

136 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Woodland Pulp LLC

Docket No. DI10-9-001

ORDER DENYING REHEARING

(Issued September 15, 2011)

1. Woodland Pulp LLC seeks rehearing of the July 19, 2011 declaratory order of the Director, Office of Energy Projects, finding that its West Branch, Forest City, and Vanceboro Storage Projects on the St. Croix River in Maine are required to be licensed.¹ For the reasons stated below, we deny rehearing.

Background

2. Woodland Pulp and its predecessors as licensee of these projects have sought several times to have the Commission find that the projects are not required to be licensed. The extensive history of these efforts is set out fully in the Director's order and is summarized here to the extent necessary to address this rehearing request.

3. Woodland Pulp's Forest City and Vanceboro Projects are located on the East Branch of the St. Croix River at the United States-Canada border, and its West Branch Project (consisting of the West Grand Dam and Sysladobsis Dam) is located on the West Branch of the St. Croix River. There are no power generating facilities at these upstream storage dams. However, Woodland Pulp also owns and operates two generating projects, the Woodland and Grand Falls Projects, downstream on the St. Croix River. Grand Falls is located upstream of Woodland.

4. The upstream storage dams were originally built in the 1800s, but, following construction of the Woodland Project in 1905, they began to be operated to support downstream generation. The Commission issued a license for the Vanceboro Dam

¹ *Woodland Pulp LLC*, 136 FERC ¶ 62,045 (2011).

Project in 1966;² that license will expire in 2016. The Commission issued licenses for the West Branch and Forest City Projects in 1980;³ those licenses expired in 2000, and the projects are being operated now pursuant to annual licenses. However, in 1988, Commission staff determined that the Grand Falls and Woodland Projects are not required to be licensed because they were authorized by a 1916 Act of Congress that predated the enactment of the Federal Power Act (FPA) in 1920.⁴ During this time, all of these projects were owned by Georgia-Pacific Corporation (Georgia-Pacific).⁵

5. In 1995, three years before new license applications for the West Branch and Forest City Projects were due, Georgia-Pacific filed a petition for declaratory order asking the Commission to rule that those projects were not required to be licensed because they did not generate power and were upstream of generating facilities that themselves did not require licenses. In response, the Director of the Commission's Office of Hydropower Licensing (OHL Director) found that the West Branch and Forest City Projects were part of the same unit of development as the Grand Falls and Woodland Projects⁶ but that the 1916 permit covered only the two generating projects.⁷ On

² *St. Croix Paper Company*, 35 FPC 458 (1966).

³ *Georgia-Pacific Corporation*, 12 FERC ¶¶ 62,141 and 62,157 (1980) (Forest City and West Branch, respectively).

⁴ *Georgia-Pacific Corporation*, 45 FERC ¶¶ 62,070 and 62,071 (1988) (Grand Falls and Woodland Projects, respectively). Section 23(b)(1) of the FPA, 16 U.S.C. § 817 (2006), provides that it is unlawful for any person, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the FPA.

⁵ The license for the Vanceboro Project was issued to St. Croix Paper but was transferred to Georgia-Pacific in 1966. *See St. Croix Paper Co.*, 49 FPC 727 (1966).

⁶ Section 3(11) of the FPA, 16 U.S.C. § 796(11) (2006), defines a "project," in part, as a complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures that are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, and all ditches, dams, and reservoirs the use and occupancy of which are necessary or appropriate in the maintenance of such unit.

