.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 402. At least 90 days before the start of any land disturbing, land-clearing, or spoil-producing activities, the licensee shall file with the Commission for approval, and with the Portland Regional Office, a final construction plan for the purpose of controlling erosion, bank stability, sedimentation, turbidity, and water pollutant effects resulting from removal of the McTaggart Creek diversion and for replacing or improving U.S. Forest Service road creek crossings to accommodate increased flows in the creek from removal of the diversion.

The plan (a) shall encompass all activities associated with removal of the diversion as well as site restoration activities and replacement or improvement of creek crossings; (b) shall be based on (1) actual-site geological, soil, slope, and groundwater conditions and (ii) the final design for the diversion removal; and (c) shall contain, at a minimum, the following items:

- (1) a description of the actual site conditions;
- (2) a provision to determine the adequacy of U.S. Forest Service road crossings on McTaggart Creek and make any necessary improvements or replacements;
- (3) provisions to minimize the take of listed salmon stocks (*i.e.*, Puget Sound Chinook salmon and Hood Canal summer-run chum salmon) and bull trout associated with in-water work during development of any physical structures and facilities, consistent with agencies' incidental take statements attached as Appendices C and D to this order.
- (4) measures proposed to control erosion, to prevent slope instability, and to minimize the quantity of sediment resulting from removal of the diversion and replacement or improvement of road crossings on McTaggart Creek;
- (5) detailed descriptions, final drawings and specifications, and specific topographic locations of all control measures to be used at the diversion site;
- (6) specific details of site preparation and restoration including grading, reseeded, and fuel storage;
- (7) a specific implementation schedule and details for monitoring and maintenance programs for diversion removal and creek crossing replacements or improvements.

The licensee shall prepare the plan after consultation with the Washington Department of Ecology, the Natural Resources Conservation Service, and the U.S. Forest Service. The licensee shall include with the plan documentation of consultation with the agencies and copies of agency comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the plan accommodates all agency comments and recommendations. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations prior to filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on geological, soil, and groundwater conditions at the site.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the

Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 404. Within 1 year after issuance of the license, the licensee shall file a plan for studying the effectiveness of maintaining the channel conveyance capacity of the mainstem Skokomish River through flow manipulation, including implementing flushing flow releases.

The plan shall include, at a minimum:

- (1) an annual water budget of up to 25,000 acre-feet of water released to the North Fork Skokomish River for the term of the license, to supplement flows in the mainstem Skokomish River and thereby allow total flows in the mainstem Skokomish River of 2,500 cubic feet per second for five continuous days, or at some other rate identified in this plan, each year for maintenance of the mainstem channel conveyance capacity;
- (2) a provision that such flows would be managed to avoid downstream flooding and adverse effects on in-migrating and spawning anadromous fish;
- (3) a provision for evaluating the effectiveness of this allotment, in accordance with the monitoring plan required by Article 413;
- (4) a provision for filing channel maintenance flow study reports every 5 years during the license term, (a) discussing the effectiveness of channel maintenance flows and flushing flows in maintaining the mainstem's conveyance capacity, and (b) recommending whether to continue or abandon efforts to maintain the river's conveyance capacity through flow manipulation; and
- (5) a schedule for implementing the plan.

The licensee shall file the plan after consultation with Mason County (County), the Department of the Army, Corps of Engineers, the Washington Department of Ecology, the Federal Emergency Management Agency, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the Washington Department of Fish and Wildlife, the Skokomish Indian Tribe (Tribe), and the Bureau of Indian Affairs.

The licensee shall include with the plan documentation of consultation and copies of comments and recommendations on the completed plan after it has been prepared and provided to the county, the agencies, and the Tribe, and specific descriptions of how their comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for these entities to comment and to make recommendations prior to filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons.

The Commission reserves the right to require changes to the license if the need for additional or alternative measures to enhance the channel conveyance capacity is identified.

Article 411. Within 180 days from the date of issuance of this license, the licensee shall file with the Commission, for approval, a plan to implement ramping rates for releases from the Cushman Project. The purpose of this plan would be to protect aquatic resources in the North Fork of the Skokomish River.

