

169 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Loveland, Colorado

Project Nos. 2829-005
2829-010

ORDER AMENDING LICENSE

(Issued December 19, 2019)

1. On March 4, 2019, and supplemented on August 2, 2019, the City of Loveland, Colorado (City of Loveland), licensee for the Loveland Hydroelectric Project No. 2829, filed an application to amend its license.¹ The City of Loveland proposes to fill an underground segment of penstock as part of a four-phase approach to decommissioning the project and surrendering its license. As discussed below, we approve the City of Loveland's amendment application, subject to modifications.

I. Background

2. The Loveland Project is located on the Big Thompson River in Larimer County, Colorado.² On June 30, 1978, the Commission issued a license for the project, with an expiration date of March 8, 2016. In September 2013, flooding along the Big Thompson River destroyed the project's dam and powerhouse, rendering both inoperable. The dam was removed as part of emergency actions taken to restore U.S. Highway 34, which had been damaged and in several locations destroyed by the flood. Afterwards, the City of Loveland determined that restoring the project was economically infeasible. Consequently, the City of Loveland filed an application to surrender its license.³

¹ *City of Loveland, Colo.*, 3 FERC ¶ 61,295 (1978).

² Portions of the project, which are not affected by this order, occupy lands within the Arapaho-Roosevelt National Forest, which is managed by the U.S. Forest Service.

³ City of Loveland, November 12, 2014 Application to Surrender License (Surrender Application). The Loveland Project has been authorized under an annual license since 2016. Notice of Authorization for Continued Project Operation, Project No. 2829-000 (Apr. 7, 2016).

3. Early discussions between the City of Loveland, Commission staff, the U.S. Forest Service (Forest Service), U.S. Fish and Wildlife Service (FWS), Colorado Parks and Wildlife, and the Colorado Department of Transportation (CDOT) determined that efforts by CDOT to rebuild Highway 34 would prevent the City of Loveland from completing all project-related decommission work in a single effort.⁴ To accommodate CDOT's efforts, the City of Loveland proposed to decommission the project in phases: phase 1, removal of the powerhouse; phase 2, removal of above-ground portions of the project penstock and other project features on National Forest System and City-owned land; phase 3, parking lot and river restoration within the reservoir footprint; and phase 4, final decommissioning of underground penstock on private land located within the Idlewild Subdivision.⁵ The Commission has approved phases 1 and 2.⁶ An amendment request for phase 3 has not, to date, been filed. This order amending the City of Loveland's license addresses the City of Loveland's request to implement phase 4.

II. Public Notice

4. The Commission issued public notice of the phase 4 amendment application on March 13, 2019, establishing an April 12, 2019 deadline for filing protests, comments, and motions to intervene. The Forest Service filed a timely notice of intervention on April 8, 2019.⁷ Joseph Wright, on behalf of the Idlewild Water Users Association (Association), composed of property owners within the Idlewild Subdivision, on which the relevant part of the penstock is largely located, filed a timely motion to intervene on April 12, 2019.⁸ The Association cites concerns with noise and traffic related to the

⁴ See generally City of Loveland, February 22, 2016 Notes, Project No. 2829-007 (filed Apr. 22, 2016); see *City of Loveland, Colo.*, 157 FERC ¶ 62,021, at P 5 (2016) (describing the February 22, 2016 conference call).

⁵ See City of Loveland, Amendment Request, Project No. 2829-010, at 1 (filed March 4, 2019) (Phase 4 Amendment Request) (describing phases 1, 2, 3, and 4); City of Loveland, Amendment Request, Project No. 2829-011 (Phase 2 Amendment Request) (filed April 17, 2019), Attachment 1 at 13 (further describing phase 2).

⁶ *City of Loveland, Colo.*, 157 FERC ¶ 62,021 (approving phase 1); *City of Loveland, Colo.*, 168 FERC ¶ 62,033 (2019) (approving phase 2).

⁷ Under Rule 214(a) of the Commission's Rules of Practice and Procedure, the Forest Service became a party to the proceeding upon the timely filing of its notice of intervention. 18 C.F.R. § 385.214(a) (2019).