⁷ *Georgia Pacific Corporation*, 77 FERC ¶ 62,189 (1996).

rehearing, this finding was upheld by the Commission, which rejected Georgia-Pacific's arguments that the storage projects were not required to be licensed because the generating projects were not within the Commission's jurisdiction, and that the Commission's jurisdiction extends only to storage projects that are connected to licensed projects.⁸

6. In 1997, Georgia-Pacific filed another petition for declaratory order, again asking the Commission to rule that the West Branch and Forest City Projects did not require licenses, this time on the ground that they were not hydraulically linked with the downstream generating facilities. Georgia-Pacific appended a headwater benefits analysis of the projects to its petition. The OHL Director agreed with Georgia-Pacific's position, on the basis that he could not determine from the evidence in the record, including the headwater benefits analysis, that the storage reservoirs provided benefits to downstream generation.⁹ Several intervenors filed requests for rehearing of that order. On May 18, 1999, in response to a request from Commission staff, Georgia-Pacific filed, for 1991 through 1997, lake level and flow data for the reservoirs in the St. Croix Basin as well as generation data for the Grand Falls Project, the first generating project downstream of the storage reservoirs.

7. The Commission, in an April 13, 2000 order on rehearing, reversed the OHL Director.¹⁰ In doing so, the Commission cited extensively a March 28, 2000 report of Commission staff that analyzed all of the data submitted in the proceeding. In that report, staff concluded that Georgia-Pacific's analysis underestimated the benefit to downstream generation of Georgia-Pacific's method of operating the Forest City and West Branch Projects to release stored water during low flow periods. In particular, staff determined that downstream generation was benefited because the reservoirs store water during the spring runoff period and release it in the summer and early fall, while they are typically allowed to fill during the late fall and early winter and are drawn down again between the end of January and the beginning of April. Using the data submitted by Georgia-Pacific, staff estimated that, from 1991 through 1997, annual generation at the Grand Falls Project was 2.4 percent to 4.9 percent greater than it would have been had the Forest City and West Grand reservoirs not operated, with an average annual increase of 3.4 percent. In addition, staff found that winter operation of the storage reservoirs increased the total generation at Grand Falls for November through February 1991-1997 by 1.3 percent to 7.4 percent, with an average increase of 3.4 percent.

⁸ *Georgia-Pacific Corporation*, 78 FERC ¶ 61,223 (1997).

⁹ *Georgia-Pacific Corporation*, 81 FERC ¶ 62,222 (1997).

¹⁰ *Georgia-Pacific Corporation*, 91 FERC ¶ 61,047 (2000).

8. Based on staff's analysis, the Commission concluded that operation of the Forest City and West Branch Projects not only provided a significant increase in generation at Grand Falls but also provided additional generation at times when that generation was particularly valuable. It concluded that, therefore, the facilities were necessary or appropriate in the maintenance and operation of the unit of development that includes the Grand Falls Project and were required to be licensed.

9. Georgia-Pacific requested rehearing, which the Commission denied in a March 18, 2002 order.¹¹ Domtar Maine Corporation, to which the projects had by then been transferred,¹² sought rehearing of the Commission's March 18, 2002 order, among other things seeking guidance as to how the projects could be operated so that licensing would not be required. In a June 4, 2002 order, the Commission declined to provide specific guidance beyond stating, as it had in its previous order, that, if all control structures were removed from the projects and the projects were then operated in a run-of-river mode, licensing would not be required.¹³

10. Domtar sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit,¹⁴ which affirmed the orders in October 2003.¹⁵ In particular, the court rejected Domtar's contentions that the upstream storage

¹¹ *Georgia-Pacific Corporation*, 98 FERC ¶ 61,312 (2002). In denying rehearing, the Commission addressed several arguments directed at staff's analysis that need not be repeated here. The Director's declaratory order sets out these arguments and the Commission's response in detail.

¹² *Georgia-Pacific Corporation and Domtar Maine Corp.*, 97 FERC ¶ 62,078 (2001). In 2009, Domtar Maine Corporation transferred the licenses to Domtar Maine LLC to reflect a business-entity conversion. *See Domtar Maine Corporation and Domtar Maine LLC*, 128 FERC ¶ 62,218 (2009).

¹³ *Domtar Maine Corporation*, 99 FERC ¶ 61,276 (2002).

¹⁴ Georgia-Pacific had appealed the orders on its 1995 petition for declaratory order to the court but the appeal was held in abeyance, at Georgia-Pacific's request, while Georgia-Pacific pursued the second proceeding. Following the Commission's denial of Georgia-Pacific's request for rehearing on its second petition for declaratory order, Domtar sought court review of the Commission orders in the second proceeding as well, and the petitions for review were consolidated.

