

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Flambeau Hydro, LLC

Project Nos. P-2395-031, P-2421-030,
P-2473-029, and P-2640-039

Order Approving Stipulation And Consent Agreement

(Issued October 3, 2003)

1. Flambeau Hydro, LLC (Flambeau), licensee for the Upper Project, No. 2640;¹ the Lower Project, No. 2421;² the Pixley Project, No. 2395;³ and the Crowley Project, No. 2473⁴ (collectively referred to as the four projects) on the North Fork of the Flambeau River in Wisconsin, violated 33 provisions of the licenses for the four projects, and a Compliance Order issued June 18, 2002⁵ (Flambeau Order). The licensee has corrected the violations and agreed to pay a civil penalty according to the terms and provisions of the attached Stipulation and Consent Agreement (Agreement). The Commission issues this Order Approving the Stipulation and Consent Agreement under Section 31(c) of the Federal Power Act (FPA), 16 U.S.C. § 823b(c) (2000), as explained below.

A. Background

2. The licenses for the four Flambeau projects were issued to Fraser Papers, Inc. on February 5, 1997. On December 20, 1999, the Commission approved the transfer of these licenses to Flambeau.⁶

3. The licenses for each of the four Flambeau projects contain numerous requirements for Flambeau to consult with the Wisconsin Department of Natural Resources (WDNR) and other resource agencies, and then to submit reports or plans to the Commission on various matters relating to project operations, recreational facilities,

¹ 78 FERC ¶ 62,085 (1997).

² 78 FERC ¶ 62,082 (1997).

³ 78 FERC ¶ 62,083 (1997).

⁴ 78 FERC ¶ 62,084 (1997).

⁵ 99 FERC ¶ 62,205 (2002).

⁶ 89 FERC ¶ 61,286 (1999).

water quality monitoring, erosion control, and spill containment. The licenses also required Flambeau to file a Hydropower Compliance Management Plan (HCMP) for each project because the Commission's license orders noted that the compliance records at these projects had been less than satisfactory.

4. Flambeau sought and received a 90-day extension of time for filing the HCMPs and other plans, but it failed to comply with the new filing deadlines. On April 11, 2002, the Division of Hydropower Administration and Compliance (DHAC) of the Commission's Office of Energy Projects (OEP) wrote and notified Flambeau that it had 15 days to file the overdue plans. This letter constituted notice to Flambeau under Section 31 (a) of the FPA that failure to comply could subject it to potential enforcement action.

5. Flambeau did not file any plans. Instead, it asked DHAC for clarification. On May 3, 2002, DHAC sent a letter to Flambeau that responded to the clarification request and reminded Flambeau that the April 11 letter's 15-day deadline for submission of the overdue plans had not changed.

6. Flambeau still did not file any of the required plans, so DHAC issued the Flambeau Order on June 18, 2002. The Flambeau Order cited 33 license violations at the four projects and required Flambeau to submit the overdue plans within 21 days (by July 9, 2002) or face possible civil penalties.

7. Flambeau filed four HCMPs (one for each of the projects) by July 9, 2002, but it did not file any of the other 29 required plans by the Flambeau Order deadline. Each HCMP contained a compliance schedule prepared by Flambeau. These schedules contained the dates on which Flambeau planned to file the 29 remaining overdue plans. According to the HCMPs, Flambeau would file 25 of these plans by October 15, 2002, and file the remaining four plans and drawings by December 31, 2002. Flambeau did not submit any plans to the Commission by its own October 15, 2002 deadline.

8. On December 11, 2002, the WDNR filed a formal complaint with the Commission that sought civil penalties against Flambeau for its failure to file 29 overdue compliance plans that were cited in the Flambeau Order. Twelve days later, Flambeau filed four of the 29 outstanding plans. On April 2, 2003, the Commission issued an order in response to the WDNR complaint (Commission Order). The Commission Order found that "Flambeau has knowingly committed multiple violations of its licenses and the compliance order, and has failed to remedy these violations in a timely manner." The Commission referred WDNR's complaint to Enforcement and OEP "for consideration of

monetary penalties commensurate with the serious nature of Flambeau's violations."⁷

9. As of the date of the Commission Order, Flambeau had not filed any more plans. Consequently, there were still 25 outstanding violations. DHAC and Enforcement met with Flambeau and established deadlines that called for correcting these violations by filing the 25 outstanding plans during April, May, and June, 2003. Flambeau complied with these deadlines and all of the requirements of the Flambeau Order are now satisfied.

B. Violations

10. Flambeau's failure to submit various plans and drawings required by the licenses for the four projects resulted in the violation of 33 separate license articles, as detailed in the attached Agreement.

