

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

)	
AMERICAN WHITEWATER; COLUMBIANA;)	Case No. _____
CENTER FOR ENVIRONMENTAL LAW AND)	
POLICY; SIERRA CLUB,)	Petition for Review
)	
Petitioners,)	
)	
v.)	
)	
FEDERAL ENERGY REGULATORY)	
COMMISSION,)	
)	
Respondent.)	

Pursuant to 16 U.S.C. § 825l(b), Petitioners American Whitewater, Columbiana, Center for Environmental Law and Policy, and Sierra Club hereby respectfully petition the Court for review of final agency action of the Federal Energy Regulatory Commission's orders granting Public Utility District No. 1 of Okanogan County's request for a two-year stay of the commencement and completion of construction deadlines in Article 301 of the license for the Enloe Hydroelectric Project No. 12569, and denying Petitioners' motion to intervene, 160 FERC ¶ 61,094 (Sept. 20, 2017) (Attachment 1), and denying Petitioners' request for rehearing. 162 FERC ¶ 61,040 (Jan. 18, 2018) (Attachment 2).

Venue is proper in this Court pursuant to 16 U.S.C. § 825l(b).

Petitioners respectfully request that this Court set aside the orders and grant such other relief as may be just and appropriate.

Date: March 16, 2018.

Respectfully submitted,

s/Andrew M. Hawley

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Certificate of Service

I, Andrew M. Hawley, hereby certify that today I filed the foregoing Petition for Review via the Court's ECF filing system, and caused one copy of the Petition for Review to be served on Respondent and its counsel, as indicated below:

Via electronic filing:

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Via electronic filing and first class mail:

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I further certify that the foregoing Petition for Review was served today on each party who participated in the underlying agency proceedings (FERC P-12569) by electronic mail or first class mail if no email was provided:

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Date: March 16, 2018.

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Attachement 1

160 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Public Utility District No. 1
of Okanogan County, Washington

Project No. 12569-014

ORDER GRANTING STAY AND DENYING MOTION TO INTERVENE

(Issued September 20, 2017)

1. On June 22, 2017, Public Utility District No. 1 of Okanogan County (Okanogan PUD), licensee for the Enloe Hydroelectric Project No. 12569, filed a request for a two-year stay of the commencement and completion of construction deadlines. As discussed below, we will grant the request.

I. Background

2. On July 9, 2013, the Commission issued an original license to Okanogan PUD for the nine-megawatt Enloe Hydroelectric Project.¹ The project will utilize the existing Enloe Dam, located on the Similkameen River near the City of Oroville in Okanogan County, Washington.

3. Article 301 of the license requires Okanogan PUD to commence construction of the project within two years of license issuance, and complete construction within five years of license issuance.² On July 31, 2015, the Commission granted Okanogan PUD's

¹ *Public Utility District No. 1 of Okanogan County, Washington*, 144 FERC ¶ 62,018 (2013).

² *Id.* at Art. 301.

request that the commencement of construction date be extended by an additional two years.³ Thus, Okanogan PUD was required to commence construction by July 9, 2017.

4. On June 22, 2017, Okanogan PUD filed a request for a two-year stay of the commencement and completion of the construction deadlines in Article 301 of Okanogan PUD's license. Okanogan PUD states that since issuance of the license for the Enloe Project, it has worked diligently toward developing and securing all the necessary permits and rights to pursue the project. However, Okanogan PUD asserts that it has been unable to advance to the construction phase of development because of litigation concerning its water rights.⁴ Okanogan PUD notes that it has been involved in water rights litigation since shortly after issuance of its license, and that litigation was not concluded until March 8, 2017.⁵ Okanogan PUD states that the lack of certainty concerning its exact water rights prevented Okanogan PUD from completing the final engineering design of the project.

II. Procedural Issues, Interventions, and Comments

5. The Commission received eight comments related to the stay request. American Rivers, American Whitewater, Center for Environmental Law and Policy, Columbiana, Conservation Northwest, Methow Valley Citizen's Council, North Cascades Conservation Council, Sierra Club, Trout Unlimited, Washington Wild, Wild Steelhead

³ *Public Utility District No. 1 of Okanogan County, Washington*, Project No. 12569-001 (July 31, 2015) (unpublished order). The order only extended the deadline to commence construction because the licensee stated that it planned to revisit the completion deadline once it developed a more definitive plan and schedule for construction activities.

⁴ Prior to development of the project, Okanogan PUD was entitled to 1,000 cubic feet per second (cfs) of water rights. In developing the project, Okanogan PUD determined that an additional 600 cfs of water rights would be needed to make the project economically viable. Therefore, Okanogan PUD sought the additional entitlement from the Washington State Department of Ecology. The Washington State Department of Ecology issued a decision granting Okanogan PUD the additional water rights on August 6, 2013. However, this decision was challenged by several non-governmental organizations in successive appeals culminating with a petition for review filed with the Washington State Supreme Court. The Washington State Supreme Court issued an order denying the petition for review on March 8, 2017. *Ctr. for Env'tl. Law & Policy v. Dep't of Ecology*, 390 P.3d 348 (Wash. 2017).

⁵ See Okanogan PUD Request for Stay at 10 and Attachment A (timeline of appeals and litigation related to the license).

Coalition, and Wild Washington Rivers (collectively, Conservation Groups) oppose Okanogan's stay request and ask that the Commission issue a public notice of the filing. American Rivers, American Whitewater, Columbiana, Methow Valley Citizen's Council, and Trout Unlimited (collectively, Public Interest Groups) filed a motion to intervene and request for a public notice. Lastly, the Lower Similkameen Indian Band (Similkameen Band) and four individuals, Mr. Stuart Gillespie, Mr. Brian Fisher, Mr. George Wooten, and Ms. Susan Crampton, filed comments opposing the request for stay.

