122 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of Pend Oreille County, Washington	Project No. 2225-001 Docket No. DI07-1-001

ORDER GRANTING REHEARING IN PART, DENYING REHEARING IN PART, AFFIRMING THAT EXISTING LICENSE IS VALID, AND FINDING THAT LICENSING IS REQUIRED

(Issued March 20, 2008)

1. Pending before us are several requests for rehearing of a declaratory order affirming that the existing license for the Sullivan Creek Project No. 2225 is valid, and finding that the project is not required to be licensed. The project is located on Sullivan Lake, Outlet Creek, and Sullivan Creek, a tributary of the Pend Oreille River, near the town of Metaline Falls in Pend Oreille County, Washington, and occupies 500 acres of U.S. lands within the Colville National Forest.

2. The licensee, Public Utility District No. 1 of Pend Oreille County, Washington (District) seeks rehearing of the determination that the existing license is valid. The U.S. Department of Agriculture's Forest Service (Forest Service), Washington Department of Fish and Wildlife (Washington DFW), and American Whitewater seek rehearing of the finding that licensing is not required. For the reasons discussed below, we reaffirm the validity of the existing license. We further reverse the finding that the entire project is not required to be licensed and find that the project is subject to our mandatory licensing jurisdiction. Finally, we find that, although the Sullivan Creek Project requires licensing and the District must apply to surrender the license, the storage reservoir comprised of Sullivan Lake and Dam does not require licensing as a storage-only project, because its effect on downstream generation is not significant. However, as part of the surrender process, the District will be required to obtain a special use authorization from the Forest Service for these and any other facilities that will continue to occupy federal land after the effective date of the surrender.

Background

3. The Commission issued an original license for the Sullivan Creek Project to the District on November 25, 1958, with an expiration date of October 1, 2008.[1] The Inland Portland Cement Company (Inland) constructed the project in 1909, and operated it under a Forest Service permit issued on September 14, 1910, for a period of 50 years. As originally constructed, the Sullivan Creek Project consisted of Sullivan Lake Dam and Reservoir, Sullivan Creek diversion dam and conduit (which diverted water from Sullivan Creek into Sullivan Lake), Mill Pond dam and reservoir, a power conduit from Mill Pond to the powerhouse (consisting of a 12,500-foot wooden flume, a 2,200-foot earthen canal and forebay, a 1,160-foot long horseshoe tunnel, and a 275-foot long steel penstock), a powerhouse, and transmission facilities. Inland used the project to generate power until 1956, when a portion of the project's wood flume collapsed. As described in a supplement to the license application, Inland and the District had agreed to transfer the project to the District following a Commission decision on the application.

4. At the time of licensing, the Sullivan Creek diversion dam and conduit, the flume section of the power conduit from Mill Pond, and the Sullivan Creek powerhouse were not being used for power generation. In the license order, the Commission referred to these project works as abandoned or discontinued facilities, and stated that they should be excluded from the license because it did not appear that the licensee had any immediate need for their use. Instead, the Commission required that the District obtain authority from the U.S. Forest Service for the abandoned facilities' continued occupancy of lands of the United States within the Colville National Forest.[2] In issuing the license, the Commission stated that the District proposed to operate the Sullivan Lake Dam and the Mill Pond dam "for the purpose of generation of power at downstream projects (other than the Sullivan Creek plant) on the Pend Oreille River and the Columbia River."[3] In Article 30 of the license, the Commission included provisions for a feasibility study of increasing the size of the project, and in Article 31, the Commission reserved its authority to require that the licensee restore power generation at the site.

5. By letter dated December 12, 1958, the District objected to the license order and specifically requested that the Commission modify it so that the discontinued project works were not described as abandoned. The District stated that "the Sullivan Creek diversion dam and conduit were never abandoned, but were discontinued and not

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[1] *Public Utility District No. 1 of Pend Oreille County, Washington*, 20 FPC 753 (1958).

[2] *Id.* at 754.

[3] *Id.*

maintained because of lack of need for the Sullivan Creek waters to supplement the waters of Harvey Creek in filling Sullivan Lake."[4] The District requested that "the diversion dam and conduit and the temporarily discontinued flume section of the power conduit from Mill Pond be included as project facilities for which Applicant has no immediate plans for reactivation except under Articles 30 and 31 of the license."[5] The District also asked the Commission to remove the requirement that the District obtain a special use authorization for the discontinued facilities from the Forest Service, and sought an extension of time within which to accept the license until after the Commission acted on its other requests.

