

**LOW IMPACT HYDROPOWER INSTITUTE
APPEALS PANEL**

**Final Determination on Appeal of Deschutes River Alliance of Certificate No. 25
for Pelton Round Butte Project**

The Appeals Panel has reviewed the appeal of Deschutes River Alliance of Low Impact Hydropower Institute's Certificate No. 25 for the Pelton-Round Butte Project. We have determined to affirm the issuance of the certificate while recommending certain modifications of Conditions 1 and 3.

Procedural History

1. On October 1, 2015, Low Impact Hydropower Institute (LIHI) notified Portland General Electric Company that the Executive Director had issued a Preliminary Certification Decision, including attached conditions, to renew Certificate No. 25 for the Facility.
2. LIHI published public notice of this Preliminary Certification Decision. Deschutes River Alliance (DRA) filed an Appeal on October 28, 2015. The Appeal was timely pursuant to the LIHI Handbook (April 2014) section 2.14.
3. Portland General Electric and Warm Springs Power & Water (Joint Licensees) responded to the Appeal on November 19, 2015. Wright-Pierce (Application Reviewer) issued a Report on the Appeal Request. This report, as issued on November 23, 2015, was timely pursuant to Handbook section 2.18.
4. On January 28, 2016, LIHI Executive Director convened this Appeals Panel.
5. Pursuant to Handbook section 2.19, the Appeals Panel has considered the merits of the Appeal. We reviewed the Preliminary Certification Decision, the Appeal and DRA's prior comments (January 5, 2015), the Application Reviewer's Report on Appeal Request and its prior Application Review (September 18, 2015), and other documents published on LIHI's website for this Project. See <http://lowimpacthydro.org/wp-content/uploads/2007/03/PGE-response-to-DRA-comments-LIHI-Recertification-Application.pdf>. Through the Federal Energy Regulatory Commission's (FERC) eLibrary, we reviewed the "Order Approving Settlement and Issuing New License," 111 FERC ¶ 61,450 (2005) (New License) and "Order Amending Annual Reporting Deadlines under Articles 415, 416, 421, 429, 434, and 436, U.S. Fish and Wildlife Service and National Marine Fisheries Service Section 18 Fishway Prescription Condition 16, and Settlement Agreement Section 4.2.5," 123 FERC ¶ 62,008 (2008) (Order Amending Annual Reporting Deadlines). We also reviewed the New License's Appendix A, which is Oregon Department of Environmental Quality's (ODEQ) water quality certification pursuant to Clean Water Act section 401, and Appendix B, which is Confederated Tribes Water Control Board's (WCB) certification (collectively, 401 Certification).

6. We now make our Final Appeal Determination pursuant to Handbook section 2.19.

Standards for Review

7. Handbook section 2.19 provides that the Appeals Panel "...will function independently of the Governing Board and make an independent decision about whether the facility should be certified."

8. The Handbook does not state the standards for review by the Appeals Panel. Given our limited function, and drawing on judicial practice in reviewing an agency's decision, we applied three standards for review of the Preliminary Certification Decision. We generally reviewed the issues raised by the Appeal against the Certification Criteria stated in the Handbook, Chapter I and Appendices A – B thereto. We reviewed each legal claim in the Appeal to evaluate whether the Preliminary Certification Decision, which relies on the Application Review, is a reasonable application of these criteria. We reviewed each factual claim to evaluate whether the decision is supported by substantial evidence in the record that LIHI considered.

Review of Claims in Appeal

9. LIHI issued an initial certificate to the Facility in 2007. The application for recertification, as filed in October 2014, involved a material change in the Facility: namely, the construction and operation of the Selective Water Withdrawal Facility (SWW) for the purpose of facilitating the collection and downstream migration of anadromous fish smolt in Lake Billy Chinook. As required by Handbook Chapter 2, the Application Review addressed this material change, and specifically, whether the SWW affects compliance with the criteria.

General

10. DRA states that the SWW has caused adverse impacts on the entire aquatic ecosystem of the lower Deschutes River downstream of the Facility. Appeal, pp. 1-3. It claims that "it would be inconsistent with LIHI principles, and indeed with LIHI's name itself, to recertify" the Facility given these impacts. *Id.*, p. 1. We find that this claim is not a proper reason for this Appeal. Handbook section 2.16 requires: "[a]n appeal request must include specific reasons why the hydropower facility should have failed one or more criteria." Thus, we hear and determine a given claim only to the extent it addresses consistency with Certification Criteria as stated in pages 48 – 59 of the Handbook.

