

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp
Klamath River Renewal Corporation

Project No. 14803-001
Project No. 2082-063

KLAMATH RIVER RENEWAL CORPORATION'S
REPLY TO COMMENTS ON SCOPING DOCUMENT 1

On June 17, 2021, the Federal Energy Regulatory Commission (Commission or FERC) issued a “Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Lower Klamath Project Surrender and Removal” (NOI)¹ and Scoping Document 1.² From July 20 - 22, 2021, the Commission held virtual scoping meetings to take agency and public comment on the scope of an environmental impact statement (EIS). The NOI established August 19, 2021 as the deadline for timely submission and proper recording of all written comments.

On August 18, 2021, the Klamath River Renewal Corporation (Renewal Corporation) filed timely written comments on the scope of issues to be addressed in the EIS.³ The Renewal Corporation expressed our appreciation for the Commission’s efforts to appropriately scope and evaluate the environmental effects of the Proposed Action and to address the regulatory needs of cooperating agencies, the Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA). Scoping provides an opportunity to bring agencies and applicants

¹ *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Lower Klamath Project Surrender and Removal* (June 17, 2021), FERC accession no. 20210617-3144.

² *Scoping Document 1 for the Proposed Surrender and Decommissioning of the Lower Klamath Project, P-14803-001* (June 17, 2021), FERC accession no. 20210617-3135.

³ *Klamath River Renewal Corporation Comments on Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Lower Klamath Project Surrender and Removal* (August 18, 2021), FERC accession no. 20210818-5111.

together for setting time limits, integrating other environmental reviews, and identifying issues for further review. The Renewal Corporation is actively working with all federal and state agencies to adhere to a timeline that allows dam removal to be completed in 2023. We respectfully request the Commission staff to undertake their best efforts to complete environmental review as soon as possible.

The Renewal Corporation welcomes the agency and public comments offered in support of the application and acknowledges comments filed in opposition to the application. As they relate to the Commission's environmental review of the Proposed Action, these comments inform the scope of the analysis that the Commission must undertake to fulfill its obligations under the National Environmental Policy Act (NEPA).⁴ Pursuant to 18 C.F.R. § 4.34(b), the Renewal Corporation offers the following reply to such comments to further inform the Commission in this regard.

I. REPLY

The record before the Commission now includes the comments of parties with divergent interests in the Lower Klamath Project, over a period that spans nearly two decades. This record is extensive and sufficient for NEPA analysis.⁵ This record shows that the Amended Klamath Hydroelectric Settlement Agreement (KHSAs)⁶ will resolve longstanding conflicts over this Project and natural resources in the Klamath Basin. The Definite Decommissioning Plan filed with the

⁴ 42 U.S.C. § 4321 *et seq.*

⁵ *Environmental Review of Amended Application for Surrender of License for Major Project and Removal of Project Works and Request for Expedited Review* (March 8, 2021), FERC accession no. 20210308-5162.

⁶ *See Additional Information Request Response* (June 23, 2017), Exhibit A, Attachment, FERC accession no. 20170623-5103.

Amended License Surrender Application (ALSA)⁷ was submitted to the Commission by the Renewal Corporation to implement this settlement.⁸

The Definite Decommissioning Plan is augmented by final design specifications and sixteen Management Plans subsequently filed in February 2021.⁹ The record reflects the progressive design¹⁰ of the Definite Decommissioning Plan, informed by the “Detailed Plan for Dam Removal--Klamath River Dams” (July 2012), the “Definite Plan Report” (July 2018), and by the Lower Klamath Project Board of Independent Consultants. The record also reflects that this progressive design was informed by the same or similar comments, and in most cases the same commenters, that responded to the NOI. The progressive design of the Definite Decommissioning Plan has been open, transparent, and inclusive of all interests responsive to our offers for collaboration.

⁷ *Amended Application for Surrender of License for Major Project and Removal of Project Works and Request for Expedited Review* (November 17, 2020), FERC accession no. 20201117-5191.

