

125 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

PacifiCorp

Project Nos. 2111-031
2071-036
935-082

ORDER ON REHEARING

(Issued October 16, 2008)

1. PacifiCorp has filed a request for rehearing of the June 26, 2008 Commission staff orders issuing new licenses for the continued operation and maintenance of the 240-megawatt (MW) Swift No. 1 Project No. 2111, the 134-MW Yale Project No. 2071, and the 136-MW Merwin Project No. 935, located on the North Fork Lewis River in Clark, Cowlitz and Skamania Counties, Washington.¹ PacifiCorp seeks modification or clarification and rehearing of its three licenses regarding (1) dead tree removal, (2) emergency telephone notification service, (3) the filing of amendment applications, (4) bull trout netting, (5) evaluation of kokanee, (6) lands for habitat management, (7) the South Merwin Trail access, (8) the Cougar Visitor Information Facility, (9) cost caps, (10) flood control, and (11) flow releases. In addition, the National Marine Fisheries Service (NMFS) filed a request for clarification and correction of the orders, and Washington Department of Fish and Wildlife (Washington DFW) filed a request for

¹ *PacifiCorp*, 123 FERC ¶ 62,260 (2008), *PacifiCorp*, 123 FERC ¶ 62,257 (2008) and *PacifiCorp*, 123 FERC ¶62,258 (2008).

Project No. 2111-031, *et al.*

- 2 -

rehearing regarding the boat launch at Swift No. 1.² For the reasons discussed below, we deny rehearing and grant the clarifications and corrections, in part.

Background

2. PacifiCorp is the licensee for three of the four licenses issued on June 26, 2008, for four projects located on the North Fork Lewis River. Public Utility District No. 1 of Cowlitz County (Cowlitz) is the licensee of the fourth project, the Swift No. 2 Project No. 2213 (located between the Swift No. 1 and Yale Projects).³ PacifiCorp's Swift No. 1 Project is the furthest upstream and largest project in the Lewis River system. The project includes a 412-foot-high, 2,100-foot-long embankment structure, impounding an 11.5-mile-long, 4,600-acre reservoir. The Yale Project includes two zoned embankment dams -- the largest being 323 feet high and 1,500 feet long -- and a 10.5-mile-long reservoir with a surface area of 3,800 acres at full pool elevation. The oldest and most downstream project in the basin is PacifiCorp's Merwin Project. Its 313-foot-high concrete arch dam extends 1,300 feet across the Lewis River, impounding a 14.5-mile-long reservoir with a surface area of 4,000 acres at full pool.

3. The licenses incorporate almost all of the provisions of a comprehensive Settlement Agreement (Agreement) related to the relicensing of the four projects.⁴ The provisions of the Agreement that are common to all four projects are discussed in the Order on Offer of Settlement and Issuing New License for the Swift No. 1 Project (Master Order).⁵

² On July 28, 2008, Clark Regional Emergency Services Agency (CRESA) filed a rehearing request concerning license requirements regarding emergency telephone notification service. The agency did not intervene in the relicensing proceedings, and because only parties to a proceeding may seek rehearing of an order on the merits, its rehearing request was rejected by notice issued on August 19, 2008. *PacifiCorp*, 124 FERC ¶ 61,172 (2008). Nevertheless, CRESA's concern is resolved in Paragraphs 8 and 9 of this order.

³ See *Public Utility District No. 1 of Cowlitz County, Washington*, 3 FERC ¶ 62,259 (2008).

⁴ The Agreement was filed on December 3, 2004.

⁵ 123 FERC ¶ 62,260 (2008).

Discussion

A. Preliminary Matters

4. To the extent that PacifiCorp's and NMFS' pleadings seek rehearing of the relicenses, they are deficient because they fail to comply with the requirements of section 385.713(c)(2) of our regulations,⁶ which requires that rehearing requests include a section, separate from the body of the rehearing order, entitled "Statement of Issues." The "Statement of Issues" section must list each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.⁷ Section 375.713(c)(2) further provides that "any issue not so listed will be deemed waived." Neither PacifiCorp nor NMFS included a separate "Statement of Issues" section in its rehearing request.⁸ Although their arguments are deemed waived, we will nevertheless address them.

