

169 FERC ¶ 61,124  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Eugene Water & Electric Board

Project No. 2242-110

ORDER ON REHEARING AND CLARIFICATION

(Issued November 21, 2019)

1. On May 17, 2019, the Commission issued a new license to the Eugene Water and Electric Board (EWEB or licensee) to continue to operate and maintain the Carmen-Smith Hydroelectric Project No. 2242.<sup>1</sup> On June 17, 2019, the Oregon Department of Environmental Quality (Oregon DEQ) and Oregon Department of Fish and Wildlife (Oregon DFW), jointly filed a timely request for rehearing of the License Order. Additionally, the United States Department of the Interior's (Interior) Fish and Wildlife Service (FWS) filed a request for clarification of the License Order. For the reasons discussed below, we grant rehearing and clarification.

**I. Background**

2. The Carmen-Smith Project is located on the McKenzie and Smith Rivers in Lane and Linn Counties, near McKenzie Bridge, Oregon, and occupies 574 acres within the Willamette National Forest.<sup>2</sup> The project consists of two developments (including dams, reservoirs, and powerhouses) with a combined generating capacity of 91.955 megawatts (MW): the Carmen-Smith development and the Trail Bridge development.<sup>3</sup>

3. As described in the License Order, on August 16, 2018, pursuant to Section 401 of the Clean Water Act,<sup>4</sup> Oregon DEQ issued a modified water quality certification

---

<sup>1</sup> *Eugene Water & Elec. Board*, 167 FERC ¶ 61,152 (2019) (License Order).

<sup>2</sup> *Id.* P 1.

<sup>3</sup> *Id.* PP 1 & 11.

<sup>4</sup> 33 U.S.C. § 1341 (2018).

containing 12 conditions.<sup>5</sup> The License Order incorporated Oregon DEQ's water quality certification conditions into the license with the exception of Condition 12, which requires EWEB to pay project-specific fees to Oregon DEQ and DFW for the costs of overseeing the implementation of the water quality certification.<sup>6</sup> The Commission excluded Condition 12 because the funding measure is contrary to the requirements of FPA sections 10(e) and 17.<sup>7</sup> The Commission noted that it has no authority to revise the water quality certification's mandatory conditions, but stated that it cannot enforce Condition 12.<sup>8</sup> Thus, ordering paragraph (D) excluded Condition 12, stating, in pertinent part: "This license is subject to the conditions submitted by the Oregon Department of Environmental Quality under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2018), as those conditions are set forth in Appendix A to this order, with the exception of . . . the requirement for project-specific funding."<sup>9</sup>

4. On rehearing, Oregon DEQ and DFW request that the Commission revise the order to delete any references to the exclusion of water quality certification Condition 12.<sup>10</sup> Alternatively, if the Commission does not include Condition 12 as part of the license, Oregon DEQ and DFW seek rehearing on alternate grounds and argue that the Commission: (1) may not revise or delete water quality certification conditions in an order;<sup>11</sup> (2) deviated from its prior precedent of including all water quality certification conditions;<sup>12</sup> and

---

<sup>5</sup> See License Order, 167 FERC ¶ 61,152 at P 69; see also Oregon DEQ August 28, 2018 filing (containing water quality certificate conditions for the Carmen-Smith Hydroelectric Project).

<sup>6</sup> License Order, 167 FERC ¶ 61,152 at P 69, n.56, at ordering para. (D), & Appendix A, Condition 12.

<sup>7</sup> *Id.* P 84 & n.56 (citing 16 U.S.C. § 803(e) and 810(b) (2018); *City of Seattle, Washington*, 142 FERC ¶ 62,231 (2013); *Gibson Dam Hydroelectric Company, LLC*, 138 FERC ¶ 62,019 (2012)).

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

<sup>9</sup> *Id.* at ordering para. (D).

<sup>10</sup> Oregon DEQ and DFW June 17, 2019 Request for Rehearing at 2 & 4-6.