⁸ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c).

phase 4 work, potential asbestos contamination on portions of the penstock, and possible future property devaluation from abandoning the penstock in place.⁹ The Association requests that the Commission require the City of Loveland to analyze and develop a plan for removal of the penstock.¹⁰

III. Licensee's Proposal

5. The City of Loveland proposes to access the underground 36-inch-diameter penstock from two locations on Idlewild Lane located within the Idlewild Subdivision and one location on city-owned land.¹¹ An approximately 20-foot by 20-foot area would be excavated to expose and tap into the penstock, and the penstock would be permanently filled with a non-toxic material.¹² The City of Loveland states that prior to filling the penstock, it will remove any remaining water, using best management practices to minimize erosion. Fluids removed from the penstock would be profiled and disposed of and a Colorado Department of Public Health and Environment dewatering permit would be acquired if necessary.

6. The City of Loveland has committed to coordinating with property owners within the subdivision to identify optimal times to access and temporarily block access to the subdivision to complete the work with minimal disturbance.¹³ The City of Loveland would provide advance notice of actual construction dates to property owners and anticipates the work would take between two to seven days to complete.¹⁴ Work areas

⁹ Idlewild Water Users Association, April 12, 2019 Motion for Leave to Intervene and Protest (Association Protest).

¹⁰ Association, Protest at 3.

¹¹ Phase 4 Amendment Request at 2, Figure 2 (providing proposed access points); Surrender Application at 3 (describing the penstock). The City of Loveland states that final penstock access will be determined during the final design and construction phases of work.

¹² Phase 4 Amendment Request at 2. The City of Loveland also states that it will attempt to bury or otherwise render safe from trips and falls non-functioning irrigation taps and a yard hydrant that are not required by the license, but previously supplied water from the underground penstock to the subdivision for irrigation and fire protection.

¹³ City of Loveland, August 2, 2019 Response to FERC Staff Data Request dated June 5, 2019 at 2 (City of Loveland Response).

¹⁴ City of Loveland, Response at 2.

(including staging and access areas) will be restored to current conditions following construction. This may include seeding where vegetated areas are disturbed and road repair.¹⁵

IV. Discussion

A. Agency Consultation

7. The City of Loveland, as the Commission's non-federal representative for consultation under section 106 of the National Historic Preservation Act,¹⁶ has engaged in ongoing consultation with the Colorado State Historic Preservation Officer (Colorado SHPO) throughout the surrender process. Prior to the September 2013 flood, the City of Loveland completed a cultural resources survey (2013 survey) of the project area in preparation for relicensing. By letter dated November 6, 2014, the City of Loveland submitted a summary report to the Colorado SHPO containing information on cultural resources identified in the 2013 survey and potential effects due to license surrender.¹⁷ The 2013 survey identified nine cultural resource sites within the Area of Potential Effect for the project.¹⁸ Five of these sites are eligible for listing in the National Register of Historic Places (National Register).¹⁹ By letter dated November 14, 2014, Colorado SHPO concurred with the summary report's eligibility findings.²⁰ The City of Loveland has stated that none of the National Register-eligible sites are within the proposed phase 4

¹⁵ Phase 4 Amendment Request at 3.

¹⁶ 54 U.S.C. § 306108 (Pub. L. No. 113-287, 128 Stat. 3227, Dec. 19, 2014).

¹⁷ Surrender Application, Exhibit C. Historic properties are those that are listed or eligible for listing in the National Register. The term "cultural resources" refers to properties that have not been determined eligible for listing in the National Register.

¹⁸ Surrender Application, Exhibit C at 4.

¹⁹ Surrender Application, Exhibit C at 5-8.

²⁰ Phase 4 Amendment Request, Attachment 4. Colorado SHPO's November 14, 2014 letter also recommended that the City of Loveland: (1) execute an agreement with the Forest Service for the management of historic properties after surrender of the project; and (2) complete a cultural resources survey of the proposed staging areas not previously surveyed as part of the 2013 survey. The City of Loveland's compliance with these recommendations, which concern areas outside the proposed phase 4 work footprint, is documented in the Commission's order addressing the City of Loveland's phase 2 amendment request. *City of Loveland*, 168 FERC ¶ 62,033 at PP 12-13, 17.

work footprint.²¹ We agree. Therefore, no historic properties would be affected by the work proposed in the licensee's phase 4 amendment request, and section 106 consultation is complete.