The plan shall include, but not be limited to: (1) provisions for ramping flows downstream from Cushman Dam No. 2 in accordance with the ramping rates recommended by the National Marine Fisheries Service (NOAA Fisheries), as outlined in the incidental take statement attached as Appendix C to this order; (2) any interim measures that can be identified for ramping flows until permanent flow control measures are in place; (3) a provision to modify the ramping rates identified in Item (1) above in the future, based on project-specific information or information included in the fishery reports filed pursuant to Article 413; and (4) a schedule for implementing and maintaining the above-mentioned ramping rates.

The licensee shall prepare the ramping rate plan after consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Washington Department of Fish and Wildlife, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the licensee's proposed plan after it has been prepared and provided to the agencies and the Skokomish Indian Tribe, and specific descriptions of how the agencies' and the Skokomish Indian Tribe's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and Skokomish Indian Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Changes to project operation shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 412. Within 180 days from the date of issuance of this license, the licensee shall file with the Commission, for approval, a comprehensive plan to enhance fish habitat in the Skokomish River Basin. The purpose of the plan is to enhance aquatic habitat in the North Fork of the Skokomish River, as well as restore aquatic habitat in McTaggart Creek and provide access to spawning habitat in tributaries of Lake Cushman and Lake Kokanee.

The fish habitat enhancement and restoration plan shall include, but not be limited to, the following provisions:

- (1) Augmenting spawning gravels in the lower North Fork of the Skokomish River to increase suitable anadromous fish spawning habitat, with any modifications necessary in light of the flow regime required under this license. This portion of the plan shall include a provision to augment gravel in the canyon reach below the Cushman Dam No. 2, between river miles (RM) 16.0 and 17.3. The licensee shall describe the amount and type of gravel to be used. Moreover, the licensee shall include a provision for evaluating the need for gravel augmentation in the lower North Fork of the Skokomish River, between the Lower Falls (RM 15.6) and McTaggart Creek (RM 13.3). Should the above evaluation show there to be benefits to augmenting gravel in the lower river reach, the plan shall provide for the augmentation of spawning gravel in the lower reach.
- (2) Evaluating the adequacy of existing culverts of the U.S. Forest Service road crossings on McTaggart Creek, and if necessary, replacing the culverts to prevent flooding, and providing fish passage in McTaggart Creek. This portion of the plan shall be based on site-specific geological, soil, and surface water conditions, and shall include, at a minimum, the following items: (a) a description of the actual site conditions; and (b) detailed descriptions, functional design drawings, and specific topographic locations of all control measures.
- (3) Funding the design, construction, and maintenance of two bridges at river fords on Richert Ranch to protect water quality and aquatic resources. The licensee shall (a) consult with the U.S. Fish and Wildlife Service (FWS), the Washington Department of Fish and Wildlife (WDFW), and the owners

of the Richert Ranch, concerning the design and location of the bridges, (b) include maps and drawings of the bridge's proposed design and locations; and (c) describe the licensee's responsibilities for funding and implementing this measure.

- (4) Providing access to spawning habitat in upper Big Creek and Dow Creek, tributaries to Lake Cushman and Lake Kokanee, by removing barriers to upstream migration.
- (5) Removing the McTaggart Creek diversion structure, and restoring natural flows to the stream for the purpose of enhancing the McTaggart Creek fishery.
- (6) Implementing specific habitat enhancement measures for the North Fork of the Skokomish River, as described in section 4.4.1.4. of the FEIS, with any modifications necessary in light of the flow regime required under this license. Such measures shall include, but are limited to, instream structure enhancements and side-channel habitat development.
- (7) Implementing measures to minimize the take of listed salmon stocks (*i.e.*, Puget Sound Chinook salmon and Hood Canal summer-run chum salmon) and bull trout associated with in-water work during development of any physical structures and facilities, consistent with the agencies' incidental take statements attached as Appendices C and D to this order.
- (8) A schedule for implementing the fish habitat enhancement and restoration plan, as well as, evaluating the success of the plan, including the gravel augmentation program, as provided for in Article 413, and (c) modifying the plan, if needed.