11. DRA states that the Joint Licensees negotiated "privately" with ODEQ to develop Interim Agreements to modify the Water Quality Management and Monitoring Plan (WQMMP) as incorporated into the 401 Certification, and associated Facility operations, for the purpose of operating the SWW. It claims that these Interim Agreements were implemented without notice to the signatories of the 2004 Settlement Agreement that was approved in the new

license. This claim is not a proper reason for this Appeal. DRA does not show that such Interim Agreements or related discussions are inconsistent with LIHI's Water Quality Criterion, which requires compliance with the 401 Certification. Further, DRA did not document that the signatories were kept in the dark. The Application Reviewer found that the Joint Licensees and ODEQ have consulted with Fish Committee as constituted by the Settlement. Application Review, p. 14, Appendix B.

12. DRA states that the Interim Agreements were implemented in violation of Oregon Administrative Rule 340-048-0050, which generally requires public notice before amendment to any 401 certification. Appeal, p. 3. We do not have authority to interpret Oregon Administrative Rules. Our review is limited to the Water Quality Criterion, which requires compliance with the 401 Certification for this Facility.

13. In a September 18, 2014 letter, ODEQ stated its view that Facility operations comply with all terms of the 401 Certification. Application Review, p. 13. DRA states that we should not defer to ODEQ's letter, because of its improper conduct in related discussions. Appeal, p. 7. We do not find any evidence that the Interim Agreements resulted from collusion or other improper conduct. Instead, we find that the 401 Certification on its face authorizes ODEQ to modify the WQMMP over time to address temperature, pH, dissolved oxygen, and phytoplankton, based on operating experience with the SWW. See, e.g., New License, Appendix A section C.6 – 7. We agree with the Application Reviewer's finding that the 401 Certification "...recognize[s] the experimental nature" of the SWW and related operations, further recognizes that such operations over time may cause temporary adverse impacts to a given water quality parameter, and requires adaptive management of such operations as FERC, ODEQ/WCB, and the Joint Licensees learn how to manage trade-offs between such parameters. Application Review, pp. 6 – 8, 13 – 14; see New License, Appendix B section 1.B.

14. The heart of the Appeal is a request that LIHI assure that the Joint Licensees are "...held accountable to their original obligations" under the 401 Certification. Appeal, p. 11. As stated in paragraph 13, we find that the 401 Certification on its face authorizes certain modifications of those original requirements incident to adaptive management of the SWW. In effect, the Appeal asks us to block such authorized modifications, and that is beyond our authority or LIHI's.

Dissolved Oxygen

15. The Appeal states that Facility operations have exceeded dissolved oxygen requirements in the original WQMMP. Appeal, p. 4. The Application Reviewer made a similar finding. Application Review, pp. 13 - 14. However, we also find that ODEQ has modified these original requirements through the adaptive management procedures in the 401 Certification, and operations comply with the amended requirements, as discussed in paragraph 13. See *id.* This claim does not show a violation of the Water Quality Criterion.

Temperature

16. We make the same finding as stated in paragraph 15.

pH

17. We make the same finding as stated in paragraph 15.

Condition 1

18. Condition 1 in the Preliminary Certification Decision requires reporting of deviations from operating requirements. DRA requests reporting of impacts to aquatic biology resulting from such deviations. Appeal, p. 9.

19. The 401 Certification requires biological monitoring incident to adaptive management. See New License, Appendix A section G, Appendix B section 1.B (5th paragraph); Application Reviewer's Comments on Appeal Letter, p. 5.

20. Pursuant to the New License, the Joint Licensees file an annual report of monitoring data with FERC, other regulatory agencies, and the Fish Committee of the Settlement parties. By subsequent order, FERC required the Joint Licensees to file this report by June 1 each year starting in 2008. "Order Amending Annual Reporting Deadlines," Ordering ¶ A.

21. We recommend that LIHI, through the Application Reviewer, confirm that such annual reports have been timely filed under the New License. We recommend that LIHI modify Condition 1 to direct the Joint Licensees to attach such reports to its Annual Compliance Statement pursuant to Handbook section 3.03.

