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104 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

City of Tacoma, Washington Project No. 2016-056

ORDER DENYING REHEARING AND LIFTING STAY

(Issued July 18, 2003)

1. On March 13, 2002, the Commission issued an order approving a settlement agreement and issuing a new license for the continued operation and maintenance of the 462-megawatt (MW) Cowlitz River Project No. 2016.[1] Friends of the Cowlitz, CPR-Fish, and the Cowlitz Indian Tribe (collectively, Intervenors); and the National Marine Fisheries Service (NMFS) filed requests for rehearing. NMFS seeks rehearing of only one issue: the Commission's issuance of a new license before completing formal consultation with NMFS pursuant to Section 7 of the Endangered Species Act (ESA). Intervenors seek rehearing of numerous aspects of the relicense order. For the reasons discussed below, we deny rehearing.

BACKGROUND

2. The Commission issued an original license for the Cowlitz River Hydroelectric Project in 1951.[2] Tacoma filed its relicense application on December 27, 1999. On September 11, 2000, Tacoma filed a settlement agreement (Agreement) signed by most of the participants in a collaborative relicensing process. On March 13, 2002, the Commission approved the Agreement with some modifications and issued a new license for the project with an effective date of April 12, 2002.

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[1] 98 FERC ¶ 61,274 (2002). The project is located on the Cowlitz River in Lewis County, Washington, and in part on lands within the Gifford Pinchott National Forest.

[2] 10 FPC 424 (1951). The original license expired on December 31, 2001, and the project has operated pursuant to an annual license since that time.

3. NMFS and Intervenors filed timely requests for rehearing, and Intervenors also filed a motion for a stay of the new license pending rehearing. As discussed in more detail below, the Commission made the new license effective on April 12, 2002, to accommodate the state's temporary stay of its water quality certification for the project. The state hearings board subsequently extended the stay pending resolution of Intervenors' appeal of the certification. As a result, on April 12, 2002, the Commission stayed the new license until further order, and the project has continued to operate under an annual license.

4. On January 24, 2002, the state hearings board resolved all but one of the certification issues, which it remanded to the state certifying agency. On June 18, 2003, the state certifying agency issued its decision on remand. Accordingly, in this order we address the parties' rehearing requests, incorporate the revised certification conditions, and lift the stay of the new license.[3]

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[3]On June 24, 2003, Intervenors filed what they termed a "supplement" to their rehearing request, citing the amendment provisions of 18 C.F.R. § 385.215. On July 2, 2003, Tacoma filed an answer in opposition to Intervenors' filing. Rule 215, which allows amendments of pleadings, does not apply to rehearings. Absent compelling circumstances, we will not accept supplemental rehearing material. See Order No. 530, Streamlining Commission Procedures for Review of Staff Action, FERC Stats. & Regs. ¶ 30,906 at 31,863 (1990).

Nevertheless, we have reviewed these materials and have determined that they do not warrant further consideration. Intervenors filed supplementary information on water quality, flood control, and fish passage. The water quality information consists of decisions of Ecology and the Hearings Board that we have already incorporated into our order on rehearing. To the extent that Intervenors raise procedural concerns about those decisions, the remedy, if any, is with the state. With respect to flood control, we find no basis for amending Article 303. Ecology determined that Article 303 is consistent with the state's anti-degradation policy and that no changes are needed. Pursuant to the Flood Control Act of 1944, the U.S. Army Corps of Engineers (Corps) is responsible for ensuring that the Cowlitz Project Dams (Mayfield and Mossyrock) are operated to meet their flood control obligations. See 33 U.S.C. § 709 and 33 C.F.R. § 208.11(e). Under this authority, the Corps developed Article 303 in consultation with Tacoma, and we have determined that it is adequate and should be included in the license. Intervenors assert that the Mount St. Helens engineering analysis (also developed by the Corps) demonstrates that Article 303 is inadequate. However, our review of that report indicates

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DISCUSSION

5. In their request for rehearing, Intervenors seek several types of relief. They request that we grant rehearing, vacate the relicensing order, and issue a new order after conducting further proceedings in accordance with their views. In the alternative, they request that we modify the new license to encompass the terms and conditions that Intervenors recommend with respect to fish passage, flood control operations, fish hatchery production and management, instream flows for fisheries and recreation, cultural resources, and public participation. They further request that we stay the effectiveness of the new license and require compliance with the original license as interim mitigation pending rehearing.

6. As explained in more detail below in connection with Intervenors' specific arguments, we find no basis for vacating the new license and conducting further proceedings. Nor do we find any basis for replacing the terms and conditions of the new license with those that Intervenors would prefer. As a result of the Hearing Board's action, the new license has been stayed pending rehearing, and the project has continued to operate under an annual license. Therefore, the licensee was required to comply with the terms and conditions of the original license while the new license was stayed, and Intervenors' motion for a stay pending rehearing is moot.

7. Intervenors state that they direct their request for rehearing not only to the Commission, but also to the other federal agencies whose administrative decisions are implemented in the relicensing order. Specifically, they request review and reconsideration of the fishway prescriptions of NMFS and the U.S. Fish and Wildlife Service (FWS) pursuant to Section 18 of the Federal Power Act (FPA), the fish and wildlife recommendations of those agencies pursuant to Section 10(j) of the FPA, and

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that the Corps intends to monitor sediment deposition in the Cowlitz River and does not expect flood protection to drop below Congressionally-authorized levels before 2020-2025. Therefore, if changes to Article 303 are needed, we can consider them in due course. Finally, Intervenors assert that an undated draft report prepared by NMFS "for discussion only" on fish passage guidelines and criteria demonstrates the inadequacy of trap-and-haul rather than volitional passage facilities. In fact, the report states that trap-and-haul facilities may be a viable option for particular sites. This issue was fully considered throughout this proceeding, and we find nothing in the draft report that would change our conclusion that the fish passage measures in the new license are reasonable and should be required in this case.

the approval of flood control license articles by the U.S. Army Corps of Engineers. Except as specifically discussed below, they make these latter requests with little or no elaboration of their basis.

8. With respect to terms and conditions recommended or required by other federal agencies, our role is limited to incorporating those conditions over which we have no control, and assuring that those over which we do have control are supported by substantial evidence and meet other applicable legal requirements. Intervenors may challenge these conditions on judicial review, provided that they first seek rehearing of them before us. To the extent that Intervenors have briefed these issues before us, we address them below.

9. Intervenors assert that they "incorporate by reference the relief sought in their motions, comments, protest, and other filings in this proceeding, to the extent not granted in final agency actions," and that they "request rehearing on any matter in the relicensing order not expressly covered above."[4] This assertion, without more, is an inadequate basis for requesting rehearing. A rehearing request must state concisely the alleged error in the Commission's decision.[5] We therefore need not sift through Intervenors' numerous filings in an attempt to discover what issues and relief they might have in mind.[6]

Water Quality Certification

10. Under Section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license for a hydroelectric project unless the state certifying agency has either issued a water quality certification for the project or has waived certification. Before

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[4]Request for rehearing at 10.

[5]18 C.F.R. § 385.713(c).