The licensee shall prepare the plan after consultation with the FWS, the National Marine Fisheries Service, the U.S. Forest Service, the National Park Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the WDFW, the Washington Department of Ecology, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the proposed habitat enhancement and restoration plan after it has been prepared and provided to the agencies and the Skokomish Indian Tribe, and specific descriptions of how the agencies' and the Skokomish Indian Tribe's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and the Skokomish Indian

Tribe to comment and make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Implementation of the habitat enhancement and restoration plan shall not commence until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission. Any measure(s), including physical structures, constructed or installed pursuant to the provisions of this article shall be shown on the as-built drawings filed pursuant to Article 303 of this license.

Article 413. Within 180 days after the date of issuance of this license, the licensee shall file with the Commission, for approval, a fish habitat and population monitoring plan for the North Fork of the Skokomish River and the mainstem Skokomish River below the confluence of the North and South Forks. The purpose of this plan is to provide a mechanism for the continued enhancement of the Skokomish River's anadromous fishery (e.g., Chinook, coho, sockeye, pink and chum salmon, and steelhead) throughout the term of this license.

The fish habitat and population monitoring plan shall include, but not be limited to: (1) a description of the proposed methods for monitoring sediment transport, channel morphology, and fish habitat and population levels in the mainstem Skokomish River and the North Fork of the Skokomish River; (2) provisions to monitor, report, and consult on turbidity levels in the North Fork in accordance with the U.S. Fish and Wildlife Service's (FWS) incidental take statement for bull trout attached as Appendix D to this order; (3) a discussion of the licensee's responsibilities in implementing the monitoring program, financial and otherwise; (4) a provision for using the monitoring data in such a way so as to provide a mechanism for enhancing anadromous fish habitat throughout the term of this license; and (5) the preparation of a Skokomish River anadromous fishery report every five years, or at an appropriate interval agreed to by the licensee, the FWS, the National Marine Fisheries Service (NMFS), the Washington Department of Fish and Wildlife (WDFW), and the Skokomish Indian Tribe.

The report provided for in this plan shall: (1) describe the status of the Skokomish River's anadromous fishery at the identified interval, including the results and conclusions of any monitoring activities conducted prior to the reporting interval; (2) identify and define present and any likely future habitat needs in the mainstem Skokomish River and the North Fork of the Skokomish River at that time; (3) describe any reasonable enhancement measure(s) recommended by the licensee, the FWS, the NMFS, the WDFW, or the Skokomish Indian Tribe to improve the fishery and aquatic

habitat in the river; (4) identify the proposed location and design of any recommended enhancement measure(s); and (5) describe the specific activities proposed to be undertaken during the next monitoring period, including a schedule for completing such activities.

The fish habitat and population monitoring plan shall also include a schedule for: (1) implementation of the plan; (2) consultation with the FWS, the NMFS, the WDFW, the Washington Department of Ecology (Ecology), the Skokomish Indian Tribe, and the Bureau of Indian Affairs concerning the results of the monitoring; and (3) filing the results, agency comments, and the licensee's response to agency comments with the Commission.

The licensee shall prepare the fish habitat and population monitoring plan after consultation with the FWS, the NMFS, the WDFW, Ecology, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the proposed fish habitat and population monitoring plan after it has been prepared and provided to the agencies and the Skokomish Indian Tribe, and specific descriptions of how the agencies' and the Skokomish Indian Tribe's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and the Skokomish Indian Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not commence until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

If, as a result of the fish habitat and population monitoring report prepared pursuant to this article, the Commission determines that additional or different enhancement measures, which may include alternative flow releases, among other measures, are needed to protect and enhance the anadromous fishery in the mainstem Skokomish River and the North Fork of the Skokomish River, the Commission may direct the licensee to implement any such measure, as appropriate.

Article 414. The licensee shall install, operate, and maintain downstream fish passage facilities at the Cushman Project to provide efficient downstream fish passage past the project.

Within 180 days after the date of issuance of this license, the licensee shall file with the Commission, for approval, a plan to install, operate, and maintain downstream fish passage facilities at the Cushman Project that includes, but is not limited to: (1) functional design drawings of the licensee's proposed downstream fish passage facilities; (2) quantification of the flows required to operate the proposed facilities, as well as a description of the flows needed for out-migration of juvenile salmonids; (3) an operation and maintenance plan; (4) a schedule for installing the facilities; and (5) the estimated capital cost of installing the facilities, the estimated annual costs of operating and maintaining the facilities, and the annual cost, in lost generation, of operating the facilities. The plan shall also consider and outline any provisions to be taken to minimize the take of listed salmon stocks (*i.e.*, Puget Sound Chinook salmon and Hood Canal summer-run chum salmon) and bull trout associated with in-water work during development of any physical structures and facilities, consistent with the agencies' incidental take statements attached as Appendices C and D to this order.

