

Oct 31, 2016

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N. E.
Washington, D. C. 20426

Allegation of License non-compliance with Articles 5, 17, 18, Form 80, Buffer Zone and Recreation Plan under P-2833

Legitimate public interest concerns include, among others, resource conservation; water quality control; flood control; fish and wildlife protection; recreation and aesthetic considerations; protection of improvements along reservoir shoreline[s]; drinking water and other domestic municipal and industrial uses; irrigation requirements; navigation; hydraulic coordination; safety and adequacy; and [regional power coordination].

Public recreation in **OUR RIVERS** is a FERC project purpose and in the public interest.

This is an unsolicited allegation of License non-compliance in response to the Licensee frivolous filing Oct 17, 2016.

A project License is a contract between the Licensee and the United States for the free use of **OUR RIVERS** to provide falling water to produce electricity.

FERC must ensure the project is best adapted to a comprehensive plan for developing the waterway for developmental purposes and non-developmental purposes and equal consideration was given to these purposes when issuing the license.

The contract is part of a comprehensive plan for **OUR RIVER** that the Licensee must first accept as a whole and then comply with during the term of the License, as accepted.

With this contract the Licensee can do neat things like Jeff Bennett described in his 1991 guidebook about Cowlitz Falls:

The falls begins with an exciting ride over rollercoaster waves, then through smaller waves before hurling boaters around a left bend and into more powerful hydraulics .. at higher flows, the big waves that dominate Cowlitz Falls became miniature versions of rapids like Granite on Hell's Canyon on the Lower Snake. This drop was dynamited and a 140 foot High dam now stands in its place.

In part the Licensee by contract was offered and accepted to build a boat ramp, access road (340), and parking lot along the 300 road as a project purpose recreation facility.

Recreation is a project purpose, not a bone the Licensee can throw at the Public Interest at its discretion to quiet Public Outcry.

Simple compliance with the existing License would resolve most decade old issues with recreational access to the Copper Canyon Creek..

SPECIFIC NON-COMPLIANCE ISSUES

Standard License Article 5 requires the Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction maintenance, and operation of the project.

The Commission requires its licensees to obtain fee title to (or the right to use in perpetuity) all project lands in order that the Commission, through its licensee, can ensure that the comprehensive development and public interest purposes of the license are being fulfilled

Failure to file a corrected compliance filing concerning the project boundary, Article 5, 17, and Recreation Plan requirements after receiving a Letter Order June 5, 2009 finding the Licensee April 3, 2008 filing was patently deficient.

Failure file a remote project boundary, Article 5, 17, 18 and Recreation Plan requirements for the Packwood Community Ball Park project related recreation facility, located 30 miles away from the dam, with As-built drawing approved May 22, 1998.

Failure to file an accurate Form 80, {20150423-5016}. The current Form 80 claims no FERC approved recreation amenities at the project and claims there are no public whitewater boating take-outs inside the project boundary.

Failure to provide evidence that it holds rights to the road as required by Licensee Article for the section of the access Road 300 currently inside the Project Boundary shown in the FERC Buffer Plan.

LICENSEE COMPLIANCE OPTIONS:

To simply honor its existing contract requirements under the terms of the License.... or

Pay daily penalty until in compliance... or

File to surrender the License....or

File to decommission the Project.....or

File to make Port Blakely a co-licensee since it controls access to the project purpose recreation 340 access road and FERC only has enforcement authority over the Licensee **INSIDE THE PROJECT BOUNDARY....** or

File to transfer the License to another party that is willing to honor the terms of the existing contract.

EMINENT DOMAIN

If any of the public's legal rights are affected, licensees can be required to acquire such rights, either by contract or in the appropriate state forum. [Intent of the eminent domain provisions of Section 21 of the Federal Power Act (FPA),(16 U.S.C. § 814)]

ENFORCEMENT

The U.S. Constitution's Commerce Clause gives FERC the authority through the Federal Power Act (FPA) to regulate the placement and operation of non-federal and privately-owned impoundment structures on waterways that affect navigable streams and waterways within the United States. Under the FPA, FERC can only hold the licensee

accountable for compliance with the terms of the license or FERC's statute or regulations.