<sup>11</sup> *Id.* at 2 & 10-13.

<sup>12</sup> *Id.* at 2 & 13-16.

(3) incorrectly determined that all funding associated with a license and paid by a licensee must be consistent with the requirements of FPA sections 10(e) and 17.<sup>13</sup>

5. On June 17, 2019, FWS filed a request for clarification of the License Order, asking the Commission to clarify how certain proposed license articles contained in the November 30, 2016 Amended and Restated Offer of Settlement (2016 Settlement Agreement) are incorporated into the new license.<sup>14</sup>

## II. Discussion

### A. Oregon DEQ and DFW's Request To Include Condition 12

6. Oregon DEQ and DFW ask that the Commission revise the License Order to include Condition 12.<sup>15</sup> Oregon DEQ and DFW state that an “unambiguous Congressional mandate in Section 401 of the [Clean Water Act] requires federal licensing agencies to either deny the certification application or incorporate the conditions of a water quality certificate.”<sup>16</sup> The agencies assert that despite this mandate, the Commission deviated from its own precedent to the extent it excluded water quality certification Condition 12 from the License Order.<sup>17</sup> Specifically, the agencies explain that while the License Order states that the Commission excluded Condition 12 from the licensing requirements,<sup>18</sup> elsewhere the License Order states that “[w]hile we include these measures in the Appendices because we have no authority to revise the mandatory conditions, we cannot enforce them.”<sup>19</sup>

---

<sup>13</sup> *Id.* at 2 & 16-25.

<sup>14</sup> FWS captioned its filing as comments; however, we are treating the filing as a request for clarification of the order.

<sup>15</sup> Oregon DEQ and DFW Request for Rehearing at 2, & 4-6.

<sup>16</sup> *Id.* at 4 (citing *Escondido Mut. Water Co. v. La Jolla, Bands of Mission Indians*, 466 U.S. 765, 777 (1984); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 293 (D.C. Cir. 2003)).

<sup>17</sup> *Id.* (citing License Order, 167 FERC ¶ 61,152 at P 84 & n.56). Oregon DEQ and DFW state that the License Order is ambiguous as to whether the Commission included or excluded Condition 12 in the License Order. *Id.* at 5.

<sup>18</sup> *Id.* (citing License Order, 167 FERC ¶ 61,152 at P 84 & n.56).

<sup>19</sup> *Id.* (citing License Order, 167 FERC ¶ 61,152 at P 84 & n.56).

7. Clean Water Act section 401(d) mandates that the conditions of a water quality certification must become conditions of any issued federal permit or license.<sup>20</sup> We grant rehearing and modify the License Order to include Condition 12 of Appendix A of the license because the Commission has no authority to reject or modify mandatory water quality certification conditions.<sup>21</sup> We continue to note, however, that the Commission cannot enforce Condition 12.<sup>22</sup>

8. Accordingly, we revise Ordering Paragraph (D) to state that: “The license issued on May 17, 2019, is subject to the conditions submitted by the Oregon Department of Environmental Quality under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2018), as those conditions are set forth in Appendix A to this order, although the requirement for gravel augmentation in the McKenzie Wild and Scenic River corridor and the requirement for project-specific funding are unenforceable.”

9. Because this order grants Oregon DEQ and DFW’s request to revise the License Order to include Condition 12 of Oregon DEQ’s water quality certification, we dismiss the agencies’ alternative arguments on rehearing as moot.<sup>23</sup>

#### **B. FWS’ Request for Clarification**

10. FWS asks the Commission to clarify: (1) whether the order excluded an article addressing gravel augmentation and large woody debris in the Lower Carmen bypassed reach;<sup>24</sup> (2) how the License Order incorporated all 34 of the proposed license articles contained in Appendix G, which includes license articles from the 2016 Settlement

---

<sup>20</sup> 33 U.S.C. § 1341(d) (2018).

