UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Adirondack Hydro-Fourth Branch, LLC Project No. 3605-036

ORDER DENYING REHEARING

(Issued October 27, 2004)

1. The Department of the Interior has filed a request for rehearing of an order by Commission staff approving and modifying recommendations regarding fish bypass facilities at Adirondack Hydro-Fourth Branch, LLC's Fourth Branch Hydroelectric Project No. 3605, located on the Mohawk River in Saratoga County, New York.[1] For the reasons discussed below, we deny rehearing. This order is in the public interest because it resolves the issue of the exemptee's current obligations with respect to fish passage.

Background

2. In 1983, the Commission issued an exemption from licensing for the 335-kilowatt Project No. 3605, as a small hydroelectric project of five megawatts or less.[2] During the exemption proceeding, the New York State Department of Environmental Conservation (NYSDEC) recommended that, upon completion of the project, the exemptee perform studies to determine the impact of turbine mortality on anadromous fish and to provide diversionary structures or fish screens, if NYSDEC determined that they were necessary. *See* letter to Kenneth Plumb (Commission Secretary) from Murdock M. McKenzie.

---

[1] 106 FERC ¶ 62,214 (2004).

[2] *See Mohawk Paper Mills, Inc.*, 22 FERC ¶ 62,267. The exemption was issued pursuant to section 408 of the Energy Security Act of 1980, Pub. L. 96-294, 94 Stat. 611, which amended, *inter alia*, section 405 and 408 the Public Utilities Regulatory Act of 1978, 16 U.S.C. § 2601, *et seq*. *See* 18 C.F.R. Part 4, Subpart K (implementing regulations).

The exemption has been held by a number of different entities. For convenience, we shall generally refer herein to "the exemptee."

Standard article 2 of the exemption required that the project comply with any terms and conditions that had been set by state and federal fish and wildlife resource agencies.[3] The study, which ultimately included an examination of the impact of the project on juvenile blueback herring, began in 1989.[4]

3. In 1991, the exemptee filed an application to amend the exemption to raise the height of project's flashboards, in order to allow the project to generate the amount of power originally contemplated. In response to the application, the U.S. Fish and Wildlife Service (FWS) commented that raising the height of the flashboards, and thus the level of the project impoundment, could potentially impact juvenile and adult outmigrating blueback herring. FWS noted that the exemptee had yet to complete the juvenile blueback herring study, and recommended that, after consulting with it, the National Marine Fisheries Service, and NYSDEC, the exemptee should develop a plan to monitor the effectiveness of downstream fish passage facilities.

4. In its order approving the amendment, Commission staff concluded that the exemptee should continue the initial juvenile blueback herring study for one year after the flashboard were installed, and then file the results, along with comments from the federal and state resource agencies, for Commission approval. If the study results showed that modification of project operations or facilities was necessary to minimize impacts on juvenile herring, the exemptee should include with their filing recommendations for such actions. In addition, the exemptee was to develop a plan to assess the project's impacts on adult outmigrating blueback herring.[5]

5. On September 27, 1993, as supplemented on November 15, 1993, the exemptee filed a plan to construct and test a downstream fish passage facility, in lieu of performing additional studies and assessing project impacts on adult blueback herring, as required by the December 16, 1991 Order. FWS concurred with the proposal, and NYSEC had no objection to it.[6]

---

[3] *See* 22 FERC at 63,386.

[4] *See* 73 FERC ¶ 62,038 at 64,141 (1995).

[5] *See* 57 FERC ¶ 62,210 (1991).

[6] *See* 66 FERC ¶ 62,040 at 64,138.

6. By order dated January 26, 1994, Commission staff amended the exemption and approved the fish passage facility plan.[7] The order required the exemptee, in conjunction with FWS and NYSDEC, to develop a plan to test the effectiveness of the proposed facility.[8]

7. On October 18, 1995, Commission staff issued an order modifying and approving the study plan proposed by the exemptee. The Commission approved the exemptee's proposal to test the effectiveness of its fish bypass facility, and to file the results with the Commission. The Commission also required the exemptee to file a plan for a "Phase II" efficiency study to determine if any modifications were necessary to improve the facility's performance.[9]

8. On November 5, 1997, the exemptee filed with the Commission a letter it had previously sent to FWS and NYSDEC containing a Phase II study plan to "focus on determining what, if any, modification to the existing fish passage facility is necessary to improve the performance of the facility."[10] The plan set forth a methodology for collecting wild juvenile blueback herring that had passed through the project's fish passage facility, and comparing their survival rate to that of a control group of fish collected upstream of the facility.[11]

9. By letter dated November 6, 1997, Commission staff acknowledged receipt of the study plan and reminded the exemptee that following completion of the study, it was to file the results and any proposed modifications to the fish passage facility, along with resource agency comments. FWS and NYSDEC were served copies of staff's letter.

---

[7] *Id.*

[8] *Id.* at 64,139 (ordering paragraph (B)).