6. On March 2, 1959, the Commission granted the District's requests.[6] The Commission modified the license order to include the discontinued facilities as project works subject to the provisions of Articles 30 and 31 of the license. The Commission also modified the project boundary to include the lands occupied by the discontinued project works, removed the requirement that the District obtain a special use authorization from the Forest Service, and provided that the license would be deemed accepted if the licensee did not seek rehearing within 30 days. The District did not seek rehearing of the modified license order.

7. Over the course of the license term, the District made several attempts to restore generation at the site. From 1965 to 1975, the District sought approval of an application for a license amendment and subsequently, a license for a redevelopment proposal that would enlarge and replace the existing Sullivan Creek Project. From 1994 to 2002, the District sought approval of an amendment application to reestablish and enlarge power generation at the project. In each instance, however, the District abandoned its efforts because the proposals were not economically feasible.[7] On September 23, 2003, the

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[4] *Public Utility District No. 1 of Pend Oreille County, Washington*, 21 FPC 283, 284 (1959).

[5] *Id.*

[6] *Id.* at 285-86.

[7] *See Public Utility District No. 1 of Pend Oreille County, Washington*, 51 FPC 999 (1974) (dismissing application for amendment of license for Project No. 2225 and fixing deadline for filing of revised application for license for Project No. 2526 to replace existing project); *Public Utility District No. 1 of Pend Oreille County, Washington*, 53 FPC 273 (1975) (denying motion for extension of time and dismissing application for license for Project No. 2526 that had been pending unperfected for nearly ten years); *Public Utility District No. 1 of Pend Oreille County, Washington v. Department of Ecology*, 146 Wash.2d 778 (Wash. 2002) (affirming state water quality certification for 1994 application for amendment to license for Project No. 2225); Letter to Magalie Salas,

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District informed the Commission of its intention not to file an application for a new license for the Sullivan Creek Project. On October 22, 2003, Commission staff issued notice of the District's intent not to seek a new license and invited new license applications from other interested entities, with a filing deadline of September 30, 2006. No such applications were filed.

8. On October 5, 2006, the District filed its petition for a declaratory order, requesting the Commission to determine that the existing license for the Sullivan Creek Project is void and that the project does not require licensing under section 23(b)(1) of the Federal Power Act (FPA). The District also requested the Commission to find that the existing license for the project will expire on October 1, 2008, with no further action required by the Commission or the licensee. In response to Commission staff's notice of the petition, various entities intervened and filed comments and protests.

9. On July 18, 2007, Commission staff issued an order concluding that, although under the facts as presented in the District's petition, the project does not require licensing under section 23(b)(1) of the FPA,[8] the current license was valid when issued and therefore should not be declared void. The order further found that the existing license will expire with no further action required by the Commission or the licensee.

10. The District, Forest Service, Washington DFW, and American Whitewater filed timely requests for rehearing. On September 4, 2007, the District filed a motion for leave to reply and a reply to the other parties' rehearing requests. On September 18, 2007, American Whitewater filed a response in partial opposition to the District's motion, arguing that the Commission should not accept the District's reply without permitting other parties an opportunity to respond.

11. In the interest of ensuring a complete record, we have considered the District's reply, although we are not persuaded by the arguments presented therein. We therefore conclude that there is no need to permit further responses from other parties.

FERC, from Mark Cauchy, District (filed Oct. 24, 2002) (requesting withdrawal of amendment application on grounds that anticipated license conditions would render the project uneconomic).

[8] *Public Utility District No. 1 of Pend Oreille County, Washington*, 120 FERC ¶ 62,045 (2007). The order did not address a motion for late intervention filed on January 9, 2007, by the Washington Department of Ecology. By this order, we grant the motion.

Discussion

12. As noted, the parties' requests for rehearing challenge various aspects of each of the determinations made in the July 18, 2007 Order. The District argues that the existing license should be declared void. The remaining parties maintain that the project requires licensing under the FPA and that the District must therefore apply to surrender the existing license. In the alternative, they argue that the District should be required to obtain a special use authorization from the Forest Service for the project's continued occupancy of federal lands before the Commission may allow its jurisdiction to terminate. We address these issues in turn.