A. Requests to Issue a Notice

6. Public Interest Groups and Conservation Groups request that the Commission issue a public notice and solicit motions to intervene and comment on Okanogan PUD's request for stay. Public Interest Groups argue that Okanogan PUD's delay in the authorized start for construction represents a material change to the terms and conditions of the license that was not contemplated at the time of licensing, and therefore, the Commission should issue a public notice.

7. The Commission generally does not issue notice of, or entertain intervention requests in, post-licensing proceedings that do not entail a material change in the plan of project development or in the terms and conditions of the license, or that would not adversely affect the rights of property holders in a manner not contemplated by the license.⁶ Here, Okanogan PUD requests only a stay of Article 301 of its license and does not seek to change the project authorized or the terms and conditions of its license. Therefore, consistent with our practice regarding requests for stay, a public notice is not required.⁷ In any case, it is clear by the number of entities that have filed comments that stakeholders have actual notice of the request for stay.

B. Intervention and Comments

8. Public Interest Groups, Center for Environmental Law and Policy, Sierra Club-Washington State Chapter, and Wild Washington Rivers filed motions to intervene. As stated above, this proceeding is a post-licensing proceeding of the type in which we do not issue public notice or provide the opportunity to intervene. Accordingly, we deny Public Interest Groups' motion to intervene.

9. Conservation Groups, the Similkameen Band, Mr. Fisher, Mr. Gillespie, and Ms. Crampton oppose Okanogan PUD's request to stay the project license and argue that

⁶ See *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986); *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at PP 6-7 (2004).

⁷ See, e.g., *Marseilles Land and Water Company*, 153 FERC ¶ 61,198 (2015).

the Commission should terminate the license. Conservation Groups, Mr. Gillespie, and Mr. Wooten argue that Okanogan PUD's failure to commence construction is based entirely on the licensee's own actions, and therefore, does not fall within the specific, narrow circumstances required for issuing a stay. The Similkameen Band opposes the project, stating that the project would harm its cultural interests by reducing flows over Similkameen Falls. Mr. Fisher, Mr. Gillespie,⁸ Mr. Wooten, and Ms. Crampton argue that the project is not in the public interest because it will harm the environment and is too costly.⁹

10. Specifically, Conservation Groups contend that Okanogan PUD's uncertainty over the amount of water available for generation is not the result of litigation. Conservation Groups assert that in 2013, the Washington State Department of Ecology issued its water right permit, which authorized Okanogan PUD to immediately commence using the water.¹⁰ Conservation Groups argue that the actual uncertainty regarding the amount of water available for generation is the result of still unknown aesthetic flows that will be required at the project.¹¹ Conservation Groups state that as part of the state-issued water quality certification and water right permit, Okanogan PUD must conduct an aesthetic study either by using a simulation or actual flows within three years after completion of

⁸ On August 3, 2017, Mr. Gillespie also filed a petition signed by 489 citizens and ratepayers opposing Okanogan PUD's request for stay, raising the same issues.

⁹ Mr. Fisher and Mr. Gillespie note that the project's cost may further increase if additional fish passage is required in the future.

¹⁰ Conservation Groups note that during litigation of the water rights, Okanogan PUD rejected arguments that its water right permit should be revocable, pending the outcome of an aesthetic flow study, asserting that the project could only move forward with a permanent water right permit. Conservation Groups assert that Okanogan PUD now claims that even this permanent water right was not sufficient.

¹¹ Conservation Groups contend that determining the amount of aesthetic flow required is a key factor in determining the physical and economic feasibility of the Enloe Project.

construction.¹² Conservation Groups note that the Washington Court of Appeals warned of the risks of constructing the project without having completed the aesthetic flow study,¹³ and the Washington Pollution Control Hearings Board ordered Okanogan PUD's water right permit be amended to specify the amount of water that must remain instream to satisfy aesthetic flow requirements.¹⁴

11. Conservation Groups allege that if Okanogan PUD needed certainty regarding its water rights it should have conducted the simulated aesthetic study to ensure it knew the amount of water available for generation; however, to date, Okanogan PUD has not conducted such a study. Thus, Conservation Groups contend that Okanogan PUD wrongly claims that the uncertainty surrounding its water rights prevented the project from moving forward.

12. Next, Conservation Groups argue that a determination of Okanogan PUD's water rights was not a necessary precondition to construction. Conservation Groups note that the Commission has granted stays where the license contained conditions with definitive language that prevented the licensee from moving forward with construction until after

¹² Citing a study conducted by Confluence Research and Consulting, Conservation Groups assert that the Washington State Department of Ecology is likely to require aesthetic flows of up to 350 to 450 cubic feet per second, which Conservation Groups contend would significantly reduce the project's potential to generate electricity and render the project economically infeasible. Conservation Groups September 7, 2017 Comments at 14 and Attachment 1 (Confluence Research and Consulting, *Aesthetics and Recreation Issues at the Enloe Hydroelectric Project* (Feb. 4, 2013)).

¹³ Conservation Groups September 7, 2017 Comments at 14 (citing *Ctr. for Env'tl. Law & Policy, et al. v. Dep't of Ecology, PUD No. 1 of Okanogan County*, No. 74841-6-I (WA Court of Appeals, Div. 1) (unpublished opinion) (July 11, 2016)).

¹⁴ Conservation Groups September 7, 2017 Comments at 14 (citing *Ctr. for Env'tl. Law & Policy, et al. v. Ecology, PUD No. 1 of Okanogan County*, PCHB No. 13-117, at 25 (June 24, 2014) (Order on Motions for Summary Judgment)).

another agency provided an approval.¹⁵ Conservation Groups aver that Okanogan PUD's license contains no similar conditions that would have prevented it from moving forward with the project, and that granting a stay in this proceeding would excuse the licensee's failure to diligently pursue the project since 2013.

