

143 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Seneca Falls Power Corporation

Docket No. IN13-13-000
Project No. 2438-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued April 23, 2013)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Seneca Falls Power Corporation (SFPC). The Commission determines this order is in the public interest because it provides fair and equitable resolution to Enforcement's investigation, under Part 1b of the Commission's regulations, of SFPC's non-compliance with certain provisions of its hydropower license. Enforcement found long-standing non-compliance with six license provisions.

2. SFPC neither admits nor denies that it violated the terms of its hydropower license, and agrees to pay a civil penalty of \$150,000. It will also invest \$300,000 in specified measures designed to enhance project operations and submit compliance monitoring reports to the Commission.

I. Background

3. SFPC is the owner and operator of two connected hydroelectric facilities operated under project license P-2438. The Commission's Office of Energy Projects (OEP) issued a compliance order in 2009 citing SFPC for long-standing failure to comply with multiple provisions of its project license. SFPC appealed the compliance order to the Commission, which affirmed OEP's findings of non-compliance and referred SFPC to Enforcement "for consideration of appropriate action."

4. Enforcement investigated SFPC's conduct and concludes that SFPC violated six license provisions: Standard Article 5, Article 412, Article 414, Article 405, Article 409, and Article 410. These articles are described in Section II along with SFPC's conduct.

II. Stipulation and Consent Agreement

5. Enforcement staff and SFPC entered into settlement negotiations and resolved this matter by means of the attached Agreement. Pursuant to the Agreement, SFPC stipulates to the facts recited in the Agreement but neither admits nor denies the violations of its license provisions.
6. Standard Article 5 requires that SFPC obtain any property rights required to operate the project. Through March 26, 2012, SFPC did not have sufficient access to property owned by the NYSCC necessary to execute its license requirements. SFPC entered into an Operating Agreement with the NYSCC in 2011 and obtained a \$1 million construction bond pursuant to that agreement as of March 2012. Once the bond was in place, SFPC was able to enter NYSCC property to maintain safety and compliance with the license requirements.
7. Article 412 requires SFPC to file and execute a plan to monitor an area of wetland vegetation in the bypassed reach of the Waterloo development by September 30, 2008. SFPC submitted an acceptable wetlands report on June 24, 2010, which was accepted by staff on November 2, 2011.
8. Article 414 requires SFPC to install a car-top boat launch by the fall of 2006. SFPC installed the boat launch on July 20, 2012.
9. Article 405 requires SFPC to constantly maintain the Seneca Lake impoundment level within 0.1 foot of the seasonal target elevations of 446.0 feet Barge Canal Datum (BCD) during the summer, and 445.0 BCD during the winter, or to provide adequate explanations as to why particular weather events made maintaining such an elevation impossible. SFPC has failed to consistently maintain Seneca Lake within these ranges or adequately explain the reasons for the non-compliance.
10. Article 409 requires SFPC to design and construct fish passages at each of the two project impoundments. The license requires that the fish passages be installed by the year 2000. Article 410 additionally requires studies of the effectiveness of these fish passages. Initially, SFPC did not construct a fish passage at the Waterloo dam impoundment. After it was constructed, the fish passage exhibited unacceptably high fish mortality rates. After modifications, the United States Fish and Wildlife Service (FWS) approved the Waterloo fish passage on November 8, 2012.
11. SFPC has not constructed a fish passage at the Seneca Falls impoundment. Without a fish passage, there have been no effectiveness studies.
12. SFPC agrees to pay a civil penalty of \$150,000 to the United States Treasury. SFPC also agrees to invest \$300,000 in specified project enhancements, including installing automatic water leveling equipment and an automatic trash rake. Pursuant to

compliance monitoring, SFPC will submit to its project docket semi-annual reports as to the status of its compliance with this Agreement.

III. Determination of the Appropriate Sanctions

13. In determining the appropriate remedy, Enforcement considered the factors described in section 18 C.F.R. § 385.1505 (2012) of the Commission's regulations, including any harm to persons, property, or the environment resulting from the license non-compliance. Enforcement also considered the level of cooperation from SFPC during this investigation, any ongoing mitigation efforts during the investigation, and commitment to future compliance. The civil penalty is consistent with the penalty factors set forth in 18 C.F.R. § 385.1505.