Validity of the Existing License

13. The District maintains that the July 18, 2007 Order was correct in determining that the project is not required to be licensed and that the current license will expire by its terms with no further action required by the Commission. However, the District argues that the order erred in concluding that it would not be appropriate to declare the existing license void. We have reexamined this issue in response to the parties' rehearing requests. For the reasons discussed below, we find that, although the July 18 Order correctly determined that Sullivan Lake Dam and Reservoir are not required to be licensed as a storage reservoir, the complete Sullivan Creek Project includes not only the Sullivan Lake Dam and Reservoir (the storage reservoir), but also the Sullivan Creek diversion dam and conduit,[9] the Mill Pond Dam and reservoir, the existing but discontinued wooden flume and earthen canal section of the power conduit from Mill Pond, the forebay, horseshoe tunnel, steel penstock, and powerhouse. These are all project works that were constructed, operated, and maintained for the purposes of generating hydroelectric power. They were included in the project license at the District's request and, if restored to service, could once again be used to generate hydroelectric power. By focusing on only the storage reservoir, the July 18 Order improperly ignored the jurisdictional significance of these additional facilities.

[9] With regard to the discontinued Sullivan Creek diversion dam and conduit, Exhibit J of the 1956 license application shows a storage reservoir of 2800 acre feet as the point of diversion from Sullivan Creek, with a flume line running from Sullivan Creek to Sullivan Lake. The diversion also appears on the Exhibit G boundary map included with the District's 1994 amendment application, although the project description in Exhibit A makes no mention of either the Sullivan Creek diversion dam or the conduit. *See* Application for Amendment of License for Major Project—Existing Dam, Sullivan Creek Hydroelectric Project No. 2225 (November 1994) at Exhibits A and G (filed Nov. 29, 1994). As is the case with the other discontinued project works, the status of these facilities will need to be addressed in the surrender process.

14. Section 4(e) of the FPA authorizes the Commission to issue licenses "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient . . . for the development, transmission, and utilization of power . . . upon any part of the public lands or reservations of the United States . . . ."[10] Section 23(b)(1) of the of the FPA makes it "unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto . . . upon any part of the public lands or reservations of the United States."[11] Thus, hydroelectric projects that are located on any part of U.S. lands or reservations fall under the Commission's mandatory licensing jurisdiction.[12]

15. Sections 4(e) and 23(b)(1) of the FPA apply to the construction, operation, and maintenance of water power "project works." Section 3(12) of the FPA defines "project works" as "the physical structures of a project."[13] A "project" is defined in section 3(11) of the FPA as a "complete unit of improvement or development."[14] Taken together, these provisions require the Commission to license all the physical structures that comprise a complete unit of development.

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[10] 16 U.S.C. § 797(e) (2000).

[11] 16 U.S.C. § 817(1) (2000).

[12] If any part of a hydroelectric project is located on U.S. lands or reservations, the entire project must be licensed. *See Big Bear Regional Wastewater Agency*, 33 FERC ¶ 61,115, at p. 61,246 (1985); *Escondido Mutual Water Co.*, 6 FERC ¶ 61,189, at p. 61,388 (1979), *aff'd in pertinent part*, *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223, 1231 (9th Cir. 1982), *reh'g denied*, 701 F.2d 826 (1983), *rev'd on other grounds, Escondido Mutual Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984).

[13] 16 U.S.C. § 796(12) (2000).

[14] Section 3(11) provides: " 'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." 16 U.S.C. § 796(11) (2000).

16. The Sullivan Creek Project has at all times included not only the Sullivan Lake and Dam, but also the Sullivan Creek diversion dam and conduit, Mill Pond Dam and reservoir, wooden flume, earthen canal, forebay, horseshoe-shaped tunnel, penstock, and powerhouse. The reservoirs are directly connected to other project works that were used to generate hydroelectric power for 46 years, and could again be so used if repaired and returned to service. Although the District emphasizes that the pre-1956 generating and switching machinery has been removed from the project site, the fact remains that these structures, while not currently being used for power generation, are nevertheless hydroelectric "project works" within the meaning of sections 3(11) and 3(12) of the FPA. These "physical structures" together with the Sullivan Lake and Dam were "used and useful" in connection with the project, and formed a "complete unit of development" that was used and could again be used to generate hydroelectric power. They were constructed, operated, and maintained on federal lands "for the purposes of developing electric power" within the meaning of section 23(b)(1) of the FPA, and could not lawfully continue to be operated or maintained on U.S. lands without a Commission license. Moreover, absent either a Commission license or a special use authorization from the Forest Service, these facilities would constitute a trespass on federal land and would be subject to immediate removal. Thus, if we were to void the license without retaining jurisdiction, as the District suggests, the licensee would at that moment become a trespasser on federal lands, and this could present a problem for the District.