[6]See OMYA, Inc. v. FERC, 111 F.3d 179 D.C. Cir. 1997) (takings claim "barely hinted at" in a footnote, coupled with quotation of entire Fifth Amendment to U.S. Constitution, was inadequate to preserve argument for judicial review). Intervenors also request that we include in the record of this proceeding all of the pleadings and other documents filed in the original licensing proceeding before the Federal Power Commission. These filings are already a matter of public record, and we need not include them here, because, as discussed later in this order, they relate not to the licensee's existing record of compliance, but to a record that Intervenors would have us develop through additional investigation, which we decline to undertake.

addressing Intervenors' arguments on rehearing, we provide a brief review of the background and recent developments concerning the state's certification and appeals process.

11. The Washington Department of Ecology (Ecology) issued certification for the Cowlitz Project on January 15, 2002.[7] Intervenors appealed the certification, and on March 8, 2002, the Pollution Control Hearings Board (Hearings Board) issued a temporary stay of the certification until April 11, 2002. The Commission issued a new license for the Cowlitz Project with an effective date of April 12, 2002. The Hearings Board subsequently extended the stay pending resolution of Intervenors' certification appeal, and on April 12, 2002, the Commission stayed the new license until further order.

12. The Hearings Board issued its decision on December 31, 2002, and issued a letter correcting and clarifying certain aspects of the decision on December 31, 2002. The parties to the certification appeal filed various requests for reconsideration, amendment, or clarification of the Hearings Board's decision. On January 24, 2003, the Hearings Board issued an order modifying its decision, granting reconsideration, and modifying its final findings of fact and conclusions of law. The order affirmed Ecology's issuance of water quality certification for the Cowlitz Project, subject to the inclusion of certain conditions and subject to a remand of the flood control provisions of Article 303 of the license. The remand was "for the limited purpose of Ecology reviewing the Article 303 flood control provisions of the license for the project to determine whether it has reasonable assurance the implementation of those provisions will not violate Washington's anti-degradation standard."[8]

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[7]Tacoma filed its certification request on December 5, 2001. Intervenors state that the period for the state to act on that request runs through December 5, 2002. This is incorrect. Section 401(a)(1) provides that the certification requirement "shall be waived" if a state certifying agency "fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year). Once a state agency has issued certification within the requisite time limit, the maximum one-year period for consideration of the request has no further legal significance.

[8]Order of January 24, 2003 at 70 (attached to Tacoma's status report on water quality certification, filed January 30, 2003).

13. On June 18, 2003, Ecology issued its supplemental order on remand.[9] After considering comments filed by Tacoma and Intervenors, Ecology found no apparent conflict between the water quality certification and Article 303 of the license, and concluded that there is reasonable assurance that implementation of the flood control provisions will not violate the state's anti-degradation policy. Ecology did not modify the certification or impose any new conditions. As a result, all certification issues have now been resolved. We therefore incorporate the revised certification conditions and lift the stay of the new license.

14. Intervenors argue that the relicensing order must be vacated because it was issued in the absence of an effective water quality certification or waiver from the state. They maintain that the Commission had no authority to issue a relicensing decision while a temporary stay of the certification was in effect. They further maintain that, because the Hearings Board subsequently extended the stay pending a decision on the certification appeal, the Commission must vacate its relicensing order to comply with Section 401(a)(1) of the CWA and to assure that the outcome of the state administrative hearing is given full effect.

15. Although we issued our relicensing order on March 13, 2002, while the temporary stay of certification was in effect, we specified that the new license would not be effective until April 12, 2002, after the stay was scheduled to expire. Thus, we recognized that the new license could not take effect without an effective water quality certification. When the Hearings Board later extended the stay pending a decision on the certification appeal, we issued a decision staying the new license until further order. Thus, our actions were fully consistent with the requirements of Section 401.

16. Nor do we find any basis for vacating the new license to assure that the Hearings Board's decision is given full effect. As noted above, the Hearings Board affirmed

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[9]See Letter from Donald Clarke to the Commission Secretary filed June 23, 2003, which attaches a copy of Ecology's supplemental order on remand. In its letter, Tacoma maintains that the Hearings Board's stay of the certification pending Intervenors' appeal must remain in effect until the time for filing any appeal of the remand decision has run, and, if any appeal is filed, the Hearings Board has issued a decision on that appeal. We disagree with this interpretation. The Hearings Board's stay order states that effectiveness of the certification is stayed "until the board renders a decision on this appeal." Hearings Board Order at 2 (attached to letter from Jonathan Feil to the Commission Secretary, filed April 8, 2002). Thus, by its terms, the stay was no longer in effect once the Hearings Board issued its decision on Intervenors' appeal.

Ecology's issuance of water quality certification for the Cowlitz Project, subject to the inclusion of certain conditions described below, and subject to a remand of the flood control provisions of Article 303 of the license. Ecology subsequently resolved all certification issues associated with Article 303. Under Section 401(d) of the CWA, any conditions of the certification become conditions of the federal license or permit, and only a reviewing court may revise or delete those conditions.[10] Therefore, we can implement the Hearings Board's decision by incorporating the revised conditions in the license, and making any necessary modifications to the license as discussed in this decision on rehearing. The revised conditions are set forth in Appendix C-1 to this decision.

17. The Hearing Board imposed 5 additional conditions on the water quality certification specified in Appendix C of the license (designated as conditions (a) through (e) in Appendix C-1 to this order). First, references to "the August 15 – September 15[11] period" in Article 13(d) of the instream flow requirements (Agreement license articles specified in Appendix A of the license) are amended to read "the August 15 – November 20 period" to protect salmon redds that may establish between September 30 and November 20. Second, Tacoma is required to undertake a study of whether and how the IHA/RVA[12] methodology, including other similar methodologies, may supplement

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[10]33 U.S.C. § 1341(d); see American Rivers v. FERC, 229 F.3d 99 (D.C. Cir. 1997).

[11]The time period referenced in Article 13(d) is from August 15 to September 30. Article 13(c) of the Agreement defined flows needed to protect salmon redds established between August 15 and September 30. The Hearings Board's additional conditions were intended to ensure that protective measures were in place to address any additional salmon redds established after September 30.

[12]Indicators of Hydrologic Alteration (IHA) is a computer program developed and made available by The Nature Conservancy that allows users to assess the degree of hydrologic alteration within a watershed from statistical indicators developed from streamflow data. The Range of Variability (RVA) is a related tool that builds upon the IHA analysis by defining target flows to restore as much of the original, natural hydrologic variation in river flows as possible while also meeting human needs for the water.

Instream flows in this case were based largely on a fall chinook spawning habitat study that used the Physical Habitat Simulation (PHABSIM), which is a component of

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existing instream flow setting methodologies, consistent with the goal of restoring declining native anadromous salmonid runs in the Cowlitz River. Third, Tacoma is required to select and monitor spawning success in additional side channels which are fully representative of available river habitat for chinook salmon to ensure that maintenance flows are not limiting potential spawning habitat. Fourth, Tacoma is required to include in the Fish Monitoring Plan required by Agreement Article 15 monitoring of redd de-watering and stranding of juvenile and adult fish from project operations.[13] Fifth, Tacoma is required to undertake an extensive monitoring program specified in Ecology's June 14, 2002 compliance order to determine the extent to which total dissolved gases (TDG) may be exceeded at the project, the causes of the exceedence, and based on the monitoring, identify operational and structural modifications to the project to ensure full compliance with the water quality standards by June 14, 2007.[14] Additionally, the Hearing Board stipulated that Ecology shall modify instream flow levels and periods, including ramping rates (specified in Agreement Article 14), if necessary, to achieve adequate channel maintenance and prevent redd dewatering and stranding of juvenile and adult fish.