¹⁵ *Domtar Maine Corp. v. FERC*, 347 F.3d 304 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004).

facilities were covered by the same 1916 permit as the two downstream generation projects and therefore were also exempt from the requirement to be licensed; that, in order to come under the Commission's licensing jurisdiction, the upstream projects must be linked to a licensed generating project; and that the Commission lacked a coherent test for deciding whether a non-generating facility requires a license, thus rendering the orders arbitrary and capricious. The court also declined to address other arguments that, it concluded, had not been properly raised before the Commission.

11. On March 5, 2010, Domtar filed another petition for declaratory order, the Director's denial of which is the subject of the present request for rehearing.¹⁶ On September 30, 2010, Domtar changed its name to Woodland Pulp LLC,¹⁷ and we will refer to Woodland Pulp as the petitioner in this order.

12. In this most recent petition, Woodland Pulp argued that the projects contribute only a *de minimis* amount to generation at the Woodland and Grand Falls Projects. Acknowledging that the Commission had already considered and rejected this argument, Woodland Pulp presented new modeling data, prepared by its consultant Kleinschmidt Associates (Kleinschmidt), which, according to Woodland Pulp, show that the upstream projects' aggregate annual average contribution to downstream generation is 2.15 percent, significantly less than the generation contribution determined by the Commission in its April 13, 2000 order. Woodland Pulp sought a determination that the storage projects would not need to be licensed in light of this new modeling data.

13. Commission staff reviewed the model prepared by Kleinschmidt and found a number of its assumptions and results problematic. Among other things, staff concluded that Kleinschmidt had made faulty assumptions that rendered its calculation of inflows into the reservoirs unreliable, had not used realistic relationships between the depth of the water in the storage facilities and the amount of water released through the outlets (stage-discharge relationships), had adopted unwarranted assumptions about how the Grand Falls Project would be operated under unregulated conditions, had provided a completely new model with changed operation rules in response to staff's request for additional information about certain aspects of the model Kleinschmidt originally submitted, and had used operations curves that did not reflect the manner in which the projects were operated historically. After discussing staff's findings in detail, the Director concluded that this study yielded results that were suspect or not replicable by staff, and that,

¹⁶ Upon issuance of a notice of this petition, the United States Department of the Interior, through its Bureau of Indian Affairs and U.S. Fish and Wildlife Service, filed a protest and motion to intervene in the proceeding.

¹⁷ See letter to Commission filed October 6, 2010.

because of the Kleinschmidt model's unreliability, accepting its results in place of those in staff's March 28, 2000 report would be unwarranted.

14. Woodland Pulp asked the Commission, in the event that it were to reject the *de minimis* argument despite the new modeling data, to find that the upstream storage projects need not be licensed because they are not connected to a Commission-licensed project. Woodland Pulp presented three facets of this argument, which the Director addressed in turn.

15. First, Woodland Pulp contended that upstream storage projects that are considered part of a downstream hydropower project need not be licensed if the downstream generating facility is not required to be licensed because it operates under a valid pre-1920 permit, as is the case with Woodland Pulp's downstream projects. The Director noted that, as Woodland Pulp itself admitted, the court of appeals had already considered this argument and had declined to overturn the Commission's interpretation of its authority in the absence of any Commission precedent that the Commission lacked jurisdiction over a non-generating facility in those circumstances. Accordingly, the Director declined to reconsider the issue.

16. Second, Woodland Pulp contended that the pre-1920 permit authorizing the operation of the Grand Falls and Woodland dams implicitly encompassed the upstream storage reservoirs as well. Woodland Pulp cited certain historical documentation purporting to support this contention. The Director again noted that the court of appeals had addressed this issue, finding that the 1916 statute authorizing the operation of the Grand Falls and Woodland dams specified only those two dams and that Congress would have specifically mentioned the storage projects if it had wanted to include them in the authorization. The Director concluded that there was no reason why Woodland Pulp could not have submitted any documentation in support of its position when it first presented this argument to the Commission and the court, that, in any case, the submitted documentation actually underscored the fact that Congress was aware of the storage facilities when it passed the 1916 statute but nonetheless did not include them in its authorization, and that Woodland Pulp was in any event estopped from raising the issue again at this time.

