

162 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

FFP Missouri 15, LLC
FFP Missouri 16, LLC

Project Nos. 13762-003
13753-003

ORDER DENYING REHEARING

(Issued March 15, 2018)

1. On September 29, 2017, the Director of the Office of Energy Projects (Director) issued original licenses (License Orders) to FFP Missouri 15, LLC (FFP Missouri 15) to construct, operate, and maintain the 5.0-megawatt (MW) Morgantown Lock and Dam Hydroelectric Project No. 13762 (Morgantown Project)¹ and to FFP Missouri 16, LLC (FFP Missouri 16) to construct, operate, and maintain the 6.0-MW Opekiska Lock and Dam Hydroelectric Project No. 13753 (Opekiska Project).² On October 25, 2017, the West Virginia Department of Environmental Protection (West Virginia DEP) and the West Virginia Division of Natural Resources (collectively, West Virginia) requested rehearing of the Opekiska License Order. On October 27, 2017, the City of Morgantown, West Virginia (Morgantown) and the Monongahela River Trails Conservancy (River Conservancy) requested rehearing of the License Orders, and West Virginia requested rehearing of the Morgantown License Order.³ As discussed below, we deny rehearing.

¹ *FFP Missouri 15 Hydroelectric, LLC*, 160 FERC ¶ 62,258 (2017) (Morgantown License Order). The Morgantown Project is located at the U.S. Army Corps of Engineers' (Corps) Morgantown Lock and Dam facility on the Monongahela River, in the City of Morgantown, Monongalia County, West Virginia.

² *FFP Missouri 16, LLC*, 160 FERC ¶ 62,257 (2017) (Opekiska License Order). The Opekiska Project is located at the Corps' Opekiska Lock and Dam facility on the Monongahela River, near the community of Everettville, Monongalia County, West Virginia.

³ In addition, on October 27, 2017, the Upper Monongahela River Association filed a request for rehearing of the License Orders. On November 21, 2017, the Commission rejected its request for rehearing as it never filed a motion to intervene in either proceeding and, thus, was not a party to either proceeding. *See FFP Missouri 15 Hydroelectric, LLC*, 161 FERC ¶ 61,209 (2017) (Notice Rejecting Request for Rehearing).

I. Background

2. On February 27, 2014, FFP Missouri 15 and FFP Missouri 16 (collectively, FFP) filed license applications for the Morgantown and Opekiska projects. On February 11, 2016, while the Commission was reviewing the license applications, FFP submitted to the West Virginia DEP applications pursuant to section 401 of the Clean Water Act (CWA)⁴ for water quality certifications for the Morgantown and Opekiska projects. West Virginia DEP received the applications on February 12, 2016.⁵ On March 9, 2016, West Virginia DEP deemed the applications complete, and stated that, per West Virginia regulations, it had one year from that date to act on FFP's requests.⁶ On March 8, 2017, West Virginia DEP issued section 401 water quality certifications for the projects, and filed the certifications with the Commission on March 9, 2017. The certifications included 18 conditions for the Morgantown Project, and 18 conditions for the Opekiska Project.

3. In licensing the Morgantown and Opekiska projects, Commission staff determined that, by not acting on FFP's requests within a year of receiving the applications, West Virginia DEP waived its section 401 water quality certification authority.⁷ Despite West Virginia DEP's reliance on West Virginia regulations, Commission staff explained that the CWA and the Commission's regulations clearly state that the triggering event for the one-year waiver period is the day the certifying agency receives the request for water quality certification.⁸ Thus, West Virginia DEP had had until February 12, 2017, to act on FFP's requests. As it did not issue the water quality certifications until March 8, 2017, it waived its authority.

4. As a result of West Virginia DEP's waiver, the conditions included in its waived certifications were no longer mandatory. Several of the conditions were determined to be administrative in nature, and were not considered for inclusion in the license. Commission staff, however, considered all other conditions as recommendations under section 10(a)(1) of the Federal Power Act (FPA).⁹ Ultimately, for reasons discussed in

⁴ 33 U.S.C. § 1341(a)(1) (2012).

⁵ In a February 16, 2016 Filing, Rye Development (parent company of FFP) provided delivery receipts demonstrating that the certification applications were delivered to the West Virginia DEP on February 12, 2016.