13. Conservation Groups also argue that Okanogan PUD wrongly accepted its license, including the deadline to commence construction, without first ensuring that it could divert the water needed for a viable project. Conservation Groups note that in *Truckee Donner Public Utility District*, the Commission denied the licensee's request for stay so that the licensee could further study the potential impacts of the project.¹⁶ In that case, the Commission stated it is the licensee's duty "to timely develop the information necessary to determine the precise project design and operational mode necessary to meet the license's conditions."¹⁷ Similarly, here, Conservation Groups assert that the Okanogan PUD has not established the parameters for the proposal, and failed to perform an aesthetic flow study.

14. Next, Conservation Groups contend that Okanogan PUD failed to pursue the project in a diligent manner. Conservation Groups allege that Okanogan PUD has lacked a clear plan for how to approach the project, including ongoing issues regarding financing and design of the project,¹⁸ and assert that Okanogan PUD has sought to sell the Enloe

¹⁵ Conservation Groups cite *City of Broken Bow, Oklahoma*, 132 FERC ¶ 61,225, at P 7 (2010) (stay granted where the licensee could not commence construction until the U.S. Army Corps of Engineers completed a risk assessment and dam safety modification study); *Sierra Hydro, Inc.*, 60 FERC ¶ 61,046 (1992) (stay granted where Special Use Authorization from the Forest Service included a condition that explicitly prohibited that licensee from commencing construction until it had secured the necessary water rights); and *East Bench Irrigation District*, 59 FERC ¶ 61,277 (1992) (stay granted where licensee could not commence construction until the Bureau of Reclamation approved the construction plans and specifications).

¹⁶ *Truckee Donner Public Utility District*, 45 FERC ¶ 61,393 (1988).

¹⁷ *Id.* at 62,233.

¹⁸ Conservation Groups cite to a June 27, 2016 Board of Commissioners meeting where Okanogan PUD expressed uncertainty about how it wanted to move forward with the project, stated that the design was outdated, discussed ways to redesign it, and asserted that it was no longer necessary.

Project since 2014.¹⁹ Conservation Groups further note that Okanogan PUD does not even anticipate negotiating a price with the design-build contractor until December 2017, despite initiating the process on October 31, 2016.²⁰

15. Conservation Groups state that the Commission has denied requests for stay in similar circumstances. For example, in *Town of Telluride, Colorado*, the Commission noted that it “has consistently denied stay requests in situations where the licensee has had contractor problems or has not obtained financing (e.g., a power sales contract), or has not settled on a final project design.”²¹ Similarly, the Commission has stated that it will not “grant stays in order to accommodate a licensee's eleventh-hour decision to file an application to substantially amend the approved project design”²² or “to allow the licensee to reconsider the feasibility of its project.”²³

16. Conservation Groups also assert that Okanogan PUD has failed to complete its license requirements in a timely manner. Conservation Groups note that since receiving a two-year extension in 2015, Okanogan PUD has only completed one additional plan, the Wildlife Management Plan, required by the license, and that the following requirements still have not been completed: Documentation of Project Financing; Cofferdam and Deep Excavation Construction Drawings; Contract Plan and Specifications; Spill Prevention Control, Countermeasures, and Blasting Plans; and Spoils Disposal Plan. Conservation Groups further note that Okanogan PUD’s filings in response to dam safety requirements under Part 12D of the Commission’s regulations have often been incomplete and late since 2015. Moreover, Conservation Groups reiterate that Okanogan PUD has not

¹⁹ Conservation Groups assert that one potential buyer, Energy Northwest, expressed concerns with project costs and the ability to meet the deadline to commence construction. As of April 2016, Energy Northwest determined that the project design was only 20 percent complete.

²⁰ Conservation Groups assert that as part of the design-build process Okanogan PUD is seeking to pass responsibility for its project to another entity by selecting a design-builder “with the capacity to provide financing, operations and maintenance services”

²¹ *Town of Telluride, Colorado*, 75 FERC 61,296, at 61,955 (1996) (*Town of Telluride*).

²² *City of Marion, Kentucky and Smithland Hydroelectric Partners*, 85 FERC ¶ 61,401, at 63,536 (1998).

²³ *East Bench Irrigation District*, 60 FERC ¶ 61,256, at 61,851 (1992).

conducted a simulated aesthetic flow study, which will be necessary to determine the amount of water available for generation.

17. Last, Conservation Groups argue that balancing the harms and the public interest demonstrates that the Commission should terminate the license. Conservation Groups note that in 2016, Okanogan PUD admitted that the power from the Enloe Project was no longer needed, stating that “additional generation from the [Wells Dam] Project coupled with generation from BPA should meet Okanogan PUD’s projected load growth for the next thirty-five years and provide long term rate stability for Okanogan PUD rate payers.” Moreover, Conservation Groups assert that any loss of money already expended by Okanogan PUD is not a basis for irreparable harm.²⁴

18. Conservation Groups contend that ratepayers will suffer harm if the project is pursued. Citing a study by Rocky Mountain Econometrics, Conservation Groups argue that ratepayers will pay two to four times the amount for power from the Enloe Project as they would for power on the open market, and be saddled with debt for decades into the future if the project moves forward. Conservation Groups further note that the estimated costs of the project have increased from \$31 million in 2008 to \$39 to \$45 million.²⁵

III. Discussion

19. Section 13 of the Federal Power Act (FPA) requires a licensee to commence project construction by the time fixed in the license, which can be no more than two years from the date of the license, and allows the Commission to extend the deadline once, for

²⁴ *Borough of Lehighton*, 57 FERC ¶ 61,401, at 62,336 (1991) (“expenditure of funds on project development is not a proper reason to maintain a license where a licensee has failed to commence construction by the statutory deadline”); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at 62,288 (2008) (“pecuniary loss, without more, does not constitute irreparable harm”); *Utilities Commission and City of Vanceburg, Kentucky*, 42 FERC ¶ 61,169 (1988) (“Expenditure of funds is not a proper reason to maintain a license where, as here, the licensee has failed to commence construction by the deadline required under Section 13.”).

