



# RELICENSING REVIEW

Wednesday, August 20, 2008 • Vol. 5 No. 5

---

**[1] Appeals Delay Spokane 401; Tribe Invokes Never-Used CWA Clause**

Avista says Washington's Department of Ecology did not have enough evidence to justify the adaptive management provision included in the section 401 water quality certification it issued for Avista's Spokane River hydroelectric project. A paper company complains the 401 allows Avista to exceed water standards and accuses DOE of violating an agreement on how the 401 would operate. The 401 appeals join one already filed by the Sierra Club. The state Pollution Control Hearing Board won't hear the case until spring. *Also at [9], the Spokane Tribe has triggered a rarely-used provision of the Clean Water Act that could require FERC to hold a hearing on the adequacy of the 401s issued by Idaho and Washington while at [10], the Spokane River dissolved oxygen TMDL proposed by DOE is poised to unravel again.*

**[2] Dispute with Former Licensing Ally Delays Box Canyon Deal**

Angry at the dramatic escalation in cost estimates over the past decade for turbine upgrades, Ponderay Newsprint Company (PNC), once an ally in Pend Oreille PUD's effort to relicense its 77 MW Box Canyon project, is suing to have the upgrades removed from the license. It's tried to block a deal settling litigation over the license and threatened not to sign it unless its power supply contract is reformed. The PUD is fighting back, but doesn't deny costs have increased. *At [11], the PUD explains how the original 1999 estimate of \$17.2 million ballooned as of May to \$126 million.*

**[3] PacifiCorp, Cowlitz & NMFS Seek Rehearing of Lewis River Licenses**

Uncertainty over FERC's policy on cost caps and the requirement to file multiple license amendments to implement settlement terms are the main factors driving rehearing requests on new licenses for four Lewis River hydroelectric projects. FERC issued the new licenses in June for three projects owned by PacifiCorp and one owned by Cowlitz PUD. The utilities received 50-year licenses for

---

## This issue...

---

### RELICENSING

Year's Delay for Spokane 401; Tribe Tests Never-Used FPA Clause .....	[1/9]
Dispute with Former Licensing Ally Delays Box Canyon Deal .....	[2/11]
PacifiCorp, Cowlitz Seek Rehearing of Lewis River Project Licenses .....	[2/12]
Swift 1, Yale Power Costs Double; Swift 2 Up 12 Percent .....	[3/13]
Sturgeon Only Remaining Issue in Swan Falls Application .....	[4/14]

### DECOMISSIONING

PG&E Submits Battle Creek Amendment ....	[5/15]
Sullivan Surrender Rehearing Denied .....	[6/16]

### HYDROKINETICS

FERC Affirms Marine Sanctuaries are not Reservations .....	[7/17]
--	--------

### HYDRO BRIEFS

FERC Rejects Most Prospect 1, 2 & 4 License Modifications .....	[8]
Rising Costs End McSwain Addition as MID Ramps Up for Relicence .....	[8.1]

---

Merwin, Yale, Swift 1 and Swift 2, which have a total authorized capacity of 577 MW. In addition to numerous factual errors, the utilities say provisions of the licenses are inconsistent with the 2004 Lewis River settlement. *At [12], they says some of those inconsistencies could be "problematic." And at [13], even though the new licenses lower cumulative project generation by only a quarter of one percent, PacifiCorp's operating costs will increase between 50 and 100 percent, while those at the PUD's Swift 2 are rising only 12 percent.*

---

#### [4] Parties Agree on Swan Falls Application; Focus Turns to Hells Canyon

Idaho Power Company doesn't expect any objections from tribes or agencies on its final relicensing application for the 25 MW Swan Falls Hydroelectric Project, filed with FERC on June 26. The Fish & Wildlife Service's environmental concerns were mostly resolved before the final application was filed. Parties say the only remaining issue is how to address water quality for white sturgeon in the Snake River. IPC does have a problem in that a judge recently approved a water right allocation below the current license's minimum instream flow requirement. *Also at [14], the proposed white sturgeon management plan at Swan Falls depends on the outcome of a Hells Canyon Complex relicensing study.*

