

137 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Kaukauna, Wisconsin

Project No. 2677-020

ORDER DENYING REHEARING

(Issued October 20, 2011)

1. On June 14, 2011, the City of Kaukauna, Wisconsin (City), licensee for the 9.4-megawatt (MW) Badger-Rapide Croche Hydroelectric Project No. 2677, located on the Fox River in Outagamie County, Wisconsin, filed a request for rehearing of its new license issued on May 18, 2011.¹ The City requests that we remove from the license whitewater boating requirements, arguing that whitewater boating in the area downstream of the U.S. Army Corps of Engineers' (Corps) Kaukauna dam is unsafe. For the reasons discussed below, we deny rehearing.

Background

2. The project consists of two developments: the Badger Development, located in the City of Kaukauna at the Corps' Kaukauna dam, and the Rapide Croche Development, located 4.5 miles downstream at the Corps' Rapide Croche dam. The City's rehearing request relates to the Badger Development.

3. The Badger Development includes a 2,350-foot-long power canal that begins at the Corps' Kaukauna dam and creates a 3,000-foot-long bypassed reach of the Fox River.² Immediately downstream of the bypassed reach is the City's Kaukauna Hydro Project No. 1510 (City Plant), which includes a dam, a powerhouse on the north shore of the river at the dam, and a 19-acre impoundment. The 2,860-foot-long dam spans a series

¹ *City of Kaukauna, Wis.*, 135 FERC ¶ 62,149 (2011).

² The project's generating facilities are located within the power canal.

of islands, which create many braided channels just downstream of the dam.³ The upstream end of the Rapide Croche impoundment begins just below the braided channels.

4. The City operates the Badger Development in accordance with a Memorandum of Agreement (MOA) with the Corps,⁴ which provides that the Corps maintains the impoundment levels for navigation and other authorized purposes and the City uses the excess inflows to generate electricity at the Badger powerhouse. If the reservoir level falls below the dam crest, the Corps directs the City to promptly cease operation until the level has returned to the top of the dam crest.

5. Historically, whitewater boaters use a 1.5-mile stretch of the river, beginning in the Badger Development bypassed reach about 1,000 feet below the Corps' dam and ending at a canoe takeout in the upstream end of the Rapide Croche impoundment.⁵ American Whitewater rates this stretch as Class II-III whitewater, with portions Class IV.⁶ American Whitewater characterizes this whitewater stretch as bedrock riverbed that creates waves for surfs and spins, with the first half of the stretch being urbanized (i.e., consisting of stonework banks, highway and railway crossings, buildings, and industrial surrounding) and the second half consisting of braided channels between wooded islands.⁷

³ See *City of Kaukauna, Wis.*, 46 FERC ¶ 62,102 (1989). The dam consists of: (1) a left and right forebay at the north end of the dam that is 25 feet high; and (2) a 2,260-foot-long spillway (across the braided channel), which varies in height from 10 feet near the north end to 6 inches along some of the islands.

⁴ This MOA with the Corps remains effective under Article 402 of the new license until a new MOA is executed and filed with the Commission as required by Article 307 of the new license.

⁵ About fifteen to twenty-four whitewater boaters use the bypassed reach, with each paddler averaging five to six visits per season. See the August 12, 2010 final Environmental Assessment (EA) for relicensing the project at 76.

⁶ The International Scale of River Difficulty defines six difficulty classes of whitewater boating: Class I – easy; Class II – novice; Class III – intermediate; Class IV – advanced; Class V – expert; and Class VI – extreme. See American Whitewater's website for a description of this scale (<http://www.americanwhitewater.org/archive/safety/safety.html>).

⁷ See American Whitewater's description of this whitewater stretch, copied from American Whitewater's website and included in the City's request for rehearing, Attachment A, Appendix 6.

6. American Whitewater describes the 1.5-mile reach as consisting of three sections, each about 0.5 miles long. Section I extends through the bypassed reach to an island just below that reach. Section II extends from the island to the braided channels, and Section III extends across the braided channels and into the upstream portion of the Rapide Croche impoundment to a canoe takeout.⁸ For the reasons discussed below, American Whitewater recommends that this reach not be boated alone or by beginner boaters without the company of experienced boaters.⁹

7. There is no formal put-in, so boaters gain access to the whitewater reach by hopping a fence at a school parking lot or using a temporary construction access ramp near the parking lot. Concrete walls and fences line much of the bypassed reach in Section I, making it difficult to impossible to exit the water along that reach.