²⁵ Conservation Groups note that these higher costs do not reflect the design-build process, which could add to the cost of the project.

no more than two additional years.²⁶ If the licensee does not commence construction by the deadline, the Commission is required to terminate the license.²⁷ Accordingly, because the Commission previously granted Okanogan PUD the maximum commencement of construction deadline permitted by the FPA, and because Okanogan PUD has not been able to commence construction, in the absence of a stay the Commission would be required to terminate Okanogan PUD's license.

20. The Commission reviews requests for stays under the standard established by the Administrative Procedure Act: a stay will be granted if the Commission finds that "justice so requires."²⁸ It is Commission policy to grant requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.²⁹ Such circumstances may occur where there are preconditions to project construction that are beyond a licensee's control, but which appear to be resolved within a definitive time frame.³⁰

21. Here, Okanogan PUD could not move forward with the project's design and construction without certainty regarding its water rights entitlement. Had Okanogan

²⁶ 16 U.S.C. § 806 (2012). That section states in pertinent part:

That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof The periods for the commencement of construction may be extended once but not longer than two additional years In case the licensee shall not commence actual construction of the project works . . . within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

²⁷ *Id.*

²⁸ 5 U.S.C. § 705 (2012).

²⁹ See e.g., *Borough of Lehigh, Pennsylvania*, 140 FERC ¶ 61,211, at P 8 (2012) (*Borough of Lehigh*) (stay granted where the licensee could not commence construction until the U.S. Army Corps of Engineers approved the licensee's project design); *City of Broken Bow, Oklahoma*, 132 FERC ¶ 61,225, at P 7 (2010) (stay granted where the licensee could not commence construction until the U.S. Army Corps of Engineers completed a risk assessment and dam safety modification study); *Gull Industries, Inc.*, 70 FERC ¶ 61,253, at 61,784 (1995) (stay granted until the U.S. Army Corps of Engineers issued a dredge and fill permit).

³⁰ *Borough of Lehigh*, 140 FERC ¶ 61,211 at P 8.

PUD moved forward with the project's design and construction based on water rights it did not subsequently obtain, a significant and expensive modification of the project would have been necessary and might have affected the economic feasibility of the project.³¹ As discussed above, litigation initiated by third parties over the project's water rights was not concluded until March 8, 2017, at which point Okanogan PUD had begun the final phases of project development.³² Moreover, while the result of the aesthetic flow study may ultimately impact the project's design, Okanogan PUD has until three years after completion of construction to conduct such a study. Any potential effects as a result of the study are speculative at this time.³³

22. Although the Commission has granted stays in circumstances where the licensee has an obligation to get approval from a third party prior to commencing construction, the Commission has also previously granted stays of a project license due to litigation.³⁴ The litigation concerning Okanogan PUD's water rights is similar to the litigation over the license itself in *City of Seattle*. In that case, the Commission reasoned that "it is not in the public interest to require a licensee to invest substantial amounts in construction activities with no assurance that it will be able to complete its project and attempt to

³¹ See *Horseshoe Bend Hydroelectric Co.*, 43 FERC ¶ 61,315, at 61,880 (1988) ("[i]f the licensee proceeds with construction to avoid termination of its license for failing to commence construction . . . , an adverse decision by the reviewing courts might nullify the licensee's construction work and expenditures"); *Sierra Hydro, Inc.*, 60 FERC ¶ 61,046 (1992) (granting a stay of the project license pending the outcome of the licensee's appeal of the Forest Service's determination concerning water rights).

³² Specifically Okanogan PUD has received approval from the Washington State Capital Projects Review Committee, the state agency charged with reviewing alternative public works contracting procedures, to employ a design-build contracting model that Okanogan PUD states will result in a swifter start to construction.

³³ This includes the result of the study submitted by Conservation Groups. Although the study estimates the flows that may be required by Washington, until an actual aesthetic flow study is conducted, Okanogan PUD cannot determine what, if any, affect additional aesthetic flows would have on the project's design.

³⁴ *Yankee Hydro Corp.*, 51 FERC ¶ 61,357 (1990) (granting stay where project financing could not be obtained for the project because of a pending jurisdictional question before the Commission in a different proceeding); *Long Lake Energy Corp.*, 40 FERC ¶ 61,223 (1987) (granting temporary stay to allow the Commission to obtain more information concerning the licensee's pending antitrust litigation); *City of Seattle, Washington*, 12 FERC ¶ 61,010 (1980) (granting stay pending outcome of appeal of project's license) (*City of Seattle*).

recover those sums.”³⁵ Here, as discussed above, were Okanogan PUD not able to obtain its water rights, a significant and expensive modification of the project would have been necessary.

23. Similarly, we find this case to be distinguishable from *Truckee Donner Public Utility District* and *Town of Telluride*. In *Truckee Donner Public Utility District*, the Commission denied the licensee a stay because the licensee failed to develop the information necessary to determine the project design.³⁶ In *Town of Telluride*, the Commission denied the request for stay because the licensee released its contractor from its contract to construct the project and failed to finalize the design of its project.³⁷ Here, Okanogan PUD reasonably declined to move forward with final project design until the conclusion of the water rights litigation.

24. With respect to the commenters’ assertions that Okanogan PUD has not diligently pursued the project and failed to meet deadlines to file numerous pre-construction plans, many of these deadlines relate to filings that could not be completed until after Okanogan PUD finalized its design and construction plans. We also disagree with Conservation Groups assertion that because Okanogan PUD has not conducted the aesthetic flow study, Okanogan PUD did not diligently pursue the project. As Conservation Groups acknowledge, Okanogan PUD is not required to complete the study until three years after the completion of construction. Moreover, the state-issued water quality certification and water right permit allows Okanogan PUD to either do a simulation study or an actual study after the project is built. We find that this is sufficient proof that Okanogan PUD, for reasons beyond its control, could not commence project construction prior to the July 9, 2017 deadline.