17. As we have previously held in a similar case, physical structures such as dams, flumes, canals, forebays, tunnels, penstocks, and powerhouses do not lose their status as "project works" under the FPA during temporary periods of non-generation, even if they have become damaged and are rendered inoperable.[15] Otherwise, licensed project works could drift in and out of the Commission's jurisdiction, without any rational basis for the change in status. Congress recognized this in enacting section 10(c) of the FPA, which requires licensees to "maintain the project works in a condition of repair adequate for . . . the efficient operation of said works in the development and transmission of power . . . ."[16] Failure to do so will place the licensee at risk of possible enforcement action, or may cause the Commission to regard the licensee's behavior as an implied surrender of the license.

18. As noted, the project originally operated under a Forest Service permit that predated the FPA. At the time of licensing, some parts of the project were in a state of disrepair, prompting the Commission to suggest that the discontinued project works had been abandoned and should be excluded from the license. The District objected to this characterization and expressly requested that the Commission include these discontinued

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[15] *Southern California Edison Co.,* 106 FERC ¶ 61,212, at P 16 (2004).

[16] 16 U.S.C. § 803(c) (2000).

project works in the license, both to preserve the possibility that they might be returned to service and to avoid the need to obtain a special use authorization from the Forest Service. The Commission included Articles 30 and 31 in the license to reflect the special status of these discontinued project works, thus removing any issue of possible violation of section 10 of the FPA for failure to maintain them in working condition throughout the license term.

19. The Commission allowed these discontinued facilities to remain in the license as project works that were not currently being used for power generation but could be returned to service at any time, after appropriate authorization. Moreover, during a substantial portion of the license term, which totaled eighteen years, the District had applications on file with the Commission to redevelop power generation at the Sullivan Creek Project. The licensee could have avoided the Commission's jurisdiction over the discontinued project works by declaring them abandoned and obtaining a special use authorization for their continued occupancy of federal land. Instead, the District insisted that these project works were not abandoned and should remain in the license in case they could be economically returned to service. We find it unconvincing for the licensee, after having received the benefits of continued Commission jurisdiction over these facilities throughout the license term, to now argue that the Commission should disregard the discontinued project works for jurisdictional purposes, simply because the end of the license term is near and it has become clear that the District's development plans are not economically feasible.

20. In short, we find that the Sullivan Creek Project, which includes the discontinued project works, required licensing under section 23(b)(1) of the FPA throughout the term of the existing license. Therefore, we find no basis upon which we could declare the existing license void. Moreover, the Sullivan Creek Project continues to require licensing under FPA section 23(b)(1), and would require relicensing now if it were not for the fact that the District has filed a notice of intent not to file a relicense application, and no other entity has filed an application to redevelop power generation at the site. Moreover, so that we can ensure that the project site is left in an appropriate condition, the District cannot simply walk away at the conclusion of the license term, but must file a surrender application.[17] As part of the surrender process, the District must obtain a special use authorization from the Forest Service for any project works that will remain on federal land after the effective date of the surrender.[18] We therefore reverse the determination in

[17] *See Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,003, at n. 17 (1999).

[18] *See Southern California Edison Co.*, 106 FERC ¶ 61,212, at P 14-17, 33 (2004). As explained in that decision, an annual license authorizes the project works to continue to occupy federal lands pending their ultimate disposition or a transfer of jurisdiction to the Forest Service under a special use authorization. Otherwise, the licensee would have

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the July 18, 2007 Order that the current license will expire by its terms with no further action required by the licensee or the Commission. In light of these findings, we deny the District's request for rehearing of this issue.

