

167 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eagle Crest Energy Company

Project No. 13123-002

ORDER GRANTING EXTENSION OF TIME TO COMMENCE AND COMPLETE
PROJECT CONSTRUCTION PURSUANT TO ARTICLE 301

(Issued May 7, 2019)

1. On November 7, 2018, and supplemented on December 18, 2018, Eagle Crest Energy Company (Eagle Crest), licensee for the Eagle Mountain Pumped Storage Hydroelectric Project No. 13123 (Eagle Mountain Project), requested extensions of time to commence project construction (until June 19, 2020) and to complete project construction (until June 19, 2023), as required by Article 301 of the project license.¹ The unconstructed project is located on the site of the inactive Eagle Mountain mine, in Riverside County, California, near the town of Desert Center, and will operate as a closed-loop, pumped storage facility with water for the initial reservoir fill and replenishment supplied by groundwater wells. The project occupies private lands and federal land under the jurisdiction of the U.S. Department of the Interior, Bureau of Land Management (BLM).

I. Background

2. The license for the Eagle Mountain Project authorized the construction of: (a) an upper reservoir; (b) an upper water conveyance system; (c) generating/pumping facilities; (d) a lower reservoir; (e) a lower water conveyance system; (f) a transmission system; (g) water supply system; (h) a water treatment system; and (i) appurtenant facilities. Article 301 of the license requires the licensee to commence construction of the project works within two years from the issuance date of the license (by June 19, 2016) and to complete construction of the project within seven years from the issuance date of the license (by June 19, 2021). Article 301 also states that the licensee may not commence construction of the project works until it has acquired all the necessary rights to construct,

¹ *Eagle Crest Energy Company*, 147 FERC ¶ 61,220 (2014).

operate, and maintain the project pursuant to standard Article 5 of Form L-2 (October 1975).²

3. On March 17, 2016, by unpublished order, Commission staff granted the licensee's request to extend the deadline to commence construction to June 19, 2018. The order reminded the licensee that, pursuant to section 13 of the Federal Power Act (FPA),³ the deadline for starting construction may only be extended once, for a period not exceeding two additional years and that therefore, the Commission could not grant any further extensions of time for the commencement of project construction. Eagle Crest did not commence construction of the project by the extended deadline. Accordingly, the license was subject to termination under section 13.⁴

4. On October 23, 2018, the America's Water Infrastructure Act of 2018 (Act)⁵ was enacted. Section 3001(b) of the Act amended section 13 of the FPA to allow the Commission to grant extensions of time for the commencement of construction for up to eight years.

5. In its November 7, 2018 filing, Eagle Crest requests a two-year extension of time to commence construction. Eagle Crest argues that the Commission may grant extensions of time for the commencement of construction for up to eight years under the Act. And the licensee asserts that its good faith and due diligence in working toward construction of the project warrant an extension of the construction deadline. To support its request, Eagle Crest describes the steps it has taken in diligently pursuing the development of the project, including the timely submission of project-specific monitoring and management plans required by the license. The licensee also states that it has been working to obtain the necessary rights to lands within the project boundary to commence construction, both by coordinating with BLM and in acquiring private lands. In its December 18, 2018 filing, Eagle Crest also requested a corresponding two-year extension of time to complete project construction.

² *Id.*, at Ordering Paragraph (E).

³ 16 U.S.C. § 806 (2012).

⁴ *See id.* (“In case the licensee shall not commence actual construction . . . within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.”).

⁵ America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018).

6. In response to Eagle Crest's November 7 filing, the National Parks Conservation Association (Association) filed a motion to intervene and comments opposing the request for extension of time to commence construction. The Association argues that the Commission does not have authority to grant the licensee an extension of time pursuant to the America's Water Infrastructure Act⁶ because the deadline to commence construction had already passed before the Act went into effect.⁷ Alternatively, the Association also argues that should the Commission grant an extension of time to commence construction, it would need to conduct a supplemental environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) based on new information and changed circumstances.⁸ Specifically, the Association asserts that the need for the project identified in the original EIS has since been reduced and needs to be reassessed, and that the groundwater impact modeling in the original EIS has been replaced by newer modeling results.⁹ Additionally, in response to Eagle Crest's December 18 filing, the Association filed comments opposing the request for extension of time to complete construction. The Association argues that Eagle Crest has not shown that project completion is viable and has failed to diligently pursue the project.¹⁰

7. The Desert Protection Society (Society) also filed comments opposing the requests for extensions of time to commence and complete construction. The Society asserts that it is a party to this order because it had intervenor status in the proceeding issuing the project license.¹¹ The Society argues that the Commission must issue an order terminating the project license because the licensee did not commence construction by the June 19, 2018 deadline.¹² Similar to the Association, the Society contends that the Commission cannot grant an extension of time to commence project construction because the America's Water Infrastructure Act went into effect after the deadline passed, and the

⁶ National Parks Conservation Association November 15, 2018 Motion at 4.