⁸ See KHSa § 7.2. The Definite Decommissioning Plan implements the settlement. A license surrender order that is “materially inconsistent” with the Definite Decommissioning Plan is inconsistent with the settlement. See KHSa § 7.2.1.C.

⁹ *Definite Decommissioning Plan Final Design and Management Plans: Lower Klamath Project* (February 26, 2021) FERC accession no. 20210226-5093.

¹⁰ The Renewal Corporation engaged Kiewit as general contractor under a progressive design-build contract. See *Response to Independent Board of Consultants Recommendations* (July 29, 2019), FERC accession no. 20190729-5074. The progressive design also reflects input from the Lower Klamath Project Independent Board of Consultants. See *Letter Report; Board of Consultants Mtg. No. 1, Lower Klamath Project* (FERC Nos. P-2082, P-14803) *Klamath River Renewal Corporation* (November 28, 2018), FERC accession no. 20181212-5147; *Letter Report; Board of Consultants Meeting No. 2, Lower Klamath Project* (FERC Nos. P-2082, P-14803) *Klamath River Renewal Corporation* (March 20, 2020), FERC accession no. 20200320-5197; *Letter Report; Board of Consultants Formal Meeting No. 3 Lower Klamath Project* (FERC Nos. P-2082-063, P-14803-001) *Klamath River Renewal Corporation* (July 2, 2021), FERC accession no. 20210702-5083.

The Definite Decommissioning Plan incorporates conditions and analyses contained in two water quality certifications,¹¹ a Biological Assessment¹² and other supporting documents. These supporting documents include relevant portions of two prior NEPA environmental impact statements¹³ and two CEQA environmental reports.¹⁴ The record reflects that these regulatory reviews and analyses were informed by the same or similar comments, and in most cases the same commenters, that responded to the NOI.

The vast majority of issues raised in comments received in response to the NOI have been raised before, carefully considered by parties in reaching the KHSA, further considered by the Renewal Corporation, studied by qualified and independent experts, including the Lower Klamath Project Independent Board of Consultants, reviewed by state and federal regulators, and are fully addressed in the record that FERC has in hand.¹⁵ The Renewal Corporation encourages FERC to rely on and incorporate relevant portions of this record as it prepares its environmental analysis of the Proposed Action.

We also ask FERC to consider the following reply comments pertaining to the scope of the alternatives to be considered in the EIS, the scope of the environmental analysis and potential

¹¹ California § 401 Water Quality Certification (April 2020); FERC accession no. 20200409-5028. Oregon § 401 Water Quality Certification (September 2018); FERC accession no. 20201117-5191 (Exhibit E).

¹² *Draft Biological Assessment* (March 2021); FERC accession no. 20210322-5335. The biological assessment was determined to be sufficient to initiate formal consultation with FERC by USFW (FERC accession no. 20210903-5069) and NMFS (FERC accession no. 20210819-5201).

¹³ *Klamath Facilities Removal Final EIS/EIR* (December 2012), FERC accession no. 20160923-5370; *Final Environmental Impact Statement for the Klamath Hydroelectric Project* (November 2007), FERC accession no. 20071116-3005.

¹⁴ *Final Environmental Impact Report for the Lower Klamath Project License Surrender, California State Water Resources Control Board* (April 2020), FERC accession no. 20200409-5054; *Klamath Facilities Removal Final EIS/EIR* (December 2012), FERC accession no. 20160923-5370.

¹⁵ For example, the State Water Board provided nearly exhaustive responses to comments on the draft EIR. See Final EIR, Chapter 2, at 2-1 – 2-1821. All of the comments on the Scoping Document appeared there in nearly identical form. The record evidence on which the State Water Board relied is now in the docket for this proceeding.

mitigation to be considered in the EIS, and suggestions that further study is needed before this application is ready for environmental review.