14. The Commission concludes that the civil penalty, project improvements, and the compliance monitoring reports set forth in the Agreement are a fair and equitable resolution of the matters concerned and are in the public interest, as they reflect the nature and seriousness of SFPC's conduct and company-specific considerations.

The Commission orders:

(A) The attached Stipulation and Consent Agreement is hereby approved without modification.

(B) This order terminates the Commission's investigation, IN13-13-000, into project number P-2438.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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

Seneca Falls Power Corporation)

Docket No. IN13-13-000

Project No. 2438-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

1. Staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Seneca Falls Power Corporation (SFPC) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation conducted under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2012). Enforcement determined that SFPC was not in compliance with six license requirements. Enforcement and SFPC agree that SFPC will pay a civil penalty of \$150,000 to the United States Treasury as well as invest \$300,000 in measures designed to enhance project operation and compliance with the license requirements, including installing an automatic water elevation leveler and an automatic trash rake at the Waterloo dam. In addition, SFPC commits to install a fish passage at the Seneca Falls dam consistent with approval from appropriate state and federal regulatory agencies and commit to other mitigation measures as detailed in the following paragraphs of this Agreement.

II. FINDINGS AND VIOLATIONS

2. Enforcement and SFPC hereby stipulate and agree to the following.

A. Background

3. SFPC is the owner and operator of two connected hydroelectric facilities operated under Commission license P-2438. SFPC is a New York corporation owned by American Energy, Inc. (AEI).

4. The Commission's Office of Energy Projects (OEP) found SFPC to be non-compliant with multiple provisions of its Commission license. OEP issued a compliance order in 2009. SFPC appealed the compliance order to the Commission, which affirmed OEP's findings of non-compliance: inadequate property rights to access land owned by the New York State Canal Corporation (NYSCC) necessary to operate the project; water level elevations inconsistent with the license-mandated levels; deficient wetlands monitoring and reporting; and

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inadequate recreational facilities. The Compliance Order also referred SFPC to Enforcement “for consideration of appropriate action.” Enforcement has investigated SFPC’s conduct underlying its non-compliance.

5. Enforcement concludes that SFPC has not complied with six license provisions. During the investigation, SFPC made improvements in its operations to address certain findings arising from the investigation. The conduct, and mitigation steps SFPC has completed to date, are described below.

B. Findings of Fact

1. Standard Article 5 – Necessary Property Rights

6. Standard Article 5 requires that SFPC obtain any property rights required to operate the project. SFPC did not have sufficient access to property owned by the NYSCC necessary to execute its license requirements. SFPC entered into an Operating Agreement with the NYSCC in 2011 and obtained a \$1 million construction bond pursuant to that agreement as of March 26, 2012. With the bond in place, SFPC was able to enter NYSCC property and perform project maintenance as needed to maintain safety and compliance with the license requirements.

2. Article 412 – Wetland Monitoring

7. Article 412 requires SFPC to file and execute a plan to monitor an area of wetland vegetation in the bypassed reach of the Waterloo development. SFPC failed to monitor wetlands in the bypassed reach of the Waterloo development and did not file a wetland monitoring report by the September 30, 2008 deadline. After that date, it submitted a report to the Commission that was not based on the expertise or methods of environmental science. Commission staff rejected the report. SFPC subsequently submitted a second wetlands report on June 24, 2010, which was accepted by staff on November 2, 2011.

3. Article 414 – Car-Top Launch Facility

8. Article 414 requires SFPC to file and execute a recreation plan, which SFPC filed on July 26, 2004. The plan was approved by the Commission on March 14, 2006. As part of that plan, SFPC was to install a car-top boat launch by the fall of 2006. SFPC installed the boat launch on July 20, 2012.

4. Article 405 – Reservoir Surface Level Elevation

9. Article 405 requires SFPC to constantly maintain the Seneca Lake impoundment level within 0.1 foot of the seasonal target elevations of 446.0 feet Barge Canal Datum (BCD) during the summer, and 445.0 BCD during the winter, or to provide adequate explanations as to why particular weather events made

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maintaining such an elevation impossible. SFPC has failed to consistently maintain Seneca Lake within these ranges or adequately explain the reasons for the non-compliance.