⁶ W. Va. Code R. § 47-5A-4.1.a.1 (2017).

⁷ See Morgantown License Order at PP 39-42; Opekiska License Order at PP 35-38.

⁸ See Morgantown License Order at PP 39-42; Opekiska License Order at PP 35-38.

⁹ 16 U.S.C. § 803(a)(1) (2012).

the License Orders, Commission staff declined to include West Virginia DEP's conditions in either license.

5. On October 27, 2017, Morgantown, West Virginia, and River Conservancy requested rehearing of the License Orders.¹⁰ West Virginia states that Commission staff erred in its determination that West Virginia DEP waived its section 401 authority. Morgantown and River Conservancy support this contention, and further assert that the License Orders failed to include adequate license conditions that would protect recreation at the projects. Morgantown further states that, in not including adequate recreation conditions, the Commission failed to give equal consideration to non-power uses of the projects, as required by the FPA.

II. Discussion

A. Section 401 Waiver

6. Section 401 of the CWA requires an applicant for a federal license, the construction or operation of which may result in a discharge to the navigable waters of the United States, to obtain a water quality certification, or waiver thereof, from the state in which the discharge originates.¹¹ Section 401 further states that if a state “refuses to act” on a request for water quality certification “within a reasonable period of time (which shall not exceed one year) after receipt of such a request,” the water quality certification requirements of section 401 are waived.¹²

7. West Virginia asserts that as the state is “charged with administering section 401 of the CWA in West Virginia” it is the state’s regulations, and not the Commission’s, that should dictate when the triggering event for the one-year waiver period occurs.¹³ West Virginia regulations state that the one-year waiver period is triggered when West Virginia DEP deems that an application is complete.¹⁴ Therefore, the state contends, because West Virginia DEP determined on March 9, 2016, that FFP’s applications were complete, West Virginia DEP had until March 9, 2017, to act on the requests, and was within the one-year waiver period when it issued the water quality certifications on March 8, 2017.

¹⁰ West Virginia DEP filed separate rehearing requests for each proceeding. However, due to the similarity of the issues raised in the rehearing requests, we are consolidating their requests into a single order.

¹¹ 33 U.S.C. § 1341(a)(1) (2012).

¹² *Id.*

¹³ *See* West Virginia’s October 25, 2017 Rehearing Request at PP 14-18.

¹⁴ W. Va. Code R. §47-5A-4.1.a.1 (2017).

8. In support, West Virginia relies on the Fourth Circuit Court of Appeals' holding in *AES Sparrows Point LNG, LLC v. Wilson (AES Sparrows)*.¹⁵ West Virginia states that because West Virginia DEP, like the Corps in *AES Sparrows*, is charged with administering the CWA, West Virginia's regulations, and not those of the Commission, should determine when the triggering event occurs.¹⁶

9. Morgantown and River Conservancy support West Virginia's position, and request that the Commission include the water quality certifications, including their conditions, in the licenses for the Morgantown and Opekiska projects.¹⁷

10. As a threshold matter, we disagree with West Virginia's contention that, as the certifying state agency, it is the appropriate agency to interpret any ambiguous terms of the CWA.¹⁸ In general, courts do not afford deference to state agency interpretations of federal law even where state agencies are delegated substantial roles in cooperative federalist schemes.¹⁹ And while it is true that states are sometimes given deference by courts in interpreting federal law where a federal agency has approved a state agency's

¹⁵ *AES Sparrows Point, LLC v. Wilson*, 589 F.3d 721 (2009) (*AES Sparrows*).

¹⁶ See West Virginia's October 25, 2017 Rehearing Request at PP 15-16.

¹⁷ See City of Morgantown's October 27, 2017 Rehearing Request at PP 14-18; River Conservancy's October 27, 2017 Rehearing Request.

¹⁸ West Virginia Request for Rehearing at P 16.