The licensee shall prepare the downstream fish passage plan after consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Washington Department of Fish and Wildlife, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation; copies of comments and recommendations on the design drawings, flow requirements, installation and operational schedules, and installation and operational costs after they have been prepared and provided to the agencies and the Skokomish Indian Tribe; and specific descriptions of how the agencies' and the Skokomish Indian Tribe's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and the Skokomish Indian Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Construction of downstream fish passage facilities shall not begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission. The downstream fish passage facilities shall be shown on the as-built drawings filed pursuant to Article 303 of this license.

Article 415. The licensee shall install, operate, and maintain upstream fish passage facilities at the Cushman Project to provide access to historical spawning habitat and enhance the restoration of anadromous fish to the Skokomish River Basin.

Within 180 days after the date of issuance of this license, the licensee shall file with the Commission, for approval, a plan to install, operate and maintain upstream fish passage facilities at the Cushman Project that includes, but is not limited to: (1) functional design drawings of the licensee's proposed upstream fish passage facilities; (2) quantification of the flows required to operate the proposed facilities, as well as a description of the flows needed for in-migration of adult salmonids; (3) an operation and maintenance plan; (4) a schedule for installing the facilities; and (5) the estimated capital cost of installing the facilities, the estimated annual cost of operating and maintaining the facilities, and the annual cost, in lost generation, of operating the facilities. The plan shall also consider and outline any provisions to be taken to minimize the take of listed salmon stocks (*i.e.*, Puget Sound Chinook salmon and Hood Canal summer-run chum salmon) and bull trout associated with in-water work during development of any physical structures and facilities, consistent with the agencies' incidental take statements attached as Appendices C and D to this order.

The licensee shall prepare the upstream fish passage plan after consultation with the U.S. Fish and wildlife Service, the National Marine Fisheries Service, the Washington Department of Fish and wildlife, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation; copies of comments and recommendations on the design drawings, flow requirements, installation and operational schedules, and installation and operational costs after they have been prepared and provided to the agencies and the Skokomish Indian Tribe; and specific descriptions of how the agencies' comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and the Skokomish Indian Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Construction of upstream fish passage facilities shall not begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission. The upstream fish passage facilities shall be shown on the as-built drawings filed pursuant to Article 303 of this license.

Article 417. Within 180 days after the date of issuance of this license, the licensee shall file with the Commission, for approval, a fish restoration plan. The purpose of the plan is to enhance the anadromous fishery in the Skokomish and North Fork of the Skokomish Rivers, Lake Kokanee, and Lake Cushman.

The plan shall provide for the restoration and enhancement of anadromous and resident fish to the North Fork of the Skokomish River and Lake Cushman, consistent with the terms and conditions of the incidental take statements attached as Appendices C and D to this order. The plan shall include, but not be limited to, the following provisions:

- (1) Implementation of a program to stock anadromous fish in the lower North Fork of the Skokomish River and Lake Cushman. The program's long-term goal would be to increase anadromous fish species' diversity and production by establishing naturally-reproducing populations wherever possible. In developing the anadromous fish stocking program, the licensee shall consult with the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the Washington Department of Fish and Wildlife (Washington Fish and Wildlife), and the Skokomish Indian Tribe to resolve issues involving the selection of species to be stocked (but those species should include Chinook, steelhead, coho, and sockeye), the magnitude of hatchery production, and the timing and location of fish releases. The licensee shall provide up to \$3,600,000 in capital expenditures to construct additional hatchery capacity, and up to \$271,000 a year for operation and maintenance of the program during the license term.
- (2) Implementation of a resident fish stocking program for Lake Cushman and Lake Kokanee. The program's long-term goal would be to increase Lake Cushman's fishery production by establishing naturally-reproducing populations wherever possible, and to enhance Lake Kokanee's put-and-take fishery. To this end, the licensee shall provide the necessary resources to (a) annually stock Lake Cushman with Kokanee salmon smolts (1.5 million) and other catchable salmonid species (e.g., rainbow trout) at a level to not impair recovery of bull trout; and (b) stock Lake Kokanee with 12,000 catchable rainbow trout. Moreover, the resident component of the fish restoration plan shall include a provision to develop the Big Creek Kokanee broodstock acclimation facility, as well as contracting with an appropriate entity to produce annual stocks for Lake Cushman and Lake Kokanee.
- (3) Measures to protect and enhance bull trout in the North Fork drainage, in accordance with the terms and conditions of the FWS's incidental take statement attached as Appendix D to this order (e.g., surveys of Lake Kokanee tributaries for suitable bull trout habitat and development of a bull trout salvage plan).