⁷ *Id.*

⁸ *Id.* at 11.

⁹ *Id.* at 12-13.

¹⁰ Association's December 26, 2018 Comment at 1.

¹¹ Desert Protection Society November 19, 2018 Comment at 2. The Society explains in its comment that when it intervened on March 1, 2010, it was named Citizens for the Chuckwalla Valley and that it was reorganized on October 26, 2011 as the Desert Protection Society. *Id.*

¹² *Id.*

Act cannot be applied retroactively.¹³ Finally, the Society argues that Eagle Crest has failed to show the reasonable diligence necessary to warrant an extension of the deadline to complete construction.¹⁴

II. Discussion

8. The Society's argument that the Commission must terminate the license is unfounded. The FPA states that if a licensee does not commence construction by the deadline prescribed in the license or as extended, the Commission shall issue notice to the licensee and subsequently terminate the license by written order.¹⁵ The Commission had not issued notice to the licensee of termination or begun the license termination process when the America's Water Infrastructure Act was enacted. Accordingly the license was still in effect. Now that the Act permits the Commission to extend further construction commencement deadlines, the Commission is not required to terminate the license rather than extend the deadline.

9. We also disagree with the Association's and Society's claim that extending the commencement of construction deadline under the recent America's Water Infrastructure Act would be an improper retroactive application of the law. Section 3001 of the Act does not limit the Commission's authority to grant extensions of up to eight years to exclusively projects licensed after passage of the legislation.¹⁶ Accordingly, the Act leaves to the Commission the discretion to determine whether projects such as the licensee's, which previously missed the deadline to commence construction under section 13 of the FPA as previously constituted but still have a valid license, can be granted a further extension of time.¹⁷ Extending the commencement of construction

¹³ *Id.* at 3.

¹⁴ Society's December 26, 2018 Comment at 3.

¹⁵ 16 U.S.C. § 806.

¹⁶ Section 3001(b) states in full: "Section 13 of the Federal Power Act (16 U.S.C. 806) is amended in the second sentence by striking 'once but not longer than two additional years' and inserting 'for not more than 8 additional years.'"

¹⁷ As the administering agency of section 3001 of the Act, the Commission is entitled to deference in interpreting the statute when it is silent or ambiguous. *U.S. Dep't of the Interior v. FERC*, 876 F.3d 360, 364 (1st Cir. 2015) (citing *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 58-59 (1st Cir. 2006)); *see also*

deadline to June 19, 2020, four years beyond the original deadline, is well within the eight-year window permitted by the statute.

10. Additionally, we find the Association's argument that a decision to extend the deadline to commence construction necessitates the preparation of a supplemental EIS for the project unconvincing. The Commission's regulations categorically exclude the preparation of a supplemental EIS for certain types of actions which do not have a significant effect on the human environment.¹⁸ Specifically, section 380.4(a)(1) of the Commission's regulations categorically excludes certain "procedural, ministerial, or internal" administrative decisions.¹⁹ Granting licensee's request for extension of time to commence project construction is administrative in nature and does not approve any changes to the project development and affect the environment in any way not contemplated by the license. Accordingly, a supplemental EIS is not necessary for the requested action.

11. Finally, we disagree with the Association and the Society that Eagle Crest has failed to diligently pursue the project, and that accordingly an extension of the deadline to complete construction is not warranted. Section 13 of the FPA grants the Commission the discretion to extend the deadline to complete construction when the project is carried out in good faith and with reasonable diligence and the extension is not incompatible with the public interest.²⁰ Eagle Crest demonstrated in its November 7 filing that it is diligently pursuing the project. Specifically, it has timely submitted to the Commission 16 required project-specific preconstruction monitoring and management plans, 15 of which have been approved, and timely filed progress reports showing its efforts to obtain necessary land rights and to implement its Historic Properties Management Plan. Neither the Association nor the Society demonstrates that granting an extension is contrary to the

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

¹⁸ 18 C.F.R. § 380.4 (2018). See also *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) ("An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an [environmental assessment] nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious.").