8. Once in the water, boaters travel downstream about 0.50 miles until they reach an island near the end of the bypassed reach, which creates a northern and a southern river channel. According to American Whitewater, the northern channel is the gentler path and is recommended for most boaters. On exiting the northern channel, boaters must paddle across the river towards the south shore to avoid the strong current at the north side of the City Plant dam.¹⁰ In the southern channel, there are submerged structures and hydraulics¹¹ that should be thoroughly scouted beforehand. American Whitewater does not recommend that the southern channel be used by novice boaters or by anyone when flows are high, because anyone caught in the hydraulic located here who becomes stuck and is forced to abandon their boats and swim would be vulnerable to the current created by water spilling over the City Plant dam.¹² Once out of the braided channels below City Plant dam, boaters travel 0.5 miles to a canoe launch/take-out located at the upper end of the Rapide Croche impoundment, where they exit the river.¹³

⁸ *See id.*

⁹ *See id.* at 1.

¹⁰ *See id.* at 3.

¹¹ When high velocity water discharges into an area with lower velocity, standing waves are created which keep water re-circulating in an area. The feature created by this phenomenon is called a hydraulic.

¹² *See* American Whitewater's description of this whitewater stretch, included in the City's request for rehearing, Attachment A, Appendix 6 at 4.

¹³ The canoe launch is in the Thousand Islands Conservation Zone on the south shore of the impoundment, near the intersection of County Roads Z and ZZ.

9. Flows not used by the City are either stored in the reservoir or released by the Corps through the dam into the bypassed reach. The Badger Development's total installed capacity is 5.6 MW and its hydraulic capacity is 3,096 cubic feet per second (cfs). In normal water years, this results in about 39 whitewater boating days a year (from March through November).¹⁴

10. Under the new license, the City will increase the development's total installed capacity to 7 MW and its hydraulic capacity to 5,260 cfs. The increase in hydraulic capacity through the powerhouse will decrease the frequency, duration, and magnitude of the spill over the Corps' Kaukauna dam. This will result in decreased whitewater boating opportunities when the project is operating, so that in normal water years, there could be 17 less days when there are boatable flows.¹⁵

11. In order to mitigate for the loss of boating opportunities and to provide increased safety for those already boating this reach, Article 408(d) of the new license requires the City to provide a put-in point at the City's Central Park¹⁶ in the bypassed reach for whitewater boaters.¹⁷ In addition, Article 409 requires the City to provide annually four, four-hour-long whitewater boating releases of 3,340 cfs.¹⁸ In order to assist boaters in planning their use of the bypassed reach, the City also must make flow information publicly available and notify boaters of scheduled flow events and possible cancellations. The article further requires the City to coordinate with the Corps and the City's Fire Department, respectively, to ensure that scheduled flow releases are compatible with the operation of the Corps' Kaukauna dam and that emergency responders are notified of scheduled flow events. The article also requires the City to monitor and evaluate recreational use of the Central Park access site and the scheduled boating flows for three years.

12. The City filed a timely request for rehearing of the license order, objecting to the whitewater boating provisions of the license. American Whitewater and the National Park Service filed separate requests for leave to answer and answers to the City's

¹⁴ See Table 11 of the EA at 87. American Whitewater identifies optimal flows for whitewater boating as between 3,000 and 7,000 cfs in the bypassed reach.

¹⁵ See EA at 86.

¹⁶ Central Park is located near the upstream end of the bypassed reach.

¹⁷ Plans for the access point will, of course, include appropriate signage regarding boating safety and the river reach's difficulty rating according to the International Scale of River Difficulty. See n. 6, *supra*, and 18 C.F.R. § 12.42 (2011).

