

UNITED STATES OF AMERICA 112 FERC ¶62,156
FEDERAL ENERGY REGULATORY COMMISSION

City of Tacoma

Project No. 2016 - 090

ORDER MODIFYING AND APPROVING UPSTREAM
FISH PASSAGE STUDY REPORT, ARTICLE 3

(Issued August 18, 2005)

On July 19, 2004, the City of Tacoma (licensee) filed its Upstream Fish Passage Study Report pursuant to Article 401 and Settlement Agreement Article 3 of the March 13, 2002 Order Approving Settlement and Issuing New License¹ and the July 9, 2004 Order Amending New License² for the Cowlitz River Project. By letter issued September 26, 2003, the Commission established the effective and issuance date of the new license for compliance purposes as July 18, 2003, the date of the Order Denying Rehearing and Lifting Stay.³ The project consists of the Mayfield and Mossyrock developments and is located on the Cowlitz River in Lewis County, in southwestern Washington.

BACKGROUND AND LICENSE REQUIREMENTS

License Article 401 incorporates Settlement Agreement (SA) Articles 1, 2, and 3, which address upstream and downstream fish passage at the project and requires the plans or reports to be filed for Commission approval. SA Article 3 requires the licensee, in consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS), to provide and maintain effective upstream fish passage at the Barrier Dam, Mayfield Dam and Mossyrock Dam through trap and haul facilities immediately upon license issuance, and continuing until volitional upstream passage systems have been implemented in accordance with the article. Further, the article requires the licensee to submit a report on adult anadromous fish traveling through the Cowlitz River Project within six months of license issuance and annually thereafter until a decision is made on constructing volitional upstream passage facilities. Article 401 as amended by the July 9, 2004 order requires the licensee to submit to the Commission documentation of its consultation with the resource agencies, copies of comments and

¹ 98 FERC & 61,274 (2002)

² 108 FERC & 61,031 (2004)

³ 104 FERC & 61,092 (2003)

recommendations made in connection with the plan, and a description of how the plan accommodates the comments and recommendations.

The report is required to include: 1) the most recent version of Tables 3, 4, and 5 from the report entitled *Contribution Rate Benchmarks for Future Runs of Spring Chinook, Fall Chinook, and Coho produced at the Cowlitz Salmon Hatchery* dated June 28, 2000 and filed with the Commission concurrently with the August 2000 Cowlitz River Hydroelectric Project Settlement Agreement; 2) tables estimating the annual number of adult recruits originating from the Cowlitz River basin upstream of the Toutle River, and including steelhead, cutthroat trout, and all other indigenous stocks that are produced at the hatcheries, along with an index of each stock to its benchmark values, or if not otherwise agreed, a default index of “1”; 3) a plan and schedule for studies, to be conducted at regular intervals, to evaluate whether specific criteria (as identified in b) of SA Article 3) for implementing effective upstream passage through volitional facilities have been met.

In part, SA Article 3 specifies the following additional requirements:

- A) For any annual report filed within 12 years of license issuance in which the results of the studies indicate that, within the next three years or less, the criteria for volitional upstream passage will be met with respect to any salmonid species originating in the Tilton basin and with respect to either spring Chinook salmon or late winter steelhead originating above Mossyrock Dam, the licensee shall also include proposed preliminary designs and schedules for the construction of upstream passage systems for the project.
- B) Upon meeting the above referenced criteria for the construction of volitional upstream passage systems, the licensee shall proceed expeditiously to complete the final design, permitting and construction of upstream passage systems.
- C) Within 5 years of license issuance, the licensee shall establish an interest-bearing escrow account in the amount of \$15 million to contribute to the total cost of constructing volitional upstream fish passage facilities.
- D) If at any time the licensee files a report indicating that the above referenced criteria are not likely to be met within 15 years following license issuance with respect to listed Chinook salmon or steelhead

originating above Mayfield Dam, the licensee shall consult with the Fisheries Technical Committee (FTC) or agencies, using the best available data at the time, regarding factors that may be contributing to the failure to meet such criteria, and the likelihood or not that such criteria will be met for the listed stocks in the foreseeable future.