22. The Appeal also requests modification of Condition 1 to include deviations from original operating requirements under the New License, even if superseded. Appeal, p. 9. Such reporting is moot, for the reasons stated in paragraph 13 above.

Condition 3

23. DRA requests a deadline for reporting of a nutrient and algae study. Appeal, p. 9. It notes that Condition 3 merely states an expectation for completion of that study in 2018. We recommend that LIHI, through the Application Reviewer, consult with ODEQ to determine whether the study is subject to a deadline. If so, we recommend further that Condition 3 be modified to include that specific deadline.

24. DRA requests that the Joint Licensees be required to release the results of their macroinvertebrate and algae study, which has apparently been completed. Appeal, p. 10. We recommend that LIHI, through the Application Reviewer, consult with ODEQ to confirm that the

study has been completed and is available to the public as may be required by the 401 Certification or the New License.

25. The Appeal requests that Condition 3 be modified to use “interested members of the public” rather than “stakeholders,” for the purpose of reporting of monitoring data in the Annual Compliance Statement to LIHI. Pursuant to Handbook section 2.3, any such statement is available to any entity, regardless of terminology. We find that this change in terminology is unnecessary.

Proposed Temperature Condition

26. DRA proposes a new condition that would establish an average weekly temperature standard and related operational requirements for SWW. Appeal, p. 10. This proposal amounts to a *de facto* amendment of the New License and 401 Certification. Whatever its merits, we find that this proposal exceeds our authority as well as LIHI’s. The Water Quality Criterion requires consistency with the 401 Certification, not amendment of that regulatory requirement at LIHI’s discretion.

27. DRA claims that the operations of the SWW have resulted in fish kills in violation of Handbook section 1.19. That section refers to the Fish Passage and Protection Criterion, which is found in Handbook, Appendix B section C, pp. 51 – 55.

28. The Criterion, through Question C.2, requires demonstration that fish passage is in compliance with a Mandatory Fish Passage Prescription issued after December 31, 1986. The Application Reviewer found that the operations of the SWW and related capture facilities have complied with the prescriptions that the National Marine Fisheries Service and U.S. Fish and Wildlife Service issued in 2004. She further found that the agencies had confirmed such compliance, subject to continuing adaptive management of the SWW and related facilities. Application Review, pp. 16 – 17. We find that the Facility complies with the Fish Passage and Protection Criterion.

Other Certification Criteria

29. The Appeal does not raise any claims under criteria other than Water Quality and Fish Passage and Protection. We have reviewed the Application Review and find that the application is consistent with all other Certification Criteria.

30. We recognize DRA’s fundamental concerns that the SWW has materially altered pre-2009 water quality in the lower Deschutes, at times harming certain aquatic species; and that the benefits for anadromous fish are still evolving. The Application Reviewer made consistent findings. Application Review, pp. 13 – 14. We find that the New License and the 401 Certification, in approving the Settlement, deliberately set in motion an experiment to restore anadromous fish migration, while acknowledging the potential for certain adverse impacts on existing water quality. See New License, Appendix A section C.4 (addressing contingencies in

SWW operations for water temperature control); Appendix B section 8 (addressing how such operations may increase downstream water temperature to some extent consistent with naturally occurring conditions).

Determination and Recommended Modifications to Certificate No. 25

31. We determine that the Preliminary Certification Decision is consistent with the Certification Criteria. We recommend modifications of Conditions 1 and 3 as stated above. We affirm the issuance of Certificate No. 25 for the Pelton Round Butte Project.

Recommended Modifications in LIHI's Procedures

32. We recommend that LIHI post on its website: (a) the applicable license, 401 certification, and other regulatory approvals which are the basis for its determination whether to certify a facility; and (b) Annual Compliance Statements following the issuance of a certificate, consistent with Handbook section 2.3. A more inclusive library will help address concerns, as expressed by DRA in this Appeal, about transparency in the adaptive management of a certified facility.

Dated: February 29, 2016



Shannon Ames
Member, Appeals Panel

Dated: February 29, 2016



Robert Deibel
Member, Appeals Panel

Dated: February 29, 2016



Richard Roos-Collins
Member, Appeals Panel