5. Articles 409 and 410 – Fish Passages

10. Article 409 requires SFPC to design and construct fish passages at each of the two project impoundments. The license requires that the fish passages be installed by the year 2000. Article 410 additionally requires studies of the effectiveness of these fish passages. Initially, SFPC did not construct a fish passage at the Waterloo dam impoundment. After it was constructed, the fish passage exhibited unacceptably high fish mortality rates. After several sets of modifications, tests, and inspections, the United States Fish and Wildlife Service (FWS) approved the Waterloo fish passage on November 8, 2012.

11. SFPC has not constructed a fish passage at the Seneca Falls impoundment. Without a fish passage, there have been no effectiveness studies.

6. Period of Non-Compliance

12. For the purposes of this settlement, the relevant period of non-compliance described in the foregoing paragraphs begins no earlier than November 10, 2005. The Commission approved a settlement with SFPC and Commission staff to remedy prior findings of non-compliance on November 9, 2005. Although some license non-compliance predates the 2005 settlement, that settlement finally resolved all non-compliance existing on or before the date of its issuance.

C. Enforcement's Findings

13. Enforcement finds that SFPC did not comply with Standard Article 5 of its license from November 10, 2005 through March 26, 2012, the date SFPC obtained a \$1 million bond and fulfilled its terms of the Operating Agreement with the NYSCC.

14. Enforcement finds that SFPC did not comply with Article 412 of its license, requiring it to monitor wetlands in the bypassed reach of the Waterloo development and report on wetlands conditions, from September 30, 2008 until November 2, 2011.

15. Enforcement finds that SFPC did not comply with Article 414 because of its untimely submission of a recreation plan and failure to promptly execute on the same. Enforcement finds the duration of this non-compliance runs from November 10, 2005 through July 20, 2012, the date SFPC installed the boat launch.

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16. Enforcement finds that since November 10, 2005, SFPC has been unable to consistently maintain the required elevations for the impoundment at the Waterloo dam or to adequately explain the deviations from Article 405 of its license.

17. Enforcement finds that SFPC did not satisfy the license requirements concerning installing and perfecting fish passages. FWS approved the fish passage at the Waterloo impoundment after final modifications were made on November 8, 2012. SFPC has not achieved compliance at the Seneca Falls impoundment. SFPC thus has been and remains non-compliant with Articles 409 and 410 of its license with regard to Seneca Falls.

III. MITIGATION TO DATE

18. In the course of this investigation, SFPC has made efforts to address the conduct described in this Agreement. Certain violations have been completely or partially resolved. SFPC is now in compliance with Standard Article 5, Article 412, and Article 414. It has obtained an Operating Agreement with the NYSCC and posted the requisite \$1 million bond pursuant to the terms of that agreement. It has submitted to the Commission a satisfactory wetlands monitoring report based on acceptable methodology. It has also completed installation of the car-top boat launch, as directed by its license-mandated recreational plan.

19. SFPC has entered into and maintained a dialogue with the New York State Department of Environmental Conservation (DEC) concerning project water level elevations as required by that agency's Water Quality Certificate. Such efforts are necessary predicates to resolving Article 405. SFPC has also maintained a dialogue with FWS concerning design, installation, and other material aspects of effective fish passages for both the Waterloo and Seneca Falls impoundments.

IV. REMEDIES AND SANCTIONS

20. SFPC stipulates to the facts described in Section II of this Agreement. SFPC neither admits nor denies Enforcement's findings that the conduct did not comply with its license. To resolve the findings contained in this Agreement, SFPC agrees to the remedies set forth in the following paragraphs.

A. Civil Penalty and Equipment Investment

21. SFPC agrees to pay a civil penalty of \$150,000 to the United States Treasury. This civil penalty may be made in three, \$50,000 installments, the first payment due no later than 180 days from the date of this agreement, the second payment due no later than one year after the first payment, and the third payment due no later than one-year after the second payment. SFPC also agrees to invest \$300,000 in certain project improvements, which should enhance compliance with

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the water level requirements that the New York Department of Environmental Conservation (DEC) is currently revising. The \$300,000 investment shall include installation of automatic water leveling equipment for the Waterloo dam within two years of the Effective Date of this Agreement, and an automatic trash rake at the Waterloo dam within five years of the Effective Date of this Agreement.