FERC expects and the law demands a licensee to understand, observe and monitor license compliance requirements throughout the life of the license, regardless of the extent or complexity of those requirements.

The Commission's Office of Energy Project (OEP) is primarily responsible for ensuring that Licensees are effectively complying with the terms and conditions of their licenses and applicable FERC rules and regulations.

Failure to comply with License requirements for the Project may be subject to the enforcement and penalty provisions of Section 31(a) of the Federal Power Act, as amended by Section 12 of the Electric Consumers Protection Act of 1986. Under Section 31, the Commission is authorized to assess civil penalties up to a maximum of \$11,000 per day for failure to comply with the Commission's orders. In addition, the Commission may take other enforcement action as necessary.

A longstanding and fundamental principle governing the actions of a hydropower license is that the licensee may not engage in any transaction that would interfere with its obligations under its license and other applicable law:

... In granting the privilege of exploiting the water resources of navigable streams...the Federal Government is making grants out of its exclusive domain. Aside from statute, there is no right to engage in such activity. The grant of such privileges may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject so such conditions, and enjoying such privileges as it does. subject to the severe limitations imposed by the statute, the Company cannot shuck off its obligations as a licensee and set itself up in another capacity, or avoid the comprehensive and inclusive powers of the Commission
Alabama Power Company v. FPC, 128 F.2d 280, 328 (DC Cir. 1942)

The Licensee has failed to take advantage of any preventive strategy to reduce instances of non-compliance. The Licensee failure in correcting the deficiencies outlined in previous compliance orders leads only to enforcement action.

FERC excludes the Public Interest from both Intervention or Rehearing Requests in FERC proceedings if the filing is merely one second late...FERC continues to coddle this Licensee after its compliance filings are late by over a decade, inaccurate or not filed at all.

Please use the Public Interest standard for future enforcement.

DISCUSSION ON CURRENT CONCERNS AT COPPER CREEK

In 2005, Washington State Office of the Interagency Committee {IAC}(drafter of the Washington State Comprehensive Outdoor Recreation Plan) in 2005 {20050812-0155}) predicted access concerns at Copper Creek:

“First, the utility’s entire amendment depends on an easement agreement with a private landowner. FERC cannot enforce an agreement between the utility and a third party as a condition of the utility’s license; therefore the proposed recreation plan cannot be approved by FERC”

A decade later the Public Interest still has to voice concern about public access to project purpose recreational sites at other FERC Licensed Projects:

“Mr. Kelleher need not be concerned. Sites outside of a project’s boundary are commonly assessed to determine their suitability to meet project purposes. Once a site, like the Fish Camp in this case, is determined to be necessary to meet the requirements of a project license the licensee is required to adjust the project boundary to incorporate the property in question.” {146 FERC 61,102 P12 }

Proper public access planning in the first instance by FERC, as advised by both IAC and National Park Service would prevent these access issues from occurring that drag along for decades at FERC projects.

Policy Statement on Hydropower Licensing Settlements

{20060921-3087}

Measures must be based on substantial evidence in the record of the licensing proceeding

Measures must be consistent with the law and enforceable. In particular, measures must be within the Commission's jurisdiction

A relationship must be established between a proposed measure and project effects or purposes

Measures should be as narrow as possible, with specific measures (e.g. ,installing riprap to prevent erosion) preferred over general measures, such as creation of an aquatic resource fund

Actions required under measures should occur physically/geographically as close as possible to the project

CONCLUSION

A Commission license for a hydropower project entails a great deal more than authorization to use a national water resource for the generation of electricity; with the license comes the responsibility to build and operate the project in a manner compatible with the public interest. (the Supreme Court stated in *Udall v. Federal Power Commission*, 387 U.s. 428, 450 (1967): The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. ... The test is whether the project will be in the public interest.)

Pursuant to the FPA, the public interest includes the protection of fish and wildlife and their habitat, the development of public recreation at project reservoirs, and the preservation of environmental amenities.

Sincerely

/s/ P Kelleher

Pat Kelleher

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Document Content(s)

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