UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

City of Tacoma, Washington Project No. 460-029

ORDER ON REHEARING AND DENYING MOTION
FOR LICENSE ARTICLES ON WATER RIGHTS

(Issued February 14, 2005)

1. In this order, we grant in part and deny in part multiple requests for rehearing of our order of June 21, 2004,[1] which amended the subsequent license for the 131-megawatt Cushman Hydroelectric Project to include conditions to protect threatened fish species, required the release of minimum flows to benefit those species, and denied a motion to reconsider the terms of the subsequent license. We also deny a motion to include license articles on water rights for the project. This order is in the public interest because it resolves issues concerning the measures needed to protect the threatened fish species, affirms the appropriate balance of developmental and environmental values for the new license term, and clarifies the relationship between the issues considered on remand and those already resolved in earlier decisions in this proceeding.

BACKGROUND

2. The Commission issued a subsequent major license to the City of Tacoma, Washington (Tacoma), for the Cushman Project on July 30, 1998, and issued an order on rehearing on March 30, 1999.[2] Tacoma, the Skokomish Indian Tribe (Tribe), the National Marine Fisheries Service (NOAA Fisheries), American Rivers, and Save the Lakes Coalition filed petitions for judicial review. On May 21, 1999, in response to

[1] *City of Tacoma, Washington*, 107 FERC ¶ 61,288 (2004).

[2] *City of Tacoma, Washington*, 84 FERC ¶ 61,107 (1998), *on reh'g*, 86 FERC ¶ 61,311 (1999). The project is located on the North Fork of the Skokomish River in Mason County, Washington, in part on federal lands in the Olympic National Forest.

Tacoma's request, the Commission stayed the new license pending judicial review.[3] Several species of fish were subsequently listed as threatened under the Endangered Species Act (ESA), and the Commission entered into formal consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service (FWS) concerning the effects of relicensing the Cushman Project on those species. On October 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for completion of formal consultation under Section 7 of the ESA.[4]

3. On March 2, 2003, Tacoma filed a motion for reconsideration, urging the Commission to revisit its balancing of public interest factors in support of the subsequent license, as well as the application of its Decommissioning Policy Statement[5] and Mead[6] decision on project economics to this case. Multiple parties filed answers in opposition to the motion. On March 3, 2003, the Tribe filed a motion to partially lift the stay to require interim conditions to protect fish and wildlife resources, including the listed fish species, pending judicial review. Tacoma filed a response opposing the Tribe's motion. NOAA Fisheries, the Washington Department of Ecology and Department of Fish and Wildlife (Washington Departments), and American Rivers filed responses in support of the Tribe's motion.

4. On September 24, 2003, the Commission issued an order holding the Tribe's motion in abeyance and directing the appointment of a settlement judge to conduct a proceeding on interim conditions.[7] While that proceeding was underway, NOAA Fisheries and FWS

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[3] 87 FERC ¶ 61,197 (1999).

[4] *City of Tacoma, Washington, et al. v. FERC*, Nos. 99-1143 *et al*. (D.C. Cir. Oct. 30, 2000).

[5] *Project Decommissioning at Relicensing; Policy Statement* (December 14, 1994), 18 C.F.R. § 2.24, 60 Fed. Reg. 339 (January 4, 1995), FERC Stats. & Regs. Preambles 1991-1996 ¶ 31,011.

[6] *Mead Corp*., 72 FERC ¶ 61,027 at 61,068-70 (1995).

[7] 104 FERC ¶ 61,324 (2003). In the same order, we denied the Tribe's petition for a declaratory order and motion for summary disposition regarding the validity of Tacoma's certifications for the project under the Coastal Zone Management Act and the Clean Water Act. The Tribe sought rehearing of that portion of our order, which we denied on December 22, 2003. 105 FERC ¶ 61,333 (2003).

filed their draft biological opinions. On December 23, 2003, the presiding judge issued his report, including an impact assessment and recommended interim remediation plan. NOAA Fisheries and FWS subsequently filed their final biological opinions on February 7, 2004, and March 4, 2004, respectively.

5. On June 21, 2004, we issued our decision in response to the court's remand, amending the subsequent license to include provisions of the biological opinions to protect the ESA-listed fish species. We also denied Tacoma's motion for reconsideration of our relicensing orders, and granted in part the Tribe's motion to partially lift the stay, thus requiring that Tacoma release a minimum flow of 240 cfs as an interim protective measure for listed species. Requests for rehearing were filed by Tacoma, the Tribe, NOAA Fisheries, Save the Lakes Coalition, Washington Departments, and American Rivers.

6. On September 30, 2004, the Tribe filed a motion to add to the license two new articles relating to Tacoma's water rights for the Cushman Project. Tacoma filed an answer opposing the motion. Initially, the Washington Department of Ecology took no position on the motion, but later filed an untimely answer in support of it on December 30, 2004.

DISCUSSION

A. Renewal of Earlier Rehearing Requests

7. All parties state that, in order to preserve their right to seek judicial review, they are renewing their earlier requests for rehearing of the 1998 license order. Some parties also renew their earlier requests for rehearing of other Commission orders issued in the course of this relicensing proceeding. Several parties note that the Commission has not indicted whether its order of June 21, 2004 constitutes final action on the Cushman Project license, or whether it will subsequently issue a new license that incorporates all amendments thus far (*i.e.*, those that the Commission made in the order on rehearing of March 31, 1999, and the order amending license of June 21, 2004).

8. This order denying rehearing is our final action on the relicense application for the Cushman Project. There is no need to issue a decision incorporating the provisions of our earlier orders in this proceeding. To the extent that parties have renewed their earlier requests for rehearing of our 1998 license order and any interlocutory orders issued in this proceeding, we deny those requests for rehearing for the reasons given in our earlier

orders. To the extent that, in the course of renewing their earlier rehearing requests, parties now make new or different arguments in support of those requests, we reject their arguments as an untimely attempt to supplement their prior requests for rehearing, which is not permitted.[8]

9. In that regard, we note that Tacoma's request for reconsideration, which we denied in our order of June 21, 2004, was, in many respects, an improper supplement to its earlier rehearing request. Although Tacoma argued that its motion was prompted by the recently-filed biological opinions, the changes in the license that resulted from those opinions were minor, and did not provide any basis for reconsidering the public interest factors in support of the new license. Indeed, we found that Tacoma's motion did not meet the Commission's threshold requirements for reconsideration. Therefore, to the extent that Tacoma's motion, or its request for rehearing of our June 21 order, seeks to introduce new or different arguments in support of its 1998 rehearing request, we reject those arguments as untimely as well.[9]

10. Tacoma does not expressly seek rehearing of our denial of its motion for reconsideration. Instead, Tacoma reiterates its arguments about why it believes the new license terms are unreasonable and thus contrary to the FPA, and faults the remand order for the same reasons that it earlier criticized the license order. Thus, although many of these arguments appear to be directed to both the license order and the remand order, they are not new and we need not reconsider them here.