21. The Forest Service, Washington DFW, and American Whitewater argue that the existing license is valid, and that the Commission must provide for the orderly disposition of the Sullivan Creek Project through a license surrender or decommissioning proceeding. In the alternative, they argue that, even if the Sullivan Creek Project is not required to be licensed under section 23(b)(1) of the FPA, the Commission nevertheless has sufficient authority under the FPA to provide for the orderly transfer of jurisdiction to the Forest Service for project facilities that occupy federal lands. As discussed above, we agree that the Sullivan Creek Project requires licensing and that the District must therefore apply to surrender the license.[19] To the extent consistent with this decision, we grant the rehearing requests of the Forest Service, Washington DFW, and American Whitewater regarding the validity of the existing license and the need for a surrender application.

22. Even in the absence of such a finding, however, we would find it necessary to provide for the orderly termination of jurisdiction over project facilities that occupy federal lands. Our longstanding practice has been to consider the public interest in

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no right to enter onto U.S. lands to access its property, and the project works would constitute a trespass and be subject to immediate removal. *Id*. P 41.

[19] For this reason, we agree with the Forest Service and American Whitewater that the Central Maine case, on which the District relies, is not applicable. *Central Maine Power Co.*, 80 FERC ¶ 62,019, *aff'd*, 81 FERC ¶61,087 (1997). That case concerned the jurisdictional status of the Moxie Project, a dam and reservoir that not only had no generating facilities, but also had no project works located on federal lands. The Commission found that, because the project for many years had provided only insignificant benefits to generation at downstream licensed projects, it was not part of any unit of hydroelectric development and the Commission's jurisdiction ceased as of the expiration of the original license, without the need for a surrender application. In contrast, in this case there are additional project works located on federal lands that, together with Sullivan Lake, comprise a complete unit of development that requires licensing under section 23(b)(1) of the FPA. In addition, because there are project works located on federal lands, we would find it necessary to provide for the orderly transfer of jurisdiction to the Forest Service even if we were to conclude that the project did not require licensing.

determining when, and in what manner, to bring the relevant part of a license to an end.[20] Moreover, we have specifically rejected the argument that our jurisdiction over transmission lines ends simultaneously with a finding that the lines are no longer primary transmission lines.[21] Although we need not do so in this case, we agree that the FPA would afford us sufficient authority to provide for the orderly transfer of jurisdiction over project facilities on federal lands when their jurisdictional status changes. We therefore grant the rehearing requests of the Forest Service, Washington DFW, and American Whitewater on this issue as well.

Jurisdictional Status of the Storage Reservoir

23. The Forest Service and American Rivers argue that the July 18, 2007 Order erred in finding that the Sullivan Lake Dam and Reservoir are not required to be licensed as a storage-only project, because they do not have a significant effect on downstream generation, and therefore cannot be considered part of a complete unit of development that includes downstream generating projects. As noted, our finding that the entire Sullivan Creek Project requires licensing under FPA section 23(b)(1) will ensure that the Commission's jurisdiction over Sullivan Lake and Dam will not terminate until after the Commission addresses the disposition of the discontinued project works and the District obtains any necessary special use authorization from the Forest Service for their continued occupancy of federal lands. However, for the reasons explained below, we affirm that, once the disposition of the entire Sullivan Creek Project has been addressed through the surrender process, Sullivan Lake will not require licensing as a storage project under section 23(b)(1) of the FPA.

24. In determining whether licensing is required for a facility such as a storage reservoir that is not directly connected to other project works, the FPA requires an examination of whether the facility is necessary or appropriate in the maintenance and

[20] *See, e.g., City of Phoenix, Arizona*, 59 FPC 1061, 1070-71 (1977) (approving settlement agreement to grant easement and terminate license for non-primary transmission line on Indian reservation).

