

166 FERC ¶ 62,104

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Tacoma, Washington

Project No. 2016-228

ORDER MODIFYING AND APPROVING PLAN TO ABANDON VOLITIONAL
UPSTREAM PASSAGE AND IMPLEMENT COWLITZ
RESTORATION AND RECOVERY FUND PLAN

(Issued March 7, 2019)

1. On January 8, 2018, the City of Tacoma, Washington (licensee) filed a plan with the Federal Energy Regulatory Commission (Commission) to abandon volitional upstream passage and implement its Cowlitz Restoration and Recovery (CRR) Fund Plan pursuant to license Article 401 and Settlement Agreement (SA) Article 3 for the Cowlitz River Hydroelectric Project No. 2016. The project is located on the Cowlitz River in Lewis County, Washington, and occupies federal lands within the Gifford Pinchot National Forest.

BACKGROUND AND LICENSE REQUIREMENTS

2. License Article 401, as amended,¹ incorporates SA Articles 1, 2, and 3, which address upstream and downstream fish passage at the project, and requires that certain plans and reports be filed for Commission approval. In part, SA Article 3(h) requires the licensee to file, for Commission approval, a plan to abandon volitional upstream fish passage and expend funds in the fish passage escrow account (the CRR Fund) in the event that the Fisheries Technical Committee (FTC),² or agencies and affected tribes, determine that expenditure of escrow funds on additional measures in lieu of volitional passage is necessary and appropriate to achieve natural stock restoration of Endangered Species Act (ESA)-listed Cowlitz River salmonid stocks.³ The licensee must file its plan

¹ *City of Tacoma Washington*, 108 FERC ¶ 61,031 (2004) (Order Amending New License).

² The FTC is comprised of the licensee and representatives from the National Marine Fisheries Service, U.S. Fish and Wildlife Service, Washington Department of Fish and Wildlife, Washington Department of Ecology, Yakama Nation, and American Rivers/Trout Unlimited.

³ The settlement agreement license articles are reproduced as Appendix A to the

with the Commission within 14 years of license issuance (i.e., by July 18, 2017, based on the effective date of the project license) if criteria for volitional upstream passage facilities, identified in Article 3, have not been met and the FTC, or agencies and affected tribes, determine that filing the plan is appropriate.⁴ On November 28, 2017, Commission staff granted the licensee an extension of time, until January 15, 2018, to file its plan.

3. Interrelated with SA Article 3, SA Article 5 identifies the licensee's responsibilities related to fish production at the Cowlitz Hatchery Complex. In part, SA Article 5 states that the remodeled hatchery complex will accommodate a range of possible production levels, up to 800,000 pounds, and notes that the current upper bound permitted by the ESA is 771,500 pounds. However, SA Article 5 further states that the total production level will not exceed 650,000 pounds per year (excluding upper basin pre-smolts that are reared and ponded in the hatchery complex to avoid conflicts with ESA-listed stocks) for all stocks⁵ until and unless a decision has been made pursuant to Article 3 to not construct volitional upstream passage, at which time hatchery production *may be considered* as part of the plan to expend funds in the escrow account for the purposes of protecting and promoting recovery of listed stocks.

4. In addition, SA Article 6 requires the licensee to file with the Commission a Fisheries and Hatchery Management Plan (FHMP), to be updated every 6 years, beginning in year 7 of the project license. The FHMP (and associated updates) are required to identify: (a) the quantity and size of fish to be produced at the Cowlitz Hatchery Complex; (b) rearing and release strategies for each stock, including upward and downward production adjustments to accommodate recovery of indigenous stocks; (c) credit mechanisms for production of high quality natural stocks; (d) plans for licensee-funded ongoing monitoring and evaluation; and (e) a fisheries management strategy consistent with the priority objective of maximizing the natural production of wild indigenous fish stocks and species in the Cowlitz River basin.

order issuing a new license for the project. *City of Tacoma Washington*, 98 FERC ¶ 61,274 (2002). The listed species are Lower Columbia River Chinook salmon, Lower Columbia River steelhead, and Columbia River chum salmon, all of which are listed as threatened under the ESA. See Order Amending New License at P 4.

⁴ The Commission stayed the new license to accommodate a state-issued stay of water quality certification for the project. On July 18, 2003, the Commission issued an order on rehearing and lifting the stay, which made the new license effective as of that date. 104 FERC ¶ 61.092 (2003).

⁵ All stocks are spring Chinook salmon, fall Chinook salmon, coho salmon, late winter steelhead, early winter steelhead, and summer steelhead.

LICENSEE'S PLAN

5. The licensee proposes to abandon volitional upstream fish passage at the project during the current license period and expend funds in the fish passage escrow account to achieve natural stock restoration. In July 2008, the licensee established an escrow account in the amount of \$15 million to contribute to the total cost of constructing volitional upstream fish passage facilities (the CRR Fund). According to the licensee, the FTC has determined that measures in addition to those provided in the SA are necessary to restore self-sustaining, natural production of ESA-listed stocks in the Cowlitz River basin, and that expenditures of the escrow fund on such additional measures in lieu of volitional upstream facilities is necessary and appropriate to achieve natural stock restoration. Accordingly, the licensee proposes to use the funds in the escrow account to implement projects pursuant to its CRR Fund Implementation Plan (Plan).