B. Boat Launch

5. On rehearing, Washington DFW argues that the existing boat launch at the Swift No. 1 reservoir is not usable at low reservoir elevations and the license should instead include section 11.2.1.8 of the Agreement, which provides that, if during the license term, an entity other than the licensee constructs a new boat launch and related facilities that would allow access to the reservoir when water levels are low, the licensee must assume operation and maintenance responsibilities. However, if the boat launch is destroyed by vandalism or natural causes, the licensee's responsibilities would end.

⁶ 18 C.F.R. § 385.713(c)(2) (2008).

⁷ The purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission.

⁸ On August 20, 2008, PacifiCorp filed a pleading styled "Errata" in which it attempted to correct the omission merely by titling the body of the rehearing request "Statement of Issues." The revision came almost a month after the July 25 rehearing deadline. Even if it had been timely filed, it failed to cure the deficiency.

Project No. 2111-031, *et al.*

- 4 -

6. On rehearing, Washington DFW asserts that the existing boat ramp is not useable during periods of reservoir drawdown and cannot be extended sufficiently to allow reservoir use during the non-recreation season. Upon review of the information provided by Washington DFW, we find that the boat launch at Swift No. 1 reservoir is not useable during winter drawdown; however, it is accessible during the primary recreation season. Due to the location and steep terrain of this reservoir, Swift reservoir receives the fewest visitors of all the reservoirs at the project. Therefore, we do not believe that the use of the Swift reservoir outside of the summer recreation season warrants the construction of another boat launch. We accordingly deny Washington DFW's request for rehearing. At the same time, we do not oppose the construction of the boat launch if a party obtains funding, as envisioned in the Agreement. This is a facility that could be constructed and maintained outside of the license.

C. Requirements to Remove Dead Trees Along the Reservoir Peripheries

7. PacifiCorp requests that the Commission revise standard Article 20⁹ to allow certain dead trees to be left for wildlife and aquatic habitat. The purpose of Article 20 is to require the removal from the reservoir and its perimeter of those dead trees that pose a hazard to project operations, public safety, or navigation; it does not require removal of dead trees that will not pose such hazards.¹⁰ Thus, the licensee will not be required to remove dead trees that do not pose such hazards. If PacifiCorp has any further questions on this matter, it should consult with the Commission staff. Accordingly, we will not revise Article 20.

D. Emergency Telephone Notification

8. PacifiCorp requests that the emergency telephone notification service requirement of the license, Article 304(a), be revised to require PacifiCorp to only provide funding for the system, and not installation, operation, and maintenance of the system.¹¹ Both Clark

⁹ Article 20 is found in the three licenses in attached Form L-1.

¹⁰ See, e.g., *Montana Power Company and Granite County, Montana*, 62 FERC ¶61,166, at p. 62,140 (1993); *Wisconsin Electric Power Company*, 75 FERC ¶ 61,011 (1996).

¹¹ Article 304 (a) of the three licenses requires that the licensee “acquire, install and maintain a new emergency telephone notification service for those portions of Clark County and Cowlitz County that are subject to inundation from the Lewis River projects.”

Project No. 2111-031, *et al.*

- 5 -

and Cowlitz Counties have already installed the emergency telephone notification service called for in the Agreement.

9. As clarification, the Commission did not intend for PacifiCorp to develop a duplicate emergency telephone notification service, only to ensure that there is such a system. PacifiCorp, while ultimately responsible for such a system, may (as it has done here) delegate its responsibilities to the counties.¹²

E. Requirement to File Amendment Applications (License Article 401(b))

10. Article 401(b) requires PacifiCorp to file applications to amend its license prior to implementing “unspecified long-term changes to project operations, requirements, or facilities for the purpose of protecting and enhancing environmental resources.” PacifiCorp and NMFS assert that this is unnecessary because the Agreement resolves all issues regarding the relicensing of the project, and the parties to the Agreement do not contemplate any measures that are not already included in the Agreement and the conditions of the license.