¹⁹ See *New York State Dep't of Env'tl. Cons. v. FERC*, No. 17-3770, slip op. at 8 (2d Cir. Mar. 12, 2018) (*New York v. FERC*) (rejecting state's argument that its interpretation of section 401 should be given deference because section 401 "contemplates a joint federal-state program"); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (holding that a state agency's interpretation of a federal statute is reviewed *de novo*) (citing *AMISUB (PSL), Inc. v. Colorado Dep't of Social Serv.*, 879 F.2d 789, 796 (10th Cir. 1989) (reviewing state Medicaid Plan, court subjected state agency's determination of procedural and substantive compliance with federal law to *de novo* review), *cert. denied*, 496 U.S. 935 (1990); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (reviewing state department of social services' interpretation of federal housing assistance law *de novo*); *Lewis v. Hegstrom*, 767 F.2d 1371, 1376 (9th Cir.1985) (reviewing construction of Medicaid Act *de novo*, without deference to state agency's construction)); see also *Three Lower Cty. Cmty. Health Servs., Inc. v. Maryland*, 498 F.3d 294, 302 (4th Cir. 2007) (noting that the Fourth Circuit has repeatedly stated that "[a] state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*") (citing *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir.1999)).

plan or interpretation of federal law,²⁰ that is not the case here. There is no evidence that the Environmental Protection Agency – the federal agency charged with primary federal oversight of the CWA²¹ – has approved any of West Virginia DEP’s procedural regulations.²²

11. As the License Orders discussed,²³ the Commission’s hydropower regulations have stated clearly since 1987 that the triggering event for the one-year waiver period is the receipt of the application.²⁴ In adopting those regulations, the Commission noted that an approach which identifies the date an application is deemed acceptable as the triggering event “fails to enforce the clear text of the waiver provision of the CWA” by potentially forcing an applicant to wait longer than a year for a state agency to act on their request.²⁵ The Commission has consistently found that the one-year waiver period begins when the certifying agency receives the request for water quality certification.²⁶

²⁰ See, e.g., *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) (“In these circumstances, in which the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state’s interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference.”).

²¹ See 33 U.S.C. § 1341(a)(1) (2012) (“Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency shall administer this chapter.”).

²² See *New York v. FERC*, No. 17-3770, slip op. at 8-9 (interpreting the section 401 waiver provision *de novo* because the EPA had not approved the state’s interpretation).

²³ See Morgantown License Order at P 41; Opekiska License Order at P 37; see also Multi-Project Environmental Assessment for the Opekiska Project, *et al.* at 13 (noting that “The failure to act on a request for water quality certification within a reasonable period of time, not to exceed one year, after receipt of such request constitutes a waiver.”).

²⁴ 18 C.F.R. § 4.34(b)(5)(iii) (2017).

²⁵ *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, 52 FR 5446, 5447-48 (Feb. 23, 1987).

²⁶ See, e.g., *Woodland Pulp LLC*, 154 FERC ¶ 62,189, at PP 30-35 (2016); see also *Virginia Power Company*, 110 FERC ¶ 61,241, at PP 14-21 (2005); *Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at PP 12-13, *on rehearing*, 161 FERC ¶ 61,186, at PP 38, 41 (2017) (rejecting New York State Department of Environmental Conservation’s argument that the section 401 one-year waiver period is triggered when the state certifying agency deems the application “complete”).

The Court of Appeals for the Ninth Circuit found the Commission's interpretation to be "fully consistent with the letter and intent" of the CWA.²⁷ The certifying agency remains free to deny the request for water quality certification with or without prejudice within one year if the certifying agency determines that an applicant fails to fully comply with the state's filing requirements or fails to provide timely and adequate information necessary to support granting a water quality certification.²⁸

12. Further, the case West Virginia relies on, *AES Sparrows*, is inapposite. That case concerned a request for a water quality certification in connection with a Corps' dredge and fill permit under section 404 of the CWA,²⁹ for a proposed liquefied natural gas terminal subject to the Commission's authority under the Natural Gas Act.³⁰ In *AES Sparrows*, the court considered a Corps regulation providing that, in determining whether the waiver period has started, the Corps' district engineer "will verify that the certifying agency has received a valid request for water quality certification."³¹ In denying AES's petition for review, the Fourth Circuit deferred to the Corps' interpretation of the CWA, as set forth in its regulations. The court held that the Corps' regulation was "permissible in light of the statutory text" and explained that it must defer" to that interpretation under *Chevron*.³²

²⁷ *State of Cal. ex. rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1553-1554 (9th Cir. 1992) (affirming Commission finding of waiver based on state failure to act within one year of receipt of water quality certification request); *see also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (upholding Commission regulation establishing receipt of a water quality certification application as the triggering event for the one-year waiver period under section 401(a)(1)).