25. We also disagree with Conservation Groups contention that granting the proposed stay would not be in the public interest because of the estimated cost of power from the project. As we stated in the original licensing order, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system, including their ability to help maintain the stability of a power system, such as by quickly adjusting power output to respond to rapid changes in system load; and to respond rapidly

³⁵ *City of Seattle*, 12 FERC ¶ 61,010 at 61,023.

³⁶ *Truckee Donner Public Utility District*, 45 FERC ¶ 61,393 (1988).

³⁷ *Town of Telluride, Colorado*, 75 FERC 61,296, at 61,955 (1996).

to a major utility system or regional blackout by providing a source of power to help restart fossil-fuel based generating stations and put them back online.³⁸

26. The Similkameen Band opposes any modification to the project dam and provides only general arguments regarding the project's effects on cultural resources. Mr. Fisher, Mr. Gillespie, Mr. Wooten, and Ms. Crampton contend the project is not in the public interest because the project is too costly and the environmental harms are too significant. These issues are outside the scope of this proceeding. In the original licensing proceeding, Commission staff analyzed the effect of the project on cultural resources³⁹ and the Similkameen Band had an opportunity to raise any concerns regarding the project's impact on cultural resources. Similarly, the license order analyzed the costs and environmental impacts of the project and determined that the project, as licensed, best adapted to a comprehensive plan for improving or developing the Similkameen River for all beneficial public uses.⁴⁰

27. For the above reasons, we will stay Article 301 of the license for two years. Consistent with Commission practice, we are making the stay effective on June 22, 2017, the date Okanogan PUD filed its stay request.⁴¹ Upon expiration of the stay, on June 22, 2019, Okanogan PUD will have until July 9, 2019, to begin construction. We are staying only Article 301, rather than the entire license, to encourage the licensee to continue project development during the term of the stay. Should the licensee need additional time to comply with particular license articles, it can seek any necessary extensions of time from Commission staff.

³⁸ *Public Utility District No. 1 of Okanogan County, Washington*, 144 FERC ¶ 62,018, at P 148 (2013).

³⁹ *Public Utility District No. 1 of Okanogan County, Washington*, 144 FERC ¶ 62,018, at PP 121-124 (2013).

⁴⁰ *Id.* P 151. To the extent that the licensee did propose substantial changes to project design, it would have to file a request to amend its license to implement those changes, and the Commission would provide notice and an opportunity to intervene in that proceeding.

⁴¹ *See City of Marion, Kentucky, and Smithland Hydroelectric Partners*, 85 FERC ¶ 61,401, at 62,537 (1998) (stating “[i]t is Commission practice to make the stay of a license (or license article) effective as of the date the stay request was filed, unless there is a clear showing that, once the stay is lifted, the licensee cannot commence construction in the time remaining before the statutory deadline.”).

Project No. 12569-014

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The Commission orders:

(A) The motion for stay of the license filed by Public Utility District No. 1 of Okanogan County on June 22, 2017, is granted as set for below.

(B) License Article 301 for the Enloe Hydroelectric Project No. 12569 is stayed, effective June 22, 2017, for two years.

(C) The motions to intervene filed by Public Interest Groups, Center for Environmental Law and Policy, Sierra Club-Washington State Chapter, and Wild Washington Rivers are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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Attachement 2

162 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1
of Okanogan County, Washington

Project No. 12569-015

ORDER DENYING REHEARING

(Issued January 18, 2018)

1. On September 20, 2017, the Commission issued an order granting Public Utility District No. 1 of Okanogan County's (Okanogan PUD) request for a two-year stay of the commencement and completion of construction deadlines in Article 301 of the license for the Enloe Hydroelectric Project No. 12569 (Enloe Project).¹ On October 20, 2017, Conservation Groups² filed a timely request for rehearing. We deny rehearing.

I. Background

2. On June 22, 2017, Okanogan PUD filed a request to stay the commencement and completion of construction deadlines contained in Article 301 of its license for the Enloe Project. The September 20 Order granted the request, stating that the ongoing litigation concerning the water rights entitlement for project prevented Okanogan PUD from moving forward with the project's design and construction.³ The September 20 Order

¹ *Public Utility District No. 1 of Okanogan County, Washington*, 160 FERC ¶ 61,094 (2017) (September 20 Order).

² The Conservation Groups are American Rivers, American Whitewater, Center for Environmental Law And Policy, Columbiana, Methow Valley Citizens Council, Sierra Club—Washington State Chapter, and Trout Unlimited.

³ *Id.* P 21.

also denied several motions to intervene filed in the proceeding.⁴ On October 20, 2017, Conservation Groups filed a timely request for rehearing, alleging that the September 20 Order: (1) wrongly denied Conservation Groups' motion to intervene; (2) failed to follow the Commission's regulations in approving the request for stay; (3) misapplied section 705 of the Administrative Procedure Act (APA); (4) failed to demonstrate that "justice so requires" the stay; and (5) failed to consider the environmental impacts of the request in violation of the National Environmental Policy Act (NEPA).

II. Discussion

A. Motion to Intervene

3. Conservation Groups argue that the September 20 Order wrongly denied its motion to intervene. Conservation Groups contend that the effect of the September 20 Order is to make a material amendment to Article 301 of the license, and therefore, an opportunity for parties to intervene and comment is required.⁵ Conservation Groups note that section 13 of the Federal Power Act (FPA) limits the Commission's ability to extend the start of construction deadline, and therefore, the request for stay is an amendment to a license term that was not contemplated at the time of licensing.⁶

4. Conservation Groups further aver that public notice is appropriate here because the decision to stay the commencement and completion of construction deadline, rather than terminate the license, significantly affects the public interest. Conservation Groups note that there have been new developments regarding the need for project power, the project's impact on anadromous fish, and the overall finding that the project is in the public interest, and contend that by not providing an opportunity for comment and intervention, the Commission denied the public a full and fair opportunity to be heard on these matters. Last, Conservation Groups argue that the fact that the public had actual notice of the application for stay is inconsequential because, by not providing an opportunity to intervene, parties cannot seek rehearing and judicial review.