18. We are including the above conditions in this order as an appendix entitled Appendix C-1. As noted above, items a, c, and d would add requirements to articles specified in the Agreement and incorporated in Appendix A of the license.[15] We are also

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the Instream Flow Incremental Methodolgy (IFIM). Staff considered but rejected Intervenors' proposed flow recommendations, which were developed through the use of the IHA/RVA analysis.

[13]Agreement Article 15 requires a monitoring plan to evaluate the effects of the instream flow requirements upon fish in the basin and reserves authority to modify the flows if they are inadequate. The Hearing Board's requirement is to ensure that the requirements of this article would also cover dewatering of redds and stranding of juvenile and adult salmon.

[14]Ecology amended the June 14, 2002 order on August 20, 2002, and filed it with the Commission on June 10, 2003. The Hearings Board's order of January 24, 2003, requires Tacoma to comply with "Ecology's June 14, 2002 order and any amendments thereto." Appendix C-1 incorporates the amended conditions.

[15]Items a, c, and d would go beyond the requirements of articles specified in the Agreement and incorporated in Appendix A of the license. Parties to the Agreement

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modifying Article 401 reserving our authority to approve the plans specified in the water quality certification and to approve any changes in instream flows or structural or operational requirements that may be developed to meet total dissolved gas standards.

Endangered Species Act Consultation

19. NMFS and Intervenors argue that we erred in issuing our relicensing order before completing formal consultation with NMFS pursuant to Section 7 of the ESA.[16] That section requires every federal agency, in consultation with FWS or NMFS, as appropriate, to ensure that its actions are not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify critical habitat for a listed species. To date, the Commission has been unable to complete formal consultation with NMFS for this relicensing.

20. On April 25, 2001, the Commission staff submitted a biological assessment (BA) to both NMFS and FWS. The staff concluded in the BA that relicensing the project in accordance with the terms of the Agreement was "not likely to adversely affect" the bald eagle and northern spotted owl, but was "likely to adversely affect" chinook salmon, chum salmon, and steelhead trout, as well as their critical habitat. FWS concurred with the staff's conclusions for the bald eagle and northern spotted owl on July 3, 2001. As a result, formal consultation with FWS was not required for those species.

21. For chinook salmon, chum salmon, and steelhead trout, NMFS responded to the staff's conclusions on January 29, 2002, over nine months later. NMFS requested that the Commission delay action on the license application and Agreement until at least September 2002 in order to coordinate formal consultation efforts with those underway at another upstream project, Lewis County Public Utility District's Cowlitz Falls Project No. 2833. Tacoma responded by letter dated February 19, 2002, urging that NMFS issue its biological opinion expeditiously to allow for earlier implementation of the Agreement. On February 25, 2002, Commission staff informed NMFS that further delay of formal consultation was neither necessary nor appropriate. On March 13, 2002, after receiving no further response from NMFS, the Commission issued its order approving the

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[15](...continued)
have not filed an amended agreement or objection to the 401 conditions.

[16]NMFS and Intervenors make many of the same arguments. For convenience, we refer only to NMFS in the following discussion, except where Intervenors raise additional issues.

Agreement and issuing a new license for the Cowlitz Project. At that point, the biological opinion was already 6 months overdue.

22. A little over a year later, in a letter dated March 27, 2003, NMFS renewed its request to combine consultation for the Cowlitz River Project with that for Cowlitz Falls, stating that it anticipated being able to begin consultation on both projects by approximately April 1, 2003, with biological opinions to follow within 90 days after an initial meeting with both licensees. On April 18, 2003, staff informed NMFS that it was unable to agree to the extension of time to complete formal consultation for the Cowlitz River Project, and requested that NMFS file its biological opinion within 30 days. To date, NMFS has neither filed it biological opinion nor indicated when it might be able to do so. The opinion is now nearly two years overdue.

23. Under Section 7(a)(2) of the ESA, a federal agency must ensure, in consultation with the Secretary of the Interior or Commerce, as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.[17] When a federal agency determines that a proposed action may affect a threatened or endangered species, it must consult with FWS or NMFS and obtain a biological opinion on whether the action is likely to result in a violation of the ESA.[18] The agency is ultimately responsible for the action, and is technically not bound by the findings of the biological opinion.[19] However, an agency that proceeds with an action in a manner that is inconsistent with the biological opinion runs the risk of having its action found to be arbitrary, capricious, and contrary to law.[20]

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[17]16 U.S.C. § 1536(a)(2). The Secretaries of the Interior and Commerce have delegated their consultation responsibilities to the Directors of FWS and NMFS, respectively. See 50 C.F.R. § 402.01(b).

[18]Id.; 50 C.F.R. § 402.12(a). If the agency finds, with the written concurrence of FWS or NMFS, that the proposed action is not likely to adversely affect listed species or critical habitat, formal consultation is not required, and the action may proceed. Id. at § 402.14(b).

[19]Sierra Club. v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987).

[20]See, e.g., TVA v. Hill, 549 F.2d 1064, 1070 (6th Cir. 1977), aff'd, 437 U.S. 153 (1978).

24. Both Section 7 of the ESA and the regulations implementing it establish time limits for completing formal consultation. Section 7(b) provides that consultation must be completed within 90 days, unless the agency and FWS or NMFS mutually agree to extend consultation.[21] Extensions of more than 60 days require the consent of the license applicant.[22] Promptly after completion of consultation, defined in the regulations as within 45 days, FWS or NMFS must deliver its biological opinion.[23] After initiation of formal consultation, Section 7(d) of the ESA prohibits a federal agency from making any irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures which would not violate Section 7(a)(2).[24]

25. In Chelan County, we considered whether, in light of these provisions, a federal agency must delay its proposed action indefinitely while awaiting a biological opinion from FWS or NMFS. We concluded that these sections of the ESA, when read together, suggest that, so long as the proposed action does not jeopardize listed species, destroy or modify critical habitat, or foreclose reasonable and prudent alternatives, a federal agency may proceed without awaiting a biological opinion if no incidental taking of listed species is likely to result.[25]

26. In that case, Commission staff had found in its BA that the proposed action would not result in any incidental taking of listed species. This case presents the more difficult issue of whether we may proceed in the absence of a biological opinion when our staff has found that the proposed action is "likely to adversely affect" listed species, and thus might result in some incidental taking. As explained below, our decision to move forward is not without some risk. Nevertheless, on balance we believe that, in view of the unacceptable delay in this case, as well as the existence of a comprehensive settlement agreement designed, among other things, to benefit listed species, it is

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[21] 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

[22] Id. at § 1536(b)(1)(B); 50 C.F.R. § 402.14(e).