²⁸ Order No. 533, 56 Fed. Reg. 23,108, at 23,127, *order on reh'g*, 56 Fed. Reg. 61,137, at 61,149; Order No. 464, 52 FR 5446 at 5447.

²⁹ 33 U.S.C. § 1344 (2012).

³⁰ *AES Sparrows*, 589 F.3d at 723-24. The Commission was not a party in the *AES Sparrows* case. Moreover, the Commission does not have a corresponding regulation under the Natural Gas Act that interprets section 401 and there was no Commission interpretation of the 401 waiver provision before the court in *AES Sparrows*.

³¹ *AES Sparrows*, 589 F.3d at 729 (quoting 33 C.F.R. § 325.2(b)(1)(ii)).

³² *Id.* *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) (granting deference to interpretations of statutes made by those government agencies charged with enforcing the statute, unless such interpretations are unreasonable).

13. Here, none of the factors that led to the Fourth Circuit's decision in *AES Sparrows* are present.³³ More apt is the U.S. Court of Appeals for the Second Circuit's recent decision in *New York v. FERC*,³⁴ in which the court affirmed that the "plain language of Section 401" requires states to grant or deny an application for a water quality certification within one year of receiving the application, not when the state deems the application complete.³⁵

14. For the reasons discussed, the Commission denies rehearing on this issue, and affirms that West Virginia DEP waived its authority to act on FFP's applications for water quality certification by failing to act within one year of receiving FFP's applications.

B. Reconsideration of the Conditions of the Water Quality Certifications as Recommendations

15. Even when a state waives water quality certification, the Commission may include certification conditions in a license when it deems them to be consistent with the FPA.³⁶ However, the mere fact that a condition has been proposed by a state, or could be perceived as minor, does not mean that it is consistent with the comprehensive improvement/development standard set forth in section 10(a)(1) of the FPA.³⁷ Parties recommending that a condition be included in a license have a responsibility "to support its recommendation with substantial evidence."³⁸ Neither the identity of the entity

³³ In hydroelectric license proceedings, the issuance of a 404 permit is solely a matter for the Corps, and "is not required by the Commission either before issuance of a license or as a license requirement." *C.f. So. Cal. Edison Co.*, 113 FERC ¶ 61,063, at P 20 (2005) (explaining that issuance of a license is not dependent on the issuance of a 404 permit).

³⁴ *New York v. FERC*, No. 17-3770 (2d Cir. Mar. 12, 2018).

³⁵ *Id.* slip op. at 10.

³⁶ *See, e.g., FPL Energy Maine Hydro, LLC*, 139 FERC ¶ 61,215 at P 15 (2012) (including license conditions from waived certification where both state licensee and state agency had filed comments in support of the conditions and Commission staff had reviewed and found them appropriate); *Twin Falls Canal Co.*, 45 FERC ¶ 61,423, at pp. 62,305-06 (1989) (including in license three conditions from untimely certification that the Commission found "necessary").

³⁷ 10 U.S.C § 803(a)(1) (2012) (stating that a licensed project "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway . . .").

³⁸ Section 313(b) of the FPA requires Commission findings to be supported by substantial evidence. 16 U.S.C. § 825(l)(b) (2012).

proposing the recommendation, nor the scale of the recommendation, nor whether the recommendation affects the safety or operation of the project obviate that responsibility.³⁹

16. Here, staff carefully considered the conditions in the certifications and decided not to include them in the license for the reasons discussed herein and in the License Orders. The Commission is satisfied that the License Orders, as conditioned, are appropriately adapted to a comprehensive plan for the Morgantown and Opekiska dams, and balance waterpower development, the protection of fish and wildlife, and recreation.

17. In its rehearing requests, West Virginia states that FFP “has authorized the West Virginia DEP to represent on its behalf that it does not object to the water quality certification conditions being included in the Commission license.”⁴⁰ West Virginia provides no additional support for why the Commission should include its conditions.