5. The Commission's longstanding policy and practice has been to provide notice and allow an opportunity for intervention and rehearing with respect to only certain, limited types of post-licensing compliance filings. Specifically, the filing must be one that entails a material change in the plan of project development or terms of the license,

⁴ *Id.* P 7.

⁵ Conservation Groups Request for Rehearing at 8 (citing section 6 of the FPA, 16 U.S.C. § 799, which requires thirty days' public notice for alterations to a license).

⁶ *Id.* (citing 16 U.S.C. § 806 (2012)).

would adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation role by the license article under which the compliance filing is made.⁷ In *City of Tacoma*, the Commission explained that “[t]his approach allows the Commission to act on numerous hydroelectric compliance matters in a manner that is both administratively efficient and consistent with the requirements of the FPA and due process.”⁸

6. The Commission has previously explained what constitutes a material change. In *Erie Boulevard Hydropower, L.P.*, the Commission analyzed what types of changes would constitute a material change to a project’s plans of development.⁹ There, the Commission stated that “[e]very case where the Commission concluded that amendments to the applicant’s plan of development were material involved significant changes to the project’s physical features ..., and changes that do not concern a project’s physical features would seldom, if ever, rise to the level of a fundamental and significant change to the plans of development.”¹⁰ In that same vein, the Commission has held that requests for extensions of time of compliance deadlines contained in a license, including requests to extend the commencement and completion of construction deadlines, are not material changes to the license and do not require the issuance of public notice or an opportunity to intervene.¹¹

⁷ *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at PP 6-7 (2004) (*City of Tacoma*). See also 18 C.F.R. § 4.202(a) (2017) (“[i]f it is determined that approval of the application for amendment of license would constitute a significant alternation of license pursuant to section 6 of the [FPA], public notice of such application shall be given at least 30 days prior to action upon the application.”).

⁸ *City of Tacoma*, 109 FERC ¶ 61,318 at P 7; see also *Kings River Conservation District*, 36 FERC ¶ 61,365, at 61,882-84 (1986) (detailing the history of the Commission’s interpretation of the notice requirement in section 6 of the FPA).

⁹ *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, at PP 15-17 (2010), *aff’d*, *Green Island Power Authority v. FERC*, 497 Fed. Appx. 127 (2d Cir. 2012); see also 18 C.F.R. § 4.35(f)(1) (2017).

¹⁰ *Id.* P 17.

¹¹ See, e.g., *Felts Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094 (1999) (finding that extensions of a project’s construction deadlines are not material changes in the project’s development plans or license terms); see also *Central Maine Power*, 53 FERC ¶ 61,089 (1990) (“Extensions of time to file plans or studies do not constitute material changes in either the plan of project development or the terms or conditions of a license.”); *Baldwin Hydroelectric Corporation*, 84 FERC ¶ 61,132 (1998) (“Extending (continued ...)”)

7. The same logic applies here. Okanogan PUD did not request to change any of the projects physical features. Nor did it effect (directly or indirectly) any material modification to the terms of the license, as the duration of the stay is limited, and the timing of commencement and completion of project construction were always subject to delay without triggering public notice requirements. Moreover, because Okanogan PUD's request for stay does not change the project's plan or development, it does not impact any property holder. Lastly, Conservation Groups are not a consulting party to any of the post-license compliance proceedings and have not demonstrated that they are uniquely affected by the request for stay, beyond their general arguments about the project, which were fully adjudicated in the licensing proceeding.

8. With respect to Conservation Groups' assertion that notice is required to allow parties to comment on circumstances that have changed since issuance of the license, as the September 20 Order stated, to the extent that the licensee did propose substantial changes to the plan of project development based on these changed circumstances, the licensee would have to file a request to amend its license to implement those changes. The Commission would provide notice and an opportunity to intervene in any such proceeding.¹² Thus, the public would have a full opportunity to be heard on matters related to any potential amendment.

9. For the reasons stated above, we deny rehearing of the September 20 Order's denial of Conservation Groups' motion to intervene. Because Conservation Groups are not a party to this proceeding, Conservation Groups cannot seek rehearing of the substantive issues in the September 20 Order. Nevertheless, we will address Conservation Groups' remaining arguments below.

B. Regulations for Amendment Applications

10. Conservation Groups contend that the Commission failed to follow its regulations in approving the request for stay. Conservation Groups state that the Commission's regulations require a licensee to file a request for an extension of time not less than three months before the deadline established in the license, but Okanogan PUD filed its request for stay just 17 days prior to the deadline to commence construction.¹³ Additionally,

the time to finish project construction makes no substantial or material change to the project, nor will it adversely affect any property holder's rights.'').

¹² September 20 Order, 160 FERC ¶ 61,094 at P 26 n.40.

¹³ Conservation Groups Request for Rehearing at 13-14 (citing 18 C.F.R. § 4.202(b) (2017)).

Conservation Groups argue that the application filed by Okanogan PUD did not meet the substantive requirements for amendment applications set forth in the Commission's regulations.¹⁴ Thus, Conservation Groups conclude that the Commission was obligated to reject Okanogan PUD's request for stay.

11. The regulations cited by Conservation Groups pertain to license amendments and are not applicable in this proceeding. Okanogan PUD requested a stay of Article 301 of its license, and the Commission's regulations do not address the timing of, or the information required in, requests for stay. Rather, the Commission evaluates each request for stay on a case-by-case basis to determine whether the applicant has demonstrated that a stay should be issued.¹⁵ Thus, the Commission's regulations do not require rejection of Okanogan PUD's request.

C. Section 705 of the APA

12. Conservation Groups argue that the Commission wrongly relied on section 705 of the APA when granting the request for stay. Specifically, Conservation Groups contend that (1) the Commission can only issue a stay pursuant to section 705 pending litigation; (2) section 705 of the APA does not permit a stay of a compliance deadline within a license; and (3) the Commission cannot stay a license that is already effective. Additionally, Conservation Groups assert that the Commission must apply the four-part preliminary injunction test in issuing stays pursuant to section 705 of the APA.¹⁶

13. Conservation Groups misinterpret the September 20 Order. Although we have cited to section 705 as a secondary basis for issuing a stay,¹⁷ it is section 309 of the FPA that gives the Commission an independent basis for granting stays of a project license.¹⁸

¹⁴ *Id.* (citing 18 C.F.R. § 4.201 (2017)).