A. Alternatives to be considered in the EIS

The NOI states that the Commission will consider the Proposed Action, the Proposed Action with any staff modifications, and the No Action alternative. However, some commenters argue that the Commission should consider a broader range of alternatives, including partial dam removal, retrofitting the existing dams with new fish passage facilities, federal takeover, and other suggestions that are materially inconsistent with the KHSA. The Renewal Corporation recognizes and supports the Commission's obligation under NEPA to consider reasonable alternatives.¹⁶

The Proposed Action (license surrender and the physical removal of the Lower Klamath Project) is to achieve volitional fish passage and free-flowing conditions in the Klamath River below Keno Dam. The Proposed Action (as described in the Definite Decommissioning Plan) is based on the KHSA and is a settlement proposal presented to the Commission as an alternative to relicensing the Project. In considering such a proposal, the Commission has established procedural safeguards under the Federal Power Act in the event that the proposal is not approved.¹⁷ The relicensing proceeding is being held in abeyance while the Commission considers the settlement proposal. If the Commission cannot determine that license surrender based on a settlement proposal is in the public interest, then it will reject the application and the licensee and other parties

¹⁶ 40 C.F.R. §§ 1502.14(a), 1508.1(z).

¹⁷ *Arizona Public Service Company*, 97 FERC ¶ 61315 (2001); *PacifiCorp*, 97 FERC ¶ 61348 (2001).

revert to the relicensing proceeding.¹⁸ The Commission has approved this procedural path for purposes of this proceeding.¹⁹

The NOI's proposed scope of alternatives under NEPA is consistent with the posture of this proceeding. The "Proposed Action with any staff modifications" alternative allows for consideration of a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the Proposed Action and meet the goals of the applicant. This also aligns with the Commission's policy of respecting a settlement when possible while allowing for accommodations necessary to address the public interest. Alternatives that are materially inconsistent with the KHSA are not feasible²⁰ and do not meet the purpose of the Proposed Action (volitional fish passage and free-flowing conditions).

Commission staff may find the analysis of partial dam removal alternatives in prior environmental documents helpful in scoping alternatives for this EIS and to prepare a summary of any such alternatives not included for detailed review in this EIS.²¹ However, suggested alternatives that require the dams and the FERC license to be retained (such as retrofitting the existing dams with new fish passage facilities) are not reasonable. The Renewal Corporation and the States of California and Oregon are not seeking a license to operate and maintain the Project as a going concern.²² Nor may the Commission compel PacifiCorp to continue to operate this

¹⁸ See *Arizona Public Service Company*, 97 FERC at ¶ 62449 (“[I]n the interest of respecting settlements when possible, we favor accommodating settlement parties on this issue in the absence of other considerations that would make such an accommodation contrary to the public interest.”).

¹⁹ See *PacifiCorp*, 155 FERC ¶ 61271 (June 16, 2016) (Abeyance Order) at ¶ 13 (“[W]e will hold the relicensing proceeding in abeyance, pending our determination on the license transfer and surrender applications that the Amended Settlement Agreement provides will be filed with the Commission on or around July 1, 2016.”).

²⁰ See KHSA § 7.2.1(C).

²¹ 40 C.F.R. § 1502.17.

²² The Commission's recent *Order Addressing Arguments Raised on Rehearing* in P- 14803-005 notes:

[W]e reiterate that, as noted in the June 2021 Transfer Order, the license transfer itself is not effective until after we act on the surrender application. *Id.* P 45 (stating that “the transfer will not be effective until the

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Project.²³ Public utility commissions have determined that dam removal consistent with the KHSA protects the interests of the power customers in the six western states comprising PacifiCorp’s service territory and have authorized rate recovery²⁴ and transfer of project lands pursuant to a license surrender order.²⁵

The Renewal Corporation believes that the NOI states a reasonable range of alternatives for purposes of environmental review. Any alternatives that are materially inconsistent with the KHSA amount to disapproval of the ALSA and, under the terms of the Abeyance Order, reinstatement of the relicensing application. Any such alternatives are, in effect, the No Action alternative for purposes of NEPA, and appropriately scoped as the continuation of the operations of the Lower Klamath Project consistent with the existing license.²⁶

B. Scope of environmental analysis and potential mitigations of proposed license surrender

The Proposed Action is responsive to FERC policy and precedent defining the appropriate scope of obligations for a licensee upon license surrender. Once the surrender of a license is approved and the project dam and other works are removed, there is no public interest in keeping

applicants file the instruments of conveyance, which must be provided within 30 days following a Commission order on the surrender application”). Accordingly, the transfer will not be effective until after the Commission completes its full NEPA review for the surrender, if approved.

