UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

SULLIVAN CREEK
POWER PROJECT

PROJECT NO. 2225
DI07-1-000

REQUEST FOR REHEARING AND CLARIFICATION
OF STATE OF WASHINGTON
DEPARTMENT OF FISH & WILDLIFE

Pursuant to Section 313(a) of the Federal Power Act (FPA),¹ and Rule 713 of the Federal Energy Regulatory Commission’s (FERC or Commission) Rules of Practice and Procedure,² Washington Department of Fish and Wildlife (WDFW) hereby requests clarification and rehearing of the July 18, 2007 Order Denying Petition For Declaratory Order That Existing License Is Void And Accepting Petition That Licensing Is Not Required (Order)³ issued by the Commission’s Director of the Division of Hydropower Administration and Compliance (Director). Two issues are raised. First, whether the Order reflects a FERC decision to not commence a decommissioning proceeding for the Sullivan Creek Project, FERC No. 2225 (project) at the expiration of its existing license. If, by the Order, FERC has decided not to commence a decommissioning proceeding, WDFW requests rehearing of the Order. If the Order is to be read as not reaching that determination, WDFW requests the Order be clarified on this point. The second issue is whether, under these facts, a NEPA environmental assessment is for a decision that

operations of the Sullivan Creek Project are no longer subject to the FPA, and no decommissioning proceeding is necessary.

WDFW’s view is that prior to the expiration of FPA jurisdiction, the public interest is served by FERC addressing decommissioning of the Sullivan Creek Project.

I. STATEMENT OF ISSUES

1. Whether the Order errs in that it is ambiguous as to whether FERC will commence a decommissioning proceeding prior to the expiration of the Sullivan Creek Project license when the Order does not mention decommissioning, the FPA implicitly provides for decommissioning, the Commission has adopted rules regarding license surrender, and the Commission has adopted a policy directly on point requiring a flexible approach decommissioning in this situation. 16 U.S.C.S. §§ 791a-825, § 799; 18 CFR § 16.18; *Project Decommissioning at Relicensing: Policy Statement*, Docket No. RM93-23-000 (1994).

2. Whether the Order errs by stating that “the Commission’s jurisdiction over the project will cease as of the expiration of the project’s original license, without the need for any further action by the Commission or the Licensee” (Order at page 6) if FERC will not require a license decommissioning process for the Sullivan Creek Project when the PUD is not requesting a new FERC license, no other party has applied for a FERC license or interest in the project, and federal take over is not likely. *Southern California Edison Co.*, 107 FERC ¶ 61,067 (2004); *Central Maine Power Company*, 81 FERC ¶ 61,087 (1997).

3. Whether the Order errs in not requiring an environmental assessment of the likely affects of a FERC decision to not require any further action under the FPA, when it is uncertain how the future operation of the
Sullivan Creek Project will affect public resources or the public interest, unclear what non-FPA regulatory jurisdictions will address future Sullivan Creek Project operations, and unknown what resulting changes may occur to project operations or project facilities. *Steamboaters v. FERC*, 759 F.2d 1382, 1392-93 (9th Cir. 1985).

**II. BACKGROUND OF PROCEEDING**

On October 5, 2006, Public Utility District No. 1 of Pend Oreille County, Washington (PUD) filed a *Petition for Declaratory Order (Petition)* requesting the Commission either determine that the existing project license was void, or state that, at the expiration of the existing license, no further FERC license would be required for the project. The Commission issued a notice of the Petition on October 25, 2006. WDFW intervened in the Petition proceeding on November 7, 2006. As noted above, the Director issued the Order on July 18, 2007.

**III. SULLIVAN CREEK PROJECT**

Sullivan Creek is in the far northeastern corner of the state and is a tributary to the Pend Oreille River, which flows into the Columbia River. The waters directly affected by the project include Sullivan Lake, Mill Pond and Sullivan Creek. Fish species observed in the vicinity of project facilities include rainbow trout, cutthroat trout, brown trout, brook trout, mountain whitefish and kokanee, as well as other resident fish species. The

4 *Petition For Declaratory Order That Licensing Not Required And That Existing License Is Void Or Will Expire By Its Own Terms With No Further Commission Action*, October 5, 2006 (Sullivan Creek Project, FERC No. 2225)

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7 Order, 120 FERC ¶ 62,045.

8 *Final Environmental Impact Statement, Sullivan Creek Hydroelectric Project*, sec. 3.5.1, p. 3-8/9 (FERC April 1998)(FEIS).
US Fish and Wildlife Service issued a final rule listing the Columbia River populations of bull trout (*Salvelinus confluentus*) as a threatened species under the Endangered Species Act on June 10, 1998. Sullivan Creek is included in the Pend Oreille Core Area as part of the Bull Trout Recovery Plan (USFWS 1998). Core areas consist of habitats that could supply all of the necessary elements for every lifestage of bull trout (e.g., spawning, rearing, migratory, and adult), and have one or more groups of bull trout. Several resource agencies believe bull trout may inhabit Sullivan Creek. In September 1994, a dead adult female bull trout was found in Sullivan Creek below Mill Pond Dam during snorkel surveys.

The Sullivan Creek Project was initially licensed by FERC in 1958 and is located on Sullivan Creek. The existing license expires on October 1, 2008. The project was originally built in the early 1900’s for cement making facilities. The project consists of Sullivan Lake and dam, Mill Pond and dam, Mill Pond Historic Site, a flume, canal, forebay, tunnel power conduit, and powerhouse. The PUD has, since FERC licensing, operated the project as a storage project benefiting downstream generation projects, which is one of the project licensed purposes. On several occasions, the PUD has taken initial steps to resume hydropower generation at the Sullivan Creek project; however, that has not happened. Parts of the project occupy lands under the jurisdiction of the US Forest Service, Colville National Forest.