18. Our decision whether to include the waived conditions in the licenses is guided by the FPA’s comprehensive improvement/development standard, not solely by parties’ proposals. Here, we agree with staff’s determination that the conditions at issue are not required to meet resource needs, which petitioners do not challenge. We also note, however, that FFP is free to work with West Virginia to implement these measures, which do not in any way interfere with the requirements of the licenses. On this basis, FFP may voluntarily implement the recreation measures included in the waived water quality certification conditions 5, 6, 7, 8, and 9.⁴¹

³⁹ *C.f. FPL Energy Maine Hydro, LLC*, 95 FERC ¶ 61,016, at 61,031 (2001).

⁴⁰ *See* West Virginia’s Rehearing Request at 18.

⁴¹ In sum, the Morgantown water quality certification condition 5 involves the construction of a permanent, heated public restroom that is in compliance with the Americans with Disabilities Act (ADA); condition 6 contemplates an ADA-compliant fishing access platform and angler walkway, as well as a non-ADA-compliant walkway; condition 7 calls for the construction of at least 5 rock vanes; condition 8 deals with trash receptacles; and condition 9 seeks 24-hour a day, 7-day per week access to the fishing platform, angler walkway, walkway and restroom. Regarding the Opekiska water quality certification, condition 5 discusses the construction of a permanent, ADA-compliant public restroom; condition 6 involves the construction of a fishing pier near the outlet retaining wall; condition 7 covers construction of an ADA-compliant angler walkway; condition 8 deals with trash receptacles, among other matters; and condition 9 deals with 24-hour a day, 7-day per week access to the fishing pier, angler walkway, and restroom. Many of these conditions would require ADA-compliant facilities. We note that a licensee’s obligation to comply with the ADA exists independent of its project license, and the Commission has no statutory role in implementing or enforcing the ADA as it applies to its licensees. *Northern States Power Company*, 78 FERC ¶ 61,363, at 62,510

19. The Commission notes that Article 411 in both the Morgantown and Opekiska licenses require the development of recreation amenities that are similar to West Virginia DEP's conditions and would address most of Morgantown and River Conservancy's recreation concerns. The License Orders currently require parking for recreational users, portable restrooms, angler paths, fishing platforms, and rock vanes/jetties to enhance fishing. Commission staff ultimately determined that the recreation amenities included in the License Orders were sufficient, and that conditions 5, 6, 7, 8, and 9 of the waived water quality certifications were unnecessary. A permanent heated restroom, as required by condition 5 of the Morgantown and Opekiska water quality certificates, would only constitute a minor enhancement over a portable restroom, and would require significant investment to construct. It would also require the licensee to pay to maintain the facility for the duration of the license.⁴² Because the anglers that currently fish at the Morgantown and Opekiska project sites already remove their trash, and no evidence of a trash problem at either project has been presented, the trash receptacles required by condition 8 of the Morgantown and Opekiska water quality certificates are unnecessary, and could in turn lead to the dumping of non-project-related waste.⁴³ The Commission finds these conclusions reasonable.

20. The Commission is also satisfied that the License Orders adequately protected fishing opportunities at the Morgantown and Opekiska project sites. Article 411 of the Morgantown License Orders requires the construction of two shoreline angler paths, one downstream of the dam and one upstream of the dam, as well as a fishing platform at the end of the downstream angler path.⁴⁴ Commission staff felt that the fishing platforms required by condition 6 of the Morgantown water quality certificate either presented significant safety concerns (if a fishing platform were to be placed on top of the powerhouse), or would present inconsistent fishing opportunities (if a fishing platform were placed on the riverward side of the powerhouse). In addition, Commission staff determined that a 1,600 foot-long angler walkway was not necessary, as significant informal shoreline angling access already exists downstream of the dam.⁴⁵ At the Opekiska Dam, Article 411 of the Opekiska License Order requires the construction of an angler access trail and fishing platform.⁴⁶ Construction of a 75-foot fishing pier and a

(1997). However, as stated in section 2.7 of our regulations, we expect licensees to consider the needs of persons with disabilities in the design and construction of their recreation facilities. 18 C.F.R. § 2.7 (2017).

⁴² See Morgantown License Order at P 119; Opekiska License Order at P 118.

⁴³ See Morgantown License Order at P 119; Opekiska License Order at P 118.

⁴⁴ See Morgantown License Order at PP 118-119.

⁴⁵ *Id.*, see also Joint Project EA at 161-162.

⁴⁶ See Opekiska License Order at P 121.