[9] *See* 73 FERC ¶ 62,038.

[10] *See* letter from David G. Crandell to Sherry Morgan (FWS Field Supervisor) and Timothy Post (NYSDEC Conservation Biologist) (dated October 3, 1997).

[11] Prior to Commission receipt of the Phase II study plan, FWS filed a letter it had sent to the exemptee commenting on the plan. *See* letter to David G. Crandell from Sherry W. Morgan (dated October 29, 1997). Among other things, FWS stated that the Phase II plan should be filed with the Commission for approval, that the plan should test the efficiency of the fish passage facility (*i.e.*, not just survival rates but the rate at which fish used the facility), and that the resource agencies had indicated that survival and efficiency testing should be conducted for both juvenile and adult herring.

10. On May 27, 2003, as supplemented on December 31, 2003, the exemptee filed a report entitled *Summary of Investigations—Evaluating the Effectiveness of the Downstream Fish Passage Facility at the Mohawk Paper Mills Project*. The exemptee made the following recommendations for facility operations: (1) provide a total attraction flow of 150 cubic feet per second (cfs); (2) divert 40 cfs minimum flow through the bypass facility; (3) use a screen to isolate portions of the facility from the fish bypass flume; and (4) inspect and clean certain portions of the facility daily and inspect and repair other portions annually.

11. By letters dated May 27, 2003 and January 23, 2004, FWS commented on the exemptee's proposal. FWS stated that it agreed with the flows recommended by the exemptee to operate the facility. It recommended that the exemptee maintain the facility throughout the passage season, which it suggested begin May 1 annually, and that the exemptee make its maintenance records available upon request to the resource agencies. FWS also asserted that the exemptee needed to study the passage survival of adult blueback herring in order to determine whether channel modifications were necessary below the fishway's discharge point, and to determine the effectiveness of the fishway by evaluating the number of fish using the bypass facility as compared to passing through the project turbine.

12. On March 22, 2004, Commission staff issued an order modifying and approving the exemptee's recommendations. Based on FWS' comments, staff required the exemptee to document its maintenance activities and make maintenance records available to the resource agencies and to begin operation of the facility by May 1 each year. Staff rejected FWS' recommendation that the exemptee be required to perform further studies, concluding that the studies already performed had satisfied the requirement of the previous Commission orders.[12]

13. On April 21, 2004, the Department of the Interior filed a timely motion to intervene and request for rehearing. Interior objects to the March 22, 2004 Order because Commission staff did not require the exemptee to perform additional studies.

Discussion

14. Interior contends that the exemptee should be required to conduct the additional studies that it recommends. The Department argues that the Commission acknowledged receipt of, but never approved, the Phase II study, so that the March 22, 2004 Order was incorrect in concluding that the study filed by the exemptee in 2003 satisfied the requirements of the 1995 Orders. Interior asserts that the October 18, 1995 and December 14, 1995 Orders altered the details of the Phase I study, but did not relate to

[12] *See* 106 FERC ¶62,214.

the Phase II study. Interior asks the Commission to require a study of how many fish are using the bypass facility as opposed to passing through the project's turbines.

15. Commission staff's November 6, 1997 Letter acknowledged receipt of the exemptee's Phase I study report and, specifically, of the Phase II study plan. Staff stated that "following completion of Phase II testing, the final study results and any recommendations to modify the fish bypass facility . . . are due 180 days after the completion of the study." While the letter does not use the word "approve," the letter was intended to reflect that staff had reviewed and approved the study plan and expected the exemptee to carry it out. Staff has used similar language in the past in directing parties to move forward with post-license plans. If staff had had any questions about the plan, or had expected any further filings before the plan was implemented, it would have stated as much. In addition, the exemptee (as well as FWS) made various filings with the Commission concerning the Phase II study.[13] Had Commission staff been under the impression that the exemptee was performing the study without proper authorization, it would have taken appropriate action to stop it.[14]

16. It is true that FWS from the start expressed the view that more extensive studies be performed. This does not, however, undercut staff's conclusion in the March 22, 2004 Order that the exemptee had satisfied its obligations under 1995 Orders. Further, there is no evidence in the record of ongoing harm to the blueback herring that warrants further study. We therefore affirm the March 22, 2004 Order.

The Commission orders:

The request for rehearing filed by the Department of the Interior on April 21, 2004, is denied.

By the Commission.

Linda Mitry,
Acting Secretary.

---

[13] *See, e.g.*, letter to David A. Stillwell (FWS) from John J. Conley (filed July 29, 2002) at 3 (describing progress of study and process for obtaining agency comment before filing with Commission).

[14] While Interior was kept continuously apprised of the progress of the studies, and participated in, and commented on, yearly study update meetings from 1998 through 2003, it was not until its request for rehearing that it first raised the issue of whether the exemptee had been authorized by the Commission to conduct the Phase II study.