17. Third, Woodland Pulp argued that requiring a license for the storage projects would affect the pre-1920 permit issued for the generating projects in contravention of section 23(a) of the FPA,¹⁸ which provides in part that the provisions of Part I of the FPA "shall not be construed as affecting any permit or valid existing right-of-way heretofore granted." The Director concluded that Woodland Pulp's interpretation of section 23(a)

¹⁸ 16 U.S.C. § 816 (2006).

was too broad, since that section should properly be read as prohibiting the Commission from requiring the licensing only of facilities that are already covered by a pre-1920 permit, which is not the case with regard to the storage facilities at issue in this proceeding.¹⁹

Discussion

18. In the present request for rehearing, Woodland Pulp does not challenge the staff's finding that the model that Woodland Pulp had presented was not reliable, thus conceding that there is no basis for revising the Commission's prior finding that the storage reservoirs make a substantial contribution to downstream generation. The sole contention the company raises is that the Director erred in finding that the storage dams require Commission licenses even though the Grand Falls Project itself does not.²⁰ Woodland Pulp argues that the Director's conclusion lacks support in the FPA and is without precedent. It continues to insist that storage dams are not required to be licensed by the Commission when they are not necessary or appropriate in the maintenance and operation of a Commission-licensed generating project.

19. Woodland Pulp notes that section 3(11) of the FPA defines a project as a complete unit of improvement or development, consisting of, essentially, all facilities, including dams and reservoirs, the use or occupancy of which are necessary or appropriate in the maintenance and operation of such unit. Reflecting this definition, the Director stated that, in determining whether licensing is required for a facility such as a storage reservoir that is not directly connected to a generating project, the FPA requires an examination of whether the facility is necessary or appropriate in the maintenance of a complete unit of hydropower development. From this statement, Woodland Pulp concludes that, because the Director found the storage facilities to be necessary and appropriate to a complete unit of improvement or development based on their contribution to generation at the Grand Falls Project, the Director determined that the storage dams are part of the Grand Falls

¹⁹ The Director also stated that Woodland Pulp could have raised this issue timely in the prior proceedings and, by raising it now, was attempting to continue challenging the Commission's authority to require licensing long after the court had affirmed that authority. Domtar had in fact raised this issue before the court of appeals, which declined to consider it because Domtar had not raised it earlier with the Commission.

²⁰ Woodland Pulp does not seek rehearing with respect to the two other legal arguments that it raised in its petition for declaratory order and that the Director rejected: that the 1916 permit covered the storage reservoirs and that asserting jurisdiction over the reservoirs was improperly "affecting" the 1916 permit. These issues are therefore waived.

Project. Woodland Pulp faults the Director for not going further to find that the storage projects, as part of the Grand Falls Project, which operates pursuant to a pre-1920 permit, are similarly excluded from the requirement to be licensed.

20. We cannot accept this reasoning. Under section 4(e) of the FPA,²¹ the Commission is authorized to license not projects but “project works necessary or convenient for . . . the development, transmission, and utilization of power.” Section 3(12) of the FPA²² defines “project works” as “the physical structures of a project.” In finding in 1988 that the Grand Falls and Woodland Projects were authorized by a 1916 act of Congress, Commission staff, which was not asked to address the jurisdictional status of the storage reservoirs, found only that the two generating projects were not required to be licensed. This determination cannot be stretched to mean that the Commission is precluded from requiring the licensing of other physical structures, at another location, that are part of a complete unit of development with the facilities that Congress included in its 1916 authorization.