[21] *See Southern California Edison Co.*, 107 FERC ¶ 61,067, at P 13-15 (2004) (affirming that removal of transmission lines that are no longer primary, and therefore not required to be licensed, can be conditioned on licensee receiving Forest Service approval to use the lands and on filing necessary permits or approvals with the Commission); *Pacific Gas and Electric Co.*, 85 FERC ¶ 61,411 (1998) (requiring that exclusion of transmission lines and associated facilities be conditioned on receipt of necessary permits for continued occupancy of federal lands to prevent creation of a regulatory gap).

operation of a complete unit of hydropower improvement or development.[22] However, neither the FPA nor its legislative history gives the Commission any guidance as to how to construe these terms. As the courts have concluded in an analogous context, such statutory provisions must incorporate common-sense limitations.[23] In other words, the facts in each case will shape the determination of whether the facilities in question are part of a unit of development and therefore must be licensed.[24]

25. In making this determination, certain principles are clear. If a non-federal dam and reservoir substantially benefit generation operations, for example through the timing of flow releases, these facilities are part of the complete unit of development.[25] This is the case whether the dam and reservoir were built for the purpose of generating electric power or were built for other purposes, such as flood control, water supply, or irrigation.[26] At the other end of the spectrum, a dam or reservoir that does not affect project generation at all is not part of a complete unit of development.[27]

26. The Forest Service and American Whitewater argue that the July 18 Order erred in determining that Sullivan Lake is not part of the unit of improvement or development that includes the downstream generating projects. As noted in the July 18, 2007 Order, the District provided evidence, based on information developed as part of a headwater benefits settlement agreement, showing that Sullivan Lake does not substantially benefit downstream generation. The order reviewed data for a ten-year period from 1996 to 2006 and found that the average annual energy contribution to downstream generation from Sullivan Lake is 12.3 megawatts, which is about 0.42 percent of the total energy

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[22] *See Union Water Power Co.*, 68 FERC ¶ 61,180 (1994), *reh'g denied*, 73 FERC ¶ 61,296 (1995).

[23] *See Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 89 (D.C. Cir. 1983) (agreeing with Commission that a 0.3 percent reduction in generating capacity did not amount to a license alteration under section 6 of the FPA).

[24] *See Great Northern Paper, Inc.*, 91 FERC ¶ 61,035 (2000).

[25] *See, e.g., Upper Peninsula Power Co.*, 56 FERC ¶ 61,191 (1991); *Ada County*, 27 FERC ¶ 61,285 (1984).

[26] *See, e.g., Marsh Valley Hydroelectric Co.*, 64 FERC ¶ 61,120 (1993); *City of Soda Springs*, 57 FERC ¶ 61,248 (1991).

[27] *See, e.g., El Dorado Irrigation District*, 29 FERC ¶ 61,375 (1984) (reservoir located downstream from jurisdictional facilities not part of complete unit of development).

generation from storage. The order concluded that, because this percentage increase in average annual generation is well below the 2.1 percent threshold that the Commission has used as a measure of substantiality in past cases, Sullivan Lake does not significantly affect downstream generation and therefore does not require licensing as part of a complete unit of development that includes the downstream projects.

27. Although not reviewed in the July 18 Order, the District provided additional information for the 42-year period from 1964 through 2006, showing that Sullivan Lake never contributed more than 0.53 percent of the total storage benefits for the twelve downstream projects receiving headwater benefits, and in most years the percentage was less. In general, this information reveals that Sullivan Lake has a similarly small impact on each downstream reservoir, although the effect is consistently larger on the closest downstream project, the Boundary Project. During the 16 year-period for which average annual generation figures at the Boundary Project are available (1990-2006), Sullivan Lake's average annual contribution to generation at the Boundary Project, which ranges from a low of 0.35 percent to a high of 1.08 percent, is less than 0.7 percent.[28] This is well below the judicially-approved 2 to 2.5 percent threshold that the Commission has found sufficiently substantial to trigger our mandatory licensing jurisdiction over storage projects in previous cases.[29] In our view, a storage reservoir that contributes, on average, 0.7 percent to the total energy produced at a downstream generating project does not substantially benefit downstream generation, and thus would not require licensing as part of a complete unit of development that includes the downstream project.

28. American Whitewater argues that, by applying the 2 percent threshold to a single reservoir instead of to a group of reservoirs, the July 18 Order used the wrong test for determining whether Sullivan Lake has a substantial effect on downstream generation. As American Whitewater points out, the court in *Domtar Maine* recognized that, in determining the collective impact of all upstream facilities owned by the same entity, the Commission has declined jurisdiction when the aggregate average impact falls below a threshold of somewhere between 2 to 2.5 percent, whereas in determining the impact of individual facilities, the Commission has excluded an individual facility from any aggregate calculations if its impact falls below some lower threshold, i.e., less than 0.1 percent.[30] Based on this distinction, American Whitewater argues that the Commission

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[28] For 13 of the 16 years, the average annual contribution is 0.51 percent or greater. *See* Exhibit 1, attached to the District's motion for leave to reply and reply (filed Jan. 24, 2007).