11. Flambeau violated the Flambeau Order by filing only four of the 33 overdue plans required by the licenses of the four projects by the deadline set in the Flambeau Order. The remaining 29 plans were filed anywhere from nine months to 11 months after the Flambeau Order deadline.

12. Flambeau's violation of license conditions at the four projects and its failure to make timely submission of plans required by the Flambeau Order constituted a violation of Section 31 (c) of the FPA and made Flambeau liable for civil penalties.

C. Small Business Regulatory Enforcement Fairness Act

13. In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996,⁸ the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of the FERC, you may call 1-888-REG-FAIR (1-888-734-3247), or write the Ombudsman at 500 W. Madison Street, Suite 1240 Chicago, Illinois 60661.

14. The Commission finds that the Stipulation and Consent Agreement provides a fair and equitable resolution of this matter and is in the public interest.

⁷ Wisconsin Department of Natural Resources v. Flambeau Hydro, L.L.C., 103 FERC ¶ 61,011 at 61,046 (2003).

⁸ Pub. L. No 104-221, 110 Stat. 860, et seq., §§ 201, et seq.

The Commission orders:

- (A) The Commission approves the attached Stipulation and Consent Agreement in its entirety and without modification.
- (B) The Commission's approval of the attached Stipulation and Consent Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
|----------------------------|---|---------------------------------|
| Flambeau Hydro, LLC |) | Project Nos. 2395, 2421, |
| |) | 2473, and 2640 |

STIPULATION AND CONSENT AGREEMENT

I. Introduction

The Federal Energy Regulatory Commission's Division of Enforcement, Office of Market Oversight and Investigations (Enforcement), enters into this Stipulation and Consent Agreement (Agreement) with Flambeau Hydro, LLC (Flambeau) to resolve all issues relating to a non-public, informal investigation conducted by Enforcement under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2003). The investigation concerns Flambeau's violations of the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.* (2000), the Commission's regulations, orders, and Flambeau's hydroelectric project licenses arising from the facts stipulated below.

II. Stipulation

Enforcement and Flambeau stipulate to the following:

1. Flambeau is the licensee for the Upper Project, No. 2640; the Lower Project, No. 2421; the Pixley Project, No. 2395; and the Crowley Rapids Project, No. 2473. Collectively, they will be referred to as the four projects.

2. The four projects are located along a 12-mile stretch of the North Fork of the Flambeau River in Price County and Ashland County, Wisconsin.
3. The licenses for the four projects include operational recreational conditions requiring, *inter alia*, the submission of as-built plans and drawings, and plans for monitoring water quality, spill containment, and monitoring the purple loosestrife weed for Commission approval.
4. Each of the four project licenses contains deadlines for filing these plans.
5. On March 15, 2001, Flambeau requested a 90-day extension of the deadlines for filing these plans.
6. The Office of Energy Project's (OEP) Division of Hydropower Administration and Compliance (DHAC), granted Flambeau's extension request on April 5, 2001 (extension).
7. The extension required Flambeau to file a Hydropower Compliance Management Plan (HCMP) for each of the four projects by July 10, 2001.
8. Flambeau did not file an HCMP for any of the four projects by the July 10, 2001 deadline.
9. The extension also set filing deadlines for 29 other required plans at the four projects.
10. Flambeau did not meet the filing deadline for any of those 29 other plans.
11. On April 11, 2002, DHAC wrote and notified Flambeau that it had 15 days to file the 33 overdue plans. This letter constituted notice to Flambeau under section

- 31 (a) of the FPA that failure to comply could subject it to potential enforcement action.
12. Flambeau did not file any plan within the 15-day period set in the April 11 letter. Instead, it called DHAC and asked for clarification.
 13. On May 3, 2002, DHAC sent a letter to Flambeau that responded to the clarification request and reminded Flambeau that the April 11 letter's 15-day deadline for submission of the 33 plans had not changed.
 14. Flambeau did not file any of the required submissions, so DHAC issued a Compliance Order on June 18, 2002. 99 FERC ¶ 62,205 (2002) (Flambeau Order).
 15. The Flambeau Order cited 33 violations at the four projects and required Flambeau to submit the overdue filings within 21 days (by July 9, 2002) or face possible civil penalties.
 16. Flambeau submitted four HCMPs, one for each of the projects, by the Flambeau Order's compliance deadline.
 17. Flambeau did not file any of the other 29 required plans or submissions by the Flambeau Order deadline of July 9, 2002.
 18. Each HCMP contained a compliance schedule prepared by Flambeau. The HCMPs called for filing of 25 of the 29 outstanding plans by October 15, 2002, and filing the remaining four plans and drawings by December 31, 2002.