[23] Id. at § 1536(b)(3)(A); 50 C.F.R. § 402.14(e).

[24] Id. at § 1536(d); 50 C.F.R. § 402.09.

[25] Public Utility District No. 1 of Chelan County, Washington, 98 FERC ¶ 61,279 (2002), reh'g denied, 102 FERC ¶ 61,043 (2003), requests for reh'g or reconsideration pending.

reasonable to allow implementation of the new license without awaiting a biological opinion from NMFS.

27. NMFS argues that, if the Commission finds that a proposed action may affect listed species, it may not proceed without first obtaining either concurrence that the action is not likely to adversely affect those species, or a biological opinion from NMFS that the action is not likely to jeopardize the continued existence of those species. In support, NMFS cites the Houston[26] case, in which the court held that the Bureau of Reclamation violated the ESA by failing to request formal consultation with NMFS on some species after that agency failed to concur, and by issuing 40-year water contracts while formal consultation on other species was still underway, without awaiting a biological opinion from FWS. The court therefore affirmed the district court's rescission of the contracts.

28. The Houston case is relevant, and it suggests some degree of risk. However, it does not address the issue now before us: whether we may proceed with a proposed action that will have beneficial effects on listed species, notwithstanding the potential for some incidental taking, when a biological opinion is nearly two years overdue and there appears to be no reasonable prospect of receiving one in the foreseeable future. In these circumstances, we believe that we can do a better job of meeting our ESA responsibilities by proceeding, rather than continuing to wait.

29. NMFS argues that the Commission must have written authorization in the form of an incidental take statement that is part of a biological opinion before proceeding with an action that results in incidental taking. In support, NMFS cites Defenders of Wildlife v. EPA.[27] In that case, the court enjoined EPA's registration of strychnine because it would result in incidental taking of listed species, and EPA had not entered into formal consultation or obtained an incidental take statement authorizing the taking. NMFS argues that both the ongoing operation of the Cowlitz Project and the mitigation measures included in the new license, such as the trap-and-haul program for fish passage, may result in the taking of listed species or adverse modification of their critical habitat.

30. NMFS is correct that, by not awaiting a biological opinion, we are proceeding with a proposed action that may result in some incidental taking of listed species, without the authorization that would be provided by an incidental take statement. Unlike

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[26]Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1127-28 (9th Cir. 1998).

[27]882 F.2d 1294 (8th Cir. 1989).

Defenders of Wildlife, in this case we have initiated consultation but have to date been unable to complete it. In addition, the measures in the new license are designed to benefit listed species and are part of a settlement agreement that NMFS has signed. By delaying the implementation of these measures, we are failing to mitigate adverse effects to those species that are ongoing. If, by its inaction, NMFS can require us to indefinitely defer our issuance of a new license, we are placed in the difficult position of being required by Section 15(a)(2) of the FPA to continue issuing annual licenses under the terms of the original license, with greater adverse effects on listed species than would occur as a result of project operation under the new license terms, with which NMFS has agreed. Therefore, issuing the new license in advance of the biological opinion, coupled with an appropriate reservation of our authority to make any necessary changes, provides better protection for listed species in these circumstances.

31. NMFS argues that the Commission's reliance on a post-licensing reopener proceeding to address issues that may arise from consultation violates Section 7(d) of the ESA. After initiation of formal consultation, Section 7(d) prohibits an agency from making any irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures. NMFS argues that issuance of the license is an irreversible, irretrievable commitment of resources, and may foreclose the formulation of reasonable and prudent alternatives. However, NMFS does not demonstrate how this might be so.[28] Rather, NMFS maintains that the Commission's use of a reservation of authority to reopen the license to include the results of formal consultation is inadequate under the ESA, again citing the Houston case.

32. In Houston, the court found that a savings clause in the water contracts that allowed for future adjustments was insufficient to avoid a violation of Section 7(d). In this case, however, we are implementing measures that NMFS has already agreed to as a result of the agreement. In addition, we are adding Article 408 to the license to address ESA concerns. Article 408 is a specific reservation of our authority to require the licensee to take whatever action we deem necessary as a result of a biological opinion from NMFS on the effects of the Cowlitz Project on chinook salmon, chum salmon, and

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[28]NMFS argues that a reservation of authority is inadequate because it does not include the power to revoke a license. This is unnecessary. By definition, reasonable and prudent alternatives must be "economically and technologically feasible." 50 C.F.R. § 402.02. If there were, in fact, no reasonable and prudent alternatives that would avoid jeopardy, continued operation of the project could be enjoined. See TVA v. Hill, note 17, supra.

steelhead trout and their critical habitat, including, as appropriate, any reasonable and prudent alternatives, reasonable and prudent measures to implement those alternatives, and incidental take conditions. Therefore, we fail to understand how proceeding without a biological opinion could foreclose reasonable alternatives that would be necessary to avoid jeopardy. Presumably, if the measures in the Agreement presented a risk of jeopardy to listed species, NMFS would not have endorsed them.[29] In these circumstances, it seems sufficient to include a reservation of authority that will allow us to impose whatever additional conditions NMFS may ultimately specify in its biological opinion.

33. NMFS argues that failure to complete formal consultation in a timely manner does not relieve the Commission of its substantive obligation to meet the requirements of Section 7 of the ESA. In support, NMFS cites a case in which a district court declined to order NMFS to complete a biological opinion in a specific time frame where it appeared that the agency was working diligently to complete consultation.[30] That is not the case here; by its own admission, NMFS had not yet begun to prepare a biological opinion for the Cowlitz relicensing when it requested an extension some two months ago.

34. We agree that the failure to complete formal consultation in a timely manner does not relieve us of our ESA responsibilities. However, by proceeding in this case, we are seeking to meet those responsibilities as best we can, given that we have been unable to complete formal consultation with NMFS to date. As we stated in Chelan County, we do not make this decision lightly. We recognize the importance of protecting endangered species and the benefit of having a biological opinion to inform our licensing decisions.

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[29]NMFS and FWS state in Section 4.3 of the Agreement that, by signing the agreement, they are not binding themselves to make any specific recommendations or take any particular action with respect to ESA compliance. However, by letter dated January 29, 2002, NMFS states that it anticipates that implementation of the terms of the Agreement will satisfy the needs of fish species listed under the ESA. Moreover, adaptive management, with its potential to modify measures to restore and recover listed salmonid stocks, is the cornerstone of the Agreement. Indeed, NMFS and FWS state in Section 4.3 of the agreement that they expect the Commission to retain sufficient discretionary involvement or control with respect to project construction, modification, maintenance and operation under the new license, issued in conformity with the terms of the Agreement, so as to ensure full compliance with the requirements of the ESA. In these circumstances, it is reasonable to conclude that alternatives developed as a result of formal consultation could be taken into account under the new license.

[30]Center for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996).

We also recognize the strain that the Services are under to complete consultations, particularly in the Pacific Northwest, with far more ESA consultations to conduct than staff to handle them. We stand ready to assist the Services in developing creative solutions to manage their Commission-related workload in a more timely manner. However, when the period specified in ESA Section 7(b) for completing consultation has elapsed, and our action, while possibly entailing some taking, will provide a meaningful benefit to the species under consultation, we do not believe that either the public interest or the listed species are served by the continued delay in our ability to issue orders that will advance the protection of the species in question.