176 FERC ¶ 61,202 (September 23, 2021) at p.7 n.34.

²³ *Arizona Public Service Company*, 97 FERC ¶ 61,315 (2001) (a licensee is not compelled to continue to operate its project; the Commission evaluates whether a surrender is in the public interest and does not solicit license applications to be analyzed in conjunction with a surrender application). *See also, Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 (2008) (the Commission cannot force a licensee to seek a new license upon expiration of the existing license).

²⁴ Orders of the California Public Utilities Commission (CPUC) and the Public Utility Commission of Oregon (OPUC) are attached at Exhibits D.1, D.2, D.3, D.4 and D.5 to the Initial Surrender Application. FERC accession no. 20160923-5370. Subsequent orders implementing the financial plan under the KHSA were appended to the ALSA at Exhibit D-4 Orders of the OPUC (January 24, 2017; May 23, 2019) and Exhibit D-6 Orders of the CPUC (December 4, 2017; July 10, 2019), FERC accession no. 20201117-5191.

²⁵ CPUC, Resolution E-5153 (2021); OPUC, Order No. 21-242 (2021).

²⁶ *See Amended Surrender Application, Exhibit E* “Chapter 3: Proposed Action and Alternatives” at 21, FERC accession no. 20201117-5191.

that project under the Commission’s jurisdiction for an extended time.²⁷ The Commission does not require, as a condition of license surrender, the former licensee to install new facilities or enhancements of nonpower resources.²⁸ Once the surrender becomes effective, the Commission’s jurisdiction ends and any ongoing obligations are properly addressed by applicable state law.²⁹

Some commenters urge the Commission to undertake analysis of long-term investments or resource enhancements. They argue for mitigation measures that are beyond the scope of a license surrender proceeding. FERC does not require a license surrender applicant, as it would a relicensing applicant, to invest in protection, mitigation and enhancement measures required by Section 10(a) or Section 4(e) of the Federal Power Act.³⁰ The Commission has consistently rejected arguments to impose such measures in license surrender proceedings:

As we explained in the surrender order, such long-term measures as ensuring the maintenance of recreational access or of the condition of the remaining project facilities would necessitate continuing Commission jurisdiction, whereas surrender of a license entails the termination of the Commission’s jurisdiction. [citation omitted]. Once the surrender becomes effective, any continuing issues would be properly addressed under applicable state regulation. In some respects surrender and dam removal might create costs or losses for the Town and its residents, but the opponents do not explain why avoidance of those impacts should require the dam to be left intact or why these costs should fall on the licensee.³¹

²⁷ *PacifiCorp*, 133 FERC ¶ 61232, 62300 (2010).

²⁸ Policy Statement on Project Decommissioning at Relicensing, Docket No. RM93-23-000 (December 14, 1994).

²⁹ *FPL Energy Maine Hydro, LLC*, 107 FERC ¶ 61120, 61406 (2004).

³⁰ See 16 U.S.C. § 803(a)(1); 16 U.S.C. § 797(e); see also *Rochester Gas and Electric Corporation*, 100 FERC ¶ 61113, 61447 (2002) (Commission applies a “public interest” standard to licensee surrender, not the same as the comprehensive development standard that applies to licensing “because license surrender is a very different proposal”).

³¹ *FPL Energy Maine Hydro, LLC*, 107 FERC ¶ 61120, 61406 (2004); see also *PacifiCorp*, 133 FERC at 62300 (once surrender of a license is approved, a project ceases generation, and a project dam and other works are removed, there is no public interest in keeping that project under the Commission’s jurisdiction for an extended time).