300-foot, ADA-compliant angler walkway was deemed unnecessary, as Article 411 contains appropriate recreation measures, and construction and operation of the Opekiska Project is not anticipated to have a negative impact on angler access.⁴⁷ In addition, Commission staff, upon reviewing recommendations from stakeholders,⁴⁸ agreed that rock vanes/jetties to enhance fishing opportunities at the project site were reasonable and cost effective, and included them as license conditions. Commission staff concluded, however, that the precise location and number of rock vanes, as set forth in Article 411 of the Morgantown License Order (and condition 7 of the Morgantown water quality certification), should be determined in consultation with all relevant stakeholders, not just the state, to ensure adequate angling opportunities. The Commission supports these conclusions, which the petitioners do not challenge.

21. In addition, although condition 9 of the Morgantown and Opekiska water quality certifications would require 24-hour-per-day, 7-day-per-week access to the recreation facilities, Standard Article 18 of the License Orders requires the licensee to make access to these facilities available to a reasonable extent.⁴⁹ This enables the licensee to consult with all relevant stakeholders, and determine an appropriate schedule that ensures the recreation facilities are accessible to a reasonable extent, without the licensee incurring potentially significant operating costs that may likely occur if it were required to keep the facilities open at all times. The Commission finds this strikes an appropriate balance between access and operating costs, and declines to adopt condition 9 of the Morgantown and Opekiska water quality certificates.

22. As discussed in the License Orders, waived water quality certification Conditions 10, 12, 13, 14, 15, and 17-18 of the Morgantown water quality certification, and 10, 12, 13, 14, 15, 16, and 18 of the Opekiska water quality certification were found to be administrative in nature,⁵⁰ and not included in the License Orders. The Commission supports Commission staff's determination regarding these conditions, and declines to discuss them further.

23. Commission staff did not include waived water quality certification condition 1 of the Morgantown and Opekiska water quality certifications, which would have required hourly water quality monitoring upstream of the Corps' lock, at the project intake, and downstream of the tailrace for the life of the project. Commission staff determined that

⁴⁷ *Id.* at P 120.

⁴⁸ West Virginia DEP's waived condition 7 for the Morgantown water quality certificate called for at least five rock vanes on the east descending bank, spaced 100 feet apart, extending 25-35 feet from shore. Rock jetties at the Opekiska Project site were recommended by the Upper Monongahela River Association, Inc.

⁴⁹ *See* Morgantown License Order at P 120; Opekiska License Order at P 118.

⁵⁰ "Administrative" conditions refer to those which do not include specific protection, mitigation, or enhancement measures.

the water quality monitoring plan included in Article 407 of the License Orders, which require water quality monitoring for the first three years of project operation, would enable the licensee to quickly identify and address any adverse effects of project construction and operation on water quality. In addition, Commission staff found that water quality monitoring in perpetuity may not be necessary, and instead noted that after the first three years of project operation the Commission would evaluate the water quality monitoring reports to determine whether it is necessary to require additional years of monitoring.⁵¹ The Commission finds staff's determination to be reasonable, and affirms it.

24. Commission staff did not include conditions 2 through 4 of the waived water quality certifications for the Morgantown and Opekiska licenses, because they require or relate to financial compensation for the loss of fish (i.e. compensatory mitigation) at the projects,⁵² which does not provide a direct, project-related benefit to aquatic resources, and is a form of damages, which the Commission has no authority to enforce.⁵³ We affirm this conclusion.

25. In addition, where it is not shown that entrainment mortality will have a significant adverse effect on the fishery population, it is Commission policy not to require compensatory mitigation for the incidental take of fish.⁵⁴ As noted in the Environmental Assessment (EA) and the License Orders, the desktop entrainment and turbine mortality study found that there is a low risk of impingement, and the mortality rate for entrained fish would only be approximately 7 percent.⁵⁵ Further, the types of fish that would be entrained and/or killed by the projects have a sufficiently high reproductive rate, such that the operation of the projects would not have a significant impact on fish populations.⁵⁶ Given the minimal impact the projects would have on fish populations, the Director

⁵¹ Morgantown License Order at PP 78-80, Opekiska License Order at PP 76-78.