8. The City of Loveland, as the Commission's non-federal representative for the purpose of informal consultation under section 7 of the Endangered Species Act of 1973,²² has consulted with FWS regarding potential effects to federally listed species throughout the surrender process. For the phase 4 amendment request, the City of Loveland states that it is relying on a Biological Assessment (BA) prepared by Jacobs Engineering for the US 34 Big Thompson Permanent Repair Project (Highway Project) because the analysis in the BA includes the phase 4 work area.²³ The City of Loveland submitted the BA to FWS by letter dated March 27, 2019.²⁴

9. The BA identified three federally listed species as having potential to occur within the Highway Project area including Preble's meadow jumping mouse (*Zapus hudsonius preblei*), Ute ladies'-tresses orchid (*Spiranthes diluvialis*), and Colorado butterfly plant (*Gaura neomexicana* ssp. *Coloradensis*).²⁵ The BA found no critical habitat for any of the federally listed species in the Highway Project area. Further, suitable habitat for Preble's mouse and Ute ladies'-tresses in the Highway Project area was found to have

²¹ Phase 4 Amendment Request at 4.

²² 16 U.S.C. § 1536 (2018); see 50 C.F.R. § 402.08 (2019).

²³ Phase 4 Amendment Request at 4; see also City of Loveland May 22, 2019 Additional Information, Project No. 2829-010, Attachment 2, Wildlife Biological Assessment/Biological Evaluation/Management, Indicator Species, U.S. 34 Big Thompson Permanent Repair Project, Estes Park to Loveland. Prepared by Jacobs; dated January 2016 (Jacobs BA).

²⁴ City of Loveland, May 22, 2019 Additional Information, Project No. 2829-010, Attachment 2 at 1.

²⁵ Jacobs BA at Appendix B. The Mexican spotted owl (*Strix occidentalis lucida*) was also considered in the biological evaluation the City of Loveland submitted to FWS during consultation for phase 2 of the license surrender. Phase 2 Amendment Request, Attachment 6, Letter Dated March 27, 2019, at 2-3. On May 16, 2019, FWS concurred with the City of Loveland's determination that the project was not likely to adversely affect the Mexican spotted owl. City of Loveland, May 22, 2019 Additional Information, Project No. 2829-011, Attachment 1.

been scoured and destroyed by the 2013 floods, and no suitable habitat was found to exist for the Colorado butterfly plant. As the result of this informal consultation between the licensee and FWS, FWS concurred with the licensee's determination that the work proposed in the licensee's phase 4 amendment request is not likely to adversely affect these species.²⁶ We agree with this finding. This completes ESA consultation.

B. Asbestos

10. In preparation to decommission the project, the City of Loveland contracted with environmental consultants to test for asbestos-containing material on certain segments of the above and below ground penstock proposed for removal and abandonment in place. Of the approximately 9,500 feet of penstock within the project boundary, roughly 1,600 feet lie within the phase 4 footprint, largely in the Idlewild Subdivision.²⁷ Segments, including those located within the phase 4 work area, were tested on October 19, 2017,²⁸ May 11, 2018,²⁹ May 1, 2019,³⁰ and May 24, 2019.³¹

11. The May 11, 2018 test report states that one of the samples, taken from a single segment of penstock outside the phase 4 work area that had been replaced in 1978 due

²⁶ City of Loveland, May 22, 2019 Additional Information, Project No. 2829-010, Attachment 1.

²⁷ City of Loveland, Response at 2; Surrender Application at 3.

²⁸ Phase 4 Amendment Request, Attachment 1.

²⁹ Phase 4 Amendment Request, Attachment 2. The 2017 and 2018 testing was conducted by DS Environmental Consulting, an independent firm certified in asbestos consulting by the Colorado Department of Public Health and Environment. *See* Phase 4 Amendment Request, Attachments 1 & 2 at 4.

³⁰ City of Loveland, Response, CTL Thompson report dated June 7, 2019.

³¹ City of Loveland, Response, CTL Thompson report dated June 7, 2019. The 2019 testing was conducted by CTL Thompson, an independent firm that is also certified in asbestos consulting by the Colorado Department of Public Health and Environment. *See* City of Loveland, Response, CTL Thompson report dated June 7, 2019 at Attachment 2.

to flooding, contained a detectable level of asbestos-containing material.³² Although historical records indicate that an approximately 664-foot-long segment of the penstock proposed for filling under phase 4 was also replaced in 1978, the majority of this segment is located underneath the main road within the subdivision and would not be permanently disturbed by the phase 4 work.³³ Moreover, samples taken within the phase 4 work area in October 2017 and May 2019 from the penstock at ground level did not test positive for asbestos-containing material.³⁴