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[8] See 16 U.S.C. § 313(a); *Sierra Association for Environment v. FERC*, 791 F.2d 1403 (9th Cir. 1986) (failure to seek rehearing within the statutory time period acts as a jurisdictional bar to judicial review); *Pacific Gas & Electric Co.*, 38 FERC ¶ 61,200 at 61,652 (1987) (a party may not, on remand, seek rehearing of what it failed to seek rehearing of earlier).

[9] For example, in the 1999 rehearing order, the Commission found that Tacoma had not presented the takings issue with sufficient detail to address any specific concerns or to preserve the issue for appeal. *See* 86 FERC ¶ 61,311 at 62, 104 and n.198; *see also* Tacoma's request for rehearing at 28-31 (filed Aug. 31, 1998). In contrast, Tacoma's current request for rehearing devotes nearly five pages and several footnotes to the issue, although the discussion still lacks much in the way of specificity. *See* Tacoma's request for rehearing at 7 n.17, 8 n.18, and 20-24 (filed July 21, 2004.

11. As a new variation on an old argument, Tacoma and Save the Lakes Coalition maintain that the remand order violates the National Environmental Policy Act (NEPA), because it fails to consider the adverse effects of decommissioning as reasonably foreseeable consequences of the license order. Because "decommissioning has become an even more likely scenario," they argue that the Commission must consider it now in a supplemental Environmental Impact Statement (EIS).[10]

12. We need not attempt to determine whether project decommissioning is any more likely now than it was in 1998. We included an analysis of decommissioning in our final EIS. No purpose would be served by examining this alternative more fully now, in a supplemental EIS, because any such analysis would not cause us to change our conclusion that the new license represents an appropriate balance of developmental and environmental values under the FPA. At this point, Tacoma has deferred its decision on whether to accept the new license until after judicial review is completed. If Tacoma ultimately makes a business decision to reject the new license, Tacoma will be required to file a surrender application.[11] Any such application will be subject to section 6 of the FPA, which provides that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission."[12] Thus, Tacoma will have an opportunity to develop and present a proposal for project decommissioning, and the Commission will then review the adequacy of Tacoma's proposal. As part of that review, the Commission staff will consider whether and to what extent a supplemental environmental analysis may be required. Unless and until we have a specific decommissioning proposal before us, any further environmental analysis of the effects of project decommissioning would be both premature and speculative.

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[10] Tacoma's request for rehearing at 16. *See also* Save the Lakes Coalition's request for rehearing at 2.

[11] As explained in more detail in a recent order involving the San Gorgonio Hydroelectric Project, if a project requires a license under Section 23(b)(1) of the FPA, the licensee must accept an annual license, and must either seek (and accept) a new license or file a surrender application. *Southern California Edison Co.*, 106 FERC ¶ 61,212 at P 18 (2004). A surrender application is similarly required for projects with minor or minor-part licenses not eligible for an annual license. *Id*. at P 30; *see* 18 C.F.R. § 16.25(c) (2004).

[12] 16 U.S.C. §799.

13. In a few instances discussed later in this order, parties' renewals of their earlier requests for rehearing raise new matters that we wish to clarify or otherwise address. Because the license is not yet final, the Commission may consider these issues *sua sponte* on rehearing.[13]

B. Amendment to Include ESA Conditions

14. Several parties seek rehearing or clarification of our order amending the new license to include conditions to protect threatened fish species. Tacoma reiterates its earlier arguments concerning the relicensing order, asserting that the conditions of the new license are not based on substantial evidence and that the remand order perpetuates the error by not reevaluating them. Tacoma maintains that the Commission's reliance on the biological opinions as a basis for imposing the new license conditions is circular, because the Commission failed to establish that many of the conditions are required by the FPA, and then determined that their inclusion in the biological opinions mooted the need to reconsider them. This is not a new argument based on the biological opinions, but rather a reiteration of Tacoma's earlier arguments that the new license conditions violate the FPA because they are not based on substantial evidence. We rejected those arguments in our relicensing and rehearing orders, finding that the new license conditions are required under the FPA and represent an appropriate balance of developmental and environmental values.

15. Tacoma also criticizes the remand order for its failure to consider new evidence that Tacoma submitted in this proceeding since 1999 concerning whether anadromous fish historically migrated upstream of the Cushman Project. In our order denying Tacoma's motion for an evidentiary hearing, we deferred consideration of this evidence based on statements by FWS and NOAA Fisheries that they intended to review it during ESA consultation.[14] Both agencies subsequently analyzed and rejected this evidence in their biological opinions.[15] Commission staff reviewed these analyses and found them reasonable. As we recently found in another case involving Tacoma, the Commission

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[13] *See Henwood Associates, Inc*., 50 FERC ¶ 61,183 at 61,547-48 (1990).

[14] 102 FERC ¶ 61,029 at 61,058 (2003).

[15] *See* NOAA Fisheries biological opinion at 4-3 through 4-5; FWS biological opinion at 32-34.

may reasonably rely on the expertise of FWS and NOAA Fisheries in matters involving listed species, and need not conduct a detailed substantive review of a biological opinion before deciding whether to implement its conditions in connection with a proposed action.[16]

16. Tacoma and Save the Lakes Coalition request that we clarify an ambiguity with respect to the minimum flow requirement of Article 407 of the new license. Article 407 requires a minimum flow release of 240 cfs or inflow, whichever is less. In NOAA Fisheries' biological opinion, Condition 1 of the incidental take statement similarly requires a minimum flow of 240 cfs or inflow. In our order on remand, we included the Condition 1 of the incidental take statement in Appendix C to the new license, and observed that because Article 407 of the license requires this minimum flow, no amendment was needed to incorporate it. Tacoma points out that the incidental take condition omits the phrase, "whichever is less," thus raising the possibility that Tacoma could be required to release more than 240 cfs whenever natural inflow is higher than the specified minimum. This would effectively transform Cushman into a run-of-river project. We do not believe that NOAA Fisheries intended this result. We therefore clarify that Condition 1 of Appendix C, like Article 407 of the license, requires Tacoma to release a minimum flow of 240 cfs or inflow, whichever is less.

17. Tacoma takes issue with the bull trout salvage plan required by Article 417 of the license, arguing that this measure lacks any evidentiary support and is arbitrary and capricious. To minimize incidental taking of bull trout, the FWS biological opinion requires Tacoma to: determine whether suitable spawning gravel and sufficiently cold water temperatures exist between October and April in tributaries to Lake Kokanee for successful bull trout reproduction; develop and implement a plan to salvage bull trout from Lake Kokanee if conditions are not suitable for bull trout spawning and incubation; and develop the salvage plan in coordination with FWS. In our order on remand, we amended Article 417 of the license to require bull trout habitat surveys and, if necessary, a bull trout salvage plan in accordance with the terms and conditions of the incidental take statement.

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[16] *City of Tacoma, Washington*, 109 FERC ¶61,198 at P 8 (2004) (biological opinion for relicensing the Cowlitz Project No. 2016). Save the Lakes Coalition makes a similar argument, stating that the biological opinions are largely based on outdated and incomplete information and are not based on the best scientific and commercial data available, which the ESA requires. However, Save the Lakes Coalition does not elaborate on these arguments, or attempt to show how the evidence supporting the biological opinions might be deficient.