21. To maintain, as Woodland Pulp does here, that the exclusion of the “Grand Falls Project” from the requirement to be licensed must include all project works that are part of the complete unit of development of that project is really a variation of the argument it raised in earlier proceedings to the effect that the storage projects were included in the permit Congress issued for the Grand Falls and Woodland Projects. As the Director stated, that issue was definitively settled by the Commission, as affirmed by the court of appeals. The fact that the Commission lacks jurisdiction over certain portions of a project does not deprive it of jurisdiction over other project works.²³ Moreover, as we have explained, Woodland Pulp’s theory leads to the unacceptable conclusion that the holder of a valid pre-1920 permit that solely authorized construction of a generating unit can, in order to provide flows to the project, build a dam and reservoir miles upstream that impound the flow of a navigable waterway or can construct bypass facilities that dewater a river reach, without the need to obtain authorization from the Commission, thereby avoiding consideration of the impacts of those actions on navigation, flood control, recreation, irrigation, or the environment.²⁴

²¹ 16 U.S.C. § 797(e) (2006).

²² 16 U.S.C. § 817(1) (2006).

²³ See *Lake Ontario Land Development v. FPC*, 212 F.2d 227 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954) (holding that Commission had licensing jurisdiction over U.S. portions of projects works that straddled U.S.-Canada border).

²⁴ See *Georgia-Pacific Corporation*, 78 FERC ¶ 61,223, at 61,955 (1997).

22. Woodland Pulp asserts that whether the Commission has authority over storage dams when the associated power-producing dams are not subject to licensing has not been presented to the Commission with regard to any dams except those at issue here. Woodland Pulp maintains that its position is wholly consistent with Commission precedent, specifically the Commission's ruling in *Union Water Power Co.*,²⁵ which Woodland Pulp cites as the Commission decision most directly relevant to the present situation. Woodland Pulp argues that, even though the Commission previously interpreted the FPA to require licensing of the storage dams, and even though the court upheld this interpretation, the Commission is not precluded from reevaluating its prior interpretation.

23. In *Union Water Power*, the Commission examined whether several storage projects in Maine were subject to its jurisdiction. In doing so, the Commission made several statements to the effect that, in determining jurisdiction, it looked to whether the facilities in question were part of a complete unit of improvement or development of a licensed project and examined the relationship between the facilities and already-identified jurisdictional components of the hydropower project. Woodland Pulp's statement that its position is consistent with *Union Water Power* is based on these references, which it interprets as reflecting the Commission's intention to restrict its jurisdictional determination to the connection of storage projects to licensed projects.

24. In fact, the Commission made clear, in responding to this argument when it was previously made by Woodland Pulp's predecessor, that the references to licensed downstream generating projects in *Union Water Power* simply reflected the fact that the downstream generating units in that case were licensed, and did not reflect a legal holding that such must always be case for the Commission to have jurisdiction over upstream storage reservoirs.²⁶ This issue, too, was settled by the court of appeals, which ultimately deferred to the Commission's interpretation of its own ruling, in the absence of any precedent to the contrary. While Woodland Pulp is again seeking to reargue this issue, we affirm that the Director correctly declined to revisit it. To the extent that Woodland Pulp asserts that the court's ruling did not preclude the Commission from reconsidering its interpretation, this is not itself an argument in support of reconsidering it. As noted above, the Commission explained *Union Water Power* in prior orders regarding the facilities at issue here, and we see no reason to revisit the matter.

25. Woodland Pulp claims that the Commission's orders in the previous proceedings reflect that it is not clear cut whether the Commission's licensing authority extends to

²⁵ 68 FERC ¶ 61,180 (1994), *reh'g denied*, 73 FERC ¶ 61,296 (1995).

²⁶ *See Georgia-Pacific Corporation*, 78 FERC ¶ 61,223, at 61,955 (1997).

non-power-producing storage dams when the storage dams are tenuously associated with a downstream generating dam not subject to Commission licensing. In support of this claim, it cites the OHL Director's 1997 order finding that licensing was not required. We disagree. The 1997 order was based on the record at the time that it was issued; once Commission staff obtained more lake level and flow data from Georgia-Pacific and prepared an analysis based on it, the Commission reversed that order. The 1997 order thus cannot be deemed to represent a Commission conclusion that the connection between the storage reservoirs and the generating projects is tenuous, or that there is any ambiguity as to the Commission's authority to require licensing of upstream storage facilities in the situation in question.