- E) If preliminary or final upstream volitional fish passage design plans and implementation schedules have not been approved and filed with the Commission at the end of year 12, the licensee must prepare and submit preliminary design plans and schedules in accordance with A) and B) above if the volitional upstream passage criteria described in b) of SA Article 3 and (A) above have been met or are likely to be met for any salmonid species in the Tilton River by year 15.
- F) If within 14 years of license issuance the criteria for volitional upstream passage facilities, described in b) of SA Article 3 and (A) and (E) above, have not been met and it is determined by the FTC or agencies, and affected Tribes, with the concurrence of NMFS and FWS, that measures in addition to those provided for in the SA are necessary to restore self-sustaining, natural production of Endangered Species Act (ESA) listed stocks in the Cowlitz River basin, and that expenditure of the escrow fund on such additional measures in lieu of volitional upstream facilities is necessary and appropriate to achieve natural stock restoration, consistent with the express purpose of the license and the SA, and with applicable recovery plans for the listed Cowlitz River stocks, the licensee shall submit to the Commission a plan to abandon volitional upstream passage and expend the funds in the escrow account for the purposes of protecting and promoting restoration and recovery of the ESA-listed stocks.
- G) Following the construction of volitional upstream passage facilities, the licensee, in consultation with the FTC or the agencies, shall monitor the effectiveness of the facilities. As deemed necessary by NMFS and the FWS, after consultation with the FTC, the licensee shall implement such reasonable modifications as may be necessary to improve passage effectiveness.
- H) Any plan required to be filed pursuant to the article shall be prepared in consultation with the FTC or agencies.

LICENSEE'S REPORT AND PLAN

In general, the licensee's report addresses the requirements of SA Article 3. The report is required to include tables estimating the annual number of adult recruits originating from the Cowlitz River basin upstream of the Toutle River. However, the licensee states that under the current fisheries management regime not all hatchery juvenile salmon and steelhead juveniles are marked that are released into the upper Cowlitz River basin tributaries such that unmarked adult Chinook or steelhead returns could be either hatchery-produced or naturally-produced fish. As a result, the licensee's filing only includes hatchery-origin returns and tables indicating whether a particular stock is marked, unmarked or both with regard to possible origins of upper Cowlitz River basin adult returns for 2002/2003. Further, the licensee states that their Fisheries and Hatchery Management Plan (FHMP) under SA Article 6 recommends an end to releases of hatchery juveniles in the upper Cowlitz River basin. Thus, the juvenile marking plan in the FHMP will provide for a more accurate identification of the origin of adult salmonids in the basin.

The report is also required to include a plan and schedule for studies, to be conducted at regular intervals, to evaluate whether certain criteria for implementing effective upstream passage through volitional facilities have been met, including: adult fish in Mayfield Lake are able to choose their tributary or origin and survive Mayfield Lake transit at rates determined by NMFS and FWS, in consultation with the FTC or agencies, to be sufficient to achieve upstream passage through volitional facilities. The licensee states that since only naturally-produced coho salmon are presently available to conduct this study, the licensee plans to defer developing a plan and schedule until such time as there are naturally-produced adult salmonids that originated in the upper Cowlitz River basin available for conducting the study.

Additionally, the article requires the licensee, within five years of license issuance, to establish an interest-bearing escrow account in the amount of \$15 million to contribute to the total cost of constructing volitional upstream fish passage facilities. However, the licensee's report does not include information on developing such an account. Finally, the licensee plans to file a revised report and accompanying data annually upon the filing date of their plan with the Commission.

AGENCY CONSULTATION

The SA Article 3 requires the licensee to provide and maintain effective upstream fish passage at the Barrier Dam, Mayfield Dam and Mossyrock Dam through trap and haul facilities, which the licensee plans to continue, in consultation with NMFS and FWS. With regard to the report, the licensee is required to prepare the report in collaboration with the FTC. By letter dated December 15, 2003, the Washington Department of Fish and Wildlife agreed conceptually with the licensee's report and requested to review the assumptions and calculations upon which the contribution rate bench marks developed by S.P. Cramer and Associates, Inc. methodology is constructed.

By email dated March 31, 2004, the FWS deferred to NMFS for approval of license articles 1, 2 and 3. By letter dated July 15, 2004, NMFS provided comments on the licensee's report and plan. NMFS commented that the licensee's report should be revised, or a plan should be developed shortly, to include information on the rehabilitation of the ladder and trap at the Barrier Dam in order to bring it up to current criteria and working conditions. By letter dated July 16, 2004, the licensee responded to NMFS' comments stating their belief that the comments did not pertain to the contents of their report, but instead to propose rehabilitation of Barrier Dam. Further, the licensee stated that NMFS presented a list of improvements that they believe must be undertaken to bring the Barrier Dam and fish ladder up to current criteria; however, they state that NMFS did not engage them or the FTC in any prior discussion of potential issues with these facilities or with any information that would indicate that the changes are warranted.