18. Tacoma maintains that there is no evidence to support FWS's assumption that bull trout are present in Lake Kokanee. FWS states in its biological opinion that the abundance of bull trout and their use of Lake Kokanee is unknown, but that some bull trout could be expected to survive passage through the Cushman Powerhouse No. 1 turbines and remain in Lake Kokanee. FWS included provisions for habitat surveys and a salvage plan based on its concern that, with the implementation of downstream fish passage at Cushman Dam No. 1, downstream migrants will be collected from Lake Cushman and released to the North Fork Skokomish River below Cushman Dam No. 2, bypassing Lake Kokanee. As a result, the local population of bull trout in Lake Kokanee would decline and possibly become extirpated if suitable conditions for reproduction do not exist in tributaries to Lake Kokanee. We noted in our order that some bull trout might continue to enter the lake by other means, requiring their continual removal. Nevertheless, we amended Article 417 to require the surveys and salvage plan to implement the conditions of the incidental take statement.

19. Although bull trout have not been documented in Lake Kokanee, the Cushman Project is not a closed system, and it is possible that bull trout may enter the lake by passing through the Unit 1 turbines. Thus, it does not appear that these measures lack any rational basis. It is not our role to second-guess the assumptions that FWS used in preparing its biological opinion. Rather, our responsibility is to ensure that our action will not violate the substantive requirements of the ESA, including the takings prohibition reflected in the incidental take provisions. The habitat surveys may determine that suitable habitat exists, obviating the need for a salvage plan. In any event, because these measures are required by the incidental take statement, we have included them in the new license.

20. Tacoma argues that many of the wildlife habitat provisions of Article 421 of the new license have been superseded and are unnecessary as a result of the Simpson Timber Company's Habitat Conservation Plan (HCP), executed in October 2000. Article 421 requires Tacoma to develop a comprehensive wildlife habitat enhancement plan that includes: (1) a land acquisition plan, (2) a plan to enhance native plants and wildlife populations, and (3) a riparian buffer zone plan for the Southern Lower North Fork Skokomish River. Among other things, these plans require Tacoma to acquire either title or easements to certain parcels of land to establish riparian habitats as a buffer zone along the lower North Fork Skokomish River corridor. The Simpson HCP requires the management of the company's timber land to protect ESA-listed species. Some of the land for which Tacoma must acquire title or easements is covered by the Simpson HCP. As a result, Tacoma seeks clarification that it should not be required to acquire and manage land that is subject to the management prescriptions of the Simpson HCP.

Alternatively, Tacoma seeks rehearing of Article 421 on the ground that it would arbitrarily require Tacoma to incur unnecessary costs and undertake redundant land management efforts already occurring under a plan that NOAA Fisheries and FWS approved.

21. There are no incidental take conditions that relate specifically to either the land acquisition plan or the riparian buffer zone plan required by Article 421. However, both NOAA Fisheries and FWS considered the land management practices required by the Simpson HCP as part of the environmental baseline in evaluating the effects of relicensing the Cushman Project.[17] Neither agency considered the possible relationship between the Simpson HCP and Tacoma's actions under Article 421. FWS found that the Simpson HCP would result in some incidental taking of bull trout from timber harvesting, road construction, and road remediation.[18] FWS also found that the Article 421 wildlife enhancement plan would be compatible with the protection of bull trout and would not have any adverse effects.[19] NOAA Fisheries found that the improved forest practices, road building, and road maintenance actions of the Simpson HCP should substantially reduce the adverse effects from actions on these lands within the Skokomish River watershed.[20] NOAA Fisheries did not analyze the effects of the Article 421 wildlife enhancement plan in its biological opinion.[21] As a result, it is unclear whether the provisions of the Simpson HCP could provide an effective substitute for some of the actions that Tacoma would be required to take under its Article 421 wildlife enhancement plan.

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[17] Regulations implementing the ESA define the environmental baseline as the past and present impacts of all federal, state, or private actions and other human activities in the action area, including any proposed federal projects that have completed formal consultation and any private actions that are contemporaneous with consultation on the proposed action, but not including the effects of the proposed action that is the subject of the consultation. 50 C.F.R. § 402.02 (2004).

[18] FWS Biological Opinion at 23.

[19] *Id*. at 62.

[20] NOAA Fisheries Biological Opinion at 4-9.

[21] *Id*. at 2-4.

22. The purpose of Article 421 is wildlife enhancement, whereas the Simpson HCP is primarily concerned with measures to protect ESA-listed species. The potential overlap concerns a parcel of Simpson land; the other lands or easements needed for wildlife enhancement and the riparian buffer zone would not be affected. We agree that Tacoma should not be required to duplicate any land management actions that the HCP requires Simpson to take. However, it is unclear whether the provisions of the Simpson HCP and Article 421 are in any way duplicative. Because our authority extends only to Tacoma, we could not ensure that the land is managed to meet the objectives of Article 421 by deferring to the Simpson HCP. It may be necessary for Tacoma to acquire title or easements to some of the land in question in order to realize all of the intended benefits of the riparian buffer zone. Alternatively, Tacoma may be able to enter into a contractual agreement with Simpson that would satisfy the requirements of Article 421. In addition, the cost of the acquisitions may be reduced because of the existence of the HCP. Thus, we find no basis for eliminating the requirement that Tacoma acquire the necessary land or easements. Tacoma can raise this issue in consultation with FWS and NOAA Fisheries during preparation of its land acquisition plan and riparian buffer zone plan, and we will review Tacoma's plan to determine whether it meets the purposes of Article 421.[22]

23. NOAA Fisheries and Washington Departments request that we clarify that the capital and annual funds required for fish restoration in Article 417 are expressed in 1998 dollars and will escalate or potentially deflate based on an appropriate index to account for inflation. Article 417 requires Tacoma to provide up to $3,600,000 in capital expenditures to construct additional hatchery capacity and up to $271,000 a year for operation and maintenance for the term of the license. NOAA Fisheries and Washington Departments request that we either determine an appropriate index to update the capital funding requirement or restate it in today's dollars, and that we also identify an appropriate index to adjust the funds to be paid annually.

[22] Article 421 requires Tacoma to prepare its land acquisition plan in consultation with FWS and NOAA Fisheries, and its riparian buffer zone plan in consultation with FWS. The riparian buffer zone plan must also be prepared in coordination with the fishery measures required by Article 412 (which requires consultation with both FWS and NOAA Fisheries) and the endangered species protection plan required by Article 423 (which requires consultation with FWS). To ensure that issues concerning the listed salmon species are adequately addressed, we have amended Articles 421 and 423 to include NOAA Fisheries as a consulted entity for purposes of the riparian buffer zone plan and the endangered species protection plan.

24. NOAA Fisheries noted in its biological opinion that the funding requirements of Article 417 are expressed in 1998 dollars, and specified as a condition of the incidental take statement that Tacoma should be required to provide the fish enhancement programs generally described in Article 417. However, NOAA Fisheries did not include a provision for cost adjustment in its biological opinion or incidental take conditions.