11. We agree that if measures are contemplated in the Agreement and incorporated in the license, then minor changes or adjustments to those requirements would not require an application to amend the license. However, in the event that the licensee wishes to implement unspecified, long-term, material changes to project operations, requirements, or facilities (i.e., not contemplated in the Agreement and not evaluated by staff prior to issuing the license order), then an amendment would be required. If the licensee is uncertain of whether an action requires an amendment, it should consult with Commission staff prior to undertaking the action.

12. Article 401(b)(1) requires that PacifiCorp file an application to amend the license for any “adjustments” to the upstream fish passage facility required by the license. PacifiCorp states that this will place an unnecessary burden on it to seek an amendment for any change to the facility, however minor. We clarify that this is not meant to require an amendment for minor changes to the facility, but rather for those material changes that were not contemplated by the license.

¹² Any other issues related to emergency communications will be handled under the projects’ existing Emergency Action Plans.

Project No. 2111-031, *et al.*

- 6 -

F. Requirement to Net Bull Trout and Kokanee Evaluation

13. Article 402(a) in the Swift No. 1 and Yale licenses requires that PacifiCorp net bull trout from the projects' tailraces and haul them to a location determined by FWS. PacifiCorp contends that Article 402 should be deleted as unnecessary. These measures are already covered by other conditions of the license, respectively, the bull trout collection and transport plan required by NMFS's Biological Opinion (condition 1, which incorporates section 4.9 of the Agreement) and the hatchery and supplementation program that is also required by the Biological Opinion (condition 1, which incorporates section 8 of the Agreement). We agree that those requirements of the article should be deleted, but that Article 402 is necessary for requiring evaluation of bull trout annually for both the Swift No.1 and Yale Projects and for managing designated conservation lands on Cougar Creek for the protection of bull trout in the Yale Project. Accordingly, we will revise Article 402 in both the Swift No. 1 and Yale licenses.

14. Article 402(b) in the Swift No. 1, Yale and Merwin licenses require that the licensee evaluate bull trout and kokanee populations annually. Because kokanee reside only in the Yale and Merwin reservoirs, we will revise Article 402 of the Swift No. 1 license to require annual evaluation only of bull trout in the Swift No. 1 reservoir.

G. Incorporating Wildlife Habitat Lands into the Project Boundary

15. PacifiCorp requests rehearing of Article 403 in the three licenses, which requires that all land acquired for wildlife habitat under the Wildlife Habitat Management Plan must be included within the project boundaries.¹³ PacifiCorp asserts that inclusion of these lands alters the settlement and creates unnecessary additional expenses and processes. Furthermore, it states that incorporating these lands within the project boundaries does not serve project purposes or assure that the public interest is served.

16. We disagree. Acquisition and maintenance of lands for wildlife habitat has been determined by the Commission to satisfy a project purpose and has been included in the

¹³ Article 403 in the Merwin Project does not include wildlife habitat land acquisition, but rather requires filing a Wildlife Habitat Management Plan with the Commission for approval, as described in section 10.8 of the Agreement. For the Yale and Swift No. 1 licenses, lands acquired for wildlife habitat are required to be included in the project boundary. In the event that the Merwin Project acquires additional lands for wildlife habitat, those lands shall be included in the project boundary.

Project No. 2111-031, *et al.*

- 7 -

licenses.¹⁴ Accordingly, the lands acquired for this purpose must be included within the project boundary. A project boundary serves the function of indicating that the lands within are used in some manner for project purposes. This helps to reduce ambiguity for purposes of license administration and compliance by clarifying the geographic scope of the licensee's responsibilities under its license (and the Commission's regulatory responsibilities).¹⁵ Any lands managed pursuant to a license condition, or if used for "project purposes," should be included in the project boundary, regardless of existing management agreements by the applicant.