<sup>21</sup> *American Rivers Inc., v. FERC*, 129 F.3d 99, 110-111 (2d Cir. 1997); *Puget Sound Energy, Inc.*, 111 FERC ¶ 61,317, at P 7 (2005).

<sup>22</sup> *See, e.g., Blue Heron Hydro, LLC*, 140 FERC ¶ 61,049 (2012) (including certification conditions in appendix while noting their unenforceability). We note that, in their request to modify the order to clarify that Condition 12 is included in the license, Oregon DEQ and DFW rely on *Blue Heron* as indicative of Commission precedent where the Commission appropriately notes its disagreement with a condition, but nonetheless includes it in the license.

<sup>23</sup> *See Oregon DEQ and DFW Request for Rehearing* at 6 (“In the event the Commission does not grant the DEQ and ODFW petition for modification, DEQ and ODFW request rehearing of the Commission’s Order . . .”).

<sup>24</sup> FWS Request for Clarification at 2.

Agreement, and whether the Commission intentionally omitted proposed Article 31 from Appendix G;<sup>25</sup>; and (3) which of the proposed license articles are included in the license under FPA section 10(j).<sup>26</sup>

11. First, we clarify that there was no specific proposed license article that explicitly pertained to gravel augmentation and large woody debris. However, Oregon DEQ's water quality certification and the Forest Service's 4(e) conditions for the project both require the licensee to implement an Amended and Restated Aquatics Management Plan, which includes gravel augmentation in the McKenzie River Wild and Scenic River corridor. The reference in paragraph 123 of the License Order to gravel augmentation in the McKenzie River Wild and Scenic River corridor is intended to clarify that the order does not include this component of the Aquatics Management Plan.<sup>27</sup> To that end, Ordering Paragraphs (D) and (E) specifically exclude gravel augmentation activities and large woody debris in the McKenzie River Wild and Scenic River corridor to the extent they are included in Oregon DEQ's water quality certification and the Forest Service's 4(e) conditions.<sup>28</sup>

12. Next, the License Order adopted all 34 of the proposed license articles contained in Appendix G either through mandatory conditions or through Commission 400-series articles. Ordering Paragraph (E) of the License Order states that the license is subject to the section 4(e) conditions submitted by the Forest Service.<sup>29</sup> The Forest Service's Condition 3 requires that the licensee implement Proposed License Articles 1-13, 15-25, and 28-34. Ordering Paragraph (D) of the License Order states that the license is subject to the conditions of the water quality certification which, under Condition 1, requires the development of the water quality management plan of proposed Article 14.<sup>30</sup> Article 402 of the license incorporates proposed Article 26 that requires the licensee to notify state and federal agencies when dead or injured threatened or sensitive species are

---

<sup>25</sup> FWS Request for Clarification at 1.

<sup>26</sup> *Id.* See 16 U.S.C. § 803(j) (2018).

<sup>27</sup> License Order, 167 FERC ¶ 61,152 at P 123 (finding adding gravel and maintaining large woody debris in the Lower Carmen bypassed reach are precluded by the Wild and Scenic Rivers Act).

<sup>28</sup> *Id.* at ordering paras. (D) & (E).

<sup>29</sup> *Id.* at ordering para. (E).

<sup>30</sup> *Id.* at ordering para. (D).

encountered.<sup>31</sup> Lastly, Article 403 mirrors proposed Article 27, which reserves to the Commission the authority to require fishways.<sup>32</sup> Additionally, the License Order inadvertently omitted proposed Article 31 from Appendix G. This order revises Appendix G to include proposed Article 31.