25. The Commission typically uses changes in the Consumer Price Index (CPI) to make cost adjustments in appropriate cases. From 1998 through 2004, the CPI rose by 16 percent. Thus, the requested adjustment would increase the capital funding requirement to $4,176,000 and the annual cost to $314,400. However, the amounts included in Article 417 were based on the Commission staff's estimate of the number of hatchery fish that would have to be stocked to achieve the lower North Fork's production potential.[23] Thus, the funding requirements are intended to meet specific fish restoration goals. There is nothing in the record to suggest that the requested cost escalation would be necessary in order to meet those goals. The adequacy of these expenditures can be considered when the plan is prepared and reviewed. Therefore, we deny NOAA Fisheries' and Washington Departments' request for clarification.

26. The Tribe makes a number of arguments about the adequacy of Article 407 of the new license. Basically, the Tribe argues that, although the Article 407 minimum flows may meet ESA requirements and suffice for an interim period pending appeals, Article 407 still violates the FPA, Treaty of Point No Point, the Commission's trust responsibility to the Tribe, and various other federal and state requirements.[24] NOAA Fisheries joins in the Tribe's request for rehearing of all but one of these issues, and incorporates by reference the issues and arguments contained in the Tribe's request. [25]

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[23] *See* FEIS at Table 4-8.

[24] *See* Part III.A of the Tribe's rehearing request at 13-29, which also mentions the Clean Water Act and Washington's water quality laws; Coastal Zone Management Act and Washington's coastal zone management program; Pacific Salmon Treaty, Pacific Salmon Treaty Act, and *Yakima v. Baldridge* stipulation and order (Dist. Wash. No. C80-342, March 7, 1985); Puget Sound Management Plan; and Magnuson Fishery Management and Conservation Act.

[25] *See* Part II of NOAA Fisheries' request for rehearing at 5-6. NOAA Fisheries does not join in the Tribe's arguments about the Coastal Zone Management Act and Washington's coastal zone management program.

27. Article 407 was not amended as a result of the recently-completed ESA consultation. The only change to the license that in any way concerns Article 407 is the inclusion of Condition 1 of the incidental take statement, which requires the licensee to comply with Article 407. Many of the Tribe's arguments were raised earlier with respect to the new license as a whole, but not with specific reference to Article 407. Some of the Tribe's arguments are new. However, apart from the observation that compliance with the ESA is insufficient to satisfy other legal requirements (and with one exception discussed below), the Tribe's and NOAA Fisheries' arguments concerning the adequacy of Article 407 do not arise from the issues addressed on remand. Rather, they could have been raised earlier, on rehearing of the relicense order. As noted above, a party may not, on remand, seek rehearing of what it failed to seek rehearing of earlier. We therefore reject the Tribe's and NOAA Fisheries' arguments about the adequacy of Article 407 as an untimely and impermissible supplement to the earlier rehearing requests.[26]

28. The only exception concerns compliance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), because NOAA Fisheries included consultation under the MSA as part of its biological opinion. The Tribe argues that the MSA "recognizes the need to protect habitat for the purposes of maintaining commercially viable quantities of fish and for rebuilding stocks where necessary to achieve a viable commercial and recreational fishery."[27] The Tribe further maintains, without elaboration, that the Cushman license flows do little or nothing to protect habitat for those purposes.[28]

29. In its biological opinion, NOAA Fisheries identifies the essential fish habitat that the Pacific Fisheries Management Council has designated for three species of federally-managed Pacific Salmon: chinook, coho, and Puget Sound pink salmon. NOAA Fisheries finds that taking of two of these species, coho and chinook, are affected by the proposed action, and concludes that relicensing the Cushman Project would adversely affect designated essential fish habitat for these species. NOAA Fisheries further finds that the terms and conditions of the incidental take statement are generally applicable to the designated habitat and address these adverse effects. NOAA Fisheries therefore

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[26] *See* note 8, *supra*, and cases there cited.

[27] Tribe's request for rehearing at 29.

[28] Although NOAA Fisheries ostensibly joined in this argument, we believe this was inadvertent; otherwise, NOAA Fisheries would be challenging its own compliance with the MSA.

recommends that these terms and conditions be adopted as essential fish habitat conservation measures to avoid, minimize, or otherwise offset adverse effects to essential fish habitat.[29] We adopted this recommendation in our order of June 21, 2004.[30] As a result, we conclude that our order is in compliance with the MSA.

C. Interim Minimum Flows Pending Judicial Review

30. In May 1999, in response to Tacoma's request, we stayed the subsequent license pending judicial review and further order of the Commission. In our order of June 21, 2004, we revisited our stay decision to consider a motion by the Tribe and the results of an expedited, non-adversarial, fact-finding proceeding before an administrative law judge, prompted in part by our own concerns that interim measures might be needed to protect threatened fish species affected by the Cushman Project. We found that minimum flows should be increased to 240 cfs or inflow, whichever is less, on an interim basis to protect the listed species, and that Tacoma could provide these flows at negligible cost to its ratepayers. We concluded that the public interest no longer supports a continued stay of the minimum flow requirements of Article 407 and certain provisions of two related license articles, and partially lifted the stay to require Tacoma to provide the necessary minimum flows pending judicial review.

31. Tacoma argues that our decision to partially lift the stay is not factually or legally justified. Tacoma maintains that nothing has changed but the passage of time required for completion of formal consultation, and that the record supports continuing a stay of the entire new license. Tacoma further argues that our decision is contrary to Commission precedent and violates the FPA.

32. In acting on stay requests, the Commission uses the standard set forth in the Administrative Procedure Act; *i.e.*, the stay will be granted if the Commission finds that "justice so requires."[31] Under this standard, the Commission considers a number of factors related to the public interest, such as whether the movant will suffer irreparable injury in the absence of a stay.

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[29] NOAA Fisheries Biological Opinion at 11-1 through 11-3.

[30] 107 FERC ¶ 61,288 at P 22.

[31] 5 U.S.C. § 705; *see, e.g.*, *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992).

33. As we explained in our order of June 21, 2004, several factors entered into our decision to partially lift the stay to require Tacoma to provide minimum flows to protect threatened fish species pending judicial review. First, the delay that had occurred in completing formal ESA consultation meant that the Cushman Project had continued to operate for more than five additional years without any conditions to benefit listed species other than the increase in minimum flows from 30 cfs to 60 cfs that Tacoma had voluntarily offered to provide in return for a stay.[32] Second, as discussed in more detail below, we considered the additional information on the effects of the Cushman Project that resulted from the proceeding on interim conditions and the biological opinions of NOAA Fisheries and FWS. This information established that a minimum flow of 240 cfs or inflow, whichever is less, is needed to mitigate ongoing adverse effects to the threatened fish species. Third, we had the benefit of the additional cost information, developed in the proceeding on interim conditions, indicating that Tacoma could provide these minimum flows at negligible cost to its ratepayers. We therefore concluded that a partial lifting of the stay was warranted so that Tacoma would be required to release these minimum flows to protect the listed species pending judicial review. Contrary to Tacoma's assertion, our decision was not arbitrary and capricious, but rather was a result of our careful consideration of both the costs to Tacoma and the needs of the threatened fish species.