- (4) A schedule for implementing and evaluating the fish restoration program required by this article, including (a) monitoring the long-term effectiveness of resident stocking program, and (b) monitoring the anadromous fish stocking efforts, as provided for in Article 413, including reporting on the status of the anadromous fishery, habitat needs, and recommendations to improve the fishery.

The licensee shall prepare the Skokomish River fish restoration plan after consultation with the FWS, the NMFS, Washington Fish and Wildlife, the Skokomish Indian Tribe, and the Bureau of Indian Affairs. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the licensee's proposed plan after it has been prepared and provided to the agencies and the Skokomish Indian Tribe, and specific descriptions of how the agencies' and the Skokomish Indian Tribe's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and the Skokomish Indian Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the Skokomish River fish restoration plan. Implementation of the fish restoration plan shall not commence until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 422. Within 1 year of license issuance, the licensee shall develop, after consultation with the Skokomish Indian Tribe, the Bureau of Indian Affairs, the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, the Washington Department of Ecology, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service, and file with the Commission for approval an Estuarine Enhancement Plan (Estuarine Plan).

The Estuarine Plan shall provide for the removal of dikes, re-establish former tidal channels, and restore estuarine conditions at Nalley Ranch to enhance fisheries and shellfish in the Skokomish Estuary. The plan shall include monitoring measures such as those recommended in Appendix D of the FEIS (FERC/EIS-0095, issued November 1996). The Estuarine Plan shall also include, but not be limited to: (a) provisions to minimize take of Puget Sound Chinook salmon, Hood Canal summer-run chum salmon, and bull trout, consistent with the terms and conditions of the agencies' incidental take statements attached as Appendices C and D to this order; (b) measures to monitor

estuarine habitat and populations changes, such as those recommended in Appendix D of the FEIS, in cooperation with highly-qualified university or other research institution investigators for no less than 5 years after beginning dike removal; and (c) measures to assess the amount of large woody debris in the estuary and to augment large woody debris if warranted.

The licensee shall include with the Estuarine Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for agencies to comment and make recommendations before filing the Estuarine Plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Implementation of the Estuarine Plan shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan including any changes required by the Commission.

Article 423. Within one year after the date of issuance of this license, the licensee shall, after consultation with the U.S. Fish and Wildlife Service, the U.S. Forest Service and the Washington Department of Fish and wildlife and appropriate nongovernmental organizations, develop and file for Commission approval, a Threatened and Endangered Species Protection Plan (T&E Plan) for the Cushman Project. The T&E Plan shall include measures to protect the Puget Sound Chinook salmon, Hood Canal summer-run chum salmon, bull trout, peregrine falcon, bald eagle, marbled murrelet and spotted owl during project construction and operation.

The T&E Plan shall include, but not be limited to, the following:

- (1) measures to protect listed salmon stocks and bull trout, consistent with the requisite provisions of Articles 401 through 407, 410 through 419, and 422 of this license;
- (2) protective measures such as establishment of buffer zones for future logging or land development, precluding construction during breeding seasons, the protection of existing and potential bald eagle roosting and perching trees, particularly along stream shorelines, and maintaining and enhancing food sources for the bald eagle;
- (3) a schedule for implementing the measures;

- (4) a description of the method(s) for monitoring the results of the implemented measures;
- (5) a monitoring schedule; and
- (6) a schedule for providing the monitoring results to the National Marine Fisheries Service, U.S. Fish and Wildlife Service, U.S. Forest Service and the Washington Department of Fish and Wildlife, and the Commission.