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10 *FEIS*, sec. 3.5.1, 3-9.
11 *Order Issuing License*, 20 FPC 753, 1958 WL 2633 (1958) (*License Order*).
12 *Order*, p. 1.
13 *FEIS*, sec. 2.1, p. 2-1.
Since the 1958 FERC licensing, a number of the project facilities have remained in disrepair; specifically, use of the Sullivan Creek diversion and conduit had been discontinued, the flume had collapsed and was missing in part, and the generating and switching machinery had been removed from the powerhouse.\(^1\) Certain areas around project facilities have been subject to landslides. One active and three previous landslides have demolished sections of the abandoned flume.\(^2\)

Currently, Mill Pond Dam restricts natural bedload movement to downstream portions of Sullivan Creek. Therefore, gravel recruitment for spawning fish is reduced and spawning habitat is limited below the facility. This limits potential spawning activity for bull trout below the dam (USFWS Section 7 Consultation – Pend Oreille River Subpopulation Columbia River Bull Trout Biological Opinion; FWS #1-9-99-I-303; 1999). Minor water seeps have been observed below the base of the earthen dam, and long-term safety of the facility is a concern (FERC site inspection July 12, 2007).\(^3\)

Thermal stratification in Mill Pond reduces air-water exchange, causing decreased levels of dissolved oxygen (DO) at lower depths that is unfavorable to fish species listed above.\(^4\) The facilities are barriers to migrating resident fish species such as westslope cutthroat trout and bull trout. Mill Pond Dam also restricts the movement of large woody debris (LWD) necessary for maintaining stream habitat complexity. LWD from the upper watershed gets trapped behind Mill Pond Dam. Future operations of the facilities are uncertain, and seasonal water flows necessary for timely migration of bull trout and westslope cutthroat trout should be addressed. Additionally, Sullivan Lake water level management is a key for maintaining important kokanee spawning habitat in the Noisy Creek tributary delta. Impounded spring runoff causes abnormally high bedload and

\(^1\) See License Order, p. 754; FEIS, sec. 2.1, p. 2-1.
\(^2\) FEIS, section 3.2.3, p. 3-3.
\(^3\) WDFW Biologist Doug Robison, personal communication (August 13, 2007) (Robison).
\(^4\) Robison, pers. communication (August 13, 2007).
spawning gravels deposits in the delta. Spawning activity in the fall is inconsistent with water level management making successful spawning difficult.21

IV. ARGUMENT

1. The Federal Power Act comprehensively addresses projects subject to its jurisdiction, and decommissioning is part of the scheme.

In adopting the Federal Power Act, Congress created a broad federal role for the development and licensing of non-federal hydropower projects.22 The Commission’s charge, in considering new project proposals or the relicensing of existing projects, is always to determine whether the project is in the public interest.23 By sections 4(e), 10(a), 15, and 23(b) of the FPA, the Commission is required to analyze a broad spectrum of public interests when considering the licensing, constructing, operating, and regulating hydroelectric projects under the Commission’s jurisdiction.24 Under sections 4(e) and 10(a), the Commission’s role is to determine whether and under which conditions a project fits within the comprehensive public interest standard set out in the FPA.

Once the Commission determines a project is in the public interest, it is empowered to issue long-term licenses.25 Throughout the term of the license, the Commission’s role is to monitor how the licensee operates and performs their Commission license obligations.26 The licensee’s operation under the license is the satisfaction of the many and varied public interests. The license is, therefore, the means through which the public interest is protected during the term of a Commission license.27

21 Robison, pers. communication (August 13, 2007).
24 16 U.S.C. §§ 797(e), 803(a), 808, and 817.
25 16 U.S.C. § 799 (initial licenses issued for a period not exceeding fifty years); 16 U.S.C. §808(e) (new licenses issued for terms between thirty and fifty years).
The FPA addresses the licensee options at the end of the original project license. A licensee may apply for a new long-term license. As Commission licenses are grants of privilege to use public resources, the FPA attempts to foster, or at least provide for, competition for new Commission licenses to ensure the best use of public resources is made. In other cases, the Commission or other federal agency may recommend that the United States take over a project at the time of license expiration; section 14 of the FPA provides a process for accomplishing this action.

The last possibility is the case in which no one applies for a new FPA license and no federal take-over action is expected. This situation may result when a hydroelectric project has reached the end of its useful life, or the costs of operation (license compliance) are not worth the effort. Sections 6 and 15 of the FPA direct how the Commission is to address the surrender of a project license. Commission rules govern the process of surrender of project licenses. In these circumstances, the Commission may need to issue annual licenses while the Commission and the licensee consider a nonpower license, an exemption, surrender of the license, federal take-over, removal of the project, or the transfer of the project.

In the case that the licensee requests termination of FPA jurisdiction, the Commission retains jurisdiction until it is satisfied as to the next regulatory framework addressing the remaining project facilities. The Commission has used the term “regulatory gap” for the time between the end of FPA jurisdiction and the application of

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28 Northern States Power Co. v. FPC, 118 F.2d 141, 143 (7th Cir. 1941).
29 16 U.S.C. § 808(a)(2) (new license issued to the applicant with the proposal best adapted to serve the public interest).
32 18 CFR § 16.18
33 Id.
the next regulatory framework.\textsuperscript{35} Even in the case of an expiring license, the Commission may issue an annual license to the licensee in order to address the regulatory gap.