¹⁸ 135 FERC at 64,458.

rehearing request, asking that the Commission retain the boating requirements. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.¹⁹ Rule 713(d)(2), however, permits parties the opportunity to file briefs on one or more issues presented by a request for rehearing. We deny the National Park Service's motion and reject its answer, which presents no new information. However, because American Whitewater's answer provides details about a May 2, 2011 whitewater boating incident raised in the City's rehearing request that was not discussed in the license or the Environmental Assessment (EA), we will consider its arguments relating to this specific issue. Therefore, we will allow American Whitewater's answer only to the extent that it addresses the May 2011 boating incident.

Discussion

13. It has long been the Commission's policy that "licensees whose projects comprise land and water resources with outdoor recreational potential have a responsibility for the development of those resources in accordance with area needs, to the extent that such development is not inconsistent with the primary purpose of the project."²⁰ When there are safety concerns, it is appropriate to move with caution in order to determine whether whitewater boating releases should be included as part of the license.²¹

14. On rehearing, the City requests that the Commission remove the whitewater boating provisions from the new license because the conditions in the bypassed reach are unsafe for recreational boating and unsafe for police and fire personnel that attempt rescues. However, the City provides no new information or arguments to support its request. Instead, it resubmits information that it previously filed in the relicensing proceeding in January 2009, including (as pertinent here) letters from the Corps and the City's Planning and Fire Departments.²² The City also includes a report from the City's Police Department about a May 2011 boating incident.²³

¹⁹ 18 C.F.R. § 385.713(d) (2011); *see also id.* § 385.213(a)(2) (prohibiting the filing of answers unless otherwise ordered by a decisional authority).

²⁰ Order No. 313, Recreational Development at Licensed Projects, 34 F.P.C. 1546 (1965).

²¹ *See, e.g., Public Utility District No. 1 of Chelan County, Wash. (Chelan County)*, 119 FERC ¶ 61,055, at P 9 (2007).

²² *See* Attachment A to the City's request for rehearing. The attachment includes correspondence from other entities as well. However, those letters either do not offer an opinion on whitewater boating at the project or raise issues that are no longer relevant to the proceeding. For example, a letter from Outagamie County Emergency Management,

15. In particular, the City points to a December 23, 2008 letter from the Corps opposing scheduled openings of the Tainter gates to provide flows for recreational whitewater boating because it believes this would put the public at an increased safety risk and would severely affect the Corps' ability to safely and efficiently operate the Kaukauna dam for authorized purposes, including navigation.²⁴ The City also refers generally to letters from various entities expressing safety concerns.²⁵

16. As Commission staff explained in the draft EA for relicensing the project, and again in the project's final EA,²⁶ when the Badger powerhouse is not operating, flows are not diverted into the Badger power canal and are instead passed over or through the Kaukauna dam as controlled by the Corps. Likewise, when river flows exceed the hydraulic capacity of the powerhouse, the Corps passes excess flows through or over the dam. Thus, because the Kaukauna dam is not a project facility, the hydro project technically cannot "provide" releases into the bypassed reach; it can only adjust generation such that it diverts less flow. The draft and final EAs further recognized that, while any flows not used for generation at the powerhouse would be available for the Corps to release or spill, ultimately the Corps must manage flows according to its operational constraints, including maintenance of the required depth in the

while generally encouraging municipalities to reduce hazards in their communities, does not offer an opinion on whitewater boating opportunities at the project. The City also included a letter from the Kaukauna Area School District, objecting to placement of an access point on school grounds. However, the access point required by the license will be located at the City's park, not on school grounds.

²³ See Attachment B to the City's request for rehearing.

We note that the City's rehearing request is procedurally deficient because, rather than "independently set[ting] forth grounds of alleged error in the order at hand," it "simply 'relate[d] back' to earlier proceedings to which the Commission has already responded." *Union Electric Co.*, 120 FERC ¶ 61,015, at P 5 (2007); see also section 313(a) of the Federal Power Act (FPA), 16 U.S.C. § 825l(a) (2006) (requiring requests for rehearing to "set forth specifically the ground or grounds upon which such application is based").

²⁴ Request for rehearing, Attachment A, Appendix 10.

²⁵ See *id.*, Attachment A, Appendix 11.