¹⁵ However, in determining whether a stay should be issued, the Commission may take into account the timing of the filing.

¹⁶ Conservation Groups Request for Rehearing at 20.

¹⁷ *Long Lake*, 40 FERC ¶ 61,223 (1987) (Commission may exercise its authority under section 309 of the FPA and section 705 of the APA to stay a license); *City of Seattle, Washington, Department of Lighting*, 12 FERC ¶ 61,010, at 61,023 (1980) (the Commission's authority to stay a project license is derived not only from section 705 of the APA, but also from Section 309 of the Federal Power Act).

¹⁸ 16 U.S.C. § 825h (2012); *see also Kings River Conservation District*, 30 FERC ¶ 61,151, at 61,320 (1985) ("The Commission's authority to issue a stay of a license order is derived primarily from Section 309 of the [FPA]"); *see also Keating v. FERC*, (*continued ...*)

Specifically, section 309 provides that “[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act].”¹⁹ Thus, the FPA provides the Commission with broad authority to take actions necessary to carry out the act, and we find that issuance of a stay of a project license under certain narrowly prescribed circumstances is well within this authority.²⁰ Because FPA section 309 is broadly applicable, the Commission has elected to utilize the standard set forth in section 705 of APA to determine whether a stay is justified.²¹ But this does not change the fact that the Commission’s underlying authority derives from FPA section 309.

569 F.3d 427, 429 (D.C. Cir. 2009) (noting that FERC has stayed the commencement of construction deadline pursuant to section 309 of the FPA).

¹⁹ 16 U.S.C. § 825h (2012). *See c.f. Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (affirming Commission’s authority to backdate a license effective date in the absence of explicit statutory authority with reference to FPA section 309).

²⁰ We also disagree with Conservation Groups contention that the Commission must apply the four-part preliminary injunction test when using the standard set forth in section 705 of the APA. Section 705 merely states that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it” 5 U.S.C. § 705 (2012). *See also California v. Bureau of Land Management*, 17-cv-03804-EDL, 2017 WL 4416409, at *13 (N.D. Cal. Oct. 4, 2017) (“the plain language of the statute leaves room to dispute whether such an analysis is required, and the legislative history provides limited and not entirely consistent evidence of Congress’ intent.”).

²¹ Previously, the Commission has applied different standards than the one set forth in section 705 of the APA. *See, e.g., Monongahela Power Co.*, 7 FERC ¶ 61,054 (1979) (“we considered [the motions for stay] under the standards of *Virginia Jobbers Association v. Federal Power Commission*, 259 F.2d 291 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)); *Nantahala Power & Light Co.*, 20 FERC ¶ 61,026 (1982) (finding that a stay pending rehearing is in the “public interest”); *Kings River Conservation District*, 27 FERC ¶ 61,098 (1984) (“[i]t is appropriate and in the public interest to stay the license issued in Project No. 2890 until completion of judicial review.”).

D. Justice Requires the Stay

14. Conservation Groups contend that the September 20 Order failed to demonstrate that a stay is required in this proceeding. Conservation Groups state that the Commission has consistently denied stay requests where (1) the licensee had not settled on a final project design;²² (2) the licensee filed an “eleventh-hour” application to substantially amend the approved project design;²³ and (3) the licensee sought extra time to reconsider the feasibility of its project.²⁴

15. Conservation Groups aver that the September 20 Order erred in finding that Okanogan PUD can proceed with project design prior to completing an aesthetic flow study, which will determine the amount of water available for the project. Conservation Groups claim that Okanogan PUD’s failure to conduct an aesthetic flow study is similar to *Truckee Donner Public Utility District*, where the Commission denied the licensee’s request for stay because it failed to develop the information necessary to determine project design. Conservation Groups assert that even though the section 401 water quality certification allows Okanogan PUD to defer the aesthetic flow study until after project construction,²⁵ the study is necessary to develop the project design on the timetable ordered in the license.²⁶ Conservation Groups request that if rehearing is

²² Conservation Groups Request for Rehearing at 23 (citing *Town of Telluride, Colorado*, 75 FERC ¶ 61,296 (1996)).

²³ *Id.* (citing *City of Marion, Kentucky, and Smithland Hydroelectric Partners*, 85 FERC ¶ 61,401 (1998)).

²⁴ *Id.* at 24 (citing *East Bench Irrigation District*, 60 FERC ¶ 61,256 (1992)).

²⁵ On August 20, 2012, the Washington Department of Ecology issued a certification under section 401(a)(1) of the Clean Water Act for the Enloe Project. The water quality certification was challenged by several organizations, and on August 30, 2013, the Washington Pollution Control Hearings Board issued an order amending the 401 water quality certification by requiring an aesthetic flow study either by simulation or within three years of the completion of construction on the project using actual flows. *Ctr. for Env'tl. Law & Policy, et al. v. Washington Dept. of Ecology, PUD No. 1 of Okanogan County*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law & Final Order (As Amended Upon Reconsideration)) (Aug. 30, 2013).

