

149 FERC ¶ 61,036  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Eastern Hydroelectric Corporation

Project No. 7019-061

ORDER REVOKING LICENSE

(Issued October 16, 2014)

1. This order revokes the license for the 687-kilowatt (kW) East Juliette Hydroelectric Project No. 7019 pursuant to section 31(b) of the Federal Power Act (FPA).<sup>1</sup> As discussed below, we take this action because licensee Eastern Hydroelectric Corporation (Eastern Hydro) has failed to construct fish passage facilities as required by Article 401 of its license, Condition 4 of the license's water quality certification,<sup>2</sup> a December 7, 2012 order approving fish passage facilities,<sup>3</sup> and a September 5, 2013 Compliance Order.<sup>4</sup>

**I. Background**

2. On February 28, 1985, Commission staff issued a minor license to the City of Forsyth, Georgia, for the East Juliette Project, located on the Ocmulgee River in East

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<sup>1</sup> 16 U.S.C. § 823b(b) (2012).

<sup>2</sup> See *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 (2002) (amending license and adding conditions, including Article 401 and conditions of the project's water quality certification).

<sup>3</sup> *Eastern Hydroelectric Corporation*, 141 FERC ¶ 62,176 (2012).

<sup>4</sup> *Eastern Hydroelectric Corporation*, 144 FERC ¶ 62,211 (2013).

Juliette, Jones County, Georgia.<sup>5</sup> Eastern Hydro has held the license since 1995.<sup>6</sup> The project includes: (1) a 20-foot-high, 1,230-foot-long concrete gravity dam that creates a 78-acre reservoir with a storage capacity of 418 acre-feet; (2) two powerhouses on the east bank of the river, one at the dam (north powerhouse) and the other 800 feet downstream of the dam (south powerhouse). Water flows to the north powerhouse, containing a 458-kW generating unit, and is discharged through a 23-foot-wide, 430-foot-long tailrace to the river. Water is also diverted through a 13-foot-wide, 400-foot-long intake canal and a 7-foot-wide, 220-foot-long penstock to the south powerhouse, containing a 229-kW generating unit.<sup>7</sup> The south powerhouse has not operated since 1999.

3. The East Juliette Dam was built in 1921, and it is the first passage barrier that anadromous fish, including American shad, encounter on their migrations upstream from the Atlantic Ocean to the Ocmulgee River. The Georgia Department of Natural Resources (Georgia DNR), the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) state that restoring access to historical spawning habitat for American shad is among their highest priorities for the region.<sup>8</sup>

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<sup>5</sup> *City of Forsyth, Georgia*, 34 FERC ¶ 62,438 (1986) (Order Issuing License (Minor)).

<sup>6</sup> On May 2, 1994, Commission staff approved the transfer of the license from the City of Forsyth, Georgia, to PK Ventures, Inc. *City of Forsyth, Georgia and PK Ventures, Inc.*, 67 FERC ¶ 62,090 (1994). Shortly after PK Ventures acquired the license, it merged with Tampa Pipeline Company (Tampa), but failed to notify the Commission until Eastern Hydro sought to acquire the license. Consequently, in May 1995 Commission staff approved the transfer of the license from PK Ventures, Inc. to Tampa and from Tampa to Eastern Hydro. *Eastern Hydroelectric Corporation, Tampa Pipeline Corporation and PK Ventures, Inc.*, 71 FERC ¶ 62,129 (1995). Mr. Robert Rose is the president or principal of all three companies.

<sup>7</sup> *Eastern Hydroelectric Corporation*, 76 FERC ¶ 62,170 (1996) (amending license to increase project's installed capacity from 643 to 687 kW).

<sup>8</sup> See NMFS letters filed August 13, 2014, August 3, 2010, October 29, 2007, October 13, 2000, and September 6, 2000; FWS letters filed August 13, 2014, August 3, 2010, November 13, 2007, October 20, 2000, and September 7, 2000; and Georgia DNR letters filed August 13, 2014, September 20, 2010, November 15, 2007, and September 26, 2000.

4. In June 2002, Commission staff amended the license to authorize the construction of an additional powerhouse containing a 1,200-kW generating unit on the west side of the river (2002 Order).<sup>9</sup> The order included additional conditions, including as pertinent here Article 401, which requires the licensee to install new fish passage facilities at the East Juliette Dam. The licensee must develop a plan in consultation with Georgia DNR, NMFS, and FWS that includes: (1) a construction schedule; (2) a proposed fishway and its operation; and (3) documentation of annual consultation with the agencies to address fish passage and entrainment issues at the project. The 2002 Order also added four conditions to the license contained in a water quality certification issued by Georgia DNR for the amendment.<sup>10</sup> Specifically, Condition 4 requires the licensee to install fish passage facilities at the project. The licensee never built the third powerhouse.