#### [5] PG&E Battle Creek Amendment Includes Dam Removal

PG&E last month submitted an application to amend the license for its 37.9 MW Battle Creek hydroelectric project, on Battle Creek in northern California. It's the beginning of the last major procedural hurdle for the mix of agencies and groups planning the \$101.5 million Battle Creek Salmon and Steelhead Restoration Project. The filing was triggered by the finalization of an agreement on the transfer of \$42.75 million in government money. FERC approval is expected in March 2009, with work set to begin next summer on the removal and modification of dams, installation of fish screens and ladders, and the construction of a 4,500-foot pipeline. *At [16], the work won't impose any direct costs on PG&E, but it will reduce generation at the sprawling project by 15 percent and double its annual cost of power.*

#### [6] FERC Denies Rehearing on Sullivan Surrender

Pend Oreille PUD's second attempt to persuade FERC that a surrender proceeding is unnecessary for the Sullivan Creek project was no more successful than its first. The PUD filed a longer pleading in its second rehearing request, and FERC responded July 18 with a longer order denying it. But the commission did approve a new scheduling order that will allow the PUD, the Forest Service and other parties to negotiate a deal setting the framework for surrender. *Also at [16], the PUD hasn't decided if it will appeal FERC's latest rejection.*

#### [7] FERC Affirms Sanctuaries are not Reservations

National Marine Sanctuaries are not "reservations" for the purposes of the Federal Power Act, FERC affirmed in July. NOAA Fisheries' Office of National Marine Sanctuaries said it had not yet decided whether to appeal the ruling, which came on a rehearing request NOAA filed challenging FERC's issuance of the first-ever license for a hydrokinetic project—Finavera's 1 MW Makah pilot off the coast of Washington State. FERC dismissed every argument NOAA mustered, leaving it unable to file mandatory section 4(e) conditions. *But at [17], it clarified that the license does not mean the project is not subject to the National Marine Sanctuaries Act.*

### HYDRO BRIEFS

#### [8] FERC Rejects Most License Modifications Sought for Prospect 1, 2 & 4

FERC has rejected most of the changes PacifiCorp sought in a rehearing request filed in connection with the new 30-year license the commission issued April 8 for the 37 MW Prospect 1, 2 & 4 project (FERC No. 2630).

FERC refused to give PacifiCorp more time to determine what safety measures should be taken to protect boaters in a stretch of the Rogue River between the project's two powerhouses. The powerhouses have relief valves that discharge water at high pressure during certain operations. The license gave the utility 90 days to evaluate the appropriate measures, but PacifiCorp said it needed six months to do a meaningful analysis and because it still hopes FERC will modify the whitewater boating flow release and access plans.

---

RELICENSING REVIEW is a report to clients of Energy NewsData covering dam relicensing issues in the Western United States. Report text section Copyright © 2008, Energy NewsData Corporation. All rights reserved; no reprinting without permission. Editorial Offices, Seattle: mail: PO Box 900928, 98109-9228; express: 117 W. Mercer St. Suite 206, 98119. Voice: (206) 285-4848; fax: (206) 281-8035. Internet: [www.newsdata.com](http://www.newsdata.com). Management and Staff: President & Publisher: Cyrus Noë • Vice President & Controller: Mary Noe • Editor: Ben Tansey • Contributors: Libby Tucker, Susan Dyke • Editorial Assistance: Jude Noland, Michelle Noe • All unsigned text by Ben Tansey • Production: Michelle Noe • Information Systems Director: Daniel Sackett • Business Development Director: John Malinowski.

---

"PacifiCorp misunderstands the purpose and scope" of the requirements, according to the June 19 order signed by FERC deputy secretary Nathaniel J. Davis, Sr. They are not premised on the outcome of requests for changes, but on boater safety.

Davis also refused to delete the three-year whitewater boating flow release study, saying the utility raised no issues that had not already been considered, that no incidents involving the relief valves have been reported, and that the utility is supposed to be reviewing the current safety plan.