12. The Association objects to the City of Loveland not testing underground portions of the penstock and also expresses concern about the penstock being filled and abandoned rather than removed because of the potential presence of asbestos-containing material.³⁵ As stated above, no samples taken from the penstock at ground level within the phase 4 work area tested positive for asbestos-containing material. In fact, of 16 sample locations along the entire length of the penstock only the one, referenced above, tested positive. We find that adequate testing has been completed to verify there is no penstock at the ground surface within the Idlewild Subdivision with asbestos-containing material. We conclude that the only underground penstock in the subdivision with the potential to contain asbestos-containing material is the 664-foot-long segment that was replaced in 1978.³⁶ According to the U.S. Environmental Protection Agency (EPA), asbestos fibers may be released into the air by the disturbance of asbestos-containing material during activities such as building repair or demolition work.³⁷ Generally, “exposure may occur only when the asbestos-containing material is disturbed or damaged

³² Phase 4 Amendment Request at 3-4 and Attachment 2 at 6. This testing included below grade section of penstock that was anticipated to be impacted by demolition work during phase 2. Phase 4 Amendment Request, Attachment 2 at 3.

³³ Phase 4 Amendment Request at 3-4 and Attachment 3.

³⁴ Phase 4 Amendment Request, Attachment 1; City of Loveland, Response, CTL Thompson report dated June 7, 2019.

³⁵ Idlewild Water Users Association, October 14, 2019 Supplemental Filing (Association Filing) at 1; Association Protest at 2-3.

³⁶ This 664-foot-long segment is located between P.I. 14 and P.I. 16 as described in licensee’s amendment application. Phase 4 Amendment Request at 3 and Figure 2.

³⁷ U.S. EPA, *Learn About Asbestos*, <https://www.epa.gov/asbestos/learn-about-asbestos#exposed>.

in some way to release particles and fibers into the air.”³⁸ Since the penstock at ground level did not test positive for asbestos-containing material and the only underground section of penstock with the potential to contain asbestos-containing material is buried, we conclude that filling and abandoning the penstock in place as proposed in the phase 4 amendment request would not pose a health risk. We find that the cost associated with excavation, further testing, and removal of this segment is not justified. In addition, in the event that the relevant segment of the penstock contains asbestos, we find that the potential disturbance or damage associated with removing that segment of the penstock could cause more potential harm than allowing it to be abandoned in place. However, one of the City of Loveland’s proposed access points, A1, appears to be within the segment replaced in 1978.³⁹ Because the City of Loveland will expose and tap into the penstock at this access point, we will require the City of Loveland to test this location for the presence of asbestos-containing material. If testing is positive for asbestos-containing material, the City of Loveland is required to promptly notify the Commission and to follow all applicable state, local, and federal regulations, including EPA and Occupational Safety and Health Administration (OSHA) regulations, for the proposed work at access point A1.

C. Noise and Traffic

13. The Association has expressed concern about disturbance from noise and traffic that would result from the phase 4 work, including the potential for the phase 4 work to temporarily interrupt access to residential properties, and takes issue with the level of detail provided by the City of Loveland in its penstock access plan.⁴⁰ As stated above, the City of Loveland has agreed to coordinate with the property owners to select optimal times for doing the work and to give advance notice of when the work would begin.⁴¹ We find that those licensee commitments coupled with the fact that the work should take a week or less to complete will adequately minimize disturbances to the surrounding landowners. Moreover, when considered against the noise and traffic that would be required to excavate and remove the entire approximately 1,600 linear feet of penstock

³⁸ *Id.*

³⁹ Phase 4 Amendment Request at 2-3 (describing the A1 access point and the location of the replaced segment) and Figure 2.

⁴⁰ Association, Filing at 1; Association Protest at 2.

⁴¹ Additionally, as required by ordering paragraph (D), the City of Loveland must submit plans and specifications, which must be filed on the record for this proceeding, to the Commission’s Division of Dam Safety and Inspections - San Francisco Regional Office before it is authorized to begin filling activities.

traversing the Idlewild Subdivision and restore the area after removal, we find that filling the penstock and abandoning it in place is the least disruptive option.