35. Intervenors argue that the time limits for formal consultation do not apply in this case, because consultation has not yet been initiated. They maintain that the Commission cannot initiate consultation unilaterally, and NMFS determined that consultation on the Cowlitz Project could not begin without information concerning operation of the upstream Cowlitz Falls Project No. 2833. Intervenors also complain that the Commission's delay in initiating formal consultation on the Cowlitz Falls Project has contributed to the delay in this case.

36. Operation of the Cowlitz Falls Project is not "interrelated" or "interdependent" with that of the Cowlitz Project, as those terms are defined in the ESA regulations.[31] Therefore, there is no requirement that consultation for these projects be combined, and consultation for the Cowlitz Project need not be delayed to accommodate the schedule for consultation on the Cowlitz Falls Project.[32]

Licensee's Record of Compliance

37. Intervenors argue that we must vacate our license order because we failed to exercise our statutory duty under Section 15(a)(3)(A) of the FPA to "take into consideration . . . the existing licensee's record of compliance with the terms and conditions of the existing license."[33] Intervenors maintain that we were required to adjudicate certain allegations of Tacoma's non-compliance with the previous license and

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[31]See 50 C.F.R. 402.02 ("effects of the action").

[32]Although the Commission and NMFS entered into formal consultation on proposed changes to operation of the Cowlitz Falls Project on July 5, 2002, the Commission is still waiting for a biological opinion in that case as well. See Letter from Joseph Morgan, FERC, to Bob Lohn, NMFS, dated April 30, 2003.

[33]16 U.S.C. § 808(a)(3)(A).

take them into account in framing the terms and conditions of the new license. If we do not vacate the relicensing order, Intervenors request that we stay the order pending completion of an adjudicatory hearing on the allegations and consideration of the effect of our findings on the new license conditions.

38. As Intervenors acknowledge, this issue relates to allegations in a complaint filed with the Commission in May 1997 by two of the Intervenors, Friends of the Cowlitz and CPR-Fish. The Commission dismissed the complaint, finding that the allegations did not support a finding of license violations. On judicial review, the U.S. Court of Appeals for the Ninth Circuit held that we erred in summarily dismissing the complaint, because the petitioners had raised material issues of fact that, if proven true, would amount to license violations. However, the court also held that, under the FPA and our regulations, we have "virtually unreviewable discretion whether to enforce any alleged license violations, as well as whether to investigate such allegations or to hold evidentiary hearings."[34] The court therefore denied the petition for review.

39. Intervenors argue that, despite the court's denial of their petition, we were nevertheless required to conduct an investigation and hold a hearing on the allegations they raised in their complaint before issuing a new license for the Cowlitz Project. In support, they cite the court's observation that its conclusion that we erred in summarily dismissing the complaint "is not purely academic,"[35] given that Section 15(a)(3)(A) requires us to consider an existing licensee's record of compliance with the terms and conditions of the existing license. They also cite the court's apparent agreement with their concern that our erroneous disposition of their complaint could "unfairly impact the relicensing negotiations" because, "by not being held accountable, Tacoma could leverage the need for mitigation of such alleged infractions to gain concessions in the relicensing process."[36] In our view, neither argument provides a basis for requiring us to conduct an investigation or hold a hearing on the allegations raised in the 1997 complaint.

40. As we explained in our relicensing order, the court held that our decision not to investigate the alleged violations was within our discretion and was therefore unreviewable. Similarly, the court held that we lawfully exercised our discretion in declining to hold an evidentiary hearing. Thus, the court found that these decisions were

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[34]Friends of the Cowlitz v. FERC, 253 F.3d 1161, 1173 (9th Cir. 2001).

[35]Id. at p. 1170 n. 15.

[36]Id. at p. 1170.

legally within our discretion even though we had erroneously dismissed the complaint. If we could decline to investigate or hold hearings then, we should be equally free to do so now, provided that we consider "all the relevant factors" so that a court can satisfy itself that we have actually exercised our discretion.[37]

41. A licensee's compliance with the terms and conditions of its license is an important matter, and allegations of noncompliance must be taken seriously. However, in this case, the complaint was filed very close to the time when the relicensing proceeding was anticipated to begin, and presented the very real possibility that an extensive investigation, followed by an evidentiary hearing, could divert resources that might better be expended on relicensing.[38] For these reasons, we were reluctant to conduct an investigation or initiate an enforcement proceeding after the court decision.

42. More importantly, however, it is not readily apparent to us that doing so would have influenced the outcome of the relicensing proceeding. For relicensing, we seek to establish the existing condition of the resources at issue and determine what measures are needed to provide an appropriate level of protection, mitigation, or enhancement. We must determine what measures are needed, as well as how the resources came to be in their present state. However, a finding that the licensee was somehow at fault would not influence our determination of what is needed to improve the condition of the resource. For example, if we found that the licensee was required to install fish protection devices and did not do so under the terms of the existing license, we would not automatically require that the licensee install those devices, plus other measures, as a condition of the new license. Rather, we would reexamine the need for not only those devices but also for other measures, and would require them if the record supported the need to do so. Thus, Intervenors are not correct in their assumption that, if we were to find that the licensee had violated the existing license, we would impose a greater level of resource protection for the new license term.

43. Similarly, if we were to find that the licensee did not violate the existing license, this would not automatically result in a lower level of resource protection measures in the new license. In either case, we would base the new license requirements on our assessment of what is needed, and what can reasonably be provided as a condition of the

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[37] Id. at p. 1172.

[38] The complaint was filed some 30 years after the underlying agreement on which many of the allegations were based, and nearly 10 years after Washington DFW first requested that the licensee build additional fish rearing facilities).

new license. Thus, initiating an enforcement proceeding on the eve of relicensing would not likely affect the outcome of the relicensing proceeding.

44. Nor do we think that Section 15(a)(3)(A) requires us to conduct an investigation or hold a hearing on the complaint. That section requires us to examine an existing licensee's record of compliance with the terms of its license. This involves examining existing information contained in our administrative records. It does not require us to create information that does not already exist, through the use of investigations or enforcement proceedings. In our relicensing decision, we examined Tacoma's record of compliance with the terms of its license, and concluded that record was satisfactory. Nothing more is contemplated by Section 15(a)(3)(A) of the FPA.

Consultation with the Cowlitz Indian Tribe

45. Intervenors argue that the Commission violated Section 10(a)(2)(B) of the FPA by not fully considering the recommendations, including fish and wildlife recommendations, of the Cowlitz Indian Tribe; as well as by approving the Fisheries Technical Committee in the Agreement, which excludes the Tribe from participation because it declined to sign the Agreement. They also complain that the Tribe was frozen out of effective participation in pre-licensing consultation because the Tribe would not sign the Agreement. They do not elaborate on these arguments, and it is difficult to determine the basis for them.

46. We addressed these matters in our order approving the Agreement and issuing a new license for the project. Throughout our decision, we considered the Tribe's recommendations and explained why we did or did not adopt them. Nothing more is required by Section 10(a) of the FPA. Nor do we find any violation of the FPA in the fact that the Tribe had an opportunity to participate in the settlement process but chose not to sign the Agreement.