34. Tacoma asserts that there is no evidentiary support for our conclusion that the minimum requisite water flow for viability of threatened salmon is 240 cfs, even on an interim basis. Tacoma asserts that the interim proceeding was procedurally flawed because the administrative law judge did not address the effects of the Cushman Project and determine whether interim protective measures are needed. In support, Tacoma argues that the judge relied on facts developed from the existing record of the relicensing proceeding, without requiring the parties to develop new evidence, and without considering Tacoma's evidence that current conditions are not causing irreparable harm to the listed salmon species.

35. The administrative judge's use of the existing record of the relicensing proceeding is neither arbitrary nor unusual, given the particular circumstances of this case. The existing record establishes that operation of the Cushman Project under the terms of the original license, without the environmental measures that are now routinely included in

[32] Although Tacoma argues that it should not be required to bear the costs of what it terms "the agencies' dilatory tactics" (Tacoma's request for rehearing at 79), Tacoma has received the economic benefits of the delay by operating the project for an additional five years with a minimum flow of 60 cfs, without being required to implement the conditions of the new license.

hydroelectric licenses, has had an adverse effect on the listed species and the habitat conditions of the North Fork Skokomish River. Thus, our concern about possible adverse effects on listed species was prompted by our familiarity with this record, and the administrative judge used it as a natural starting point.

36. Similarly, there was nothing in the existing record to suggest that a minimum flow of 60 cfs would be adequate to meet the needs of the listed species on an interim basis. Rather, when we issued our stay decision in 1999, we found that, because of the time that would be required to install a new flow release valve, Tacoma's offer to increase flows to 60 cfs in exchange for a stay would provide better near-term environmental conditions than would otherwise be available under the new license. We did not attempt to address whether a minimum flow of less than 240 cfs might be adequate to meet the needs of the listed species pending judicial review.

37. Thus, in view of the already extensive record on project effects, the objective of the interim proceeding was not, as Tacoma suggests, to determine whether the Cushman Project was causing "irreparable harm to listed species."[33] Rather, our objective was to consider whether there was a need for interim protective measures pending judicial review in light of all the circumstances then present.[34]

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[33] Tacoma's request for rehearing at 80.

[34] Tacoma's reference to the need to avoid irreparable harm to listed species comes from the first *Platte River* case, which directed the Commission to consider the need for "temporary, 'rough and ready' measures to prevent irreversible damage pending relicensing." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 116 (D.C. Cir. 1989) (*Platte I*). The court subsequently upheld the Commission's decision to require interim protective measures in one of the two licenses at issue. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (1992)(*Platte II*). We find nothing in these cases to suggest that we may not require interim protective measures unless we first find that there is a need to prevent irreversible damage during the interim period. In *Platte I*, the court directed the Commission to develop an evidentiary record to assist it in determining whether interim protective measures were needed to prevent irreversible damage to ESA-listed species pending relicensing. In *Platte II*, the court reviewed the Commission's conclusions in light of this standard and found them reasonable. In this case, relicensing is complete, and we have already developed an extensive record that evaluates the effects of the Cushman Project on a full range developmental and environmental resources, including ESA-listed species. Since our purpose here is to determine whether to partially lift a stay of the new license to provide interim protection to listed species pending judicial review,

(continued…)

38. Tacoma criticizes our reliance on the biological opinions, arguing that they address only long-term and not interim conditions. Although it is true that the biological opinions do not expressly examine the need for interim conditions, they do support the need for interim minimum flows. For ESA purposes, the environmental baseline includes the effects of the Cushman Project's operation under the stayed license and the project's contribution to the current status of the listed species.[35] It is clear from NOAA Fisheries' biological opinion that existing conditions are inadequate to protect the listed species.

39. Consistent with their listing, NOAA Fisheries finds that most populations comprising the listed evolutionarily significant units (ESUs) of these species are not viable.[36] The current status of Puget Sound chinook salmon and Hood Canal summer chum salmon indicates that the species-level biological requirements of these ESUs are not being met. The abundance of Puget Sound chinook salmon and Hood Canal chum salmon, while increasing in recent years, remains far below historical levels.[37] NOAA Fisheries finds that the existence and past operation of the Cushman project has substantially affected chinook salmon and summer chum salmon within the action area, and that some of these effects, to a lesser or greater degree, will likely continue into the future. The environmental baseline for ESA purposes includes the past effects of the Cushman Project, but does not include the future effects of continued operation of the project under the new license, which is the subject of the ESA consultation.[38] The habitat requirements of Puget Sound chinook salmon and Hood Canal summer chum salmon are not being met under the environmental baseline within the action area.[39] Maintenance or

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we believe that the appropriate standard is whether there is a need for interim conditions, not whether there is a need to prevent irreversible damage to listed species.

[35] *See* NOAA Fisheries Biological Opinion at 2-4.

[36] *Id*. at 3-2. The Puget Sound ESU is comprised of 31 historically quasi-independent populations of chinook salmon, 22 of which are believed to be extant. Of these, only 2 to 6 are thought to be viable, or naturally self-sustaining. *Id*. The Hood Canal ESU is comprised of 16 historically quasi-independent chum salmon populations, 9 of which are presumed to be extant. *Id*. at 3-4.

[37] *Id.* at 3-6.

[38] *Id.* at 4-2 and n.4.

[39] *Id*. at 4-8.

further degradation of existing conditions within the action area would contribute to the long-term declining trend of the ESA-listed species and thus would continue to increase the high risk of extinction on which the listings were based.[40] The environmental baseline, while improving, does not currently meet biological requirements for these species within the action area.[41] The existing minimum flow of 60 cfs is part of the environmental baseline, and is therefore inadequate to prevent continuing adverse effects on listed species.

40. NOAA Fisheries further finds that a flow of 240 cfs or inflow, whichever is less, is not the best streamflow for anadromous fish in the lower north Fork Skokomish. However, NOAA Fisheries finds that it is a reasonable minimum instream flow to restore anadromous fish production and enable the survival and recovery of listed salmon.[42] The proposed minimum flow of 240 cfs is sufficient to maintain adequate adult migration, holding, spawning, egg incubation, juvenile rearing and migration conditions, and water quality.[43]

41. Tacoma does not specifically address FWS's biological opinion on bull trout, other than to state that it "did not purport to evaluate measures that might be necessary to avoid irreparable harm to bull trout during the interim period."[44] Like NOAA Fisheries, FWS includes the past effects of operation of the Cushman Project in the environmental baseline for ESA purposes. FWS finds that the overall status of the Coastal-Puget Sound distinct population segment (DPS) has not improved since its listing on November 1, 1999, and the status of the Lake Cushman subpopulation is "depressed."[45] FWS finds that the Cushman Project continues to adversely affect bull trout habitat in the 8-mile long reach of the lower North Fork and the 9-mile long Skokomish River mainstem by diverting most of the flow directly to Hood Canal, resulting in loss of access to side

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[40] *Id*. at 4-9.

[41] *Id*. at 4-10. NOAA Fisheries' analysis of project effects shows that the baseline status for all habitat indicators is "not properly functioning." *Id*. at 5-17 to 5-18.

[42] *Id*. at 5-9.

[43] *Id*. at 7-2.

[44] Tacoma's request for rehearing at 85.