In late 1994, the Commission officially engaged its regulated community and other constituents in a discussion about license surrender and the Commission’s desire to address the regulatory gap. The Commission requested comments on the subject of decommissioning those projects for which, at the end of their license, no new application had been filed, or were not likely to be relicensed or accept a new license.\textsuperscript{36} On December 14, 1994, the Commission issued a policy statement explaining how sections 6 and 15 of the FPA provided the Commission authority to engage in decommissioning proceedings at the expiration of Commission licenses.\textsuperscript{37}

The Commission’s policy is directly on point to the Sullivan Creek Project license situation. In such an expiring license case, the FPA requires a decommissioning process.\textsuperscript{38} The policy is clear: “In those instances where it has been determined that a project will no longer be licensed, because the licensee either decides not to seek a new license, rejects the license issued, or is denied a license, \textit{the project must be decommissioned.}” (Emphasis added.)\textsuperscript{39}

In the instant case, the PUD has requested, and FERC seems to have agreed, that at the expiration of the existing license the PUD need not apply for a new license for the Sullivan Creek Project. As the PUD is not applying for a new license, and no transfer to

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\textsuperscript{38} Decommissioning Policy, p.3 (“The Commission . . . rejects the notion that it is without the statutory power to act where negotiated solutions cannot be arranged.”); p. 23, (“[section] B. The Commission’s Role in Decommissioning”), p. 24 (“the Commission should be able to take appropriate steps that will satisfactorily protect the public interests involved.”).
\textsuperscript{39} Decommissioning Policy, p. 3.
\end{flushright}
another FERC licensee or federal take-over is proposed, the FERC policy is on point and should apply. Sullivan Creek Project must be decommissioned.

As used by the Commission, the term “decommissioning” does not suggest a result, but instead is “a very flexible approach.” The Commission’s policy notes that many public interests and multiple concerns come into play when considering the termination of Commission jurisdiction. Under the policy, alternative courses of action are to be considered so as to assist in informing the Commission’s choice of the best alternative for the public interest and project facilities. Through decommissioning, the Commission declared its decision to continue overseeing the licensee and interested parties working out a comprehensive resolution of the project’s future, and, “until this is done, the Commission retains the jurisdiction by issuing annual licenses.”

However, the Order ambiguously does not mention decommissioning or any discussion of the future operation of the Sullivan Creek Project after license expiration. The Director’s Order said nothing about the licensee’s remaining obligation to explain what will happen with the project post license expiration. The Director’s Order completely fails to reconcile how its statement that “the Commission’s jurisdiction over the project will cease . . . without the need for any further action by the Commission or the Licensee” is consistent with the Commission interpretation of the FPA, surrender rules, and its decommissioning policy. In fact, it seems completely inconsistent with those authorities.

The better view is that the FPA unambiguously charges the Commission to consider and protect public interests affected by the FPA projects. Because the Commission’s authorities and policy rationally provide that a discussion of

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40 Id.
41 Id.
42 Decommissioning Policy, p. 25
43 Order, p. 6.
decommissioning must result when no new license is requested, WDFW requests the Commission so clarify the Order.

2. The Commission abdicates consideration of the public interests impacted by the Sullivan Creek Project, and places a cloud on the Commission’s authority, unless it requires a decommissioning discussion to bridge the regulatory gap.

“[A] licensee ought not to be able to simply walk away from a Commission-licensed project without any Commission consideration of the various public interests that might be implicated by that step.” The Commission should require a process examining what will occur to project facilities when the PUD’s license for the Sullivan Creek Project expires in October 2008.

Commission decisions support the Commission protection of the public interest by reviewing what happens to project facilities at the expiration of a license. In the Southern California Edison Co., a relicensing case for the Big Creek No. 4 Project (FERC No. 2017), FERC addressed its authority to reserve jurisdiction over parts of previously licensed facilities that were no longer needed as part of the relicensed project. Regarding project features that were no longer subject to FPA licensing authority, the Commission noted its long practice of retaining jurisdiction until it was clear what would happen to them. The Commission affirmed retaining jurisdiction over the facilities, beyond the expiration of the existing license, until the licensee obtained US Forest Service permits for the facilities. The Commission stated that it “can consider the public interest in determining when and in what manner, to bring the relevant part of a license to an end (footnote omitted).” Citing Pacific Gas and Electric Company, the

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44 Decommissioning Policy, p. 24.
46 Id. at 61, 220.
47 Id.
48 Id.
Commission further stated that it “has specifically rejected the argument that
Commission jurisdiction . . . ends simultaneously with a finding that [previous project
facilities] are no longer [jurisdictional].”50

The Pacific Gas and Electric Co. situation was similar. There, the licensee of a
number of projects desired to remove certain transmission lines from FPA licensing. The
Commission agreed regarding the lack of jurisdiction but would not release jurisdiction
until the licensee had filled the regulatory gap by obtaining permits from the landowning
federal agency.51

In Central Maine Power Company, at the end of the original license, licensee
decided not to apply for a new license and instead proposed transferring the project to
another for non-FPA purposes.52 During the FERC review, licensee stated it would
cease all jurisdictional activity and operate the project in run-of-river mode.53 Initially
(January 1994), FERC required a surrender proceeding; however, FERC later (July 1997)
determined that, because of the insignificant affect on downstream resources, no further
proceeding was necessary.54 It is not clear from the case whether the insignificant affect
was the result of run-of-river operation, or the small affect the project had on downstream
project generation. It may also be that, given the number of years of administrative
proceeding, the Commission was satisfied that a decommissioning-like record of future
conditions had addressed any potential regulatory gap.