¹⁹ 18 C.F.R. § 380.4(a)(1).

²⁰ 16 U.S.C. § 806.

public interest. We therefore conclude that Eagle Crest has sufficiently justified its request to extend the construction deadlines.²¹

12. The Commission issues notices and entertains intervention requests in post-licensing proceedings that entail a material change in the plan of project development or in the terms and conditions of the license, or that would adversely affect the would-be intervenor's rights in a manner not contemplated by the license.²² Post-licensing proceedings that do not involve such issues generally do not adversely affect any entities' rights because they typically do not alter the licensee's obligations or impose new burdens on third parties. Specifically, questions of timing are usually administrative matters²³ that do not address the merits of the project in question. Accordingly, a request to extend the deadline for the commencement of project construction is generally not an action subject to intervention.²⁴ This is the case here, where the National Parks

²¹ The Association cites to *JDJ Energy Co.*, 105 FERC ¶ 61,135 (2003) and (*JDJ Energy*) *Summit Energy Storage, Inc.*, 88 FERC ¶ 61,257 (1999) (*Summit*) to support its argument that Eagle Crest has not offered any concrete evidence to “advance the imminence or likelihood of project [completion].” Association’s filing at 1 (citing *Northumberland Hydro Partners, L.P.*, 95 FERC ¶ 61,013 (2001)). These cases are distinguishable because in both instances the Commission found that, following an initial two-year deadline and a two-year extension, plus two additional two-year extensions permitted by project-specific statutes, the licensees had failed to demonstrate progress towards project construction and operation. In *JDJ Energy*, the Commission found that “it did not appear that JDJ was making significant, concrete progress towards the construction and operation of the project” and that the “progress reports filed by JDJ indicated that there had been little progress in project activities for well over one year.” *JDJ Energy Co.*, 105 FERC ¶ 61,135 at P 10. In *Summit*, the Commission found that the licensee “made no meaningful effort to develop the project since the last extension was granted, and has in fact taken steps to end its development effort.” *Summit*, 88 FERC at 61,812.

²² See, e.g., *Public Utility District No. 1 of Okanogan County, Washington*, 160 FERC ¶ 61,094, at P 7 (2017), *reh’g denied*, 162 FERC ¶ 61,040 (2018); *Bangor Hydro-Electric Co.*, 87 FERC ¶ 61,035, at 61,130 (1999). While not germane here, the Commission does allow intervention by entities that are required by the project license to be consulted on the matters at issue in a post-license proceeding. For example, a state resource agency could intervene in a proceeding to review a fisheries plan as to which the licensee was required to consult with the agency.

²³ *Wisconsin Valley Improvement Company*, 88 FERC ¶ 61,054, at 61,136 (1999).

²⁴ *Id.*

Conservation Association has not explained how it would be adversely affected by the proposed extension and thus, has not stated a case for why its intervention in this post-licensing proceeding would be appropriate. National Parks Conservation Association's motion to intervene is therefore denied.

13. Each post-licensing proceeding is a distinct matter, requiring new intervention – if allowed – by those who wish to participate.²⁵ This is to prevent the post-license relitigation of issues already addressed in the licensing proceeding. As explained above, the Commission will allow interventions in post-license proceedings, in appropriate instances. Here, the Desert Protection Society did not file a motion to intervene in this post-licensing proceeding, and their intervenor status in the now-final license proceeding does not carry over to this proceeding. In any event, the Desert Protection Society made no demonstration that it would be adversely affected by the proposed extension, which, as noted, is required for a motion to intervene in this post-licensing proceeding.

14. Finding that the reasons advanced by the licensee justify the extension of time requests, we grant the request to extend the deadline to commence construction until June 19, 2020, and grant the licensee's request to correspondingly extend the deadline to complete construction to June 19, 2023. We remind the licensee that it must satisfy all preconstruction requirements of the license prior to beginning construction.²⁶

The Commission orders:

(A) Eagle Crest Energy Company's requests to extend the deadlines to commence and complete construction for the Eagle Mountain Pumped Storage Hydroelectric Project No. 13123, filed on November 7, 2018, and December 18, 2018, respectively, are approved. The extended deadline to commence project construction is June 19, 2020, and the extended deadline to complete project construction is June 19, 2023.