[45] FWS Biological Opinion at 22.

channels and degraded instream habitat due to unsuitable water depths and velocities.[46] FWS finds that the increase in the minimum instream flow release from 30 cfs to 60 cfs provides better conditions for migration and access to additional foraging and spawning habitat for bull trout, but is inadequate to provide good passage conditions. Also, at 60 cfs, many of the side channels do not provide suitable conditions for bull trout spawning, rearing, or foraging because they lack sufficient flow to provide adequate water depths and velocities, or are disconnected from the main channel.[47] At 240 cfs, foraging and rearing habitat in the side channels will be accessible and will have adequate water depths and velocities.[48]

42. Thus, the biological opinions of NOAA Fisheries and FWS provide evidentiary support for our partial lifting of the stay to require minimum flow releases of 240 cfs or inflow, whichever is less. These flows are needed now to address the adverse effects of the Cushman Project on the threatened fish species.

43. Tacoma argues that our decision to partially lift the stay is inconsistent with Commission precedent, which favors granting a stay "when implementing license terms and conditions will result in irreparable harm and foreclose meaningful judicial review."[49] Tacoma relies primarily on our 1999 stay decision, but also cites two other cases in which the Commission stayed the implementation of costly construction requirements pending judicial review.[50] Significantly, these two cases did not involve a stay of measures designed to protect ESA-listed species. A different balance is called for when threatened species are at risk. Moreover, requiring the 240 cfs minimum flow will neither result in irreparable harm nor in any way foreclose meaningful judicial review.

44. Tacoma asserts that the harm to Tacoma and its ratepayers of providing the 240 cfs minimum flow continues to be irreparable, unrecoverable, and substantial. However, Tacoma makes almost no attempt to refute our conclusion that the Tacoma can pass these

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[46] *Id*. at 51.

[47] *Id*.

[48] *Id*.

[49] Tacoma's request for rehearing at 87.

[50] *See Wisconsin Power and Light Co.*, 104 FERC ¶ 61,157 at P 7 (2003); *Montana Power Co*., 85 FERC ¶ 61,400 at 62,535 (1998).

costs on to its ratepayers with minimal impact. Tacoma states that our assumption "ignores today's competitive electric power markets, in which customers have choices."[51] Tacoma adds, without elaboration, that our remand order failed to include the significant costs of constructing the Richert Ranch bridge.[52] However, Tacoma does not provide any information to suggest that our analysis of ratepayer impacts is in error. Although Tacoma criticizes our remand order for "adopting without explanation a new economic analysis never applied previously,"[53] Tacoma does not indicate why we might be precluded from considering this information, together with our traditional economic analysis, in determining whether to partially lift the stay. We conclude that an analysis of ratepayer impacts is relevant, and provides a useful perspective for considering whether a continued stay of the minimum flow requirements is in the public interest.

45. NOAA Fisheries and the Tribe request that we broaden the justification for our decision to partially lift the stay to include other authorities in addition to the ESA and the threatened status of the listed fish species. They base this request on their concern that, if these species are later de-listed, there is a risk that Tacoma will seek to reinstate the stay.

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[51] Tacoma's request for rehearing at 88.

[52] As discussed in our order of June 21, 2004, we required the construction of this bridge to replace the wet crossing on Richert Ranch that will be inundated when Tacoma begins releasing the 240 cfs minimum flow. Tacoma filed a plan proposing two alternative options for this bridge on October 19, 2004, explaining that it developed the second alternative to address negative comments filed in response to the first alternative. The Tribe filed comments on November 17, 2004. To date, no other parties have filed comments on Tacoma's plan. While we are interested in having the bridge completed as soon as possible, we do not want construction of the bridge to delay the release of minimum flows. We therefore clarify that, notwithstanding any suggestion to the contrary in our order of June 21, 2004, Tacoma is required to begin releasing 240 cfs or inflow, whichever is less, as soon as the minimum flow release valve is installed and ready for operation. Parties are requested to file comments on Tacoma's second alternative for the bridge within 30 days of issuance of this order. The Commission staff will consider Tacoma's plan and the parties' comments in a subsequent order.

[53] Request for rehearing at 48.

46. We deny this request. When we issued our stay decision in 1999, the threatened fish species were not yet listed, and we anticipated that judicial review would soon proceed. Although the Tribe's 2003 request that we partially lift the stay was based on a variety of laws, our decision to institute a proceeding on interim conditions was prompted by our concern about the time required for completion of formal ESA consultation and the effects of project operation on the listed species. If circumstances change after the parties have once again filed requests for judicial review, the court of appeals will have exclusive jurisdiction to consider any arguments about the continued need for a stay.

47. The Tribe and NOAA Fisheries also request that we reconsider our rejection of the three alternative means that the Resource Parties proposed for releasing 240 cfs. These alternatives are: (1) installing a new 24-inch cone valve on an existing outlet pipe at the base of Dam 2; (2) discharging water over the Dam 2 spillway through the use of an existing spillway gate; and (3) cutting a notch in the top of Dam 2 and installing a floating weir to regulate flows through the notch. We found that a 78-inch-diameter discharge regulating valve should be installed, leaving an upstream butterfly valve in place as a guard valve. The Tribe and NOAA Fisheries state that the three alternatives "appear to be less expensive and time-consuming than the Commission's choice."[54] In support, they rely on the declaration of Dennis Gathard, an engineer who had supplied testimony for the Tribe and American Rivers during the interim proceeding.[55]

48. Although the Tribe and NOAA Fisheries argue on rehearing that the 24-inch cone valve is preferable to the 78-inch discharge regulating valve, this is in direct conflict with the position taken in their motion for clarification of the Commission staff's approval of Tacoma's procurement specification for the minimum flow valve.[56] Although the motion for clarification deals with implementation of the non-stayed portion of Article 408 and is the subject of a separate post-licensing proceeding, it is directly relevant to the issues presented on rehearing. We therefore address it here.

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[54] Tribe's request for rehearing at 31.

[55] *See* Exhibit 4 to Tribe's request for rehearing.

[56] *See* Tribe's and NOAA Fisheries' motion for clarification of Commission's September 14, 2004 letter regarding Tacoma's procurement specifications for minimum flow valve (filed September 30, 2004).

49. The Commission staff issued a letter approving Tacoma's procurement specification for the minimum flow valve on September 14, 2004.[57] On September 30, 2004, the Tribe and NOAA Fisheries filed a motion for clarification, asking that the Commission clarify that Tacoma's proposed valve specification can accommodate: (1) the flushing flows of up to 2,500 cfs for five continuous days required by Article 404 of the license; and (2) the eventual restoration of up to 95 per cent of the average annual flow to the North Fork Skokomish River if, after judicial review, the new license ultimately requires such flows. The Tribe and NOAA Fisheries further requested the Commission to clarify that, if Tacoma's valve specification cannot accommodate these flows, Tacoma must submit a revised valve specification that will accommodate them. On October 15, 2004, Save the Lakes Coalition filed an answer in opposition to the motion. On October 8, 2004, and again on January 21, 2005, Tacoma filed letters stating that the relief requested by the Tribe and NOAA Fisheries would significantly affect the specifications for the valve and the procurement process, and requesting that the Commission advise Tacoma regarding what action it should take in light of the motion.