Contrary to PUD assertions, its case is very different from Central Maine. In
Central Maine, at the time of license expiration, FERC knew exactly what would happen
to the project facilities; they had been taken out of energy production and transferred to a

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50 Southern California Edison Co., 107 FERC at 61,220.
52 81 FERC ¶ 61,087 (1997).
53 Id. at 61,344.
54 Id.
town for recreational and environmental purposes.\textsuperscript{55} At the time of the transfer, FERC knew that the public interest was protected and the regulatory gap closed as the State of Maine had agreed to take over regulation of the project in the future.\textsuperscript{56} In the instant case, nothing is known about the PUD’s current and future plans for the Sullivan Creek Project. FERC has no knowledge whether the PUD plans to sell the project, whether prospective purchasers are financially or operationally responsible,\textsuperscript{57} or whether the future operator can or will capably address maintenance, safety or liability issues as they arise.\textsuperscript{58} In short, there is no record as to what plans or intents the PUD has as to life after FERC jurisdiction. Absent any information, let alone substantial evidence,\textsuperscript{59} about the PUD’s intent, FERC has no basis upon which to consider the public interest standard required in surrender cases.\textsuperscript{60} FERC decisions are required to be supported by substantial evidence, and failure to require that level of information results in unsupported, arbitrary and capricious decisions.\textsuperscript{61}

In contrast to this responsible history of addressing the public interest while addressing licensee needs, is the statement of the Director in the instant case: “the Commission’s jurisdiction over the project will cease as of the expiration of the project’s original license, without the need for any further action by the Commission or the

\textsuperscript{55} Central Maine, 81 FERC at 61,343.
\textsuperscript{56} Id. at 61,344; see also Arizona Public Service Co., 109 FERC ¶ 61,036, 61135-36 (2004).
\textsuperscript{57} See Duke Energy Corporation, 118 FERC ¶ 62,223 (2007)(Commission cites to Decommissioning Policy in support of statement that financial worthiness of transferee a consideration at license transfer proceeding, however record satisfied Commission).
\textsuperscript{58} Star Mill Inc., 112 FERC ¶ 62,131, 64,294 (2005) (Commission cites Decommissioning Policy for need to review transfers of increasing marginal projects, those likely to require decommissioning in near future, and to transferees lacking financial or operational capacity).
\textsuperscript{60} Southern California Edison Co., 107 FERC ¶ 61067, 61220 (2004); see also City of Phoenix, Arizona, 59 FPC 1061, 1071-71 (1977).
\textsuperscript{61} Pacific Gas and Electric Co. v. FERC, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (“A reviewing court sets aside final action of FERC if that action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); citing 5 U.S.C. § 706(2)(A) (other case cites omitted).
Licensee. The director fails to acknowledge any public interest in his determination. He fails to discuss the decision in the context of the FPA’s comprehensive scheme and protection of public values. Rules the Commission has adopted for this situation are not mentioned. The Commission policy directly on point is not even acknowledged.

WDFW believes that the public interest deserves, and the FPA requires more than a ministerial termination of federal oversight. The Commission’s authority, policy, and prior decisions rationally require the Commission rehear the Order and instead state, in the case no new FERC license is requested, a discussion of decommissioning must result.

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62 Order, p.6.
3. The National Environmental Policy Act requires at least an environmental assessment of whether releasing the PUD’s Sullivan Creek Project from FERC jurisdiction is a major Federal significant action.

The Commission is subject to the National Environmental Policy Act of 1969 (NEPA), and must apply it in this case. NEPA makes environmental protection a statutory duty of every federal agency, and they are “not only permitted but compelled to take environmental values into account.” Regarding federal agency decisions, NEPA requires the preparation of an environmental impact statement for “all major Federal actions significantly affecting the quality of the human environment.” Rules of the Council on Environmental Quality implement NEPA and provide: “In determining whether to prepare an environmental impact statement the Federal agency shall . . . prepare an environmental assessment.” The exception to this rule is the case where the agency has determined this type of proposed project or federal decision is categorically exempt from NEPA requirements. Nothing in the Order cites to a categorical exemption or otherwise provides a basis to determine NEPA should not apply. If not categorically exempt, FERC must prepare at least an EA.

In fact, Commission NEPA rules address and require at least an environmental assessment (EA) if the Sullivan Creek Project license were to be surrendered or FERC was to otherwise terminate FPA jurisdiction. Projects subject to a FERC EA include “(13) Surrender of water power licenses and exemptions where project works exist or

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64 42 U.S.C. §§ 4231-4370f
65 Arizona Public Service Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973) (citing Calvert Cliff’s Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971)).
66 42 U.S.C § 4332(2)(c).
67 Steamboaters v. FERC, 759 F.2d 1382, 1392-93 (9th Cir. 1985) (citing 40 CFR § 1501.4(b)(1984)).
68 Steamboaters, 759 F.2d at 1393.
69 See 18 CFR § Part 380; 18 CFR § 380.5.
ground disturbing activity has occurred . . .” The Sullivan Creek Project is a project clearly under a FERC license, facilities of the project currently exist, and ground disturbing activity has occurred.