If any of the measures prove unsuccessful, the plan shall provide for the inclusion of alternative measures or modifications to measures in a revised plan, that are developed in consultation with the National Marine Fisheries Service, U.S. Fish and Wildlife Service, U.S. Forest Service, and the Washington Department of Fish and Wildlife.

The licensee shall include with the T&E Plan documentation of consultation, copies of comments and recommendations on the completed plan, after it has been prepared and provided to the National Marine Fisheries Service, U.S. Fish and Wildlife Service, U.S. Forest Service and the Washington Department of Fish and Wildlife, and specific descriptions of how the agencies' comments and recommendations are accommodated by the T&E Plan. The licensee shall allow a minimum of 30 days for the agencies to comment before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing activities shall begin at the Cushman Project until the licensee is notified by the Commission that the T&E Plan is approved. Upon Commission approval, the licensee shall implement the T&E Plan, including any changes required by the Commission.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

Appendix C

NOAA Fisheries believes that the following terms and conditions are necessary and appropriate to minimize take of the listed Puget Sound chinook salmon and Hood Canal summer chum salmon resulting from implementation of the action.

1. The licensee shall release a minimum instream flow of 240 cfs, or natural inflow at the point of Dam No. 2.
2. The licensee shall provide an annual water budget of up to 25,000 acre-feet for sediment flushing, channel maintenance, and habitat forming processes in the lower North Fork Skokomish River, as generally describes in Articles 404 and 407, for the term of the license.
3. The licensee shall provide upstream and downstream passage as generally described in Articles 414 and 415, and subsequent prescriptive fishways under the reserved authority of Article 419. Passage facilities must conform to NOAA Fisheries criteria and performance standards.
4. The licensee shall provide the fish enhancement programs generally described in Article 417. Sponsors of the fish enhancement programs must be designated, and they must consult with NOAA Fisheries under section 10 of the ESA and develop HGMPs for the hatchery actions.
5. The licensee shall limit daily amplitude downramp to no more than 50% of maximum flow.
6. The licensee shall monitor the effects of false attraction at Potlatch tailrace and, after seeking and obtaining Commission approval, make any necessary structural and operational modifications necessary to protect listed chinook salmon and summer chum from the effects of delay or injury as described in Article 418.
7. The licensee shall perform the estuarine improvements generally described in Article 422.
8. The licensee shall minimize take of listed species associated with inwater work (through appropriate timing restrictions and construction practices) as the physical structures and facilities are developed. This work shall further require that:

- a. Spill control equipment shall be on site and in quantities sufficient to effectively contain and recover accidental release of chemicals in the Project site.
- b. Personnel shall be familiar with spill control equipment operation and procedures prior to the initiation of work.
- c. Instream work shall be conducted consistent with WDFW's Hydraulic Code by conforming to a Hydraulic Project Approval from WDFW.

Appendix D

The following terms and conditions are required for the implementation of RPM 1:

1. The licensee shall modify the plan for the stocking of resident fish for the Lake Cushman recreational fishery to eliminate the use of cutthroat trout because of the expected predation on bull trout and competition for prey resources.
2. The licensee shall substitute the planting of cutthroat trout for the recreational fishery with rainbow trout to reduce the extent of competition and predation.
3. The licensee shall limit the annual stocking of rainbow trout in Lake Cushman to a level that will not impair the recovery of the bull trout or the anadromous fish populations.
4. The licensee shall develop the plan for the stocking of fish for the recreational fishery in coordination with the Service, NOAA Fisheries, WDFW, and the Skokomish Tribe.

The following terms and conditions are required for the implementation of RPM 2:

1. The licensee shall monitor the downstream turbidity levels in the North Fork during sediment-generating construction activities related to the construction of side channels and large woody debris clusters.
 - Monitoring will occur 600 feet downstream from the project site.
 - Monitoring will occur at 15 minute intervals during all sediment generating activities.
2. The licensee shall establish background turbidity levels at a location just upstream of the project. Background turbidity levels shall be measured every three hours while in-water work is occurring.
3. If project-induced sediment levels exceed background by the amounts and durations listed below, then the amount of take authorized by the Incidental Take Statement will have been exceeded. The licensee must immediately cease sediment-generating activities and inform the Commission of the exceedence. The licensee will contact the Service's consulting biologist at the Western Washington Fish and Wildlife Office in Lacey, Washington (360) 753-9440, and will review with the Service and the Commission the need to reinitiate consultation.