13. Finally, with respect to which of the proposed license articles were included in the license under FPA section 10(j), we note that the Oregon DFW, Interior, and the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) filed 22 recommendations under section 10(j), which the Commission stated were identical to the proposed license articles in the 2016 Settlement Agreement.<sup>33</sup> The License Order determined that all but one of the 22 recommendations were within the scope of FPA section 10(j) and had already been included as mandatory license conditions.<sup>34</sup> The License Order also found that the remaining 10(j) recommendation (notifying state and federal agencies when dead or injured threatened or sensitive species are encountered) was not within the scope of section 10(j), but included this recommendation in the license under FPA section 10(a) through Article 402.<sup>35</sup> Accordingly, we will clarify the License Order by revising: (1) the third sentence of paragraph 122 to read that "In total, 22 recommendations were filed under section 10(j) that were identical to the proposed license articles in the 2016 Settlement Agreement."; (2) footnote 91 to read that "Oregon DFW recommended, pursuant to section 10(j), proposed Articles 3-13, 17-18, 22, 26, and 28-33. Interior recommended proposed Articles 3-13, 16-18, and 22. NMFS recommended proposed Articles 3, 7-13, and 31."; and (3) the first sentence of paragraph 123 to read that "This license includes all 34 of the proposed license articles through mandatory license conditions [Ordering Paragraphs (D), (E), (F), and (G)] and license articles."

---

<sup>31</sup> *Id.* at ordering para. (K), Article 402.

<sup>32</sup> *Id.* at ordering para. (K), Article 403.

<sup>33</sup> *Id.* P 122. Paragraph 122 erroneously states that only 21 recommendations were filed under FPA section 10(j). Interior concluded that the resource agencies filed a combined total of 31 recommendations under section 10(j) that were identical to proposed license articles 3-33. FWS Request for Clarification at 2. However, Articles 14, 15, 19, 20, 21, 23, 24, 25, and 27 were not filed under 10 (j), but under FPA sections 4(e) or 18, or pursuant to section 401 of the Clean Water Act.

<sup>34</sup> *Id.* P 123. The first sentence of Paragraph 123 mistakenly states 20 instead of 21.

<sup>35</sup> *Id.* P 124.

The Commission orders:

(A) Oregon Department of Environmental Quality and the Oregon Department of Fish and Wildlife's June 17, 2019 request for rehearing is granted, as described in the body of this order.

(B) The following corrections are made to the May 17, 2019 License Order:

(1) Ordering Paragraph (D) is revised to read:

The license issued on May 17, 2019, is subject to the conditions submitted by the Oregon Department of Environmental Quality under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2018), as those conditions are set forth in Appendix A to this order, although the requirement for gravel augmentation in the McKenzie Wild and Scenic River corridor and the requirement for project-specific funding are unenforceable.

(2) The third sentence of P 122 is revised to read:

In total, 22 recommendations were filed under section 10(j) that were identical to the proposed license articles in the 2016 Settlement Agreement.

(3) Footnote 91 is revised to read:

Oregon DFW recommended, pursuant to section 10(j), proposed Articles 3-13, 17-18, 22, 26, and 28-33. Interior recommended proposed Articles 3-13, 16-18, and 22. NMFS recommended proposed Articles 3, 7-13, and 31.

(4) The first sentence of P 123 is revised to read:

This license includes all 34 of the proposed license articles through mandatory license conditions [Ordering Paragraphs (D), (E), (F), and (G)] and license articles.

(5) Appendix G of the License Order is revised to include:

**Article 31. Upstream Passage at Sweetwater Creek**

Except as otherwise provided in the Construction Management Plan implemented under Article 16, the Licensee shall maintain a minimum elevation of 2,083 feet in Trail Bridge Reservoir from 15 August through 31 October for the term of the New License, which is intended to aid upstream passage of bull trout into Sweetwater Creek by providing a minimum depth of one foot of water in the entrance to the Sweetwater Creek culvert. The Licensee shall carry out a Sweetwater Creek Culvert biological evaluation, as described in Section 4.1.6.1 of the Aquatics Management Plan, Exhibit B to the November 2016 Amended and Restated Settlement Agreement to evaluate the effectiveness of modifications to Trail Bridge Reservoir operations (Section 4.1.4 of the

Aquatics Management Plan, Exhibit B to the November 2016 Amended and Restated Settlement Agreement) to aid bull trout entry into Sweetwater Creek.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.