Many of the Commission’s surrender decisions reflect the use of NEPA documents as part of the decision making record. As the above cases show, the Commission is aware that a “regulatory gap” exists when the Commission terminates FPA jurisdiction over project facilities, especially when those facilities will continue to exist on the public landscape. A Sullivan Creek Project decommissioning discussion would create the record and provide the substantial evidence to support a Commission decision in this matter. However as it stands, nothing in the Order suggests FERC took the “hard look” at the potential environmental impacts of the decision releasing the Sullivan Creek Project from FPA jurisdiction without further public interest review. Absent a record proving the “hard look” and providing the evidence to support such a decision, the Order fails to meet the required standard.

The Commission must rehear this matter and require an appropriate environmental assessment and engage in a record discussion of the effect on the public interest of PUD’s request to terminate FPA jurisdiction. Anything less fails to meet the requirements of NEPA.

V. CONCLUSION

For the reasons stated above, Washington Department of Fish and Wildlife respectfully request that the Federal Energy Regulatory Commission rehear and clarify

70 18 CFR § 380.5(13).
72 Steamboaters, 759 F.2d at 1393 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976) (other cites omitted).
the Order by stating a further proceeding regarding decommissioning of the Sullivan Creek Project (FERC No. 2225) will be required prior to the expiration of the existing FERC license.

DATED this 16th day of August, 2007.

Respectfully submitted:

ROB MCKENNA
Attorney General

\S\
WILLIAM C. FRYMIRE, WSBA#16551
Senior Counsel
PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of August, 2007, at Olympia, WA.

|S|  
JO ANN BLAKE  
Legal Assistant
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FEDERAL ENERGY REGULATORY COMMISSION  
SULLIVAN CREEK  
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7 *Order*, 120 FERC ¶ 62,045.

8 *Final Environmental Impact Statement, Sullivan Creek Hydroelectric Project*, sec. 3.5.1, p. 3-8/9 (FERC April 1998) *(FEIS)*.
US Fish and Wildlife Service issued a final rule listing the Columbia River populations of bull trout (*Salvelinus confluentus*) as a threatened species under the Endangered Species Act on June 10, 1998. Sullivan Creek is included in the Pend Oreille Core Area as part of the Bull Trout Recovery Plan (USFWS 1998). Core areas consist of habitats that could supply all of the necessary elements for every lifestage of bull trout (e.g., spawning, rearing, migratory, and adult), and have one or more groups of bull trout. Several resource agencies believe bull trout may inhabit Sullivan Creek. In September 1994, a dead adult female bull trout was found in Sullivan Creek below Mill Pond Dam during snorkel surveys.

The Sullivan Creek Project was initially licensed by FERC in 1958 and is located on Sullivan Creek. The existing license expires on October 1, 2008. The project was originally built in the early 1900’s for cement making facilities. The project consists of Sullivan Lake and dam, Mill Pond and dam, Mill Pond Historic Site, a flume, canal, forebay, tunnel power conduit, and powerhouse. The PUD has, since FERC licensing, operated the project as a storage project benefiting downstream generation projects, which is one of the project licensed purposes. On several occasions, the PUD has taken initial steps to resume hydropower generation at the Sullivan Creek project; however, that has not happened. Parts of the project occupy lands under the jurisdiction of the US Forest Service, Colville National Forest.

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10 *FEIS*, sec. 3.5.1, 3-9.
11 *Order Issuing License*, 20 FPC 753, 1958 WL 2633 (1958) (*License Order*).
12 *Order*, p. 1.
13 *FEIS*, sec. 2.1, p. 2-1.
15 See *Order*, p. 1-2.
Since the 1958 FERC licensing, a number of the project facilities have remained in disrepair; specifically, use of the Sullivan Creek diversion and conduit had been discontinued, the flume had collapsed and was missing in part, and the generating and switching machinery had been removed from the powerhouse.\textsuperscript{17} Certain areas around project facilities have been subject to landslides. One active and three previous landslides have demolished sections of the abandoned flume.\textsuperscript{18}

Currently, Mill Pond Dam restricts natural bedload movement to downstream portions of Sullivan Creek. Therefore, gravel recruitment for spawning fish is reduced and spawning habitat is limited below the facility. This limits potential spawning activity for bull trout below the dam (USFWS Section 7 Consultation – Pend Oreille River Subpopulation Columbia River Bull Trout Biological Opinion; FWS #1-9-99-I-303; 1999). Minor water seeps have been observed below the base of the earthen dam, and long-term safety of the facility is a concern (FERC site inspection July 12, 2007).\textsuperscript{19}

Thermal stratification in Mill Pond reduces air-water exchange, causing decreased levels of dissolved oxygen (DO) at lower depths that is unfavorable to fish species listed above.\textsuperscript{20} The facilities are barriers to migrating resident fish species such as westslope cutthroat trout and bull trout. Mill Pond Dam also restricts the movement of large woody debris (LWD) necessary for maintaining stream habitat complexity. LWD from the upper watershed gets trapped behind Mill Pond Dam. Future operations of the facilities are uncertain, and seasonal water flows necessary for timely migration of bull trout and westslope cutthroat trout should be addressed. Additionally, Sullivan Lake water level management is a key for maintaining important kokanee spawning habitat in the Noisy Creek tributary delta. Impounded spring runoff causes abnormally high bedload and

\textsuperscript{17} See License Order, p. 754; \textit{FEIS}, sec. 2.1, p. 2-1.
\textsuperscript{18} \textit{FEIS}, section 3.2.3, p. 3-3.
\textsuperscript{19} WDFW Biologist Doug Robison, personal communication (August 13, 2007) (Robison).
\textsuperscript{20} Robison, pers. communication (August 13, 2007).
spawning gravels deposits in the delta. Spawning activity in the fall is inconsistent with water level management making successful spawning difficult.\textsuperscript{21}

IV. ARGUMENT

1. The Federal Power Act comprehensively addresses projects subject to its jurisdiction, and decommissioning is part of the scheme.