⁵² Condition 3 would require the licensee to mitigate for the incidental take of fish due to the operation of the Morgantown and Opekiska projects. Condition 2 of West Virginia DEP's waived water quality certification requires the licensee to install certain connectors to be used to attach collection devices for fish entrainment studies. Similarly, condition 4 requires the licensee to develop impingement and entrainment studies, which would be used to determine the compensatory mitigation due pursuant to condition 3.

⁵³ Morgantown License Order at P 93; Opekiska License Order at P 92.

⁵⁴ See *Allegheny Energy Supply Co., LLC*, 109 FERC ¶ 61,028, at P 6 (2004); (quoting *City of New Martinsville v. FERC*, 102 F.3d 567 (D.C. Cir. 1996)).

⁵⁵ See EA at 105-11; Morgantown License Order at P 93; Opekiska License Order at P 91.

⁵⁶ See EA at 108.

properly declined to require compensatory mitigation for the incidental take of fish. Therefore, the Commission finds that Commission staff's decision not to include waived water quality certification condition 3 in the License Orders was appropriate. Further, as condition 3 is not included, conditions 2 and 4, which relate to condition 3, are unnecessary, and are not included in either the Morgantown or Opekiska license.

26. Waived condition 11 of the Morgantown and Opekiska water quality certifications would require the suspension of power generation during maintenance dredging activities, in order to protect mussel species. As FFP did not propose maintenance dredging during project operation, Commission staff determined that waived condition 11 was not necessary, and did not include it in License Orders. The Commission finds this conclusion to be reasonable.

27. West Virginia DEP's waived water quality certifications also contain conditions (condition 16 in the Morgantown Project water quality certification, and condition 17 in the Opekiska Project water quality certification) requiring FFP to operate the projects in "run-of-the-river-mode." As discussed in the License Orders, only the Corps has the authority to determine flow releases at Morgantown and Opekiska dams.⁵⁷ To that end, water available to the Morgantown and Opekiska projects for power generation (e.g. water flows) will be determined by the Corps pursuant to an operating plan and a memorandum of agreement (MOA) between the Corps and FFP.⁵⁸ As such, because West Virginia DEP cannot modify the Corps' flow regime, these conditions were properly rejected.⁵⁹

C. Additional Issues

28. Morgantown alleges that the Morgantown License Order fails "to give equal consideration... to the protection of recreational opportunities; and the preservation of other aspects of environmental quality"⁶⁰ as required by sections 4(e) and 10(a)(1) of the FPA.⁶¹ Morgantown and River Conservancy also seek additional license conditions to protect recreation at the Morgantown project site, including fishing, canoeing, and kayaking, as well as access to recreation and the Caperton Trail and Mountaineer Heritage Park during and after construction. River Conservancy also states the Opekiska

⁵⁷ See Morgantown License Order at 54, Opekiska License Order at 50

⁵⁸ See Morgantown License Order at n.44; Opekiska License Order at n.43.

⁵⁹ Even if West Virginia did not waive its water quality certification authority, the Commission would have been unable to enforce this condition. See, e.g., *Blue Heron Hydro LLC*, 140 FERC ¶ 61,049, at P 11 (2012) (explaining that the Commission cannot require a licensee to change how the Corps operates a Corps dam).

⁶⁰ See City of Morgantown's Rehearing Request at 4.

⁶¹ 16 U.S.C. §§ 797(e), 803(a)(1) (2012).

License Order must include license conditions to mitigate recreation impacts at the Opekiska Project.⁶² Neither party, however, identifies specific conditions in either of the waived water quality certifications that would address these concerns.

29. Morgantown's assertion that the License Orders violated the equal consideration requirements of sections 4(e) and 10(a)(1) of the FPA is without merit. Under sections 4(e) and 10(a) of the FPA, the Commission, in determining whether or not to issue a license for a project, must consider, among other things, the environmental and recreational factors of a project, in addition to power development.⁶³ Giving equal consideration to these factors, however, does not constitute equal treatment, nor does it "give non-power factors preemptive force."⁶⁴ The Commission alone is charged with balancing power and non-power values, and ultimately has the discretion over whether or not to adopt recommendations.