6. The CRR Fund will be dedicated to resource projects that further protection, restoration, and recovery of aquatic resources that are not otherwise covered by specific resource protection, mitigation, and enhancement (PM&E) measures identified in the project's license or in the National Marine Fisheries Service's (NMFS) biological opinion. The licensee states that funded resource projects must be located in the Cowlitz River basin upstream to the mouth of the Toutle River and are limited to: (a) land acquisition or lease of riparian, wetlands, and uplands; (b) conservation easements; (c) riparian and wetland protection and enhancement; (d) habitat restoration projects; (e) assessments of habitat and limiting factors; and (f) other projects not described above that advance the goals/purposes of protecting and promoting restoration and recovery of ESA-listed upper Cowlitz River basin stocks that are supported by consensus agreement of the FTC.

7. The licensee states that its responsibilities for implementing the Plan will include: (a) providing the funding to carry out the projects approved as described; (b) administering the CRR Fund plan; (c) leading the endeavor to develop a system to solicit and evaluate potential resource projects; (d) leading an assessment and prioritization of habitat and limiting factors associated with each species and life history stage on a site specific basis; (e) developing specific resource projects in consultation with and for approval by the FTC; (f) coordinating with landowners that may affect, or be affected by funded projects; and (g) reporting.

8. The licensee plans to convene meetings with the FTC as necessary to discuss issues and solicit and approve resource projects. The FTC will approve the schedule for implementing the initial analysis, resource project solicitations, project design and monitoring, and other expenditures pertinent to the implementation of the Plan. Decisions on the use of the CRR Fund, including any accrued interest, will be made by the FTC. The Plan identifies the following criteria and priorities for resource project approval and restoration and recovery fund expenditures: (a) the FTC will develop a system to solicit and evaluate potential resource projects; (b) the evaluation system

should consider factors that reflect the feasibility of proposed resource projects to achieve the purpose of the CRR Fund; (c) the FTC will consider all relevant information currently available to determine whether a resource project meets the criteria; (d) proposed resource projects must be consistent with state and federal laws and policies; and (e) funded projects will be limited to the project types identified under Paragraph 6 above and be limited to specific locations and conditions identified therein.

9. According to its Plan, unless landowner policies dictate otherwise, the licensee will have primary responsibility for implementing resource projects funded by its Plan in the Cowlitz River basin. This will include lead responsibility for acquisition, administration, and oversight of the projects. The licensee will comply with applicable City of Tacoma directives and state and federal laws for contract selection, awards, and payments. For resource projects that require selection of a consultant or contractor, the licensee will offer members of the FTC an opportunity to participate on the selection committee. The FTC members will bear all costs of participation on the selection committee. Any person, or private or governmental entity, including the licensee, may propose a resource project and, if any such project is selected for funding, the entity that proposed the project will have the primary responsibility for acquisition, administration, and oversight of the project.

10. The licensee plans to prepare and file an annual report with the Commission, describing implementation of its Plan during the previous calendar year and listing planned projects for the current calendar year. A brief report on each project completed and any periodic monitoring identified in the funded project will be included in the annual reports. The project completion reports will be completed by the project proponent and will include background information on the existing environment and the issues associated with it, the goals and objectives of the project, methodology used for enhancement, methodology and schedule for continued monitoring and management, and expected results. In addition, monitoring reports will include: a description of the methods and results of monitoring; maps, figures and photos, as appropriate; and future monitoring schedule and methodology changes.

11. The annual reports will include the following items: (a) a summary of resource projects implemented and associated monitoring results; (b) any applicable project completion reports; (c) a summary of any lands/easements acquired during the year; (d) a summary of any issues, concerns, or recommended changes identified by members of the FTC during the year regarding implementation of projects; (e) a list of any changes to the Plan proposed by the FTC during the year; (f) a list of activities and expenditures planned for the current year; and (g) an accounting log of the CRR Fund balance at the end of the reporting year.

AGENCY CONSULTATION

12. The licensee developed its Plan in consultation with the FTC between 2011 and 2014. The licensee's filing includes documentation of consultation with the FTC, including meeting minutes from the November 4, 2014 FTC meeting, in which the Plan was discussed. In addition, by emails dated June 17 and July 7, 2014, the Lower Columbia Fish Recovery Board and Washington Department of Fish and Wildlife, respectively, provided comments on the licensee's draft Plan, which were incorporated into the final Plan. By letters dated October 3, 2014 and December 14, 2017, the U.S. Fish and Wildlife Service and NMFS, respectively, concurred in and approved the licensee's Plan.