17. We will, however, modify Article 403 in the Swift No. 1 and Yale licenses, as PacifiCorp requests, to require that it update its project boundaries within five years of license issuance to reflect all lands acquired for wildlife habitat under that article during that period, rather than requiring a project boundary update upon each new parcel acquisition.

18. The second concern raised by PacifiCorp regarding wildlife habitat lands was the requirement to file annual plans that would describe the lands proposed to be acquired under the land acquisition and habitat enhancement funds. PacifiCorp is concerned about land speculation if the lands were delineated in the plan for approval before they would be purchased. To avoid such speculation, we will revise Article 403 in the Swift No. 1 and Yale licenses to require that the lands be described in the annual plans after they have been acquired.

H. South Merwin Trail Access

19. Article 406 of the Merwin license requires that PacifiCorp submit a plan to provide a trail easement to connect a proposed Clark County regional park to the south side of Lake Merwin, as outlined in section 11.2.3.4 of the Agreement. In 2007, Clark County finalized its comprehensive plan, which did not mention the Merwin location for a regional park. PacifiCorp requests that we clarify the obligation to provide a trail easement is contingent upon Clark County committing to develop the regional park near Merwin Lake.

20. We will revise Article 406 to require that the plan providing a trail easement to the regional park is contingent on Clark County developing the regional park.

¹⁴ See EIS at 5-29 to 5-31. Wildlife habitat lands acquisition and maintenance are discussed in each of the three licenses under Section B of Other Issues.

¹⁵ See *PacifiCorp*, 80 FERC ¶ 61,334 (1997).

Project No. 2111-031, *et al.*

- 8 -

I. Cougar Visitor Information Facility

21. PacifiCorp requests that we eliminate the Cougar Visitor Information Facility because the facility is not necessary to carry out project purposes and reasonable alternatives exist for a visitor's facility and for a facility to curate artifacts.

22. In the EIS, Commission staff concluded that a visitor's center in Cougar would allow the licensees to provide general information on the projects to the public and more specific information on recreational opportunities or safety and security. Including the Cougar Visitor Information Facility in the project boundary would help ensure that the proposed facility would be used for project purposes for the term of the new license. The project area closest to Cougar is the Yale Project.¹⁶ In response to comments on the draft EIS, staff stated that, as proposed in the Agreement, the visitor information facility would be developed immediately adjacent to the projects and would provide public information about recreational opportunities at the projects.

23. The four Lewis River projects are the primary recreational attraction in the vicinity of Cougar and, as acknowledged in the Joint Explanatory Statement of the Agreement, the visitor center would provide benefits to project visitors.¹⁷ The Visitor Information Center would serve as a primary gateway to the upper Lewis River Basin by providing public information on its history and resources, including information about the Yale and Swift Creek reservoirs, project facilities and operations, environmental, recreational and cultural resources. We agree with staff that there is a clear nexus with the projects and we will continue to require that a Visitor Information Facility plan be filed within five years of the date of issuance of the license as set forth in Article 410 of the Yale license.

J. Cost Caps

24. The Master Order recognizes that the Agreement and many of the conditions of the four licenses establish limits on the licensee's responsibility to fund various resource mitigation measures and studies, but concludes that it is nevertheless the licensees' obligation to complete the measures required by the license articles, in the absence of Commission authorization to the contrary.¹⁸

¹⁶ EIS at 5-30.

¹⁷ *Id.* at A-18.

¹⁸ 123 FERC ¶ 62,260 at P 21.

Project No. 2111-031, *et al.*

- 9 -

25. On rehearing, PacifiCorp objects to this conclusion, and asks instead that the Commission approve the cost limits included in the Agreement.