47. The purpose of the Fisheries Technical Committee that we approved as part of the Agreement is to advise and assist Tacoma in the design and monitoring of plans and studies, reviewing and evaluating resulting data, and decisions on adaptive management measures associated with the fisheries measures required in the new license. As such, it is a means of providing input to Tacoma, not to the Commission, and there is nothing in the FPA that would require the Tribe's participation. In that regard, Intervenors' assertion that the Fisheries Technical Committee violates the Federal Advisory Committee Act

(FACA) is misplaced.[39] Because the Committee exists to advise Tacoma and does not advise the Commission in any manner, the FACA provisions are inapplicable.

Fish Passage

48. Intervenors argue that the fish passage provisions in the relicensing order, which implement the conditions and prescriptions of the federal resource agencies, are inadequate for the protection, mitigation, and enhancement of the fisheries resources affected by the project. They assert that these provisions are inconsistent with the Northwest Power Planning Act, because they do not provide the "best available means for aiding downstream and upstream passage of anadromous and resident fish." They maintain that the record in support of the fish passage provisions is inadequate, and that NMFS ignored its own best practices in order to reach a compromise in settlement negotiations.

49. As explained in our relicensing order, fish passage and its role in the recovery of listed salmon were matters of considerable controversy in this proceeding. Intervenors argued that fish should be able to travel the river through natural means, which would include fish ladders or some other means of volitional passage. Staff examined this issue in the final Environmental Impact Statement (EIS) and concluded that the fish passage measures identified in the Agreement represent the best available means of providing fish

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[39]Intervenors argue, without elaboration, that the Commission's approval of the Fisheries Technical Committee violates the Federal Advisory Committee Act, 5 U.S.C. App. 2, because it confers preferential standing to non-governmental groups that signed the Agreement, at the expense of open public observation and comment, and that the requirement that Tacoma prepare an Information Management Plan does not correct the defect. In support, they cite Alabama-Tombigbee Rivers Coalition v. Dept. of the Interior, 26 F.3d 1103 (11th Cir. 1994). That case involved a committee that was established for the purpose of advising FWS on the best available scientific evidence and assessing the status of a species proposed for listing as endangered pursuant to the ESA. Because the FACA provisions applied and FWS did not observe the statutory requirements, the court enjoined FWS from publishing, using, or relying on the committee's report. Here, as explained above, the Fisheries Technical Committee is advising Tacoma, not the Commission. If, after considering the Committee's recommendations, Tacoma decides to propose changes as part of an adaptive management approach, the Commission will consider those changes and will seek public comment on them, in accordance with its regulations and policy. Thus, the Committee neither advises the Commission nor precludes public participation regarding the merits of any proposed changes.

passage, as well as the means to refine those measures to improve passage as more information is developed through monitoring and additional studies. Thus, the measures are consistent with the Northwest Power Planning Act and the Northwest Power Planning Council's Columbia Basin Fish and Wildlife Program.[40]

50. Intervenors assert that the EIS provided a deficient analysis of the relative effectiveness of a trap-and-haul system versus fish ladders. However, they do not attempt to demonstrate why this might be so, other than to state that the "studies cited were self-referencing 'gray' literature" and were "unrepresentative of the Cowlitz River and its fish resources," and that information about a tram system before construction of Barrier Dam was overlooked.[41] These assertions, without more, are inadequate to enable us to understand their complaints or to address their arguments.

51. Intervenors argue that NMFS disregarded its best practices and policies, citing Congressional testimony that trap-and-haul facilities are problematic and are considered a "last resort for fish passage."[42] Be that as it may, NMFS reviewed the available evidence and concluded that trap-and-haul facilities were adequate in the circumstances of this case. Commission staff reached the same conclusion in the final EIS. We therefore find no error in the fact that NMFS has stated a preference, in the abstract, for volitional fish passage facilities.

52. As the record of this proceeding makes clear, we agree that the fish passage provisions in the new license are adequate. The mandatory prescriptions under Section

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[40]98 FERC ¶ 61,274 at 62,092-93 and 62,096-97. Intervenors also assert that the Agreement and relicensing order disregard the passage needs of resident fish, which they maintain must be provided for as part of the Columbia Basin Fish and Wildlife Program. As explained in our relicensing order, the Northwest Power Act requires the Commission to take the Program into account "to the fullest extent practicable." This does not translate into a requirement that the Commission must provide volitional fish passage facilities for resident fish (which, unlike anadromous fish, do not require passage for completion of their life cycle).

[41]Request for rehearing at 21-22.

[42]Request for rehearing at 23.

18 of the FPA and Section 401 of the CWA are consistent with the terms of the Agreement. Therefore, we deny rehearing of these provisions.[43]

Flood Control

53. Intervenors assert that, while the project dams are successful in ameliorating floods of low to intermediate magnitude (those between 20,000 and 50,000 cubic feet per second (cfs)), they do not provide adequate protection from high intensity floods. Intervenors maintain that Tacoma should be required to modify its reservoir operations to provide better flood control, and that current operations favor power production over increased reservoir storage, which increases the risk of flooding. They add that they sought to engage representatives of Tacoma and Ecology in a constructive dialog on flood control before a settlement Agreement was reached, but these parties were unwilling to discuss the issue in the settlement context. Instead, Tacoma developed and submitted a revised proposal for flood control operations in consultation with the U.S. Army Corps of Engineers (Corps).

54. Hydroelectric projects serve many different purposes, including power production; recreation; flood protection; and protection, mitigation, and enhancement of fish and wildlife resources. Maximization of any one purpose usually results in detrimental effects to other purposes. For example, although keeping reservoir levels low might provide better flood protection, it would likely reduce the amount of water available for power production, recreation, and instream flows for fish and wildlife. For this reason, the FPA requires the Commission to balance these competing interests in an attempt to optimize project operation to meet a variety of developmental and environmental needs.

55. In their comments on the draft EIS, Intervenors made recommendations for reservoir elevations and instream flows. Commission staff requested additional

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[43]Intervenors claim that there is a logical disconnection in the "trigger" mechanism for upstream volitional passage, because it depends on a demonstration that self-sustaining runs have been achieved. They maintain that volitional passage would create the conditions for self-sustaining runs. This ignores the fact that trap-and-haul facilities do provide effective fish passage. As explained in our relicensing order, there are many uncertainties associated with determining the feasibility of reestablishing anadromous fish upstream of the project. Volitional passage facilities improve fish survival rates by only 2 percent, at an estimated cost of $30 million. The Agreement adopts the reasonable approach of deferring construction of volitional facilities until a better balance of costs and benefits is achieved.

information from Tacoma on how changes to project operation under the Agreement would affect flood control, and how Intervenors' recommendations would affect both flood control and project operations. Staff reviewed Tacoma's analysis and concluded that Intervenors' recommendations could result in minimum flows not being sustainable, and the Agreement would provide better flood protection.[44]

56. While Intervenors might strike a different balance, they have not shown that the provisions for flood control in the new license are in any way unreasonable or inadequate. Nor is there any basis for rejecting the flood control provisions because they were not made part of the settlement negotiations. Parties seeking a settlement may include whatever issues they wish in their negotiations, and an offer of settlement need not include all parties or all issues in a proceeding. The Commission reviews offers of settlement in light of the requirements of the FPA, and will approve them if they meet those requirements and are in the public interest.