Nor did Davis agree to eliminate the requirement for a boating access study plan for Powerhouse 2. PacifiCorp argued the roads and parking area are not adequate to support such access, and that adding them would compromise project security. FERC said again the utility raised no new issues and that the license order reasonably found the concerns could be addressed by limiting access to the eight days a year when whitewater flows are released under the license and through continued monitoring. The license also provides for a report on safety issues or other hazards after three years, whereupon PacifiCorp could seek changes to the access provisions.

The commission also denied PacifiCorp's request to extend to one year the six-month deadline for an erosion and sediment control plan. PacifiCorp cited the complexity of the project—it has three diversion dams, a reservoir and three powerhouses—but Davis said PacifiCorp has been operating the project for over 50 years and so "should be familiar with the site conditions and any maintenance issues associated with ongoing project operations."

But Davis did agree to clarify some minor points on the license's provisions for small animal access over project canals. He also agreed to correct the figure for the project's authorized capacity. The license said it was 41.56 MW—"a figure provided by PacifiCorp in its relicense application and used throughout the relicense proceeding. [But] on re-hearing, PacifiCorp asserts for the first time that the 41.56 MW figure is incorrect." He said the material the utility provided backed up this correction, and so the new authorized capacity of the project is 36.76 MW.

### **[8.1] Rising Costs End McSwain Addition as MID Ramps Up for Relicence**

Citing "escalating material costs," the Merced Irrigation District this month told FERC it is withdrawing its application to add the 1.8 MW McSwain Energy Recovery Unit to its existing 103.5 MW

Merced River Hydroelectric Project (aka McSwain and New Exchequer) on the Merced River in Mariposa County, California (FERC No. 2179).

MID filed an application in November 2006 to amend the McSwain/New Exchequer license for the new unit, followed in March 2007 by a supplement documenting consultations. "Since preparing its amendment-application, the districts' projected costs to develop [the project] have increased significantly," wrote Don Pope, who took over as general manager in June. "The district has determined it is not economically feasible to proceed with licensing and construction of the unit at this time."

Pope told *Relicensing Review* the project is suspended, not abandoned. MID was at the "30 percent design review" stage and had spent roughly a quarter million dollars on the project. The district's finance plan was a combination of conventional and Clean Renewable Energy Bonds (CREBs). But he said MID did not get a large enough CREBs allocation, especially as the project cost rose in two years to \$9 million from \$4 million. He said the engineer's estimate of the cost of the turbine alone jumped 45 percent in that time.

The withdraw filing came almost 50 years to the day after FERC announced MID had applied to build its 89 MW McSwain & New Exchequer project for \$44 million. The project's 50-year license took effect in 1964. MID has already set aside \$6.7 million for, and held two public meetings in anticipation of, filing a relicense application no later than Feb. 28, 2012. A pre-application document is set to be filed in mid to late October.

## *RELICENSING*

### **[9] Year's Delay for Spokane 401; Tribe Tests Never-Used FPA Clause • from 1**

Appeals of the section 401 water quality certification issued June 10 in Washington for Avista Utilities' Spokane River hydroelectric project are likely to delay finality in the proceeding for up to a year. In addition to the Sierra Club, appeals have been filed by a paper company and the utility itself.

The Washington State Pollution Control Hearing Board scheduled a hearing for April 27 through May 8, 2009 and the three-member panel has 90 days after that to issue a ruling, which itself is subject to requests for "reconsideration."

The Spokane project encompasses four developments totaling 123 MW in Washington State—two

in downtown Spokane (Upper Falls and Monroe Street) and two down river from Spokane (Nine Mile and Long Lake); and a fifth development upstream in Idaho—15 MW Post Falls. Avista filed a separate relicensing application for Post Falls (FERC Nos. 2545 and 12606), but FERC, which did an environmental review covering all five projects, has not ruled on the licensee's request to "bifurcate" Post Falls from the others.