In adopting the Federal Power Act, Congress created a broad federal role for the development and licensing of non-federal hydropower projects.\textsuperscript{22} The Commission’s charge, in considering new project proposals or the relicensing of existing projects, is always to determine whether the project is in the public interest.\textsuperscript{23} By sections 4(e), 10(a), 15, and 23(b) of the FPA, the Commission is required to analyze a broad spectrum of public interests when considering the licensing, constructing, operating, and regulating hydroelectric projects under the Commission’s jurisdiction.\textsuperscript{24} Under sections 4(e) and 10(a), the Commission’s role is to determine whether and under which conditions a project fits within the comprehensive public interest standard set out in the FPA.

Once the Commission determines a project is in the public interest, it is empowered to issue long-term licenses.\textsuperscript{25} Throughout the term of the license, the Commission’s role is to monitor how the licensee operates and performs their Commission license obligations.\textsuperscript{26} The licensee’s operation under the license is the satisfaction of the many and varied public interests. The license is, therefore, the means through which the public interest is protected during the term of a Commission license.\textsuperscript{27}

\textsuperscript{21} Robison, pers. communication (August 13, 2007).
\textsuperscript{23} Udall v. FPC, 387 U.S. 428, 450, 18 L. Ed.2d 869 (1967).
\textsuperscript{24} 16 U.S.C. §§ 797(e), 803(a), 808, and 817.
\textsuperscript{25} 16 U.S.C. § 799 (initial licenses issued for a period not exceeding fifty years); 16 U.S.C. §808(e) (new licenses issued for terms between thirty and fifty years).
\textsuperscript{26} See 16 U.S.C. §823b.
\textsuperscript{27} 16 U.S.C. § 797(e).
The FPA addresses the licensee options at the end of the original project license. A licensee may apply for a new long-term license. As Commission licenses are grants of privilege to use public resources, the FPA attempts to foster, or at least provide for, competition for new Commission licenses to ensure the best use of public resources is made. In other cases, the Commission or other federal agency may recommend that the United States take over a project at the time of license expiration; section 14 of the FPA provides a process for accomplishing this action.

The last possibility is the case in which no one applies for a new FPA license and no federal take-over action is expected. This situation may result when a hydroelectric project has reached the end of its useful life, or the costs of operation (license compliance) are not worth the effort. Sections 6 and 15 of the FPA direct how the Commission is to address the surrender of a project license. Commission rules govern the process of surrender of project licenses. In these circumstances, the Commission may need to issue annual licenses while the Commission and the licensee consider a nonpower license, an exemption, surrender of the license, federal take-over, removal of the project, or the transfer of the project.

In the case that the licensee requests termination of FPA jurisdiction, the Commission retains jurisdiction until it is satisfied as to the next regulatory framework addressing the remaining project facilities. The Commission has used the term “regulatory gap” for the time between the end of FPA jurisdiction and the application of

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28 Northern States Power Co. v. FPC, 118 F.2d 141, 143 (7th Cir. 1941).
29 16 U.S.C. § 808(a)(2) (new license issued to the applicant with the proposal best adapted to serve the public interest).
32 18 CFR § 16.18
33 Id.
the next regulatory framework.\textsuperscript{35} Even in the case of an expiring license, the Commission may issue an annual license to the licensee in order to address the regulatory gap.

In late 1994, the Commission officially engaged its regulated community and other constituents in a discussion about license surrender and the Commission’s desire to address the regulatory gap. The Commission requested comments on the subject of decommissioning those projects for which, at the end of their license, no new application had been filed, or were not likely to be relicensed or accept a new license.\textsuperscript{36} On December 14, 1994, the Commission issued a policy statement explaining how sections 6 and 15 of the FPA provided the Commission authority to engage in decommissioning proceedings at the expiration of Commission licenses.\textsuperscript{37}

The Commission’s policy is directly on point to the Sullivan Creek Project license situation. In such an expiring license case, the FPA requires a decommissioning process.\textsuperscript{38} The policy is clear: “In those instances where it has been determined that a project will no longer be licensed, because the licensee either decides not to seek a new license, rejects the license issued, or is denied a license, \textit{the project must be decommissioned}.” (Emphasis added.)\textsuperscript{39}

In the instant case, the PUD has requested, and FERC seems to have agreed, that at the expiration of the existing license the PUD need not apply for a new license for the Sullivan Creek Project. As the PUD is not applying for a new license, and no transfer to


\textsuperscript{38} Decommissioning Policy, p.3 (“The Commission . . . rejects the notion that it is without the statutory power to act where negotiated solutions cannot be arranged.”); p. 23, (“[section] B. The Commission’s Role in Decommissioning”), p. 24 (“the Commission should be able to take appropriate steps that will satisfactorily protect the public interests involved.”).

\textsuperscript{39} Decommissioning Policy, p. 3.
another FERC licensee or federal take-over is proposed, the FERC policy is on point and should apply. Sullivan Creek Project must be decommissioned.