19. Flambeau did not submit any plans to the Commission by the October 15, 2002 deadline that Flambeau specified in the HCMPs.
20. On December 11, 2002, the Wisconsin Department of Natural Resources (WDNR) filed a formal complaint with the Commission that sought civil penalties against Flambeau for its failure to file 29 overdue compliance plans that were cited in the Flambeau Order.
21. On December 23, 2002, Flambeau submitted plans for monitoring the purple loosestrife plant at each of the four projects.
22. On April 2, 2003, the Commission issued an order in response to the WDNR complaint (Commission Order). The Commission Order found that "Flambeau has knowingly committed multiple violations of its licenses and the compliance order, and has failed to remedy these violations in a timely manner." The Commission referred WDNR's complaint to Enforcement and OEP "for consideration of monetary penalties commensurate with the serious nature of Flambeau's violations." *Wisconsin Department of Natural Resources v. Flambeau Hydro, L.L.C.* 103 FERC ¶ 61,011 at 61,047 (2003).
23. On April 14, 2003, Enforcement and DHAC met with Flambeau and established deadlines for submission of the 25 outstanding plans required by the Flambeau Order.
24. Flambeau submitted the remaining 25 plans according to the deadlines established at the April 14 meeting.

25. As of June 27, 2003, Flambeau had submitted the last of the plans required by the Flambeau Order and was then in compliance with the Flambeau Order.
26. Flambeau's failure to submit these plans on time impeded the Commission from carrying out its responsibilities to oversee the operation of the four projects, and the environmental and recreational aspects of the projects.

III. Violations

Enforcement alleges that Flambeau violated the following provisions:

1. Article 501 of each of the licenses for the four projects required the licensee to file an HCMP. Under the extended deadlines set in DHAC's April 5, 2001 letter, Flambeau was required to file the four HCMPs by July 10, 2001. Flambeau did not file the four HCMPs until July 8, 2002, one year after the extended deadline for compliance with Article 501. Flambeau violated Article 501 of each of the four licenses by failing to file an HCMP for those projects on time.
2. Under the extended deadlines in DHAC's April 5, 2001 letter, Articles 410 (Project Nos. 2395, 2421, and 2473) and 412 (Project No. 2640) required Flambeau to file a plan by September 7, 2001, for monitoring the purple loosestrife plant at each of the four projects. Flambeau did not file those plans until December 23, 2002, which was 15 months after the extended filing deadline and five months after the deadline set in the Flambeau Order. Flambeau violated Articles 410 and 412 of these licenses by failing to file the purple loosestrife monitoring plans on time.

3. Under the extended deadlines in DHAC's April 5, 2001 letter, Flambeau was required to file 18 plans for the four projects by September 7, 2001. These plans related to:

- Article 403 - Water Level Plans (all four projects)
- Article 404 - Reservoir Operation Plan (all four projects)
- Article 405 - Minimum Flow Plan (Project No. 2640)
- Article 406 - Water Quality Monitoring Plan (Project Nos. 2395, 2421, and 2473)
- Article 408 - Water Quality Monitoring Plan (Project No. 2640)
- Article 414 - Spill Containment Plan (Project No. 2421)
- Article 416 - Revised Recreation Plan (Project No. 2640)
- Article 418 - Spill Containment Plan (Project No. 2395)
- Article 419 - Spill Containment Plan (Project No. 2473)
- Article 420 - Spill Containment Plan (Project No. 2640)

Flambeau filed these 18 plans in April, May, and June of 2003, 20 to 21 months after the extended filing deadline and 10 to 11 months after the deadline in the Flambeau Order. Flambeau violated each of these articles of the licenses at the four projects.

4. Under the extended deadlines in DHAC's April 5, 2001 letter, Flambeau was required to file seven plans by March 11, 2002. These related to:

- Article 413 - Erosion Control Plan (Project No. 2473)
- Article 414 - Land/Buffer Zone Containment Plan (Project Nos. 2395 and 2473)
- Article 415 - Land/Buffer Zone Containment Plan (Project No. 2421)
- Article 415 - As-built drawings (Project Nos. 2395 and 2473)
- Article 416 - As-built drawings (Project No. 2421)

Flambeau filed these seven plans in May and June 2003, which was 14-15 months after the extended deadlines and 10 - 11 months after the deadline in the Flambeau Order. Flambeau violated each of these license provisions.