Hatchery Production and Management

57. Intervenors argue that the provisions for hatchery production and management in the relicensing order fail to provide sustainable fisheries levels for all fish species affected by the project. They maintain that production cutbacks for the Cowlitz hatcheries fail to provide adequate protection, mitigation, and enhancement for existing fish resources, particularly as they affect early winter and summer steelhead stocks. However, they fail to articulate any basis for these assertions.

58. Intervenors also complain that "the license articles setting numerical poundage 'production' levels and a 'current upper bound permitted by the ESA' were the outcome of a negotiated compromise and not supported by scientific evidence."[45] Again, they make no attempt to explain or support these assertions. Accordingly, we are unable to consider them further.

The Commission orders:

(A) The request for rehearing filed by the National Marine Fisheries Service on April 12, 2002, in this proceeding is denied.

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[44]98 FERC ¶ 61,274 at 62,093; final EIS at pp. A-24 to A-25.

[45]Request for rehearing at 8.

(B) The request for rehearing filed by Friends of the Cowlitz, CPR-Fish, and the Cowlitz Indian Tribe on April 12, 2003, in this proceeding is denied.

(C) Appendix C of the license is amended to include the additional conditions submitted by the Washington Department of Ecology under Section 401 of the Clean Water Act, as those conditions are set forth in Appendix C-1 to this order.

(D) Article 401 is modified to read as follows:

Article 401.

(a) Requirement to File Plans for Commission Approval:

Settlement Agreement articles 1, 2 and 3 (Appendix A) require the licensee to prepare plans regarding fish passage in consultation with the Fisheries Technical Committee or the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Washington Department of Fish and Wildlife, and Washington Department of Ecology (FTC or agencies) if the Agreement has become void. Water quality certification conditions 1b, 1c, and 1e require the license to prepare plans for monitoring effects of instream flow on salmon habitat, dewatering salmon redds, stranding juvenile and adult salmon, and monitoring total dissolved gases associated with spill events. Each such plan shall also be submitted to the Commission for approval. These plans are listed below in the approximate sequence we anticipate they would be filed.

Settlement Article No.	Facility or Activity	Due Date from License Issuance or Otherwise Specified
Article 1	Plan for downstream fish passage and collection facilities and measures at Riffe Lake or Cowlitz Falls (if Lewis County Public Utility District concurs) .	6 months
Article 2	Study plan or study results evaluating turbine mortality and the effectiveness of existing louver system at Mayfield Dam.	6 months
Article 3	Plan for studies to evaluate whether criteria for implementing effective upstream volitional passage facilities have been met.	6 months
Article 1	If necessary, a plan for further improvements to downstream passage facilities or measures at Riffe Lake or Cowlitz Falls (if Lewis County Public Utility District concurs) most likely to reach 95% FPS, based on effectiveness studies, and continued monitoring and evaluation of those facilities.	18 months from completion of new or modified facilities.
Article 2	Plan for improvements to downstream fish passage at Mayfield Dam.	3 years
Article 2	If 95% FPS has not been achieved at Mayfield Dam, plans to further improve the effectiveness of the facilities or measures, or to substitute other measures.	18 months from completion of downstream passage improvements, with additional plans at 18-month intervals if recommended by FTC.

Settlement Article No.	Facility or Activity	Due Date from License Issuance or Otherwise Specified
Article 3	Design and schedule for constructing volitional upstream passage facilities.	In the first annual report that is filed within the first 12 years that indicates that, within the next 3 years or less, volitional passage criteria will be met for (1) any species originating in the Tilton basin and (2) either spring chinook or late winter steelhead originating above Mossyrock Dam. By the end of year 12, if volitional passage criteria have been or will be met for any salmonid species in the Tilton River by year 15.
Article 3	Plan to abandon volitional upstream fish passage and expend the $15 million in the fish passage escrow account.	By year 14, if determined by the FTC or agencies and affected tribes that expenditure of escrow funds on additional measures in lieu of volitional passage is necessary and appropriate to achieve natural stock restoration.

Water Quality Condition	Facility or Activity	Due Date from License Issuance or Otherwise Specified

1b	Plan and schedule for study of IHA/RVA methodology	To be determined in consultation with Ecology
1c	Plan and schedule to monitor side channel habitat for chinook salmon	To be determined in consultation with Ecology
1e	Total dissolved gas Transect Study Plan for each dam	April 1, 2003
1e	Total dissolved gas Preliminary Compliance Schedule for each dam	August 1, 2003

For each plan, the licensee shall submit to the Commission documentation of its consultation, copies of comments and recommendations made in connection with the plan, and a description of how the plan accommodates the comments and recommendations. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information. The Commission reserves the right to make changes to any plan submitted. Upon Commission approval, the plan becomes a requirement of the license, and the licensee shall implement the plan or changes in the project operations or facilities, including any changes required by the Commission.

(b) Requirement to File Amendment Applications:

Certain license conditions contemplate unspecified long-term changes to project operations or facilities for the purpose of mitigating environmental impacts. These changes may not be implemented without prior Commission authorization granted after the filing of an application to amend the license. The condition is listed below.

Settlement Article No.	Modification
Article 15 and 16	Modification of instream flows or pulsing flows for channel maintenance, if monitoring shows flows to be inadequate.

Water Quality Certification Conditions	Modification

Condition 1c and 1d	Modification of instream flows, pulsing flows or ramping rates, if monitoring shows flows are causing de-watering of redds or stranding of juvenile or adult salmon
Condition 1e	Structural or operational modifications to reduce total dissolved gas concentration to within water quality standards

(E) The license is amended to add the following article:

Article 408. The Commission reserves its authority to require the licensee to take whatever action the Commission deems necessary as a result of a biological opinion from the National Marine Fisheries Service on the effects of the Cowlitz Project on chinook salmon, chum salmon, and steelhead trout and their critical habitat, including, as appropriate, any reasonable and prudent alternatives, reasonable and prudent measures to implement those alternatives, and incidental take conditions.

(F) The stay of the new license issued on April 12, 2002, in this proceeding is lifted, effective the date of this order.

