

EXHIBIT F

16 FERC P 61044 (F.E.R.C.), 1981 WL 33308
**1 Commission Opinions, Orders and Notices

United States Department of the Interior
City of Seattle, Washington

Docket No. EL78-36

Project No. 553

Order Declaring Interim Settlement Effective and Partially Releasing a Condition
(Issued July 24, 1981)

***61078** Before Commissioners: C.M. Butler III, Chairman; Matthew Holden, Jr., and J. David Hughes.

Each of the signatories to the document entitled "Submission of Offer of Settlement" has submitted to the Director, Division of Hydropower Licensing, a timely unconditional acceptance of the conditions of approval of the Settlement Agreement that are set out in the Order Conditionally Approving Interim Offer of Settlement, issued herein on May 12, 1981. Accordingly, as provided by Ordering Paragraph (B) of that order, the Settlement Agreement is declared effective as of that date.

While National Marine Fisheries Service (NMFS) accepted the conditions, it requested consideration of certain comments pertaining to the condition in the penultimate paragraph of the body of the order, specifically, "that Seattle will be required to restore the present operating regime with respect to the disputed flow within 60 days after a petition is filed with the Commission, unless otherwise ordered by the Commission." NMFS was joined by the Sauk-Suiattle Indian Tribe, the Upper Skagit Indian Tribe and the Swinomish Tribal Community. We are treating their requests as motions for relief from that condition.

The Settlement Agreement provides for a two-year modification of the operating regime of Project No. 553 to enhance the habitat of the Skagit River for anadromous species. It also provides for a concurrent study of possible adverse effects of the increased flows on the generation of power and recreation, as well as the probable beneficial effects on the fishery.

Article III of the Settlement Agreement provides a procedure for modifying the flows of the river in the event of "severe, unanticipated impacts" from the increased flows under the agreement. It says that any party to this proceeding may request a change, and that if the parties cannot reach an agreement, the party requesting the change may petition the Commission for resolution. Article IV of the Settlement Agreement provides, in this connection, that the licensee of Project No. 553, the City of Seattle (Seattle), shall continue to provide the flows specified in the agreement "unless a specific disputed flow restriction under Article III has remained unresolved for a period of six months after a petition to the Commission." But it does not indicate what Seattle is to do in the event of such unresolved disputed flows.

We called Article III a "safety valve" when considering approval of the Settlement Agreement. Six months seemed too long a waiting period for modifying flows in the event of "severe, unanticipated impacts", and it also seemed that Seattle should be given a specific obligation rather than full discretionary authority. Accordingly, approval was conditioned on reduction of the period to 60 days and, in framing a specific obligation, on restoration of the *status quo* at the time of consideration of the Settlement Agreement.

****2** In its comments, NMFS calls Article III an "escape clause" notes that Article I, Section 4, authorizes broad "action" in *bona fide* emergencies, and says that Article III contains a standard and procedure for modifying flows. Since NMFS's comments indicate that Article III addresses flow changes of less immediacy and more permanency than appeared at the time of considering the Settlement Agreement, the six months' period specified in Article IV now appears to be reasonable.

With respect to Seattle's automatic obligation to restore the *status quo ante*, NMFS points out that if the fishery interests petition for more flows, automatic restoration will operate *against* them, whereas if the power and recreation interests petition for less

flows, automatic restoration will operate *for* them. In other words, NMFS infers that any predetermined direction to Seattle with respect to an operating regime is bound to be arbitrary, and that full discretionary authority is the only neutral course.

Seattle's authority to modify the operating regime of Project No. 553 will arise under the Settlement Agreement only if a petition for resolution of a disputed flow is not acted upon within six months. Any modification pursuant to that authority should be subject to the Commission's approval, modification or other ***61079** further order. Accordingly, the condition in question is released to the following extent:

It is a condition of approval of the Settlement Agreement that if the Commission does not act on a petition for resolution of a disputed flow within six months after it is filed, Seattle will have authority to modify the operating regime with respect to that flow within the limits of the requested change, subject to the subsequent approval, modification or other further order of the Commission.

In other words, the Commission will have the first opportunity to resolve the disputed flow, as provided in the Settlement Agreement. If the Commission does not act on the petition within six months after it is filed, Seattle may, in its discretion, or may not, modify the operating regime as to the disputed flow within the limits of the requested change. If Seattle does not modify the operating regime, the petition will remain pending for Commission action after the six month period; or, if Seattle chooses to modify the regime, the petition will remain pending for Commission approval, disapproval or modification of Seattle's action—which last point does not appear to be addressed by the Settlement Agreement, and is what remains of the original condition.

Since we consider the instant action to be a partial release of a condition that we imposed, rather than an imposition of a new condition, and since the signatories to the document entitled “Submission of Offer of Settlement” have accepted the condition, there is no reason for its submission to the parties.

The Commission orders:

The condition in the penultimate paragraph of the Order Conditionally Approving Interim Offer of Settlement, issued May 12, 1981, is partially released as set forth in the body of this order.

Federal Energy Regulatory Commission
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