IV. Remedies

For purposes of settling any and all civil and administrative disputes, and in lieu of any other penalty or remedy that the Commission might assess or determine concerning any of the matters in the investigation in Project Nos. 2395, 2421, 2473, and 2640, Flambeau agrees that:

1. Flambeau will make payments totaling \$170,000 to remedy its violations of the FPA, the Flambeau Order, and the licenses of the four projects.
2. Flambeau shall pay a civil penalty to the United States Treasury in the amount of \$120,000. This penalty will be paid according to the following schedule:
 - a. Within thirty (30) days after the date upon which the Commission's order approving this Agreement becomes final and no longer appealable, Flambeau shall pay \$50,000.
 - b. On December 1, 2004, Flambeau shall pay \$20,000.
 - c. On June 1, 2005, Flambeau shall pay \$50,000.
3. Flambeau shall make these civil penalty payments by delivering a certified check, payable to the Federal Energy Regulatory Commission, Lockbox 93938, Chicago, Illinois 60673. The check shall have "Civil Penalty - Project Nos. 2395, 2421, 2473, and 2640" referenced on it. Flambeau may elect to make these payments by completing an electronic wire transfer to an appropriate Commission account.

4. On or after May 1, 2004, Flambeau will pay \$50,000 to the Price County Forestry Department in Phillips, Wisconsin (Price County). Payment will be made within fourteen (14) days of receipt of notice from Price County that it is ready to proceed with the agreed to recreational enhancements. This payment shall be made in the form of a check, made payable to the Price County Forestry Department.
5. It is the intent and understanding of Flambeau and Enforcement that this money shall be used by Price County to create recreational enhancements at the Smith Lake County Park, which is located within the boundary of the Pixley Project, No. 2395. Price County provided Enforcement with a letter stating that it would use the money specifically to enhance existing recreational facilities at the Smith Lake County Park by constructing a shower/flush toilet building. These enhancements are in addition to, and not duplicative of the recreational requirements contained in the license for the Pixley Project.
6. Within 30 days of the date that Flambeau makes its payment to Price County, Flambeau must submit to the Commission an affidavit stating that it has paid this amount to Price County, and that it has received assurance from Price County that this money was used for the intended purpose.
7. Failure to make a timely payment, or otherwise comply with any of the terms and conditions stated in this part of the Agreement, will violate a final order of the

Commission and may subject Flambeau to additional action under the enforcement provisions of section 31 of the FPA.

8. If any payment is not made on time, interest will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(2)(iii) (2003) from the date that the payment is due.

V. Terms

1. Enforcement and Flambeau state that they enter into this Agreement voluntarily and that, other than the agreements provided herein, no tender, offer, or promise of any kind whatsoever has been made by any party to this Agreement or by any member, officer, agent, or representative thereof, to induce the other party to enter into this Agreement.
2. This Agreement does not address or affect any issues pending in any other matter.
3. Unless the Commission issues an order approving this Agreement in its entirety and without modification, this Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor Flambeau shall be bound by any provision or term of the Agreement, unless they agree otherwise in writing.
4. Upon the issuance of a final Commission order approving this Agreement without modification, this Agreement shall resolve as to Flambeau, its agents, officers, directors and employees, both past and present, and the Commission shall release and be forever barred from bringing against Flambeau, its agents, officers, directors, or employees, both past and present, any and all administrative or civil claims or matters asserting any and all

claims, liabilities, causes of action, demands, rights, alleged entitlements, obligations, known or unknown, asserted or not asserted, vested or unvested, without limitation, arising out of, related to, or connected with the allegations in Parts II and III of this Agreement. Upon the issuance of a final Commission order approving this Agreement without modification, the investigation into the allegations involving Project Nos. 2395, 2421, 2473, and 2640 that are contained in Parts II and III of this Agreement is terminated. This Agreement shall not bar Commission action in the event the Commission determines that Flambeau has failed to comply with any provision of Part IV of this Agreement.

5. The provisions of this Agreement shall apply to Flambeau, and its parent and/or controlling entities, and the successors and assigns of each of these entities.

6. Flambeau agrees that a Commission order approving this Agreement without modification shall be a final and nonappealable order assessing civil penalties under section 31 (d)(2) of the FPA, 16 U.S.C. § 823b (2000). With regard to such order, Flambeau waives assessment by order after hearings on the record; the filing of proposed findings of fact and conclusions of law; an initial decision by an administrative law judge pursuant to the Commission's Rules of Practice and Procedure; post-hearing procedures pursuant to the Commission's Rules of Practice and Procedure; and judicial review by any court.

7. With respect to the representations of the parties set forth herein, the undersigned representative of each party represents and warrants that he has read them and knows the

contents thereof, that all the statements and matters set forth are true and correct to the best of his knowledge, information, and belief, and that he understands that each party enters into this Agreement in express reliance on those representations.

8. Each of the undersigned warrants that he is an authorized representative of the party designated, is authorized to bind such party, and accepts this Agreement on behalf of that party.

9. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted this ____ day of September 2003.

Flambeau Hydro, LLC

Division of Enforcement
Office of Market Oversight and
Investigations

By: _____
Donald H. Clarke
Counsel for Flambeau Hydro, LLC

By: _____
Robert Pease
Director, Division of Enforcement
Office of Market Oversight
and Investigations