Both Washington's Department of Ecology (DOE) and Idaho's Department of Environmental Quality (DEQ) issued 401s for the project in June, but no appeals were filed of the Idaho 401, which dealt with a narrower range of issues.

**In a separate action**, the Spokane Tribe has invoked an obscure section of the Clean Water Act that could force a public hearing at FERC if the tribe finds something it doesn't like in either state's 401. Experts said the clause, section 401(a)(2), has never been used in a relicensing proceeding. It requires FERC to notify EPA that it received the 401s. EPA must then make a determination about their affect on downstream states and tribes and notify them of their rights.

The tribe asked the Environmental Protection Agency to invoke the clause. In a set of letters dated August 15, EPA's Office of Water and Watersheds notified FERC that based on a "limited review" of the Washington and Idaho 401s, it believes the discharges they allow "may affect the quality of water" in Washington State and at the Spokane Reservation—which is one mile downstream of Long Lake. Both have 60 days to notify FERC and EPA of any objection they may have "to the re-issuance of the license" and to request FERC hold a public hearing on the matter.

DOE's Jim Bellatty said the provision may help jump start negotiations between DOE and DEQ on a memorandum of understanding to work out details reconciling differences for the flows from Post Falls Dam. The question is over how to implement findings once new studies are completed. The agencies had a preliminary meeting some weeks ago but haven't met since. If an MOU can't be worked out by the 60-day deadline in the EPA letter, DOE might request FERC hold a hearing on DEQ's 401.

The provision was invoked after the tribe's legal review of the CWA. Brian Crossley, the Spokane Tribe's Water and Fish Program Manager, said the tribe is concerned that the 401 is not specific enough about what actions Avista must take to meet dissolved oxygen (DO) and total dissolved gas standards. "It says [they'll] develop a plan, which is vague." Crossley said he expects to have discussions

with Avista about how to strengthen its commitment to meeting the downstream water quality standards for DO, TDG and fish. The outcome of those talks will guide the tribe's decision about whether to ask for a FERC hearing.

The tribe is wary of what it can do, however, because in an earlier settlement over another Avista project down stream, it agreed not to challenge the Spokane River relicensing.

**In its 401**, DOE said the utility must provide aesthetic flows of 300 cfs from Memorial Day to the end of September at the project's downtown Upper Falls development. It set a minimum flow for fish protection of 850 cfs at Upper Falls and nearby Monroe Street during summer and 1100 cfs the rest of the year. If that cannot be achieved "due to insufficient flow" above those projects due to conditions beyond Avista's control, the utility must meet with DOE to discuss "adaptive management" remedies.

Although the aesthetic flow issue commanded the most public attention, the 401 appeals center on how DOE approached "marrying up" the 401's ten-year compliance schedule for DO at Long Lake, which is well west of Spokane, with the new total maximum daily load (TMDL) standard the agency is trying to get approved for Long Lake's 23.5 mile reservoir.

The Sierra Club appeal says the 401 fails to meet the state standard of providing a "reasonable assurance" that applicable state water quality standards will be met, especially in the Upper Falls portion of the river, with respect to DO, toxic pollutants, fisheries and fisheries habitat. This failure is in part because the 401 defers the design, completion and development of studies and mitigation measures until after the license is issued.

Avista's appeal makes 10 arguments, nearly all questioning DOE's authority in various respects. It says DOE lacks authority to revise the 401 after issuance or to require Avista to obtain additional state permits, cease project operations or obtain DOE approval before making changes to the project. It argues only FERC can enforce the 401; that several conditions are not supported by substantial evidence; and that DOE cannot impose an adaptive management process with respect to fish protection flows that rely on projects not considered in the 401, namely, Post Falls. It wants clarification that Post Falls is beyond DOE's jurisdiction.

Avista is also asking the PCHB to strike all conditions not supported by substantial evidence or predicated on actions outside Avista's control.

For example, it said a section of the 401 requires it to evaluate the composition of sediments removed from above Monroe Street and placed below the dam "even though there is no evidence" Avista's facilities affect the composition of those materials.