30. Morgantown claims that the Morgantown Project license fails to give equal consideration to recreational opportunities, based on the fact that Commission staff chose not to include several recommended recreation measures as license conditions. To the contrary, Commission staff fully considered all recommended protection, mitigation, and enhancement measures for recreation at the project sites, and explained in the Morgantown Project license why the measures were, or were not, ultimately included in the license.⁶⁵ We find staff's conclusions to be reasonable and therefore deny rehearing on this issue. Thus, despite the assertions of Morgantown and River Conservancy, the License Orders were properly conditioned to protect recreation at the project sites, and do not require additional conditions.

31. However, FFP is still in the process of preparing a recreation plan and construction access plan, pursuant to Articles 411 and 412 of the Morgantown License Order, respectively. These plans will serve to further address recreation, including providing access to the Caperton Trail and Mountaineer Heritage Park during project construction. In addition, as discussed in greater detail above, FFP has voluntarily committed to additional recreation measures, thereby providing additional opportunities to the public.

⁶² River Conservancy states that the Opekiska License Order should mitigate recreation impacts at the project by protecting access to fishing and kayaking areas, and providing restroom and parking facilities. The Commission notes that all of these recreation measures are currently included in the Opekiska License. Thus, additional recreation measures at the Opekiska project will not be discussed further.

⁶³ 16 U.S.C. §§ 797(e), 803(a)(1).

⁶⁴ *Alabama Power Co.*, 155 FERC ¶ 61,263, at P 20 (2016); (quoting *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992)).

⁶⁵ See Morgantown License Order at PP 115-124; Opekiska License Order at PP 114-121.

32. Further, Articles 411 and 412 of the Morgantown License Order require FFP to consult with several parties, including Morgantown and River Conservancy, during the preparation of the recreation plan and construction access plan. As the Commission has stated previously, review and approval of such plans following post-licensing consultation is an adequate vehicle for ensuring that the plan will reflect the concerns of all participants to the consultation process.

33. For the reasons discussed, the Commission does not believe it is necessary to include additional license conditions for recreation in either of the License Orders, and denies rehearing on this matter.

The Commission orders:

The requests for rehearing filed by the West Virginia Department of Environmental Protection, West Virginia Division of Natural Resources, City of Morgantown, and the Monongahela River Trails Conservancy are denied.

By the Commission. Commissioners LaFleur and Glick are dissenting in part with a joint separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FFP Missouri 15, LLC
FFP Missouri 16, LLC

Docket Nos. P-13762-003
P-13753-003

(March 15, 2018)

LaFLEUR and GLICK, Commissioners, *dissenting in part*:

Today's order concludes that the West Virginia Department of Environmental Protection (West Virginia DEP) did not act in a timely manner on the applications of FFP Missouri 15, LLC and FFP Missouri 16, LLC for a water quality certificates for the Morgantown and Opekiska Projects. We agree with denying rehearing on that issue.

However, we would have granted rehearing on the failure to include certain conditions requested by the West Virginia DEP. We find that conditions 5,7,8, and 9 and part of condition 6 were modest requests to enhance recreational use of the project lands incidental to the Morgantown and Opekiska Projects.¹ Moreover, West Virginia DEP affirmatively asserted that the licensee does not object to these conditions, and there is no record evidence to the contrary. Therefore, we believe these conditions should be included in the license.

We acknowledge that the West Virginia DEP submitted its water quality certification conditions out of time and thus waived its mandatory conditioning authority, but it is Commission practice to consider incorporating the late-filed conditions into the license as recommendations under section 10(a)(1) of the Federal Power Act.² The Commission has often included minor conditions requested by state authorities in such circumstances as long as they do not interfere with the licensee's safe and effective operation of the hydroelectric facility for electric generation. In the interest of

¹ These conditions include: a permanent public restroom instead of a portable restroom, a/k/a porta-potty; trash receptacles; an angler walkway on the shoreline; a minimum number of rock vanes; and fishing piers.

² 16 U.S.C §803(a)(1) (2012).

cooperative federalism, and consistent with the Federal Power Act,³ we believe the Commission should have adopted these modest recommendations of the West Virginia state agency.

Accordingly, we respectfully dissent in part.

Cheryl A. LaFleur

Commissioner

Richard Glick

Commissioner

³ Section 10(a)(2)(B) requires the Commission to consider the recommendations of relevant federal and state agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located. 16 U.S.C §803(a)(2)(B) (2012).