²⁶ See the draft EA for the project, issued January 20, 2010 at 77-79; and final EA, issued August 12, 2010 at 86, 89. References in this order to the EA are to the final EA, unless otherwise noted.

impoundment's navigation channel.²⁷ Thus, the requirement for the City to provide boating flows of 3,340 cfs four days a year should not affect the Corps' operations. Indeed, Article 409 requires the City to coordinate with the Corps to "ensure that the scheduled flows are compatible with operation of the Kaukauna dam."²⁸

17. As for the safety of boaters and others who might enter the water, including police and fire personnel attempting rescues, Commission staff recognized that whitewater boating in this stretch can be difficult for individuals not familiar with the reach and that significant walled-in, fenced-in, and private property areas along the river prevent safe exit from most of the bypassed reach. Staff also recognized that the 1.5-mile stretch is currently used by whitewater boaters,²⁹ but that there is no formal access point so boaters must jump a fence along the river. Staff concluded that boaters who currently enter the reach by climbing over a fence with their boats would be safer as a result of the designated boat put-in.³⁰ Developing a new boat access at Central Park would eliminate trespass on school property and provide safe boater access. Moreover, while it is difficult or impossible to exit the river in the bypassed reach, there are opportunities for exiting the river below the bypassed reach: a viewing platform/pier that extends into the river near the beginning of the braided channels;³¹ an access point on the shore between the bypassed reach and the City Plant Dam, required by the water quality certification for the project;³² and the canoe launch/take-out at the end of the 1.5-mile stretch.

18. Last, to support its claim that whitewater boating in the 1.5-mile stretch below Kaukauna dam is unsafe, the City attaches to its rehearing request a police report of a recent whitewater boating incident where, according to the City, a skilled kayaker with 20 years experience was unable to safely navigate the reach.³³ On May 2, 2011, the kayaker was caught in a hydraulic in the southern channel near the Elm Street island. Because his kayak skirt broke during his effort to release himself from the hydraulic, he

²⁷ *Id.*

²⁸ *City Of Kaukauna, Wis.*, 135 FERC ¶ 62,149 at 64,458 (Article 409(d)). The license does not mandate specific days for when these scheduled flows should occur, which should provide sufficient flexibility to ensure these flows are provided.

²⁹ *See* EA at 85.

³⁰ *See id.* at 89.

³¹ *See* request for rehearing, Attachment A, Appendix 6 at 4.

³² 135 FERC at 64,465 (Appendix A, Condition 9).

³³ Request for rehearing, Attachment B.

was forced to abandon his kayak and swim to shore. The kayaker was unharmed in the incident. In response, American Whitewater explains that the kayaker was in the process of attempting standard maneuvers to exit the hydraulic when the elastic band on his kayak skirt failed. When forced into the water, the kayaker swam to shore following standard practices for swimming in whitewater. At no time was he in need of rescue.³⁴

19. One incident, however, does not warrant elimination of the whitewater boating requirements from the license. All whitewater boating poses some risk, including the risk that rescue may be required, or may not be possible. The fact that there may be risk involved with whitewater boating or other recreational activities does not obviate a licensee's responsibility to provide recreational opportunities in accordance with area needs.³⁵ Rather, as is the case here, it is but one factor that we may consider in our determination of whether, or under what conditions, to require a licensee to provide public access to project lands or waters.³⁶ As discussed above, we agree with Commission staff's findings in the EAs and license order and affirm the whitewater boating requirements of the license. We accordingly deny rehearing.

The Commission orders:

The request for rehearing filed by the City of Kaukauna, Wisconsin, on June 14, 2011, is denied.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ In fact, in the police report, the kayaker acknowledges that he made two mistakes: he should have had a rescue rope down river and a chaser kayak to recover his equipment when trying a new part of the river (i.e., the south channel) when the water was so high. *See* request for rehearing, Attachment B, at 4.

³⁵ *See, e.g., Chelan County*, 119 FERC ¶ 61,055, at P 10 (2007); and *New York State Electric and Gas Corporation*, 109 FERC ¶ 61,360 (2004).

³⁶ *See Public Utility District No. 1 of Lewis County, Wash.*, 117 FERC ¶ 61,188, at P 18 (2006).