Another section requires Avista "to implement a seven-step adaptive management process" anytime river flows drop below 850 cfs for more than five days "even though the four Avista dams subject to this [401] have no effect on those flows."

Avista said the 401 included a detailed definition of "adaptive management" that DOE "had not shared with Avista during the entire alternative relicensing process, and that did not have the benefit of public comment." The definition "presupposes" the project is affecting natural resources and there are therefore potential remedial measures. But in the 401, the term applies only to flows between downtown Spokane and the next lowest project, Nine Mile Dam. "Because flows in this portion of the river are not controlled" by the run-of-river downtown dams, "there is no basis for presupposing a project effect on fish due to flows, and therefore no potential for remedial measures."

DOE sought "unfettered discretion" by including a set of "biological objectives" that Avista said it never saw before the draft 401 was issued and which are not a part of DOE's standards. The agency "reserves to itself the prerogative to revise" the objectives and applicable implementation measures "as it sees fit," including changes to operations and physical structure.

But the 401 should not "require compliance with biological objectives that were not the subject of a settlement agreement, and that are so broad and vague as to effectively free [DOE] from the constraints of its own water quality standards."

DOE "repeatedly reserves authority" in at least ten sections to make changes to the 401 over the license term if it determines the provisions are not adequate, the utility also complains.

**Spokane-based Inland Empire Paper Company (IEP)**, which has a permit to discharge effluent into the Spokane River, also filed an appeal. It says the 401 allows Avista to exceed the state regulatory limit on water quality compliance schedules by giving it "up to ten years from the date FERC issues a license." It says DOE violated an agreement it signed to develop a TMDL on DO in coordination with the 401.

Long Lake dam, the lowermost development that impounds the 23.5 mile-long Lake Spokane

reservoir, has been formally recognized by DOE as the primary cause of low DO levels, IEP notes. The 401 "disregards this evidence and allows Avista additional time to study and evaluate its contribution." It believes DOE should have required Avista to prepare a plan to address the problem before issuing the 401.

The company notes that in March, 2007, DOE signed a memorandum of agreement for the development of a DO TMDL in the lake in which it agreed to address Avista's share of responsibility for DO in the 401. The draft TMDL names IEP as one of five point sources. IEP's allocation is stated in its discharge permit but "Avista's participation in the TMDL implementation is essential to achieve water quality standards. In light of the substantial contribution to the DO problems in Lake Spokane, Avista should have been included in the TMDL and received a load allocation."

A 2003 state law requires dam operators to develop plans offering a "reasonable assurance" that water quality standards will be achieved within ten years, or 2013. But the 401 only requires that Avista prepare a plan for water quality attainment within two years of FERC's issuance of the license. It therefore violates the state law by "granting Avista a compliance schedule that is longer than ten years."

"As it stands now, the compliance schedule in the 401 is such that the dam owners aren't responsible for acting on anything until FERC issues the license," Doug Krapas, IEP environment manager told *Relicensing Review*. "That could be five years down the road" or even longer by the time the study information comes out. Meantime the other dischargers must comply with the 10-year schedule under the TMDL. "We want the two to be consistent." He said IEP has already spent \$3 million to reduce its emissions of phosphorous that gathers behind the dam, feeding plants that consume oxygen.

## [10] DOE Awaits Outcome of Internal EPA Discussion on Spokane Permits • from 1

The outcome of an internal discussion at the Environmental Protection Agency may have major implications for the draft water quality standards and permits issued in Washington and Idaho along the Spokane River, but the impact on the section 401 certification for Avista's Spokane River hydroelectric project is unclear.

A significant issue in the Section 401 appeals filed by parties in the Spokane River relicensing is the degree to which the timeline for compliance with dissolved oxygen (DO) standards match up with

those in a draft water quality standard the state Department of Ecology (DOE) has prepared for Long Lake (aka Lake Spokane), a 23-mile long reservoir created by Long Lake dam, the project's lowest development.