D. Property Values

14. The Association states that allowing the penstock to be abandoned in place will limit property development and impact property values.⁴² The City of Loveland has consulted with a real estate appraiser, who did not find any evidence that the value of properties near the abandoned penstock would be negatively impacted by its presence.⁴³ The Association suggests that the appraiser's letter should have contained an analysis based on the proximity of the penstock to each property, and in particular, to Mr. Wright's property.⁴⁴ The Association also objects to the report not including an analysis of impacts should a homeowner want to excavate his or her property in the future or impacts from homeowners having to inform purchasers of the existence of the penstock when they "cannot with certainty say that the pipeline components do not contain any asbestos."⁴⁵ Finally, the Association contests the letter's use of natural gas pipelines as a proxy for the penstock.

15. As pointed out by the City of Loveland, a majority of the homes in the Idlewild Subdivision were constructed after or concurrently with the penstock, and there is no evidence from sales since installation of the penstock that home values have been impacted. The Association provides no analysis to the contrary. Further, the letter states that the appraiser relied on his knowledge of past work analyzing the effects of natural gas pipelines on real estate values because he was "not aware of any other location where a similar circumstance exists involving a water main being taken out [of] service and where paired sale analysis could be utilized."⁴⁶ While not determinative, the letter's findings support our conclusion that abandoning the penstock in place is the least disruptive available option.

⁴² Association, Protest at 2-3.

⁴³ City of Loveland, Response, Letter from Foster Valuation Company LLC dated July 31, 2019.

⁴⁴ Association, Filing at 2.

⁴⁵ Association, Filing at 2.

⁴⁶ City of Loveland, Response, Letter from Foster Valuation Company LLC dated July 31, 2019.

16. Finally, the Association states that the City of Loveland implies that it has an easement for the penstock but that to Mr. Wright's knowledge, there is no such recorded or documented easement.⁴⁷ While we note that the City of Loveland has stated that it has been unable to locate any prior agreements with private property owners along the penstock,⁴⁸ this matter is not relevant to our determination here. The Commission has no authority to resolve disputes as to property rights; rather such matters must be resolved in a court of appropriate jurisdiction.⁴⁹

V. Conclusion

17. The phase 4 amendment request to fill and abandon the penstock in place is the fastest, least disruptive, and least adverse environmental option to proceed with the surrender of the project license. The amendment should be approved.

The Commission orders:

(A) The City of Loveland's (licensee) application to amend the license for the Loveland Hydroelectric Project, filed on March 4, 2019, and supplemented on August 2, 2019, to fill and abandon 1,600 feet of underground penstock in the Idlewild Subdivision is approved, as modified by paragraphs (B), (C), (D), and (E) below.

(B) Prior to commencing ground disturbing activities, the licensee must coordinate with property owners within the subdivision as described in this order to identify optimal times to access and temporarily block access to the subdivision to complete the work with minimal disturbance, and must provide reasonable advance notice of actual ground disturbing activities to property owners.

(C) Should the licensee access the penstock in the previously replaced segment located between P.I. 14 and P.I. 16 as described in licensee's amendment application, the licensee must, prior to commencing fill activities, including tapping into the pipeline, at this site, test the penstock at the proposed pipeline access point for the presence of asbestos-containing material. If testing is positive for asbestos-containing material, the

⁴⁷ Association, Filing at 2.

⁴⁸ Surrender Application, Exhibit B at 57.

⁴⁹ See, e.g., *Appalachian Power Co.*, 153 FERC ¶ 61,299, at P 29 (2015) (describing how a dispute over a licensee's easement must be resolved in a court of appropriate jurisdiction, and not before the Commission); *Firstlight Hydro Generating Co.*, 142 FERC ¶ 62,256, at n.12 (2013) ("Any disputes regarding property rights are not within the Commission's [j]urisdiction . . .").

City of Loveland must follow all applicable state, local, and federal regulations, including EPA and OSHA regulations, in conducting the fill work at that access point.

(D) The licensee may not begin penstock filling activities until the Commission's Division of Dam Safety and Inspections - San Francisco Regional Office has reviewed and commented on the submitted plans and specifications, determined that all preconstruction requirements have been satisfied, and has authorized the start of filling activities.

(E) Within 30 days of completing all work authorized in this order, the licensee must file a final report with photographs that demonstrates that the project's penstock has been decommissioned in accordance with this order. The licensee must submit two copies of this report to the Commission's Division of Dam Safety and Inspections (D2SI) – San Francisco Regional Office, and one copy to the Director of D2SI.

(F) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l (2018), and the Commission's regulations at 18 C.F.R. § 385.713 (2019). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.