5. After receiving several extensions of time, on January 5, 2006 (as supplemented on April 25, 2006), the licensee filed a plan to construct a fish lift on the east side of the river that incorporated most of the agencies' recommendations.<sup>11</sup> The licensee stated that the fish lift would be constructed and operational by March 1, 2007. In August 2006, Commission staff issued an order modifying and approving the licensee's plan (2006 Order).<sup>12</sup>

6. The licensee did not construct the approved fish lift, and in April 2007 Commission staff issued a Compliance Order directing the licensee to comply with the

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<sup>9</sup> *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 (2002).

<sup>10</sup> Under section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. 33 U.S.C. § 1341(a)(1) (2012). Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project. *Id.* § 1341(d). Appendix A to the June 2002 Order contains the certification conditions. 99 FERC ¶ 62,207, at Appendix A (2002).

<sup>11</sup> The proposed fish lift would have operated by directing fish into a hopper at the toe of the dam. The hopper would rise vertically via an elevator system and release the fish into the reservoir at the top of the dam.

<sup>12</sup> *Eastern Hydroelectric Corporation*, 116 FERC ¶ 62,132 (2006).

requirements of the 2006 Order.<sup>13</sup> The licensee's response to the Compliance Order was inadequate. In particular, the licensee failed to explain what construction measures it had taken since 2006, and failed to provide a schedule for filing plans and specifications with the Commission's Atlanta Regional Office as required by the 2006 Order. On February 8, 2011, Commission staff issued an order directing the licensee to show cause why the Commission should not require the licensee to cease generation at the project. The licensee responded on March 9, 2011, and expressed interest in constructing a fish ladder in lieu of the fish lift.<sup>14</sup> Thereafter, Commission staff, Georgia DNR, NMFS, and FWS consulted with the licensee to develop plans for the fish ladder, which the licensee filed on June 20, 2012.

7. In December 2012, Commission staff issued an order modifying and approving the licensee's new drawings for a fish ladder (2012 Order).<sup>15</sup> The order approved the design of a four-foot-wide ladder that would provide upstream passage of fish (primarily American shad) around the project dam. The fishway entrance would be located on the east side of the north powerhouse's tailrace. Fish that enter the fishway would swim up the ladder through a series of baffles to the project's reservoir.

8. The 2012 Order required the licensee to modify its fish passage designs and file revised plans and specifications with the Commission's Atlanta Regional Office at least 60 days before beginning construction. In addition, the order required the licensee to file, for Commission approval: (1) a construction schedule that guaranteed fish ladder operation beginning in 2014; and (2) a fishway operation plan developed in consultation with Georgia DNR, NMFS, and FWS, which describes the target species for fish passage, operation schedules, and a method for determining the effectiveness of the fishway following its first year of operation. The order required the licensee to file the construction schedule and fishway operation plan within 120 days (by April 6, 2013). The licensee could not begin construction of the fishway until authorized by the Commission's Atlanta Regional Office.

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<sup>13</sup> *Eastern Hydroelectric Corporation*, 119 FERC ¶ 62,075 (2007).

<sup>14</sup> A fish ladder is different from a fish lift. A fish ladder allows fish to swim upstream through a series of steps or baffles, whereas the fish lift transports fish via a hopper and elevator system from the toe of the dam to the top of the dam.

<sup>15</sup> *Eastern Hydroelectric Corporation*, 141 FERC ¶ 62,176 (2012). The licensee filed a late request for rehearing of the order, which the Commission's Secretary rejected as untimely. *Eastern Hydroelectric Corporation*, 142 FERC ¶ 61,055 (2013).

9. The licensee did not file the construction schedule or fishway operation plan by the April 6, 2013 deadline, and it never filed the revised plans and specifications.

10. On April 17, 2013, Commission staff issued a letter directing the licensee to file, by May 2, 2013, the overdue construction schedule, fishway operation plan, and documentation of consultation with Georgia DNR, NMFS, and FWS.

11. On May 2, 2013, the licensee filed the construction schedule and fishway operation plan. The licensee's construction schedule stated that it would: (1) obtain all permits required for construction by June 1, 2013; (2) mobilize the site for construction from June 1 to June 30, 2013; (3) construct the fishway from July 1 to October 31, 2013; (4) test the fishway from November 1 to November 30, 2013; and (5) revegetate and fence the site from December 1 to December 31, 2013. The licensee stated that it would begin fishway operation by March 15, 2014.