²⁶ Conservation Groups state that the Washington Court of Appeals noted the risk Okanogan PUD faces by moving forward with the project without first conducting the aesthetic flow study. Conservation Groups Request for Rehearing at 22 (citing *Ctr. for Env'tl. Law & Policy v. Washington Dept. of Ecology*, 196 Wash. App. 360, 372 n.16 (2016) (“the [aesthetic flow] study may indicate that there is no flow level that is (continued ...)”).

denied, the Commission require Okanogan PUD to conduct a simulated aesthetic flow study prior to project design and construction to ensure that the public interest is protected.²⁷

16. Next, Conservation Groups assert that the September 20 Order erred in stating that Okanogan PUD was in the final phases of project development, and was pursuing the project with due diligence. Conservation Groups contend that at a June 2016 Board of Commissioners meeting, Okanogan PUD expressed uncertainty regarding moving forward with the project and discussed a potential redesign. Conservation Groups also assert that a former Okanogan PUD Commissioner recently stated that the PUD was largely responsible for the delay in the project, admitting that it was not complete because the PUD Commissioners were “messing around with it and dragging our feet.”²⁸ Furthermore, Conservation Groups allege that had Okanogan PUD been pursuing the project with due diligence, it would have initiated the process to perform an aesthetic flow study when the litigation pertaining to the water rights concluded.

17. Last, Conservation Groups assert that the September 20 Order wrongly stated that the project is needed for ancillary services. Conservation Groups state that nothing in the record supports this conclusion and the project may not be able to effectively provide such services given its small generating capacity and limited storage capacity. Conservation Groups further state that the Commission did not address concerns that the cost of providing power from the Enloe Project could be up to two to four times higher than the cost of power on the open market.

18. Conservation Groups repeat many of the arguments the Commission rejected in the September 20 Order. With respect to the aesthetic flow study, nothing in the license or the 401 water quality certification requires Okanogan PUD to conduct a simulated aesthetic flow study prior to the design and construction of the project. In fact, the 401 water quality certification specifically allows Okanogan PUD to conduct an actual flow study within three years following construction. Although future changes may be required as a result of any such study, Okanogan PUD can move forward with its project without the study at this time. We are not persuaded by Conservation Groups’ attempt to

protective of both the fishery resource and aesthetics, and Ecology may withdraw the water right permit’’)).

²⁷ Conservation Groups assert that ordering the study now would not weaken or conflict with the water quality certification, which is focused on ensuring that an aesthetic flow study is done.

²⁸ Conservation Groups Request for Rehearing at 22 (citing Okanogan PUD Board of Commissioner Meeting, October 9, 2017, public comment of Ernest Bolz).

relitigate issues related to the project that were fully addressed during licensing and the 401 water quality certification proceeding.²⁹ Previously, the Commission rejected American Whitewater's assertion that an aesthetic flow study should be conducted prior to construction, finding that "the license order reasonably provided a means for testing the proposed flow's effect on aesthetics and water quality after the project is constructed, while providing a framework for making improvements, if needed."³⁰ None of the circumstances related to the aesthetic flow study have changed since our order, and we find no reason to reopen the license to impose additional measures at this time.

19. We also do not find that the anecdotal evidence submitted by Conservation Groups demonstrates that Okanogan PUD has not diligently pursued the Enloe Project. Okanogan PUD was engaged in protracted litigation over the water rights at the project for nearly four years. Additionally, as stated in the September 20 Order, since the water rights litigation concluded, Okanogan PUD has received approval from the Washington State Capital Projects Review Committee, the state agency charged with reviewing alternative public works contracting procedures, to employ a design-build contracting model that Okanogan PUD states will result in a swifter start to construction. Further, since issuance of the September 20 Order, Okanogan PUD has filed its Dam Survey Program Plan and Schedule and its Annual Environmental Action Plan Status Report and Drill. Last, Okanogan PUD has not indicated that it plans to change its project development or will be using the additional time afforded by the stay to reevaluate the project's design or feasibility.

20. Conservation Groups also misstate our conclusions regarding the need for power. The September 20 Order merely noted the conclusions made in the licensing proceeding, and found that adjudication of issues related to the original license were beyond the scope of this proceeding. We reiterate that a stay proceeding is not the appropriate forum to relitigate such arguments.

²⁹ *Public Utility District No. 1 of Okanogan County, Washington*, 145 FERC ¶ 61,144 (2013) (denying American Whitewater's request for rehearing regarding a pre-construction aesthetic flow study and amending the license to incorporate the aesthetic flow study condition that was added to the project's water quality certification by the Washington Pollution Control Hearings Board after the issuance of the license order).

³⁰ *Id.* P 19.

E. NEPA Requirements

21. Conservation Groups argue that the Commission failed to consider the environmental impacts of the stay. Conservation Groups aver that under NEPA, the Commission must take a “hard look” at the potential environmental consequences of the proposed action.³¹ Conservation Groups state that if there are changes to the project, or new circumstances or information that affects the Commission’s analysis in the environmental assessment, the Commission’s duty extends to preparing a supplemental environmental assessment, even after it has issued a license.³²

22. Conservation Groups aver that there are new developments that affect the Commission’s analysis and findings in the environmental assessment prepared for licensing. Specifically, Conservation Groups state that the need for project power has changed and that new information is available regarding the project’s effect on certain fish species. Conservation Groups contend that because the Commission did not address how these new developments affected its environmental analysis and licensing decision prior to issuing the September 20 Order, the Commission is in violation of NEPA and its implementing regulations.

23. The Commission's regulations categorically exclude from review under NEPA certain types of actions which do not have a significant effect on the human environment.³³ Specifically, section 380.4(a)(1) of the Commission’s regulations categorically excludes certain “procedural, ministerial, or internal” administrative decisions.³⁴ Approval of Okanogan PUD’s request for stay is administrative in nature and does not approve any construction or changes to the project development. Therefore, an environmental analysis is not required. Should the changed circumstances cited by Conservation Groups require an amendment to Okanogan PUD’s license,

³¹ Conservation Groups Request for Rehearing at 25 (citing *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011)).

³² *Id.* (citing 40 C.F.R. § 1502.9 (2017)).

³³ 18 C.F.R. § 380.4 (2017). *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) (“An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious.”).

³⁴ 18 C.F.R. § 380.4(a)(1) (2017).

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Commission staff would prepare, if necessary, a NEPA document in the evaluation of any such proposal.

The Commission orders:

The request for rehearing filed by Conservation Groups on October 20, 2017, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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