50. We deny the motion for clarification. In our 1998 relicensing decision, we denied the Tribe's and NOAA Fisheries' request for a license condition requiring restoration of flows to the North Fork Skokomish River. These parties may not now seek to renew their request by filing a motion for clarification of the staff's approval of Tacoma's valve specifications. As we pointed out in our order of June 21, 2004, the 24-inch cone valve would not provide for the need to meet the flushing flow requirements of Article 404 or the ramping-rate requirements of Article 411. As a result, the 78-inch discharge regulating valve would be a permanent installation instead of a temporary fix designed only to release a minimum flow of 240 cfs.[58] Because it is clear from their motion for clarification that the Tribe and NOAA Fisheries agree that the minimum flow valve should be designed to accommodate the eventual release of the 2,500 cfs flushing flows, we deny their request to reconsider our rejection of the smaller 24-inch valve.

51. The other two alternatives present significant problems and concerns that would delay or prevent their implementation. The Commission could not approve them without additional studies, and there is no guarantee that they could be found acceptable. Alternative 2 would require structural modifications to the existing spillway drum gates and installation of a steel beam support and cable lifting assembly. The Tribe and NOAA

[57] *See* Letter from Harry T. Hall, FERC, to Patrick D. McCarty, Tacoma (issued September 14, 2004).

[58] *See* 107 FERC ¶ 61,288 at PP 39-40.

Fisheries state that this alternative is feasible and the cables could be retracted to provide flow releases during flood events. However, the structural modifications that would be required are not accounted for in the original design and intended method of operation of the drum gates. This arrangement would be essentially a fixed operation, which would make it difficult to regulate the minimum flow releases because of variation in inflow to the reservoir or changes in the reservoir level. Manual release of the cable supports to allow for flood passage is dangerous and might not be possible during flood flows. Under flood conditions, it might not be possible to reach the gates in order to release the cable supports. In addition, debris could build up on the beam and cable assembly, leading to overtopping of the dam and possible dam failure.

52. The Tribe and NOAA Fisheries acknowledge that Alternative 3 presents issues of structural capacity to meet safety requirements. However, they assert that these issues would be resolved in a preliminary design of the approach and that it is "conceptually possible."[59] While this alternative might be possible, there are several reasons why it is not advisable at Cushman Dam No. 2. The road across the crest of the dam is currently the only means of access to the gated spillway. If a notch were cut in the top of the dam, a bridge would have to be constructed over it. Because of the location of the existing valve house at the base of the dam, a notch could not be cut at the dam center. The dam abutments have had erodibility issues in the past, and a continuous flow falling from over 100 feet above onto the abutments would likely result in erosion, thus posing a potential risk to the dam's stability. In addition, depending on the size and location of the notch, arch stresses and the stability of the dam could be adversely affected and thus would require further engineering evaluation.

53. Because of these concerns, our dam safety staff would have to require engineering studies before these alternatives could be considered. Moreover, they might not prove to be acceptable after additional study. This would further delay the release of minimum flows. We therefore decline to reconsider our rejection of these alternatives.

D. Motion for License Articles on Water Rights

54. On September 30, 2004, the Tribe filed a motion requesting that we amend the new license to include two new license articles relating to Tacoma's state water rights. On October 15, 2004, Tacoma filed a response in opposition to the motion. By letter dated October 19, 2004, the Washington Department of Ecology (Ecology) informed the Tribe

[59] Tribe's request for rehearing at 34.

that it did not object to the Tribe's motion but would not submit a filing in support of it.[60] More than two months later, on December 30, 2004, Ecology filed an untimely response in support of the Tribe's motion.[61]

55. The Tribe requests that we add the following new articles to the license: (1) "an article requiring Tacoma's compliance with its existing state water rights to the satisfaction of the Washington Department of Ecology or a court of competent jurisdiction, including if necessary Tacoma's restricting its water usage to match its authorized amount"; and (2) "an article reserving the Commission's authority to unilaterally modify the Cushman Project license as may be necessitated by action on Tacoma's water rights taken by the Washington Department of Ecology or a court of competent jurisdiction."[62] The Tribe asserts that Tacoma does not have the requisite water rights to operate the Cushman Project, and also maintains that Tacoma's existing water rights conflict with the Tribe's reserved water rights. The Tribe claims that, by seeking these license articles, it is not asking the Commission to adjudicate water rights or to refrain from issuing a license. Rather, it requests the addition of these license articles so that the Commission does not issue a license that appears to "exempt the licensee from complying with Washington's water rights laws" or "sanction continued operation of a project that patently violates state water appropriation laws."[63]

56. Tacoma argues that we should reject the Tribe's motion as an impermissible attempt to supplement its request for rehearing of our order of June 21, 2004. Tacoma also asserts that the Tribe's motion is unsupported and unnecessary. Tacoma maintains that it has sufficient water rights for the Cushman Project,[64] and that if it is later required to

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[60] *See* Letter from Joe Stohr, Ecology, to Mason Morriset, counsel for the Tribe (included as Attachment A to the Tribe's letter of November 30, 2004 to the Commission Secretary and identified in the Commission's eLibrary system as a "comment on filing of the Skokomish Indian Tribe under P-460").

[61] Under our rules, an answer to a motion must be made within 15 days after the motion is filed, unless otherwise ordered. *See* 18 C.F.R. § 385.213(d).

[62] Tribe's motion at 2.

[63] *Id*. at 10-11.

[64] *See* Tacoma's Response to Request for Additional Information, Vol. 2, Request Item 26 (September 10, 1993).

obtain additional water rights, Standard License Article 5, which is part of the new license, already addresses this matter adequately.[65] Ecology's response to the Tribe's motion states that "Tacoma currently operates the Cushman Project at a capacity in excess of the total diversion quantities authorized in its water rights, and exceeds the authorized storage capacity in Lake Cushman."[66] Thus, the facts regarding Tacoma's water rights are in dispute, and we could not therefore resolve them without some sort of adjudication.

57. As all three parties point out, Tacoma filed an application for additional water rights in 1998. To date, Ecology has taken no action on the application. The Tribe first raised this issue in the relicensing proceeding, and we declined to consider it on the grounds that we lack authority under section 27 of the FPA to adjudicate water rights.[67] Inclusion of the Tribe's first requested license article would require us to determine whether and how to enforce Washington's water rights laws, which we are without authority to do. Inclusion of the Tribe's second requested license article is unnecessary in light of Standard License Article 5. We therefore deny the Tribe's motion.

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[65] As set forth in ordering paragraph (M) of our 1999 order on rehearing, 86 FERC ¶ 61,311 at 62,106, the license is subject to the articles set forth in Form L-1 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States," 54 FPC 1799 (October 31, 1975). Standard Article 5 requires that the licensee, within five years from the date of issuance of the license, acquire title in fee or the right to use in perpetuity all property necessary or appropriate for the construction, maintenance, and operation of the project, including lands, easements, and water rights.

[66] Response of Washington Department of Ecology at 2 (filed December 30, 2004).