As used by the Commission, the term “decommissioning” does not suggest a result, but instead is “a very flexible approach.”40 The Commission’s policy notes that many public interests and multiple concerns come into play when considering the termination of Commission jurisdiction.41 Under the policy, alternative courses of action are to be considered so as to assist in informing the Commission’s choice of the best alternative for the public interest and project facilities. Through decommissioning, the Commission declared its decision to continue overseeing the licensee and interested parties working out a comprehensive resolution of the project’s future, and, “until this is done, the Commission retains the jurisdiction by issuing annual licenses.”42

However, the Order ambiguously does not mention decommissioning or any discussion of the future operation of the Sullivan Creek Project after license expiration. The Director’s Order said nothing about the licensee’s remaining obligation to explain what will happen with the project post license expiration. The Director’s Order completely fails to reconcile how its statement that “the Commission’s jurisdiction over the project will cease . . . without the need for any further action by the Commission or the Licensee” is consistent with the Commission interpretation of the FPA, surrender rules, and its decommissioning policy.43 In fact, it seems completely inconsistent with those authorities.

The better view is that the FPA unambiguously charges the Commission to consider and protect public interests affected by the FPA projects. Because the Commission’s authorities and policy rationally provide that a discussion of

40 Id.
41 Id.
42 Decommissioning Policy, p. 25
43 Order, p. 6.
decommissioning must result when no new license is requested, WDFW requests the Commission so clarify the *Order*.

2. **The Commission abdicates consideration of the public interests impacted by the Sullivan Creek Project, and places a cloud on the Commission’s authority, unless it requires a decommissioning discussion to bridge the regulatory gap.**

“[A] licensee ought not to be able to simply walk away from a Commission-licensed project without any Commission consideration of the various public interests that might be implicated by that step.”\(^{44}\) The Commission should require a process examining what will occur to project facilities when the PUD’s license for the Sullivan Creek Project expires in October 2008.

Commission decisions support the Commission protection of the public interest by reviewing what happens to project facilities at the expiration of a license. In the *Southern California Edison Co.*,\(^ {45}\) a relicensing case for the Big Creek No. 4 Project (FERC No. 2017), FERC addressed its authority to reserve jurisdiction over parts of previously licensed facilities that were no longer needed as part of the relicensed project. Regarding project features that were no longer subject to FPA licensing authority, the Commission noted its long practice of retaining jurisdiction until it was clear what would happen to them.\(^ {46}\) The Commission affirmed retaining jurisdiction over the facilities, beyond the expiration of the existing license, until the licensee obtained US Forest Service permits for the facilities.\(^ {47}\) The Commission stated that it “can consider the public interest in determining when and in what manner, to bring the relevant part of a license to an end (footnote omitted).”\(^ {48}\) Citing *Pacific Gas and Electric Company*,\(^ {49}\) the

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\(^{44}\) *Decommissioning Policy*, p. 24.

\(^{45}\) *Southern California Edison Co.*, 107 FERC ¶ 61,067 (2004).

\(^{46}\) *Id.* at 61, 220.

\(^{47}\) *Id*.

\(^{48}\) *Id*.

\(^{49}\) 85 FERC ¶ 61,411 (1998).
Commission further stated that it “has specifically rejected the argument that Commission jurisdiction . . . ends simultaneously with a finding that [previous project facilities] are no longer [jurisdictional].”

The Pacific Gas and Electric Co. situation was similar. There, the licensee of a number of projects desired to remove certain transmission lines from FPA licensing. The Commission agreed regarding the lack of jurisdiction but would not release jurisdiction until the licensee had filled the regulatory gap by obtaining permits from the landowning federal agency.

In Central Maine Power Company, at the end of the original license, licensee decided not to apply for a new license and instead proposed transferring the project to another for non-FPA purposes. During the FERC review, licensee stated it would cease all jurisdictional activity and operate the project in run-of-river mode. Initially (January 1994), FERC required a surrender proceeding; however, FERC later (July 1997) determined that, because of the insignificant affect on downstream resources, no further proceeding was necessary. It is not clear from the case whether the insignificant affect was the result of run-of-river operation, or the small affect the project had on downstream project generation. It may also be that, given the number of years of administrative proceeding, the Commission was satisfied that a decommissioning-like record of future conditions had addressed any potential regulatory gap.

Contrary to PUD assertions, its case is very different from Central Maine. In Central Maine, at the time of license expiration, FERC knew exactly what would happen to the project facilities; they had been taken out of energy production and transferred to a

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50 Southern California Edison Co., 107 FERC at 61,220.
52 81 FERC ¶ 61,087 (1997).
53 Id. at 61,344.
54 Id.
town for recreational and environmental purposes. At the time of the transfer, FERC knew that the public interest was protected and the regulatory gap closed as the State of Maine had agreed to take over regulation of the project in the future. In the instant case, nothing is known about the PUD’s current and future plans for the Sullivan Creek Project. FERC has no knowledge whether the PUD plans to sell the project, whether prospective purchasers are financially or operationally responsible, or whether the future operator can or will capably address maintenance, safety or liability issues as they arise. In short, there is no record as to what plans or intents the PUD has as to life after FERC jurisdiction. Absent any information, let alone substantial evidence, about the PUD’s intent, FERC has no basis upon which to consider the public interest standard required in surrender cases. FERC decisions are required to be supported by substantial evidence, and failure to require that level of information results in unsupported, arbitrary and capricious decisions.