22. The foregoing \$300,000 investment is subject to SFPC's existing license requirements, including but not limited to updating the flow monitoring plan as appropriate. Before installation, SFPC will consult with and receive the approval of the Commission's Division of Hydropower Administration and Compliance (DHAC) for the automatic water leveler and the Division of Dam Safety and Inspections for the automatic trash rake. These Divisions must also provide final approval for purposes of the improvements satisfying the terms of this settlement. Approval will not be unreasonably withheld.

B. Additional Mitigation

23. With respect to the water levels for the project area, SFPC commits to continuing its dialogue with DEC, and abiding by the results of DEC's process to amend the water level requirements in the Water Quality Certificate. SFPC also agrees to file with the Commission, within thirty (30) days of DEC issuing a final, revised Water Quality Certificate, a request that the Commission amend the relevant license requirements to comport with any changes to water levels and water level management reflected in the revised Water Quality Certificate. SFPC further commits to abiding by the rules of procedure of a Commission proceeding to amend the license, responding promptly to Commission requests within the context of that proceeding, and abiding by the results of said proceeding.

24. Regarding the Seneca Falls fish passage, SFPC will continue dialogue with the US Fish and Wildlife Service, and abide by Commission procedures and deadlines concerning reporting plans and progress on this issue to OEP staff. SFPC will install a fish passage at Seneca Falls within two years of the Effective Date of this Agreement, or, alternatively, consistent with the design and timeline for doing so as approved by FWS and OEP staff.

C. Compliance Monitoring

25. SFPC shall file with the Commission in its Project docket a semi-annual compliance report detailing the status of annual penalty payments; the status of fish passage construction at Seneca Falls dam; the status of revising the Water Quality Certificate with DEC and seeking amendment to the related license requirements; and the status of the project improvements specified above. Such semi-annual reporting shall continue until all of said obligations are completed. SFPC shall also promptly report to the Commission any instance of non-

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compliance with the provisions of its license or this Agreement that has occurred or is foreseen.

V. TERMS

26. The “Effective Date” of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein, and that arose on or before the Effective Date, as to SFPC, any affiliated entity, and any successor in interest to SFPC.

27. Commission approval of this Agreement without material modification shall release SFPC and forever bar the Commission from holding SFPC, any affiliated entity, and any successor in interest to SFPC liable for any and all administrative or civil claims arising out of the conduct addressed and stipulated to in this Agreement that occurred on or before the Agreement’s Effective Date.

28. Failure to make timely civil penalty payments or to comply with the mitigation and monitoring agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act (FPA), 16 U.S.C. §792, *et seq.*, and may subject SFPC to additional action under the enforcement provisions of the FPA.

29. If SFPC does not make the civil penalty payment described above at the times agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission’s regulations at 18 C.F.R. § 35.19(a)(2)(iii) from the date that payment is due, in addition to the penalty specified above.

30. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or SFPC has been made to induce the signatories or any other party to enter into the Agreement.

31. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor SFPC shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and SFPC.

32. In connection with the payment of the civil penalty provided for herein, SFPC agrees that the Commission’s order approving the Agreement without

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material modification shall be a final and unappealable order assessing a civil penalty under sections 215 of the FPA, 16 U.S.C. § 825o-1(b), as amended. SFPC waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

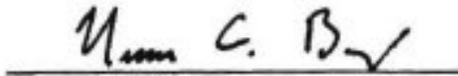
33. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

34. The undersigned representatives of SFPC affirm that they have read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of their knowledge, information and belief, and that they understand that the Agreement is entered into by Enforcement in express reliance on those representations.

35. The Agreement may be signed in counterparts.

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

Agreed to and accepted:

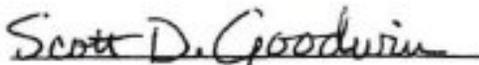


Norman C. Bay

Director, Office of Enforcement

Federal Energy Regulatory Commission

Date: 4.5.13



Scott Goodwin

President and CEO

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American Energy, Inc. and Seneca Falls Power Corporation

Date: 4-1-2013

Document Content(s)

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