[67] *See, e.g.*, 71 FERC ¶ 61,381 at 62,489 (1995); 86 FERC ¶ 61,311 at 62,073 n.13 (1999).

F. Requests to be Added as a Consulted Entity

58. Save the Lakes Coalition requests that the Commission add it as a consulted entity for implementation of all license articles that it believes could potentially affect the levels of Lake Cushman and Lake Kokanee.[68] As described in the Coalition's rehearing request, this would include Article 404 (flushing flows), Article 405 (minimum lake levels and temporary changes for flood protection), Article 406 (monitoring plan for minimum flows and lake levels), Article 407 (temporary increases in flows), Article 412 (fish habitat enhancement plan), Article 413 (fish habitat and population monitoring plan), Article 417 (fish restoration plan), and Article 423 (threatened and endangered species protection plan). The Coalition argues that all of these articles could potentially affect lake levels, and that no other party can adequately represent the interests of the property and business owners who live and work around Lake Cushman and Lake Kokanee.

59. As discussed in the 1999 rehearing order, minimum lake levels are specified in Article 405. Tacoma must operate its project in a manner that maintains these levels. If Tacoma violates this article, the Coalition can file a complaint or request that the Commission initiate a compliance investigation. The other license articles are designed to be implemented in conjunction with Article 405 and would therefore have little, if any, potential to affect lake levels. For example, minimum flow releases under Article 407 would not affect lake levels under normal operating conditions, because the minimum flow requirement is 240 cfs or inflow, whichever is lower. Thus, when inflow is less than 240 cfs, only the amount of the inflow must be released as a minimum flow. Although the resource agencies and some other parties argued that 240 cfs should be an absolute minimum, to be released at all times, the Commission declined to adopt this requirement because it could cause the reservoir to be drawn down when inflow is less than 240 cfs. Similarly, although Article 423 contemplates the possibility that additional or different enhancement measures, including alternative flow releases, may be needed, the

[68] Save the Lakes Coalition made a similar request (concerning Articles 405 through 408 and Article 413) in its 1998 request for rehearing. The rehearing order considered the Coalition's concerns but did not otherwise address its request to be added as a consulted entity. *See* 86 FERC ¶ 61,311 at 62,096 (1999).

Commission could not require these measures without first providing notice and an opportunity for a hearing in which the Coalition could seek to intervene. Therefore, as a general proposition, we find no reason to include Save the Lakes Coalition as a consulted entity for purposes of the specified license articles.[69]

60. The only exception is Article 406, which requires a comprehensive plan for monitoring lake levels, as required by Article 405, and stream flows in the Skokomish River downstream of the project, as required by Article 407. As discussed in the 1999 rehearing order, there is the potential for a conflict between minimum flows and lake levels during the spring, when Lake Cushman is refilled after the winter drawdown, particularly during extreme low-flow years. For this reason, the Commission amended Article 406 to require that the plan establish a mechanism for addressing this conflict.[70] Because this would require developing specific priorities to address specific conditions, Article 406 clearly could affect lake levels. We will therefore add Save the Lakes Coalition as a consulted entity for purposes of this article.

61. The Washington Department of Fish and Wildlife (Washington DFW) requests that we add it as an agency to be consulted for purposes of Articles 401 and 402 of the license. Article 401 requires a construction plan for the removal of dikes at the Nalley Ranch. Article 402 requires a construction plan for the removal of the McTaggert Creek diversion. Both articles require that the plans include provisions to minimize the take of listed salmon stocks and bull trout associated with in-water work. Washington DFW supports both articles, but argues that these actions may disturb fish and wildlife habitat and may directly affect fish and wildlife resources that the agency has statutory responsibilities to protect. We will therefore add Washington DFW as an agency to be consulted for purposes of Articles 401 and 402.

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[69] The Coalition argues that the Commission has granted similar consultation rights to affected property owners in other cases, citing *City of Summersville*, 86 FERC ¶ 61,149 at 61,532 (1999); *West Penn Power Co.*, 83 FERC ¶ 61,225 at 62,002 (1998); *Halecrest Co.*, 63 FERC ¶ 61,307 at 63,120 (1993); and *Pacific Gas and Electric Co.*, 40 FERC ¶ 61,035 at 61,099 (1987). In these cases, however, the property owners' interests were directly affected by the matters on which they were to be consulted. Here, the Coalition's request to be added as a consulted entity is much broader.

[70] *See* 86 FERC ¶ 61,311 at 62,096-97 and ordering paragraph (I) at 62,106 (1999).

The Commission orders:

(A) The requests for rehearing in this proceeding, filed on July 20 and 21, 2004, by the City of Tacoma, Washington; Save the Lakes Coalition; and Washington Department of Fish and Wildlife and Washington Department of Ecology; are granted in part as discussed in this order, and denied in all other respects.

(B) The requests for rehearing in this proceeding, filed on July 21, 2004, by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries); the Skokomish Indian Tribe; and American Rivers, *et al.*; are denied.

C) The motion for license articles on water rights, filed on September 30, 2004, by the Skokomish Indian Tribe, is denied.

(D) The motion for clarification of the Commission staff's approval of Tacoma's procurement specifications for the minimum flow valve, filed on September 30, 2004, by the Skokomish Indian Tribe and NOAA Fisheries, is denied.

(E) Notwithstanding any suggestion to the contrary in our order of June 21, 2004, Tacoma is required to begin releasing 240 cfs or inflow, whichever is less, as soon as the minimum flow release valve is installed and ready for operation. Parties are requested to file comments on Tacoma's second alternative for the Richert Ranch bridge, as described in its plan filed on October 19, 2004, within 30 days of issuance of this order.

(F) In Articles 401 and 402 of the license, the Washington Department of Fish and Wildlife is added as an agency to be consulted.

(G) In Article 406, Save the Lakes Coalition is added as an entity to be consulted.

(H) In Articles 421 and 423, NOAA Fisheries is added as an agency to be consulted.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Tacoma, Washington Project No. 460-029

(Issued February 11, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

In the underlying order in this proceeding, dated June 21, 2004, the Commission amended the subsequent license for the Cushman Project to include conditions to protect several species of fish listed as threatened under the Endangered Species Act. The Commission also granted in part a motion to partially lift a stay of the subsequent license pending judicial review to require the licensee, City of Tacoma, Washington (Tacoma), to release a minimum flow of 240 cubic feet per second. I dissented from the portion of the June 21, 2004 order that partially lifted the interim stay pending judicial review.

In my dissent, I noted, among other things, that in the past the Commission has consistently granted stays of costly license requirements pending judicial review, and that the order partially lifting the stay departed from this precedent. I observed that the Commission had in the past denied requests to lift the stay in question, and that nothing had changed since the denial of those requests but the passage of time. I also noted that the licensee might suffer irreparable harm from lifting the stay because the order directed the licensee to make costly, permanent changes to the project that could not be reversed if the licensee prevailed in its legal challenge to the terms of the license.

In this order on rehearing of the June 21, 2004 order, Tacoma contends that our decision to partially lift the stay is not justified. I agree. For the reasons set forth in my dissent of June 21, 2004, I would grant rehearing and maintain the stay originally imposed by the Commission pending judicial review.

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Joseph T. Kelliher