26. We deny the request. We understand the licensee's desire to fix the costs that it may incur for resource protection and enhancement measures. As the order explains, it is likely that the specified funding will be sufficient for the measures in question. However, the Commission cannot constrain the fulfillment of its statutory responsibilities by agreeing to such spending caps.¹⁹ We therefore affirm the conclusion in the Master Order that it is the licensee's obligation to complete the measures required by the license articles, in the absence of Commission authorization to the contrary. In addition, we are adding an additional license article to each license to so state.

K. Flood Control Requirements

27. PacifiCorp seeks clarification of Article 302 of the three licenses, which provides for flood management at the three projects. According to section 12.8 of the Settlement Agreement, PacifiCorp will seek an amendment of the FEMA agreement and Standard Operating Procedure Manual by the first anniversary of the license issuance. Once PacifiCorp obtains FEMA approval of the revised high runoff procedure, it then can seek an amendment to the licenses.

L. Flow Release Requirements

28. PacifiCorp requests that the Commission clarify whether the licenses require that the Commission be notified prior to adjustment of minimum flow for approval or whether the intent was for the Commission to be notified after a change in minimum flow. The Master Order, at paragraph 29, stated that the procedures should also include notification of the Commission regarding any deviations from the required minimum flows. We will include a new license article in the three licenses which clarifies the notification requirement.

M. Corrections to License Articles and Appendices

29. As discussed below, PacifiCorp points out a number of corrections that should be made to various conditions of the three licenses.

¹⁹ See, e.g., *Public Utility District No. 1 of Chelan County, Washington*, 119 FERC ¶ 61,055, at P 12-17 (2007).

Project No. 2111-031, *et al.*

- 10 -

30. We will correct the last sentence in standard Article 29 of the three licenses.
31. Appendix E of the Swift No. 1 Project license will be corrected to complete the last sentence in Article 2.
32. Ordering Paragraph (E) of the Yale Project license will be changed to refer to Appendix B.
33. Appendix A, Section 4.3(4)(a) of the Yale Project water quality certificate, references the 7Q10 year flow of 32,884 cfs for the Lewis River at Merwin Dam. As PacifiCorp states, it should reference the 7Q10 year flow of 27,088 cfs at the Yale Dam. We will make this correction. In addition, sections 4.4(2)(f) and 4.4(3) will be revised to conform to the language in the water quality certification.
34. NMFS pointed out six typographical errors in the Yale Project No. 2071 section 18 prescriptions (Appendix B), which we will correct.

N. Corrections to Discussion Section of License Order

35. PacifiCorp also seeks correction of some typographical errors and other items in the discussion section of the order. The requested corrections and edits are minor and do not affect the license articles or ordering paragraphs. We take note of them, but see no need to take any action.

The Commission orders:

(A) The request for rehearing filed on July 28, 2008, by the Washington Department of Fish and Wildlife is denied.

(B) The request for rehearing filed on July 28, 2008, by PacifiCorp is granted to the extent set forth in this order.

(C) The request for rehearing filed on July 25, 2008, by National Marine Fisheries Service is granted to the extent set forth in this order.

(D) The following technical corrections and clarifications are granted to the extent described above and the orders are revised to read as follows:

(1) Yale Project No. 2071, Ordering Paragraph (E) shall be revised to refer to Appendix B.

(2) Article 401(b)(1) of the Swift No.1 Project No. 2111, Yale Project No. 2071 and Merwin Project No. 935 are each revised as follows:

Project No. 2111-031, *et al.*

- 11 -

	Condition No.	Modification
1	Section 18 no. 4.5 and BO no. 1	Modifications to passage facilities to achieve performance standards

(3) Article 402 in the Swift No. 1 Project No. 2111 is revised to read as follows:

Article 402. *Aquatic Resources Management Measures.* The licensee shall continue to implement the following aquatic resources management measure:

(a) in conjunction with the licensees for the Yale Project No. 2071 and Merwin Project No. 935, evaluate bull trout populations annually.

The licensee shall include evidence of compliance with this measure in the annual reports filed with the Commission under section 14.2.6 of the Settlement Agreement (Agreement) filed on December 3, 2004.