DOE began preparing the DO standard—a total daily load management, or TMDL—back in 1999. Once the TMDL is ready, National Pollutant Discharge Elimination System (NPDES) permits can be prepared for dischargers along the river—in this case a handful of municipal wastewater treatment plants and paper mills in Washington and Idaho. DOE writes the permits for Washington dischargers while in Idaho, responsibility for writing such permits falls to the EPA.

The Sierra Club and others say studies have shown that if the dams were removed and existing dischargers remained, the state standard would be met. Others point out that while its true there would be no DO problem absent the reservoir, that's because there'd be no lake in the first place.

DOE's Jim Bellatty said the question of how Avista's contribution to DO would be handled was dealt with back in 1999. Unlike treatment plants and paper mills, Avista was not a point source. "They are not a source of nutrients, ammonia or [biochemical oxygen demand (BOD)]," he notes. "It was decided if we need to deal with Avista's contribution to DO, we'd address it in a 401 process and that is what we have done." Now, he said the Sierra Club and IEP are complaining there's a "disconnect" between the TMDL and 401 compliance schedules.

In addition to the 401 appeals, however, the TMDL is on hold. Bellatty said that's because EPA has asked DOE to hold off until it can resolve an internal matter that emerged after the Sierra Club sent a letter last June to EPA's Washington D.C. headquarters.

In that letter, Bonne W. Beavers, attorney for the Sierra Club Upper Columbia Group, said the organization was concerned about "Region 10's abandonment of a watershed-based approach to bi-state water quality issues on the Spokane River." She wrote that the Idaho draft permits, combined with effluent from four municipal wastewater treatment plants in Washington, constitute "practically all of the nutrient loading" in the Spokane River and violate the state's standards.

The TMDL distinguishes between loading caused by human activities and natural "background" loading. The permits EPA has drafted apportion all

the human-caused DO loading allowed under the TMDL at Lake Spokane to the dischargers in Idaho, and therefore none to those in Washington. "Clearly, once these discharges cross the state line and mix with just a fraction of Washington loading, the standards will be violated," Beavers wrote. She said this apparent policy change "has the potential to negatively impact local clean up efforts as well as set a dangerous precedent for other watersheds nationwide."

In the earlier DO TMDL, "the boundary conditions at the state line did not include the Idaho point dischargers," she noted. Rather, discharges from both states were considered in determining how much loading could be added "beyond background" to avoid causing a violation. "Now Region 10 has directed [DOE] to include the Idaho dischargers as 'background' from which discharges in Washington may cause further decline. The cumulative approach enables "twice the allowable decline. Using this type of math will never result in restoration of Lake Spokane."

Christine Psyk, associate director of EPA Region 10's Office of Water and Watersheds, said the Washington TMDL includes "a very ambitious, natural condition" standard for DO in Lake Spokane. Deviation is allowed, "but only a very little, resulting in stringent reductions for point and non-point dischargers." TMDL's only set a target for how much of a pollutant a water body can handle before a violation occurs and apportions that to the various sources. NPDES permits are the means by which the apportionments are enforced.

EPA must write the Idaho discharge permits to comply with Washington state water quality standards. Psyk said three draft permits have been written and meet those standards. The drafts were released for comment in March 2007 but have been in limbo ever since. She acknowledged the final writing of the permits has taken "longer than usual. These are challenging permits. They effect downstream state standards. There are a lot of different issues."

Psyk also acknowledged that most recently, the delay has been due to "internal discussion" at EPA that includes meetings among personnel from Region 10 and headquarters. Regarding the nature of the discussions, she would say only that it has to do with the "legal defensibility" of the Idaho permits and the need to make sure it is "as solid as it can be."

Asked about the state boundary question, she said under the permits, "water quality delivered at the

---

**'Using this type of math will never result in restoration of Lake Spokane.'**

---

border is for all intents and purposes clean and akin to background...It assumes upstream Idaho sources are controlled to stringent limits that then deliver phosphorous levels similar to natural background."