[29] *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003); *Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353 (D.C. Cir. 2003).

[30] *Domtar Maine*, 347 F.3d at 312.

should use the lower percentage test in determining whether an individual reservoir must be licensed.

29. This is incorrect. American Whitewater misunderstands the purpose of the lower threshold. We have used the lower threshold as a basis for excluding a reservoir from consideration based on its insignificant benefits to downstream generation. We have not used it as a measure of significance when determining whether a single reservoir substantially benefits downstream generation and therefore requires licensing. As discussed in the *Chippewa and Flambeau* case, we considered two reservoirs individually rather than together in light of the fact that one reservoir increased generation by only about 0.06 percent of total downstream generation, whereas the other increased downstream generation by almost 6 percent.[31] We reasoned that the effect of the first reservoir was too insignificant for us to conclude that it was necessary or appropriate to maintain or operate the downstream projects, and thus was not part of the complete unit of development. We therefore excluded it from consideration, instead of considering it in combination with the second reservoir.

30. In *Georgia Pacific* (the decision reviewed in *Domtar Maine*), we found licensing required for a group of three reservoirs that collectively enhanced downstream generation by an average of 3.4 percent, with a range of from 2.4 to 4.9 percent.[32] These reservoirs, when viewed in isolation, enhanced downstream generation by an average of 1.8 percent, 1.1 percent, and 0.5 per cent, respectively, but their aggregate contribution was sufficiently substantial to require that they be licensed as part of a complete unit of development that includes the downstream generating facilities.

31. Similarly, in *Great Northern Paper*, we explained that, while the size of the power contribution of an individual facility is one factor we consider in determining jurisdiction over upstream facilities, it would be inappropriate to conclude that a number of satellite facilities are non-jurisdictional, based on a consideration of each of them in isolation.[33] Thus, when a group of reservoirs collectively enhance downstream generation by a

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[31] *Chippewa & Flambeau Improvement Co.*, 95 FERC ¶ 61,017, at p. 61,037 (2001), reh'g denied, 95 FERC ¶ 61,327 (2001), *aff'd*, 325 F.3d 353 (D.C. Cir 2003).

[32] *See Georgia-Pacific Corp.*, 98 FERC ¶ 61,312 at p. 62,336 (2002), *aff'd sub nom. Domtar Maine Corp., Inc. v. FERC*, 347 F.3d 304, 311 (D.C. Cir. 2003).

[33] *See Great Northern Paper, Inc.*, 91 FERC ¶ 61,035, at p. 61,121-24 (2000) (finding licensing required for ten upstream reservoirs that collectively enhanced downstream generation by between 4 and 5 percent, despite company's argument that although one reservoir added 2.2 percent to generation, none of the other nine units added as much as one percent.)

significant amount, we would not exclude any one reservoir from the group unless its individual contribution could be clearly disregarded as insignificant (i.e., less than 0.1 percent). However, this does not mean that, when only one upstream reservoir is at issue, we would use this lower threshold as a measure of whether licensing is required. Rather, we regard the 2 percent threshold as an appropriate measure of significance in relation to downstream generation, and we do not believe a lower threshold should apply if the contribution of only a single reservoir is at issue.

32. The Forest Service and American Whitewater maintain that Sullivan Lake requires licensing as a storage project because it is located on federal lands and is operated for the purpose of benefiting downstream generation. In effect, they argue that the reservoir's location on federal lands, coupled with its operation to benefit downstream generation, provides an alternate basis for the Commission's mandatory licensing jurisdiction.

33. While it is true that a complete project requires licensing if any part of it is located on federal lands, a storage reservoir that is not directly connected to any generating facilities is not a complete project, and its jurisdictional status will depend on whether it substantially benefits downstream generation, and thus is part of a complete unit of development that includes the downstream generating facilities. Thus, a storage reservoir's location on federal lands does not, without more, provide a sufficient basis for our mandatory licensing jurisdiction.[34] As we have seen, Sullivan Lake's direct connection to additional project works that were used for power generation makes it part of a complete unit of development that requires licensing under FPA section 23(b)(1). However, once the disposition of those project works has been addressed through the surrender process and any necessary special use authorizations have been obtained, Sullivan Lake will no longer require a Commission license as a storage reservoir, because its effect on downstream generation is not substantial.