In addition, the licensee shall file with the Commission within 2 years of license issuance, a bull trout limiting factor analysis, as described in section 5.5 of the Agreement filed on December 3, 2004.

(4) Article 402 in the Yale Project No. 2071 is revised to read as follows:

Article 402. *Aquatic Resources Management Measures.* The licensee shall continue to implement the following aquatic resources management measures:

(a) in conjunction with the Swift No. 1 Project No. 2111 and Merwin Project No. 935, evaluate bull trout and kokanee populations annually; and

(b) manage designated conservation lands on Cougar Creek for the protection of bull trout (section 5.2 of the Settlement Agreement filed on December 3, 2004).

The licensee shall include evidence of compliance with these measures in the annual reports filed with the Commission under section 14.2.6 of the Settlement Agreement.

(5) The second paragraph of Article 403 of the Swift No.1 Project No. 2111 is revised to read as follows:

All lands acquired for wildlife habitat under the Swift No. 1 and Swift No. 2 Land Acquisition and Habitat Protection Fund and the Lewis River Land Acquisition and Habitat Enhancement Fund shall be included within the project boundary and updated

Project No. 2111-031, *et al.*

- 12 -

within five years of the issuance date of the license to reflect all lands acquired for wildlife habitat under the Wildlife Habitat Management Plan.

(6) The sixth paragraph of Article 403 of the Swift No. 1 Project No. 2111 is revised to read, in part, as follows:

.... The annual plans shall include: (a) a description of the lands acquired under the Swift No. 1 and Swift No. 2 Land Acquisition and Habitat Protection Fund; (b) a description of the lands acquired under the Lewis River Acquisition and Habitat Enhancement fund associated with the Swift No. 2 Project

(7) The second paragraph of Article 403 of the Yale Project No. 2071 is revised to read as follows:

All lands acquired for wildlife habitat under the Yale and Lewis River Land Acquisition and Habitat Protection Funds shall be included within the project boundary and updated within five years of the issuance date of the license to reflect all lands acquired for wildlife habitat under the Wildlife Habitat Management Plan.

(8) The sixth paragraph of Article 403 of the Yale Project No. 2071 is revised to read, in part, as follows:

.... The annual plans shall include: (a) a description of the lands acquired under the Yale Land Acquisition and Habitat Protection Funds; (b) a description of the lands acquired under the Lewis River Acquisition and Habitat Enhancement fund associated with the Yale Project;

(9) The first sentence of Article 406 of the Merwin Project No. 935 is revised to read as follows:

South Shore Merwin Trail Access Plan. Within one year of Clark County committing to develop a regional park near Merwin Lake, the licensee shall file with the Commission for approval, a plan to provide a trail easement to connect a proposed Clark County regional park to the south side of Lake Merwin, as outlined in section 11.2.3.4 of the Settlement Agreement filed on December 3, 2004.

(10) The following license Articles regarding cost caps are added to each of the licenses.

Swift No. 1 Project No. 2111: Article 413. Funding. Notwithstanding the limitation on expenditures as expressed in the mandatory conditions and included in this license, the Commission reserves the right to require the licensee to undertake such

Project No. 2111-031, *et al.*

- 13 -

measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

Yale Project No. 2071: Article 415. *Funding*. Notwithstanding the limitation on expenditures as expressed in the mandatory conditions and included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

Merwin Project No. 935: Article 414. *Funding*. Notwithstanding the limitation on expenditures as expressed in the mandatory conditions and included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

(11) The following license Articles regarding modification of minimum flows are added to each of the licenses.

Swift No. 1 Project No. 2111 : Article 414. *Minimum Flow Modification*. The licensee may temporarily decrease minimum flows below Swift No. 1 Dam upon agreement between the licensee and the Flow Coordination Committee as defined in Section 6.2.5 of the Settlement Agreement. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each incident.

Yale Project No. 2071: Article 416. *Minimum Flow Modification*. The licensee may temporarily decrease minimum flows below Yale Dam upon agreement between the licensee and the Flow Coordination Committee as defined in Section 6.2.5 of the Settlement Agreement. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each incident.