The Sierra Club regards the approach as blatantly transparent and political. "The emperor has no clothes," said Beavers, adding that "jaws dropped" when the EPA pointman at the time read the new approach to participants in the TMDL development. Since "natural background" means non-human activity, she wonders if this means the EPA "doesn't consider the Idaho dischargers human?"

Doug Krapas, environmental manager for the Inland Empire Paper Company, which is slated to receive a new NPDES permit under the TMDL, said the original 2004 draft of the TMDL included a very stringent standard for phosphorous, which can contribute to DO. Dischargers considered this unattainable and put together a "use attainability analysis" based on preserving existing uses. But the state was unwilling to accept the UAA, so a two-year collaborative ensued yielding a Management Implementation Plan that included a memorandum of agreement.

The MOA/MIP was included in a new TMDL, Krapas said, but the EPA complained it did not meet state water quality standards, so DOE revised it to include a shorter compliance schedule and more stringent discharge limits, including 8 parts per million for phosphorus, which was below the 10 ppm in the original TMDL that the dischargers already considered unachievable. That was "significantly different from what we'd agreed to," he said. "That's where we are today." In addition, he said, DOE went back on a pledge to address Avista's contribution to DO in the 401 certification.

DOE's Bellatty said "What we told everyone all along is that we felt we could approach Avista's DO contribution to Lake Spokane in the 401 equally as well as in the TMDL. [In the 401], we set up a process to do that. It enables us to move ahead and understand Avista's contributions to the problem in an adaptive management approach within a compliance schedule."

The Sierra Club's Beavers agrees the dispute goes back to the DO TMDL that DOE first issued in 2004. She said the dischargers spent a million dollars assembling the UAA to achieve lower standards while another group of stakeholders worked with DOE on a plan to inform the TMDL. DOE worked extensively with the UAA group but at the end of the day had a record "showing the UAA was baloney and they couldn't support it." DOE issued a "legally

and scientifically defensible" TMDL in 2004, but the dischargers threatened to sue. DOE opted for a collaborative that went on for two years and generated a set of "foundational concepts" to guide a new TMDL; the concepts paper was signed only by DOE and the dischargers. At that point, "the whole thing fell apart," she said.

Some government employees were so unhappy with DOE's turn-around, they balked. The Sierra Club cites Drea Traeumer, who once served as DOE's lead for the DO TMDL. She resigned from the agency in August 2007 and in January gave testimony to a state legislative committee working on the state's Whistleblower statute.

Traeumer confirmed to *Relicensing Review* that she told the committee "There was a lot of push back from the dischargers, and Ecology chose to enter into a two-year negotiation to come up with a result that would create capacity" for the continued discharge of phosphorus. "And in order to effect this result, policy decisions were made at the top which would then drive the science to come to those conclusions." She said the TMDL is "scientifically indefensible and will violate state water quality laws."

Traeumer also said her predecessor at DOE, Ken Merrill, who co-authored the 2004 TMDL, was effectively removed from his position after disagreeing with the agency management's decision to adopt the discharger's approach. Merrill confirmed the account last year to the *Spokesman Review*, adding, "I was trying to make it legally, scientifically, and technically defensible."

Beavers said the new TMDL came out in 2007 with "bogus numbers" and EPA issued draft discharge permits in Idaho that "were also defective" while DOE wrote permits for Washington dischargers that "were also heinous." DOE reviewed the comments on the TMDL and re-issued it, but "it was just as bad."

Meantime, DOE awaits the outcome of EPA's internal discussion. It was planning to put its NPDES permits out for a second round of public comment, but that too is on hold. If EPA sticks with its existing position on the state boundary issue, DOE can go forward with the submission of its TMDL and second round of permit comments. But if EPA takes a new approach, the state may have to rewrite the TMDL and the Washington permits, while EPA would presumably issue new Idaho permits for comment.

All of the acrimony over the 401 and TMDL may have an ironic consequence. Recalling that many of the complaints in the 401 appeals revolve around the

mismatched timing of the 401 and TMDL compliance schedules, DOE's Bellatty noted there is now "an opportunity to synchronize the schedules"—albeit only because the 401 is on appeal and the TMDL on hold.