34. The Forest Service and American Whitewater argue that Sullivan Lake must be licensed because the total amount of power generated annually from its storage releases, 12.3 megawatts, is substantial, and is greater than that produced by many hydroelectric projects that require licensing under the FPA. While we agree that the amount of annual generation attributable to Sullivan Lake is not insignificant, this is more a measure of the size of the downstream projects than of the significance of Sullivan Lake's contribution. When downstream projects are small, even a substantial percentage gain will yield a small amount of power. Conversely, when downstream projects are large, a small percentage gain can yield a large amount of power. Average annual generation cannot be assessed in a vacuum. The significance of a storage reservoir's contribution to downstream generation must be considered in relation to the generating capacity of the downstream facility that it benefits. In other words, it is not the total amount of power

[34] *See Georgia-Pacific Corp.*, 91 FERC ¶ 61,047, at n.25 (2000).

that is relevant, but rather its importance to the downstream generation facilities. It is for this reason that we find it appropriate to use a percentage gains test for both larger and smaller downstream generating projects.[35]

Need for an Environmental Assessment

35. Washington DFW argues that the Commission is required to prepare an environmental assessment (EA) to determine whether a decision to release a project from the Commission's jurisdiction is a major federal action significantly affecting the environment. Washington DFW further argues that an EA is required for a license surrender or termination of FPA jurisdiction.

36. Commission regulations implementing the National Environmental Policy Act (NEPA) provide that compliance and review actions, including jurisdictional investigations, are categorically excluded from the requirement to prepare either an environmental assessment (EA) or an environmental impact statement (EIS).[36] The reason for this is that a determination of the Commission's jurisdiction to require licensing under the FPA is an administrative matter that does not have any effect on the environment. As discussed above, however, if a project that requires licensing is to be decommissioned, a surrender application must be filed. An EA is required for a license surrender where project works exist or ground disturbing activity has occurred.[37] Depending on the outcome of the EA, the Commission may or may not prepare an EIS.[38] In this case, there are existing project works on federal lands that must be the subject of a surrender application. Therefore, we clarify that, at a minimum, the Commission will prepare an EA for the Sullivan Creek Project surrender proceeding.

The Commission orders:

(A) The request for rehearing filed on August 17, 2007, by the Public Utility District No. 1 of Pend Oreille County, Washington, in this proceeding is denied.

(B) The requests for rehearing filed in this proceeding on August 16, 2007, by the Washington Department of Fish and Wildlife, and on August 17, 2007, by the U.S.

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[35] *See Chippewa and Flambeau Improvement Co.*, 112 FERC ¶ 61,115, at P 15 (2005).

[36] *See* 18 C.F.R. § 380.4(a)(3) (2007).

[37] *See* 18 C.F.R. § 380.5(b)(13) (2007).

[38] *Id.* § 380.5(a).

Department of Agriculture's Forest Service and American Whitewater, are granted in part and denied in part, to the extent discussed in this order.

(C) The motion for late intervention filed in this proceeding on January 9, 2007, by the Washington Department of Ecology is granted.

By the Commission. Commissioner Moeller concurring in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of Pend Oreille County, Washington	Docket No. DI07-1-001 Project No. 2225-011

(Issued March 20, 2008)

MOELLER, Commissioner *concurring in part*:

Given the facts of this particular case, this order on rehearing correctly finds that the District's existing hydroelectric license is a valid one. In fact, if we agreed with the District and found that the license was void, the District would be placed in the untenable position of trespassing on federal lands.

With regard to the District's alternative argument that because the license will expire by its own terms, no further action is required by either the licensee or this Commission, we cannot ignore our statutory duty and precedent and allow a licensee that has benefited from a hydroelectric license to simply walk away. On balance, we reach a good result by requiring the District to apply for a surrender of the license while clarifying that the storage reservoir comprised of the Sullivan Lake and Dam does not require licensing as a storage-only project, because the project's effect on downstream generation is not significant.

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Philip D. Moeller
Commissioner