12. On May 9, 2013, Commission staff provided comments on the licensee's construction schedule and fishway operation plan. Commission staff concluded that the licensee's construction schedule was unrealistic. According to the schedule, the licensee planned to start construction by July 1, 2013, exactly 60 days from the date of its May 2, 2013 filing. At the time, the licensee had not yet provided its revised plans and specifications to the Atlanta Regional Office, although the 2012 Order required the licensee to submit them for review and comment, along with other preconstruction plans and specifications, at least 60 days prior to the start of construction. In addition, Commission staff stated that the fishway operation plan failed to provide protocols for monitoring the effectiveness of the fishway as required by the 2012 Order.<sup>16</sup> To ensure that construction of the fishway could begin as soon as possible, the May 9 letter required the licensee to provide: (1) documentation of consultation with the agencies, (2) fishway effectiveness protocols in its fishway operation plan; and (3) revised plans and specifications to the Atlanta Regional Office for review.

13. On May 24, 2013, the licensee abandoned the schedule it had filed three weeks earlier and asked for more time to consult with the agencies. The licensee cited a lack of progress in obtaining from Georgia DNR a water withdrawal permit, which the licensee said is required for construction of the fish ladder. The licensee also cited a lack of

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<sup>16</sup> The 2012 Order required the licensee to develop the monitoring protocols in consultation with Georgia DNR, NMFS, and FWS; however, the licensee never consulted with the agencies. Georgia DNR, NMFS, and FWS prepared and sent the fishway operation plan to the licensee on March 28, 2013. The licensee included the agencies' plan in its filing but removed the fishway effectiveness protocols.

progress in developing the fishway effectiveness protocols. The licensee stated that the protocols recommended by NMFS and FWS included tagging fish passing through the fish ladder, providing video monitoring, and tracking the upstream habitat of the fish. The licensee did not agree with the agencies' protocols. Instead, the licensee stated that it would provide manual counting and reporting of fishes during the spawning season, but did not describe in detail how it would assess the effectiveness of the fishway.

14. On May 30, 2013, FWS filed comments on the construction schedule and fishway operation plan. On May 31, 2013, Georgia DNR and NMFS also filed comments. The agencies recommended that the licensee follow the effectiveness protocols included in the March 28, 2013 fishway operation plan prepared by Georgia DNR, NMFS, and FWS and sent to the licensee. The agencies also stated that the licensee had not consulted with them to discuss or modify the protocols. In addition, Georgia DNR said there were no unusual or exceptional conditions at the project that would delay the licensee's acquisition of a water withdrawal permit.<sup>17</sup>

15. On June 20, 2013, Commission staff issued a letter granting the licensee's request for more time to consult with the agencies to develop fishway effectiveness protocols. Commission staff stated that the licensee must file its protocols by August 19, 2013. Commission staff warned the licensee that failure to provide the protocols could result in the imposition of civil penalties or revocation of the license pursuant to section 31 of the FPA.

16. The licensee did not file the fishway effectiveness protocols or the revised plans and specifications with the Commission's Atlanta Regional Office.

17. On September 5, 2013, Commission staff issued a Compliance Order, finding that the licensee was in violation of Article 401 of its license, Condition 4 of its water quality certification, and the 2012 Order.<sup>18</sup> The Compliance Order required the licensee to file a plan and schedule for complying with the 2012 Order that would enable fishway operation by 2014, including: (1) a detailed fishway construction schedule, including revised plans and specifications for review by the Commission's Atlanta Regional Office; (2) specific fishway effectiveness protocols; and (3) actions taken by the licensee to obtain a water withdrawal permit from Georgia DNR. The Compliance Order stated that the licensee's plan and schedule must include copies of correspondence between the licensee and Georgia DNR, NMFS, and FWS. The Compliance Order directed the

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<sup>17</sup> See Georgia DNR email to Commission staff filed June 13, 2013.

<sup>18</sup> *Eastern Hydroelectric Corporation*, 144 FERC ¶ 62,211 (2013).

licensee to file the outstanding items within 15 days (i.e., by September 20, 2013). Finally, the Compliance Order warned the licensee that failure to comply could result in civil penalties, an order to cease operation of the project, or revocation of the license pursuant to section 31 of the FPA.

18. On September 17, 2013, the licensee provided: (1) a revised construction schedule that pushed construction back another year (with construction beginning July 1, 2014, and ending December 31, 2014); (2) a proposal to discuss the fishway effectiveness protocols with the agencies; and (3) a copy of the draft water withdrawal permit from Georgia DNR. The licensee did not include any documentation of consultation with the agencies and did not provide a schedule for submitting its revised plans and specifications to the Atlanta Regional Office for review.