Merwin Project No. 935: Article 415. *Minimum Flow Modification*. The licensee may temporarily decrease minimum flows below Merwin Dam pursuant to Sections 6.2.4 and 6.2.5 of the Settlement Agreement. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each incident.

(12) The last sentence in Form L-1, Article 29 of the Swift No.1 Project No. 2111, the Yale Project No. 2071 and the Merwin Project No. 935 are each revised as follows:

Provided further, that in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Project No. 2111-031, *et al.*

- 14 -

(13) The dates of the Settlement Agreement in the mandatory conditions are revised as follows:

Swift No. 1 Project No. 2111, Appendix C, Exhibit A, title shall read as: November 30, 2004;

Swift No. 1 Project No. 2111, Appendix D, first sentence shall read as: filed ... on December 2, 2004;

Merwin Project No. 935, Appendix A, Section 4.2, first sentence shall read as: November 30, 2004, submitted to FERC on December 2, 2004; and

Merwin Project No. 935, Appendix A, Exhibit A, title shall read as: November 30, 2004.

(14) In Swift No. 1 Project No. 2111, the last sentence of Appendix E shall be revised to read as follows:

... Settlement Agreement concerning the relicensing of the Lewis River Hydroelectric Project Nos. 935, 2071, 2111 and 2213, Cowlitz and Skamania Counties, Washington, dated November 30, 2004, and filed with the Commission on December 3, 2004.

(15) Yale Project No. 2071, Appendix A, is revised as follows:

(a) Section 4.3(4)(a) the 7Q10 flow for the Lewis River at Yale Dam is 27,088 cfs;

(b) Section 4.4(2)(f) : Identify adaptive management strategies to further improve the temperature fluctuation regime for the cold-water biota in the event that target temperatures are not achieved.

(c) Section 4.4(3) : If it is determined through the TWQAP that steps must be taken in order to protect the most sensitive beneficial uses, the Licensee shall employ all reasonable and feasible methods identified in response to condition 2(e and f) to ensure that the water temperature fluctuation regime in the Canyon remains below levels which would harm the aquatic biota or limit the potential healthy cold water habitat.

(16) Yale Project No. 2071, Appendix B, is revised as follows:

(1) On page 81, the acronym for Collection Efficiency is “CE”; (2) on page 82, in article 4.3, the third sentence shall read: “The Licensee must consider without limitation entry rate, fall back, crowding at the entrance, delay and abandonment of the trap area”; (3) on page 84, in article 6, the first sentence is revised to read as: “Unless and until

Project No. 2111-031, *et al.*

- 15 -

alternative technologies are implemented, the Licensee must provide for the transport by truck of all Transported Species collected at the Yale Upstream Facility”; (4) on page 87, in article 10, the first sentence of the second paragraph shall read: “Unless otherwise directed by the Services, the Licensee must provide for the marking of all the transported juvenile anadromous salmonids collected by the Yale Downstream Facility until such time as the Yale Upstream Facility is completed pursuant to this license and the Swift Upstream Facility is completed pursuant to the Swift No. 1 and Swift No. 2 licenses, and must provide for the tagging of a statistically valid sample of the fish transported as appropriate to accomplish the monitoring and evaluation objectives set forth below, the methodology of such tagging to be determined by the Licensee in Consultation with the ACC (including at least the Services) and approved by the Services”; (5) on page 88, in article 11, the last sentence shall read: “If these facilities do not function as well to collect bull trout as the interim collection method based on effectiveness monitoring, as determined by the USFWS, the Licensee shall continue the interim collection method”; and (6) on page 90, in article 13, the fourth paragraph, the third sentence shall read: “The Licensee, together with the licensees for the Merwin, Swift No. 1 and Swift No. 2 projects, must allow the ACC (including at least the Services) a period of 90 days to provide comments on the draft revised M&E Plan as part of such Consultation.”

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.