By the Commission. Commissioner Massey dissented in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

APPENDIX C-1

WASHINGTON DEPARTMENT OF ECOLOGY
WATER QUALITY CERTIFICATION CONDITION ADDENDUM

1. The Board, based upon the above findings of fact and conclusions of law, except for the issue of Article 303 of the license, affirms Ecology's issuance of the §401 Certification, with the imposition of the following conditions, which shall be incorporated into the Certification:

   a. References to "the August 15 – September 15 period" in Article 13(d) of the instream flow requirement shall be amended to read "the August 15 – November 20 period."
   b. Ecology shall require Tacoma, as a part of its program of adaptive management of the project, to undertake a detailed study of whether and how the IHA/RVA methodology, including other similar methodologies may supplement existing instream flow setting methodologies, consistent with the goal of restoring declining native anadromous salmonid runs to the Cowlitz River. Such study shall be undertaken pursuant to a plan and schedule developed by Tacoma and approved by Ecology.
   c. Ecology shall require Tacoma to select and monitor additional side channels, which are fully representative of the available river habitat for native chinook salmon below the project, including those where significant potential habitat is likely to be limited due to the lack of adequate maintenance flow. This task shall be done pursuant to a plan and schedule developed by Tacoma and approved by Ecology. If monitoring shows the flows of those channels to be inadequate for maintenance, Ecology shall modify the flows appropriately to the levels and periods necessary to achieve adequate channel maintenance; provided, such flows are consistent with the stream flows required under paragraph 1.d below.
   d. Ecology shall require Tacoma to include in Tacoma's monitoring, under Article 15 of the Settlement Agreement, the de-watering of redds and the stranding of juvenile or adult fish. In the event such monitoring reveals de-watering of redds or the stranding of juvenile or adult fish, due to the operations of the project, Ecology shall modify the instream flows, including the ramping rates, if necessary, to cure the problem.

e. Ecology's June 14, 2002 order and any amendments thereto (set forth below), shall be incorporated into the §401 Certification.

2. The §401 Certification is remanded to Ecology for the limited purpose of Ecology reviewing the Article 303 flood control provisions of the license for the project to determine whether it has reasonable assurance the implementation of those provisions will not violate Washington's anti-degradation standard.

June 14, 2002 Order on Total Dissolved Gases

In accordance with RCW 90.48, it is ordered that Tacoma Power take the following actions to seek to achieve compliance no later than June 14, 2007, with standards for total dissolved gas. These actions are required on the Cowlitz River near the locations known as the Mayfield Dam and Mossyrock Dam.

1. Conduct Monitoring Requirements as follows:

A. Collect dissolved gas data in the tailraces and forebays of each dam:
   1. Collect forebay data during spills using monitors measuring gas in the reservoir near the dam.
   2. Collect cross-sectional transect gas data during several spill scenarios. At a minimum, perform transects below the actual aerated zones during the spill.
   3. Collect gas data for Mossyrock, Mayfield, and the Salmon Hatchery barrier dams.
   4. Assess amount and duration (if any) of air entrainment by turbines.
   5. Analyze how the bathymetry below each dam influences TDG levels.
   6. Analyze how the dam structures influence spill characteristics and subsequent TDG entrainment.

B. Identify permanent monitoring site(s):
   1. Data collection may be limited only to operational spill events that will be defined

based on analysis of data obtained during 1.A. above.

2. The quantity and location of permanent monitoring/compliance station(s) will be defined based on analysis fo data obtained during 1.A. above.

C. Use acceptable quality assurance practices.

D. Monitors will be at a compensation depth where bubbles do not form on the instruments, generally about 15 feet deep.

E. Reporting will be done in accordance with Condition Number 3 below.

2. If, as a result of the data analysis during 1.A. above, the Department determines that abatement is necessary, take actions to abate gas to meet Water Quality Standards:

A. Reduce dissolved gas through operational adjustments:
   1. Identify ways to reduce operational spill.
      a. Analyze potential changes to reservoir operation and storage to reduce the spill during water flows that lead to standards exceedences for gas.
      b. Analyze any other operational possibilities to reduce high TDG.

B. If the analysis of changes to operations demonstrates that water quality standards will not be assured and the Department determines that further analysis is necessary, proceed to identify potential structural modifications to reduce gas generated by dam operation to meet water quality standards:
   1. Perform preliminary engineering analysis of options.
   2. Develop preferred options. The U.S. Army Corps of Engineers dissolved gas abatement program on the Columbia and Snake Rivers is a good base model for reference.

C. No later than April 1, 2003, submit a Transect Study Plan including quality assurance plans and an Operational Spill Analysis for each dam to the Department for review and approval.

D. No later than August 1, 2003, submit a Preliminary Compliance Schedule for each dam to the Department for review and approval. A final compliance schedule will be submitted within 120 days of completion of the work described in 1.A. Such schedule shall be designed to obtain compliance no later than June 14, 2007, unless such time is extended by further order of the Department.

3. Reporting Requirements:

A. No later than 30 days after an operational spill at either dam, submit a report that includes the following information to the Department:

1. A description of water conditions for the year in terms of basin runoff conditions and flows as compared to average years.
2. Tables showing date, times, and amounts (in percent saturation) of dissolved gas when water quality standards are exceeded. Explain reasons for spill. Discuss steps that were taken to fix each problem.

B. By October 1 of each year when operational spill has occurred, submit a report to the Department which include reasons for spill and tables and graphs showing quantities (in cfs) of spill at each dam. The data collected shall include:

- Observed total river flow,
- Project hydraulic capacity,
- Total spill.

C. Notify the Department of any exceedences of the total dissolved gas standards due to spill within one week of violation. Include in this notice, any steps that have been taken to correct the problem.

D. A report summarizing gas entrainment for each dam shall be made available on the website within one month of exceedence of water quality standards.

Submittals and notifications required in this Order shall be to the following:

Department of Ecology
Southwest Regional Office
Attn: Water Quality Section/Nonpoint Source Unit Supervisor
PO Box 47775
Olympia, WA 98504-7775

Failure to comply with this Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce the terms of this Order. Prior to the implementation of operational or structural changes, Tacoma Power shall operate the project in a manner consistent with past operations that does not increase the frequency of exceedences. This Order does not restrict or limit the authority of the Department to issue penalties or take other enforcement action with respect to any exceedence.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Tacoma, Washington Project No. 2016-056

(Issued July 18, 2003)

MASSEY, Commissioner, dissenting in part:

As the order points out, the Commission's staff has submitted its biological assessment concluding that relicensing the project in accordance with the Settlement Agreement is "likely to adversely affect" chinook salmon, chum salmon, and steelhead trout, as well as their critical habitat. We can reasonably conclude that there will be some incidental taking. Thus, this case is distinguishable from Chelan County,[1] where staff had concluded that the proposed action would not result in any incidental taking.

Although I am highly sympathetic with the majority's frustration that delay in receiving NMFS's biological opinion only delays implementation of a comprehensive settlement agreement designed to incrementally benefit the listed species in the longer term, the law is clear. The Commission is barred by law from proceeding with an action that results in incidental taking without written authorization in the form of an incidental take statement that is a part of a biological opinion. We have no such biological opinion here. [2]

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[1]Public Utility District No. 1 of Chelan County, Washington, 98 FERC par. 61,279 (2002) reh'g denied. 102 FERC par 61,043 (2003), requests for reh'g or reconsideration pending.

[2]Under the Endangered Species Act, if the Commission proceeds with an action without the benefit of the biological opinion, and the action results in an unauthorized taking, the Commission, individual Commissioners, and staff members could be subject to civil penalties up to $25,000 and imprisonment for up to one year. 16 U.S.C. § 1540(a) and (b).

The majority's rationale for proceeding – that the public interest will be better served – has a lot of appeal. Nevertheless, despite our frustration and good intentions, the Commission does not have the legal authority to take this otherwise laudable action.

For these reasons, I must respectfully dissent.

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William L. Massey
Commissioner