19. On October 1, 2013, Commission staff issued an order directing the licensee to show cause why the Commission should not require the licensee to cease generation at the project.<sup>19</sup> The order gave the licensee 30 days to respond.

20. On October 30, 2013, the licensee responded, stating that ceasing generation would cause the licensee and its employees economic harm and would eliminate the benefits of hydropower at the site. However, the licensee did not provide any proof of consultation with the agencies or progress in gaining the water withdrawal permit. The licensee again asked for additional time to continue discussions with the agencies regarding the fishway effectiveness protocols.

21. The licensee has not made any other filings to satisfy the Compliance Order's requirements.

22. On April 17, 2014, Commission staff issued an order requiring the licensee to cease generation within five days from the date of the order.<sup>20</sup> On April 28, 2014, and May 28, 2014, Commission staff sent the licensee letters stating that staff was eager to resolve the matter and available anytime to discuss the actions needed to bring the project back into compliance with the license.<sup>21</sup> Staff asked the licensee for a date and time to discuss the situation. The licensee did not seek rehearing of the staff order and did not respond to staff's letters.

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<sup>19</sup> *Eastern Hydroelectric Corporation*, 145 FERC ¶ 62,003 (2013).

<sup>20</sup> *Eastern Hydroelectric Corporation*, 147 FERC ¶ 62,045 (2014).

<sup>21</sup> Both letters were sent by certified mail and were received by the licensee.

23. On July 17, 2014, we issued an order proposing revocation of the license (July 2014 Order).<sup>22</sup> This order provided notice of the proposed revocation and gave the licensee 30 days (i.e., by August 18, 2014) to request an evidentiary hearing before an Administrative Law Judge. The licensee did not respond by the deadline.

24. Georgia DNR, NMFS, and FWS, filed comments in response to the July 2014 Order.<sup>23</sup> NMFS and FWS support revocation of the license. Given the history of non-compliance exhibited by the licensee, they believe the licensee will not construct the fish passage facilities. Georgia DNR acknowledges the licensee's protracted non-compliance, but encourages the Commission to continue to pursue license compliance.

25. On August 18, 2014, American Rivers and Altamaha Riverkeeper (conservation groups) jointly filed a motion to intervene and comments and recommendations regarding license revocation.<sup>24</sup> While the conservation groups support the proposal to revoke the license, they oppose any revocation order that does not, at a minimum, condition the revocation on the removal of all project works owned by the licensee, including generating equipment, the powerhouse, and other infrastructure. The conservation groups believe that removal of these facilities could open up potential opportunities for fish passage or dam removal. The conservation groups state that the licensee should bear the costs of decommissioning the project.

26. On August 25, 2014, the licensee filed an untimely response to the July 2014 Order. The licensee asks for an additional 20 days to work with Commission staff to resolve its noncompliance with the fishway requirements. The licensee acknowledges that it does "not [contest] the history of the project," but explains that it was not informed of the revocation proceeding until August 19, 2014, because its representative had been out of the country.<sup>25</sup> Additionally, the licensee states that it obtained the water withdrawal permit from Georgia DNR on March 11, 2014, and enclosed a copy of the

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<sup>22</sup> *Eastern Hydroelectric Corporation*, 148 FERC ¶ 61,028 (2014).

<sup>23</sup> See NMFS comments filed August 13, 2014, FWS comments filed August 14, 2014, and Georgia DNR comments filed August 14, 2014.

<sup>24</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214(b) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(b) (2014).

<sup>25</sup> The licensee stated that it had been in South America working on another project that "is far larger than the Juliette fish ladder and demonstrates that we have the expertise and financial capacity to complete projects."

permit. The licensee did not request an evidentiary hearing before an Administrative Law Judge.

## II. Discussion

27. Under section 31(b) of the FPA, after notice and an opportunity for an evidentiary hearing, the Commission may issue an order revoking a license, where the licensee is found by the Commission to have knowingly violated a final order after having been given reasonable time to comply fully with that order.<sup>26</sup>

28. Fish passage facilities were first required by the license in 2002. The record clearly demonstrates Commission staff's and the agencies' intensive efforts over the last twelve years to achieve this goal. It is equally clear that these efforts have met with steady resistance from the licensee.

29. As explained above, Eastern Hydro failed to comply with the 2012 Order approving the fishway design and the September 2013 Compliance Order that set out the specific parameters for the licensee to achieve compliance with license Article 401, Condition 4 of the water quality certification, and the 2012 Order.