²⁵ *Puget Sound Energy, Inc.*, 112 FERC ¶ 61,116, at P 6 (2005); *see City of Tacoma, Washington*, 109 FERC ¶ 61,318, at P 9 (2004).

²⁶ This order only grants Eagle Crest's requests to extend the construction deadlines and does not affect any of the preconstruction license requirements, including standard Article 5's requirement to acquire the rights to all lands necessary for project operation within five years of issuance of the license, as noted by the Association. Association's December 24, 2018 Filing at 2.

(B) National Parks Conservation Association's motion to intervene is denied.

(C) 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. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2018). 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. Commissioner Glick is dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Eagle Crest Energy Company

Project No. 13123-002

(Issued May 7, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I support Eagle Crest's requests to extend the deadlines in its license. I also agree with most of today's order granting those extensions. Eagle Crest has diligently pursued the project and it is appropriate to extend the deadlines for commencing and completing construction, consistent with the Commission's authority as modified by the America's Water Infrastructure Act of 2018 (AWIA).¹

2. I disagree, however, with the Commission's decision to deny the National Parks Conservation Association's (Association) motion to intervene. The Association has adequately stated its interests in the proceeding and explained the adverse effects that the proceeding might have on those interests.² That should be sufficient for the Commission to grant the Association party status and consider its arguments on the merits.³

¹ America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018).

² Association Motion to Intervene and Opposition at 2-4. The Desert Protection Society (Society) also filed comments on Eagle Crest's extension requests, but did not file a motion to intervene, apparently assuming that its status as a party in the underlying licensing proceeding would carry over to this proceeding. Society Opposition at 2. Although one might excuse that failure given that the Commission did not notice Eagle Crest's filing as a new proceeding requiring intervention, the fact remains that it did not seek to intervene in this new proceeding, which is required under Commission precedent. *See Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, at P 13 & n.30 (2019). In any case, while the Commission makes that failure the nominal basis for denying intervention, the logic of the Commission's order strongly suggests that the outcome would be the same even if the Society had filed a new motion to intervene.

³ *See* 18 C.F.R. § 385.214(b) (2018) (stating the bases for intervention); *see also id.* § 385.214(c)(1) ("If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.").

3. Instead, the Commission declares that this is not the type of proceeding in which it permits intervention (although today's order also seems to suggest that there may be exceptions, not enumerated here, to that general rule).⁴ Apparently, the Commission regards this type of proceeding as an immaterial modification to the license, meaning that our decisionmaking would not benefit from comments by affected entities.⁵ Although I agree that a post-licensing proceeding generally should not re-litigate the underlying license, that does not mean that would-be intervenors have nothing useful to say about the determinations that the Commission must make in that proceeding. For example, I have reviewed the filings by the Association and the Society regarding Eagle Crest's diligence as well as the legality of applying the AWIA to this project. Although I ultimately was not persuaded by either group's arguments, I found them useful in making my decision. At the end of the day, I do not believe that the Commission should grant or deny intervention based on what we think a would-be intervenor may say in their comments. If we disagree with commenters' arguments or find that they are not germane, we should so say on the record, rather than keeping them out of the proceeding altogether.

4. I fully recognize the importance of administrative efficiency, especially when it comes to hydroelectric licensing where licenses take years to process. But just as a hospital should seek to do more than simply minimize the length of patient stays, the Commission cannot let the desire for administrative efficiency prevent us from developing a full record and giving that record the consideration it deserves. In any case, today's order responds to the Association's and the Society's merits arguments in four concise and convincing paragraphs⁶—hardly an oppressive administrative burden for the Commission. By denying intervention, however, today's order deprives those entities of the ability to challenge the merits of the Commission's responses on appeal.⁷ I believe that we would be better served by permitting intervention in these proceedings, responding fully to would-be intervenors' arguments, and allowing them to challenge our responses before a court and vindicate any rights they may have.

For these reasons, I respectfully dissent in part.

⁴ *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117 at P 12.

⁵ *Id.*

⁶ *Id.* PP 8-11.

⁷ 16 U.S.C. § 825l(b) (2012) (providing that “[a]ny party to a proceeding” may appeal the Commission's order in that proceeding); see *N. Co lo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) (a non-party must be considered a party only “for the limited purpose of reviewing the agency's basis for denying party status”).

Richard Glick
Commissioner