The Proposed Action is the removal and decommissioning of licensed facilities and restoration of project lands, as appropriate to the public interest, to the degree necessary for FERC to relinquish jurisdiction to the States of California and Oregon. The scope of FERC's environmental analysis and potential mitigation measures should stay focused on the impacts of dam removal and any actions necessary to facilitate FERC's release of jurisdiction over project lands.

C. No further study is required for environmental review

As noted above, the record supporting this application is extensive and complete. The record includes detailed studies and analyses of the environmental issues that the Commission may choose to include in the scope of its EIS. These existing studies and analyses were informed by successive rounds of public comment over decades. The work product is based on sound science and substantial evidence. Qualified experts did this work. The work product was reviewed by federal and state agencies with jurisdiction or subject matter expertise and by the Lower Klamath Project Independent Board of Consultants. The Yurok, Karuk, and Klamath Tribes actively participated in the field work and other scientific study related to implementation of the KHSA.³² The body of scientific, technical, engineering, economic and environmental work that has been done to develop the Proposed Action is comprehensive, if not unprecedented, for a license surrender application.

³² The Yurok Tribe filed comments in response to the NOI and, among other things, noted:

The Tribe emphasizes that for over 20 years studies have been conducted on all aspects and details of Klamath dams including possible removal and starting with the EIS scoping done by FERC in 2004 the public has had ample time to identify and comment on issues important to them. The record before FERC includes adequate and up-to-date information regarding the issues related to dam removal.

Yurok Tribe Comments on Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Lower Klamath Project Surrender and Removal (August 2021), FERC accession no. 20210820-5045.

It is the Commission’s prerogative to determine, and indeed the Renewal Corporation supports, any further work the Commission believes is necessary to fulfill its NEPA obligations. However, comments received in response to the NOI suggesting that the environmental record is not based on sound science or is out-of-date are without merit. These are subjective arguments made by parties that disagree with the outcomes of these studies and analyses. The credibility and integrity of this record speaks for itself. In this regard, we again direct FERC to the “cross walks” to the record previously provided in our August 18, 2021 comment letter,³³ Attachment A to our March 8, 2021 letter,³⁴ and Tables 3-1 and 3-2 contained in Exhibit E to the ALSA.³⁵

The NEPA rules provide the proper guidance to determine the need for any further studies or analyses.³⁶ The Renewal Corporation submits that the studies and analyses it has provided the Commission in support of the Proposed Action fully comport with these rules and provide an excellent foundation for environmental review.

II. CONCLUSION

The Renewal Corporation again expresses our appreciation to the Commission and to the cooperating agencies to appropriately scope and evaluate the environmental effects of the proposed license surrender and decommissioning of the Lower Klamath Project. We renew our request to

³³ FERC accession no. 20210818-5111.

³⁴ FERC accession no. 20210308-5162.

³⁵ FERC accession no. 20201117-5191.

³⁶ 40 C.F.R § 1502.23 (Agencies must ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents but are not required to undertake new scientific and technical research to inform their analyses.); 40 C.F.R § 1502.21 (Agencies may rely on existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts.); *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010) (NEPA does not require that an agency employ the best, most cutting-edge methodologies.); *Citizens For Alternatives To Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1098 (10th Cir. 2007) (So long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a hard look at the environmental consequences of the proposed action, the court will not second-guess the wisdom of the ultimate decision. Perfection is not required by the NEPA process.) (quotations omitted).

Commission staff to please undertake their best efforts to complete environmental review on a schedule that allows dam removal to be completed in 2023. We renew, as well, our offer to support this work in any way that we can.

DATED: September 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of September 2021, I have served KRRC's Reply to Comments on Scoping Document 1 for FERC Project Nos. 14803-001 and 2082-063 via email containing a link thereto, or via U.S.P.S. if no email address was available, upon each person designated on the official service lists compiled by the Secretary in these proceedings.

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