30. To date, the licensee has failed to fulfill, or make any meaningful progress toward fulfilling, these requirements. It filed a construction schedule with the Commission's Atlanta Regional Office that on its face could not be met. It never submitted its revised fishway design to the Atlanta Regional Office for review and never developed the required fishway effectiveness protocols in consultation with the agencies. We have no reason to believe that Eastern Hydro intends to comply, and its untimely response to our July 2014 Order only reinforces our belief.<sup>27</sup>

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<sup>26</sup> 16 U.S.C. § 823b(b) (2012).

<sup>27</sup> The licensee asserts that the delay in constructing the fishway was due to its difficulty in obtaining a water withdrawal permit from Georgia DNR. We disagree. It is not clear why the licensee would need a state water withdrawal permit for the fishway, but assuming that it does, any alleged delays in obtaining the permit should not have prevented the licensee from meeting its other obligations (e.g., producing the revised construction plans and specifications and providing them to the Atlanta Regional Office for review, or developing the required fishway effectiveness protocols in consultation with the agencies).

31. As stated previously, the East Juliette Dam is the first passage barrier that anadromous fish encounter on their migrations upstream from the Atlantic Ocean to the Ocmulgee River. Georgia DNR, NMFS, and FWS state that restoring access to historical spawning habitat for American shad is among their highest priorities for the region. With Eastern Hydro's continued non-compliance with the conditions of its license, the project will continue to block the upstream passage of American shad through the project.

32. For the above reasons, we find that, under section 31(b), Eastern Hydro knowingly violated the September 2013 Compliance Order and that it was given a reasonable time to comply with the order before we commenced this revocation proceeding. Consequently, we revoke Eastern Hydro's license for the East Juliette Project.

33. The conservation groups request that the Commission condition license revocation by requiring the licensee to remove all project facilities that it owns.<sup>28</sup> While we understand the conservation group's interest to see removal of all project facilities owned by the licensee, we will not condition license revocation upon a licensee's completion of such extensive remedial actions. The Commission has broad authority to fashion appropriate remedies to further the goals of the FPA in a manner that is "necessary and appropriate to carry out" the revocation of this license.<sup>29</sup> Here, we are revoking the license for Eastern Hydro's refusal to install fish passage facilities. As a general rule, we do not condition the effectiveness of a license revocation by imposing additional requirements on a licensee that has shown its unwillingness to comply with other

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<sup>28</sup> The conservation groups also request the Commission to consider a range of alternatives in any environmental analysis accompanying the revocation order, including: (1) partial and/or complete removal of project facilities; (2) partial and/or complete removal of the East Juliette Dam; or (3) installation and long term-operation of permanent fish passage facilities at the project site. The Commission's regulations categorically exempt compliance actions, like the instant proceeding, from environmental analysis under the National Environmental Policy Act of 1969 (NEPA). *See* 18 C.F.R. § 380.4(a)(3) (2014); *see also James B. Boyd, et al.*, 136 FERC ¶ 62,119, at PP 26-27 (2011) (finding that implied surrender of a license is "an administrative proceeding designed to terminate an authorization for a license that is, for all practical purposes, no longer in effect. As such, it has no effect on the environment and an environmental analysis is not required."). Here, license revocation will not authorize any action or alter the current condition of the project or the surrounding environment. Thus, no NEPA analysis is required.

<sup>29</sup> *See Centerville Hydro, Inc.*, 66 FERC ¶ 61,278, at 61,783-84 (1994) (citing section 309 of the FPA, 16 U.S.C. § 825(h) (2012)).

Commission orders, given that doing so would be impractical — a licensee that has failed to comply with license requirements would be unlikely to comply with those requirements when made part of a license revocation that it opposes. Rather, this order requires only that Eastern Hydro disable all of the project's generating equipment to prevent operation of the project in violation of section 23(b)(1) of the FPA.

34. Public safety will not be affected by revoking the license. The dam is classified as low hazard and an inspection of the project on August 22, 2013, by the Commission's Atlanta Regional Office, found that the project meets Commission engineering and dam safety standards and criteria, and exhibited no adverse conditions which might immediately affect project safety.

35. Upon issuance of this order, the licensee must permanently disable all generating equipment. Following revocation of the license, the Commission's jurisdiction will end, and authority over the site will pass to the State of Georgia's dam regulatory authorities.

The Commission orders:

(A) The license for the East Juliette Project No. 7019 is revoked, effective 15 days from the issuance date of this order.

(B) Within 10 days of the issuance date of this order, Eastern Hydroelectric Corporation must permanently disable the project's generating equipment and file documentation with the Commission that this action has been completed.

(C) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825l (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2014). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