In contrast to this responsible history of addressing the public interest while addressing licensee needs, is the statement of the Director in the instant case: “the Commission’s jurisdiction over the project will cease as of the expiration of the project’s original license, without the need for any further action by the Commission or the

55 Central Maine, 81 FERC at 61,343.
56 Id. at 61,344; see also Arizona Public Service Co., 109 FERC ¶ 61,036, 61135-36 (2004).
58 Star Mill Inc., 112 FERC ¶ 62,131, 64,294 (2005) (Commission cites Decommissioning Policy for need to review transfers of increasing marginal projects, those likely to require decommissioning in near future, and to transferees lacking financial or operational capacity).
60 Southern California Edison Co., 107 FERC ¶ 61067, 61220 (2004); see also City of Phoenix, Arizona, 59 FPC 1061, 1071-71 (1977).
61 Pacific Gas and Electric Co. v. FERC, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (“A reviewing court sets aside final action of FERC if that action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); citing 5 U.S.C. § 706(2)(A) (other case cites omitted).
Licensee. 62 The director fails to acknowledge any public interest in his determination. He fails to discuss the decision in the context of the FPA’s comprehensive scheme and protection of public values. Rules the Commission has adopted for this situation are not mentioned. The Commission policy directly on point is not even acknowledged.

WDFW believes that the public interest deserves, and the FPA requires more than a ministerial termination of federal oversight. 63 The Commission’s authority, policy, and prior decisions rationally require the Commission rehear the Order and instead state, in the case no new FERC license is requested, a discussion of decommissioning must result.

62 Order, p.6.
3. The National Environmental Policy Act requires at least an environmental assessment of whether releasing the PUD’s Sullivan Creek Project from FERC jurisdiction is a major Federal significant action.

The Commission is subject to the National Environmental Policy Act of 1969 (NEPA),\(^{64}\) and must apply it in this case. NEPA makes environmental protection a statutory duty of every federal agency, and they are “not only permitted but compelled to take environmental values into account.”\(^{65}\) Regarding federal agency decisions, NEPA requires the preparation of an environmental impact statement for “all major Federal actions significantly affecting the quality of the human environment.”\(^{66}\) Rules of the Council on Environmental Quality implement NEPA and provide: “In determining whether to prepare an environmental impact statement the Federal agency shall . . . prepare an environmental assessment.”\(^{67}\) The exception to this rule is the case where the agency has determined this type of proposed project or federal decision is categorically exempt from NEPA requirements. Nothing in the Order cites to a categorical exemption or otherwise provides a basis to determine NEPA should not apply. If not categorically exempt, FERC must prepare at least an EA.\(^{68}\)

In fact, Commission NEPA rules address and require at least an environmental assessment (EA) if the Sullivan Creek Project license were to be surrendered or FERC was to otherwise terminate FPA jurisdiction.\(^{69}\) Projects subject to a FERC EA include “(13) Surrender of water power licenses and exemptions where project works exist or

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\(^{64}\) 42 U.S.C. §§ 4231-4370f

\(^{65}\) Arizona Public Service Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973) (citing Calvert Cliff’s Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971)).

\(^{66}\) 42 U.S.C § 4332(2)(c).

\(^{67}\) Steamboaters v. FERC, 759 F.2d 1382, 1392-93 (9th Cir. 1985) (citing 40 CFR § 1501.4(b)(1984)).

\(^{68}\) Steamboaters, 759 F.2d at 1393.

\(^{69}\) See 18 CFR § Part 380; 18 CFR § 380.5.
ground disturbing activity has occurred . . .” 70 The Sullivan Creek Project is a project clearly under a FERC license, facilities of the project currently exist, and ground disturbing activity has occurred.

Many of the Commission’s surrender decisions reflect the use of NEPA documents as part of the decision making record. 71 As the above cases show, the Commission is aware that a “regulatory gap” exists when the Commission terminates FPA jurisdiction over project facilities, especially when those facilities will continue to exist on the public landscape. A Sullivan Creek Project decommissioning discussion would create the record and provide the substantial evidence to support a Commission decision in this matter. However as it stands, nothing in the Order suggests FERC took the “hard look” at the potential environmental impacts of the decision releasing the Sullivan Creek Project from FPA jurisdiction without further public interest review. 72 Absent a record proving the “hard look” and providing the evidence to support such a decision, the Order fails to meet the required standard.

The Commission must rehear this matter and require an appropriate environmental assessment and engage in a record discussion of the effect on the public interest of PUD’s request to terminate FPA jurisdiction. Anything less fails to meet the requirements of NEPA.

V. CONCLUSION

For the reasons stated above, Washington Department of Fish and Wildlife respectfully request that the Federal Energy Regulatory Commission rehear and clarify

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70 18 CFR § 380.5(13).
72 Steamboaters, 759 F.2d at 1393 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976) (other cites omitted).
the Order by stating a further proceeding regarding decommissioning of the Sullivan Creek Project (FERC No. 2225) will be required prior to the expiration of the existing FERC license.

DATED this 16th day of August, 2007.

Respectfully submitted:

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[S]
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PROOF OF SERVICE

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DATED this 16th day of August, 2007, at Olympia, WA.

[Signature]
JO ANN BLAKE
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Submission Contents

Request for Rehearing and Clarification of State of Washington Department of Fish & Wildlife
WDFWFinalReqRehear97.doc......................................................... 1-17

Request for Rehearing and Clarification of State of Washington Department of Fish & Wildlife
WDFWFinalReqRehear97.doc......................................................... 18-34