### **[11] Dispute with Former Licensing Ally Delays Box Canyon Deal • from 2**

Ponderay Newsprint Company (PNC), once an ally in Pend Oreille PUD's effort to relicense its 72 MW Box Canyon project, has become its biggest foe. Citing the seven-fold escalation in cost estimates over nine years for turbine upgrades that are included in the 2005 license, the PUD's largest industrial customer is refusing to sign a mediated draft settlement of the litigation it co-filed with the PUD over license terms. PNC has also tried to get an injunction preventing the PUD from signing the settlement and is pursuing litigation to force removal of the upgrade from the license.

A court denied the injunction "but obviously the PNC lawsuit has raised new issues the parties have to deal with," said PUD attorney Jim Vasile. He declined to discuss details of the mediation but confirmed another conference call is set for next month. PUD Regulatory Director Mark Cauchy said the litigation "does put pressure on the district."

Besides PNC and the PUD, other parties to the draft settlement include the Department of Interior, US Forest Service and the Kalispel Indian Tribe.

PNC, which gets most of the output from Box Canyon, was also haggling for changes in the terms of its power supply contracts. The company did not respond to repeated requests for comment.

PNC is owned by North Carolina-based Bowater Inc. Since Bowater merged last October with Montreal-based Abitibi, the combined company's stock price has steadily declined from over \$35 to below \$10.

The new 50-year license FERC issued for Box Canyon (FERC No. 2042) in July 2005 was the subject of multiple rehearing requests. PNC and the PUD argued section 4(e) mandatory conditions filed by Interior and the Forest Service, including those for fishways and a trout restoration program, were costly and unreasonable—while the agencies argued FERC improperly left out some of their 4(e) conditions. In November 2006, FERC made some adjustments, but decided it didn't have authority to exclude 4(e) conditions it considered unreasonable or unlawful and restored them to the license. The PUD and PNC sought review in the DC District Court of

Appeals, which stayed the disputed conditions pending the litigation (06-1387).

In early 2007, the parties agreed to enter a mediation that yielded a draft settlement earlier this year. None of the five parties had formally approved the draft, but it was in the process of being finalized in April. "There were still a few issues to be resolved and suddenly PNC said they were not going to sign it," said PUD attorney Jerry Boyd.

The license also included a requirement to replace all four generators and turbines at the project, two of which were to have "fish friendly" minimum gap turbine runners. In its final EIS, FERC said the upgrades were "largely" to reduce the level of total dissolved gas. The turbine upgrades were not among the terms challenged in the litigation. Last summer, the PUD estimated the upgrade as currently configured will increase generation by 43,400 MWh and reduce TDG by 28 percent during spill events.

PNC has told the PUD it was surprised in early May to hear that cost estimates for the upgrade program had increased considerably. Likewise, the PUD said it was surprised last June to learn of PNC's concerns over cost increases. However, one PUD affidavit suggests it knew of the concerns by last March, while the PUD has documented that many of the cost increases have been a matter of public record over the years.

According to the minutes of a May 27, 2008 PUD board meeting, chairman Daniel Peterson asked PNC "to discuss their statement that they are refusing to sign the settlement agreement due to the increased costs for the turbine upgrade project."

Paul Machtolf, PNC vice president and resident manager, told the board it should hire an independent consultant to evaluate the project "due to the extreme cost increase since it was initiated several years ago," according to the minutes. He questioned the need to replace all four turbines and generators and said "it does not make sense to sign an agreement that his company still questions." But he said he would sign if the independent consultant's analysis agreed with the PUD's.

Also according to the minutes, the PUD's attorney, Jerry Boyd, and its consultant, Jack Snyder of EES Consulting, warned of significant risks if the turbine upgrades were not undertaken as planned. Snyder said the work must be done by 2013 to avoid violating the license. Later Snyder also said changing the program as PNC recommended could cost the PUD a reduction in the 50-year license term; force