DISCUSSION AND CONCLUSION

13. Pursuant to SA Article 3, the licensee requests approval of its CRR Fund Implementation Plan in lieu of providing volitional upstream fish passage. Based on fishery productivity testing in the upper Cowlitz River basins, the FTC determined that there was a low likelihood of reaching productivity goals within the next 10 years. Rather than delaying implementation of significant recovery actions to protect, restore, or enhance critical fisheries habitat and populations of ESA-listed species, the FTC recommended terminating additional productivity testing and thereby allowing expenditure of fish passage escrow funds on multiple recovery measures in lieu of volitional passage.

14. The licensee's Plan would abandon volitional upstream fish passage efforts during the current licensing period and instead utilize the CCR Fund for the purposes of protecting and promoting restoration and recovery of ESA-listed stocks in the upper Cowlitz River basin. Although SA Article 5 states, in part, that if a decision is made to not construct volitional upstream passage, hatchery production *may be considered* as part of the plan to expend funds in the escrow account for the purposes of protecting and promoting recovery of listed stocks, the licensee's plan did not include expending CRR funds on hatchery production at this time. SA Article 5 states that following completion of the remodeled Cowlitz Hatchery Complex (completed in 2010), the remodeled complex will *accommodate* a range of possible production levels, up to 800,000 pounds annually. SA Article 5 states that the current upper bound permitted by the ESA is 771,500 pounds; however, Article 5 also specifically states that following completion of the remodeled complex, the *total production* level will not exceed 650,000 pounds per year for all stocks, until and unless a decision has been made not to construct volitional upstream passage during the remaining license term, at which time hatchery production may be considered as part of the plan to expend the funds in the escrow account.

15. Although Article 5 contemplates possibly expending escrow funds toward increased hatchery production, we note that this is not specifically required, and furthermore, hatchery production is also subject to the FHMP required by SA Article 6

(as identified in Paragraph 4 above). Nonetheless, we note that hatchery production could be increased or decreased by the FTC in the future based on the mechanisms contained in the FHMP under Article 6 to protect and promote the recovery of ESA-listed fish species.

16. The licensee states that it will be responsible for implementing the Plan and it will endeavor, with the FTC, to develop a system to solicit and evaluate potential resource projects. The Plan states that any person, or private or governmental entity, including the licensee, may propose a resource project. Consequently, the licensee should ensure that the public is timely made aware of its opportunity to propose resource enhancement projects under the Plan. Such proposals should be evaluated and given equal consideration based on the merits of the data and the feasibility of the proposed project to achieve the purposes of the CRR Fund.

17. Considering the complexity and public interest related to fisheries management activities and decisions in the Cowlitz River basin, we recognize the importance of keeping the public apprised of the licensee's actions and FTC decisions. We understand the licensee has previously held public outreach meetings to discuss the status of fishery management issues and decisions in the Cowlitz River basin. Accordingly, in its annual reports, the licensee must identify how the public is being provided the opportunity to submit project proposals and be kept apprised of the licensee's efforts under the Plan.

18. In its Plan, the licensee defers to the Commission to establish an annual reporting due date. As proposed, the licensee would allow the FTC 30 days to review and comment on the annual reports prior to the licensee filing them with the Commission. Therefore, the licensee should file the Cowlitz Restoration and Recovery Fund Reports with the Commission annually by March 1, beginning March 1, 2020. The licensee is advised that Commission staff will review the reports, but may not provide written acknowledgment of the filing unless the licensee proposes changes to the original plan. If any such changes are proposed, the licensee should ensure that a request for approval of the changes is identified in the cover letter.

19. The licensee's Plan establishes a specific framework for the expenditure of the fish passage escrow account funds to protect and promote restoration and recovery of ESA-listed stocks in the upper Cowlitz River basin. The Plan is proposed in lieu of volitional upstream fish passage, based on the FTC's determination that expenditure of escrow funds on additional measures is necessary and appropriate to achieve natural stock restoration. Resource projects will be approved by the FTC, and the licensee will be responsible for implementing the Plan. The licensee's Plan satisfies the requirements of license Article 401 and SA Article 3 and therefore, as modified, should be approved.

The Director orders:

(A) The City of Tacoma, Washington's (licensee) Cowlitz Restoration and Recovery Fund Implementation Plan (Plan), proposed in lieu of providing volitional upstream fish passage under license Article 401 and Settlement Agreement Article 3, filed with the Federal Energy Regulatory Commission (Commission) on January 8, 2018, for the Cowlitz River Hydroelectric Project No. 2016, as modified in paragraph (B), is approved.

(B) The licensee shall file with the Commission its Cowlitz Restoration and Recovery Fund Reports annually by March 1, beginning March 1, 2020. In addition to the elements the licensee proposed to include in its annual report, the licensee shall identify how the public is being kept apprised of its efforts under its Plan and how it is soliciting input for proposals from the public. The licensee shall allow the Fisheries Technical Committee (FTC) a minimum of 30 days to review and comment on the report prior to filing it with the Commission. The report shall also include the licensee's response to any comments or recommendations from the FTC.

(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. § 825l (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.

Thomas J. LoVullo
Chief, Aquatic Resources Branch
Division of Hydropower Administration
and Compliance

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