- 74 NTUs above background at any time, or
 - 27 NTUs above ground for more than one hour, cumulatively, over an 8-hour workday, or
 - 10 NTUs above background for more than 3 hours, cumulatively, over an 8-hour workday.
4. If the turbidity levels begin to approach these limits, or if turbidity limitations established by the Washington State Department of Ecology's Water Quality Certification for these projects are exceeded, the Commission will contact the Service's consulting biologist to discuss means of assuring that the authorized amount of incidental take is not exceeded.

The following terms and conditions are required for the implementation of the RPM 3:

1. The licensee shall determine whether suitable spawning gravel and cold enough water temperatures between October and April occur within tributaries to Lake Kokanee for successful bull trout reproduction. Since site specific information is lacking for bull trout that reside in Lake Kokanee, the Service has assumed the conditions that are needed for successful bull trout reproduction include both the dropping of water temperatures to less than 9 degrees C. within the October to December period to initiate spawning and then for the water temperatures to remain between 2 and 8 degrees C. for at least the next 120 days for incubation.
2. The licensee shall develop and implement a plan to salvage bull trout from Lake Kokanee if suitable conditions for bull trout spawning and incubation are lacking.
3. The licensee shall develop the salvage plan in coordination with the Service.

The Service expects that take of bull trout from the South Fork/Lower North Fork and Lake Cushman Upper North Fork subpopulations will occur. The action area is within the Skokomish River Basin, and the Skokomish Estuary includes bull trout foraging, spawning, rearing, migratory and overwintering habitat. The RPMs, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action. If, during the course of the action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the RPMs provided. The licensee must immediately provide to the Service and the Commission an explanation of the causes of the taking, and review with the Service and the Commission the need for possible modification of the RPMs.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Tacoma, Washington

Project Nos. 460-026
460-021

(Issued June 21, 2004)

KELLIHER, Commissioner, dissenting in part

I dissent from the portion of the order that partially lifts the interim stay pending judicial review. I am writing to explain my reasons for doing so.

In the past, the Commission has consistently granted stays of costly license requirements pending judicial review. This order departs from that precedent.

This is not the first time the Commission has ruled on lifting the stay on the license conditions in the new license issued for the Cushman Hydroelectric Project No. 460. In the past, we have consistently denied these requests. In City of Tacoma,¹ we rejected a motion to lift a stay on this project and continued to grant a stay pending judicial review because “the public interest would not be served by requiring Tacoma to incur substantial, largely unrecoverable costs to modify the Cushman Project before any meaningful opportunity for judicial review of the new license provisions.”²

Nothing has changed since then but the passage of time. There is no doubt this proceeding has taken a great deal of time. However, any delays are largely attributable to Endangered Species Act proceedings, rather than actions taken by the licensee. Although this order suggests impatience with the licensee, the licensee has not yet had a meaningful opportunity for judicial review of the new license conditions. That is evidenced by the fact that this order further amends the license.

There is no compelling evidence in the record of this proceeding to suggest that irreparable harm to threatened species would occur if the Commission followed its historic practice and maintained the status quo pending judicial review.

However, the licensee may suffer irreparable injury from lifting the stay. The order rejects temporary measures and directs the licensee to make permanent changes to the project. In the event the licensee were to prevail in its legal challenge to the license terms, these permanent structural changes cannot be reversed. In Tacoma we continued the stay because “[t]he costs of the new license are substantial, and would be largely

¹ City of Tacoma, 87 FERC ¶ 61,197 (1999).

² Id. at 61,735 (footnote omitted).

unrecoverable if the license requirements were significantly altered as a result of judicial review.”³

The harm Tacoma asserts is not merely economic injury. In prior orders in this proceeding, we recognized that upon full implementation of the license terms, the Cushman Project would be uneconomic and that the licensee may resort to decommissioning.⁴ That would clearly foreclose any meaningful opportunity for judicial review. The order appears to dismiss that concern, however.

I believe the Commission should have remained true to its precedent, and continued the stay pending judicial review.

Joseph T. Kelliher
Commissioner

³ Id.

⁴ Id.