By independent report dated August 17, 2004 and filed with the Commission on August 24, 2004, American Rivers and Trout Unlimited provided comments on the licensee's plan. In general, they concurred with the licensee's report; however, stated that they could not locate the following information in the licensee's report: a) demonstration of volitional upstream passage of adult salmonids; b) estimate number of adult recruits originating from the Cowlitz River upstream of the Toutle River under present conditions; c) studies to evaluate if adult fish in Mayfield Lake are able to choose their tributary of origin; d) number of adults that can survive migration in Mayfield Lake; e) plans for fish disease management; f) designs and schedules for construction of upstream passage systems; g) plans for adult passage at Barrier Dam fish weir that could include breaching of the weir; and h) an interest-bearing escrow account of \$15 million to construct adult migration facilities.

By letter filed with the Commission on September 22, 2004, the licensee responded to the independent report filed by American Rivers and Trout Unlimited stating that the report correctly summarized many of the actions that are proposed by the

licensee in their Fisheries and Hatchery Management Plan. As a result, their information needs should be developed over time through implementation of SA Article 3 in addition to proposals included in their Fisheries and Hatchery Management Plan.

DISCUSSION AND CONCLUSIONS

The SA Article 3 requires the licensee, within five years of license issuance, to establish an interest-bearing escrow account in the amount of \$15 million to contribute to the total cost of constructing volitional upstream fish passage facilities. Or, if it is determined to abandon volitional upstream passage, the licensee is required to expend the funds in the escrow account for the purposes of protecting and promoting restoration and recovery of listed Cowlitz River stocks. However, the licensee's report does not include information on establishing such an account. Therefore, the licensee should include in their annual report or file separately by July 18, 2008 documentation that the escrow account has been established.

The licensee plans to file a revised report and accompanying data annually upon the filing date of their plan with the Commission. The SA Article 3 j) requires that any plan required to be filed pursuant to the article shall be prepared in consultation with the FTC or agencies. This consultation process should also be adhered to for the filing of the annual reports. Therefore, the licensee should file with the Commission, beginning July 19, 2005, and annually thereafter, an annual Upstream Fish Passage Study Report. The licensee's 2005 report, however, should be filed with the Commission within 60 days from the date of this order.

With regard to NMFS's comments on the licensee's filing, license Article 413 of the July 9, 2004 Order Amending New License requires the licensee to develop a trap and haul plan, in consultation with the FTC, including NMFS, and file the plan for NMFS and Commission approval. In part, the plan is required to adhere to NMFS criteria regarding trapping and hauling of anadromous fish. Considering Article 413 requires that the licensee adhere to NMFS criteria regarding trapping and hauling and the licensee's plan under the article is still being developed, it is appropriate that NMFS's comments regarding improvements to Barrier Dam be addressed in the development of their plan under Article 413. Therefore, the licensee should include any such improvements to Barrier Dam in their plan under Article 413 before filing their plan with NMFS and the Commission for approval.

The licensee's Upstream Fish Passage Study Report should provide a baseline for identifying future data needs to be included in subsequent annual reports. Additionally,

any plans or studies developed out of the article should assist in meeting the criteria under the article and assist in determining the need for volitional upstream fish passage systems. Additionally, the FTC collaboration and review process should provide the guidance necessary for the successful reintroduction of upper Cowlitz River basin stocks.

The licensee's plan satisfies the requirements of SA Article 3 of the March 13, 2002 Order Approving Settlement and Issuing New License for the Cowlitz River Project. Therefore, the licensee's plan, as modified, should be approved.

The Director orders:

(A) The Upstream Fish Passage Study Report, filed July 19, 2004, under Settlement Agreement Article 3 of the March 13, 2002 Order Approving Settlement and Issuing New License for the Cowlitz River Project as amended by the July 9, 2004 Order Amending License, as modified by paragraphs (B) and (C), is approved.

(B) The licensee shall file with the Commission, within 60 days from the date of this order and annually thereafter beginning July 19, 2006, an annual Upstream Fish Passage Study Report. The report shall include the information required under Settlement Agreement Article 3 and be prepared in consultation with the Fisheries Technical Committee. The licensee shall allow the Fisheries Technical Committee 30 days to comment on the report prior to filing the report with the Commission. The report shall include any comments from the Fisheries Technical Committee and the licensee's response to any such comments.

(C) The licensee shall file with the Commission, by July 18, 2008, documentation that the \$15 million escrow account has been established.

(D) The licensee shall file an original and seven copies of any filing required by this order with:

The Secretary
Federal Energy Regulatory Commission
Mail Code: DHAC, PJ-12.3
888 First Street, NE
Washington, DC 20426

(E) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 CFR ' 385.713.

George H. Taylor
Chief, Biological Resources Branch
Division of Hydropower Administration
and Compliance