26. Woodland Pulp states that the minimal additional power generated by operation of the storage dams does not justify the cost of licensing. Therefore, the company asserts, if the Commission concludes that the projects must be licensed, Woodland Pulp will be forced to remove all control structures from the storage dams so that they no longer store water, and the impoundments behind the dams will be drawn down. In this connection, Woodland Pulp introduces -- for the first time -- an argument that the reservoirs have value unrelated to the mill. According to the company, the dams are operated for the benefit of environmental resources both within the lakes and downstream, as well as for recreational users of the impoundments. Woodland Pulp states that the impoundments are a four-season recreational asset to the region, depended on by fishing guides, small recreational businesses, and camp owners. In the absence of the dams, the impounded lakes would not be able to sustain such business and recreational opportunities at the levels currently provided.

27. Woodland Pulp appears to misunderstand the implications of a decision on its part not to license the storage reservoirs. Such a decision would mean that the company could no longer manipulate flows from the reservoirs, which would then be operated in a run-of-river mode. It does not mean, however, that the project dams or gates would have to be removed or that the impoundments would necessarily be drawn down. Rather, the company could leave its current facilities in place, in whatever configuration it determined would best meet the needs of the local community, so long as those facilities would no longer manipulate flows.²⁷ The dams and impoundments could remain, and the

²⁷ Woodland Pulp could consult with Commission staff as to exactly what measures would be required to cease controlling the reservoirs. By way of example, in *Great Northern Paper, Inc.*, 97 FERC ¶ 61,204 (2001), the company removed gates and lifting structures. In *H. Bruce Cox*, 90 FERC ¶ 61,239 (2000), in a discussion of implied surrender, the Commission explained that the exemptee would be required to close intake gates and remove flashboards.

reservoirs could continue to provide environmental and recreational benefits to the region.²⁸

28. Woodland Pulp adds that the electric power generated at Grand Falls and Woodland is used to provide low-cost power for Woodland Pulp's mill at Baileyville, Maine. The pulp mill provides 317 direct jobs, is the economic driver in Washington County, and accounts for more than three quarters of the property taxes paid in Baileyville, a town that represents 20 percent of the valuation for the entire county.

29. We are sensitive to the importance of the Woodland Pulp Mill to the local economy. However, Woodland Pulp does not contend that power produced as a result of the operation of the storage reservoirs is needed for the operation of the mill, nor does it contend that ceasing to operate the reservoirs would have a detrimental effect on those elements of the economy that depend on the mill's operation.²⁹

30. Woodland Pulp asserts that the issue presented here regarding the scope of the Commission's authority is narrow and not likely to attract much attention or create significant precedent, because there are few hydropower projects still operating under pre-1920 permits, and none of those includes non-federal upstream storage reservoirs connected to a downstream generating facility that is authorized by such a permit. Woodland Pulp raised this same point in its petition, and the Director concluded that these arguments are irrelevant to the controlling issue of whether the projects fall within the Commission's licensing jurisdiction based on their contribution to downstream generation and consistent with the provisions of the FPA. We agree with the Director's conclusion and see no need to reconsider it.

31. For all of the above reasons, we will deny Woodland Pulp's request for rehearing.

²⁸ It is possible that more natural operation of the impoundments would have some effect on environmental or recreational resources, but Woodland Pulp has not alleged this or provided any details on the subject.

²⁹ Further, Woodland Pulp states that, regardless of whether one accepts the generation contribution figures derived by Kleinschmidt or those previously determined by Commission staff, the storage dams provide little, if any, marginal benefit to Woodland Pulp, given the costs associated with operating them. See rehearing request at 4.

The Commission orders:

The request for rehearing filed August 18, 2011, by Woodland Pulp LLC is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.