

106 FERC ¶ 61,087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

S.D. Warren Company

Project Nos. 2897-005, 2931-004,
2932-006, 2941-004, 2942-007

ORDER ON REHEARING

(Issued January 29, 2004)

1. On October 31, 2003, S.D. Warren Company (Warren) filed a request for rehearing of certain requirements in five Commission orders issuing new or subsequent licenses for its Dundee Project No. 2942, Gambo Project No. 2931, Mallison Falls Project No. 2932, Little Falls Project No. 2941, and Saccarappa Project No. 2897, all located on the Presumpscot River, in Cumberland County, Maine.¹ On December 3, 2003, the U.S. Department of the Interior filed a response to the request for rehearing.² We are denying the request for rehearing; most of the appealed conditions were promulgated by other agencies with mandatory conditioning authority, and the rest are reasonable, minor adjuncts to mandatory conditions.

¹ 105 FERC ¶ 61,009 through 61,013 (2003). The projects are required to be licensed because they are located on a navigable stream. See Central Maine Power Company, 36 FPC 967, 968 (1966).

² The Commission's rules do not permit answers to a request for rehearing, but the Commission may provide parties an opportunity to file briefs on issues presented in such a request. 18 C.F.R. § 385.713(d)(1) (2003). Under the Mandatory Conditions Review Process adopted by the Secretaries of the Interior and of Commerce, in consultation with the Commission, when a request for rehearing is filed with the Commission that identifies substantial issues with either Department's conditions or prescriptions, the Department will review the concerns in the request for rehearing and submit a brief to the Commission pursuant to the above Commission rule. Since this is the situation here, Interior's response will be considered.

BACKGROUND

2. The five subject projects span a 12-mile reach of the Presumpscot River, from about ten miles upstream from Casco Bay to river mile 21.9. Two of the projects are “major” (i.e., authorized installed capacities of more than 1,500 kilowatts (kW)),³ and received new licenses.⁴ Three projects are “minor” (1,500 kW or less)⁵ and received subsequent licenses.⁶

3. Warren’s applications for new or subsequent licenses for the five Presumpscot Projects were consolidated for processing and environmental review. Several state and federal agencies filed terms and conditions to be included in the license. In particular, the Maine Department of Environmental Protection (Maine DEP) issued water quality certification for the projects pursuant to Section 401 of the Clean Water Act,⁷ and Interior’s Fish and Wildlife Service (FWS) submitted a fishway prescription for the projects pursuant to Section 18 of the Federal Power Act (FPA).⁸

³ See 18 C.F.R. § 4.30(b)(15)&(16) (2003). These are the 2,400-kW Dundee Project No. 2942 and the 1,900-kW Gambo Project No. 2931.

⁴ A new license is any non-annual license that is issued under Part I of the FPA after the initial license for a project. See 18 C.F.R. § 4.30(b)(19).

⁵ See 18 C.F.R. § 4.30(b)(17). These are the 800-kW Mallison Falls Project No. 2932, the 1,000-kW Little Falls Project No. 2941, and the 1,350-kW Saccarappa Project No. 2897.

⁶ A subsequent license is a license issued under Part I of the FPA after the expiration of a minor license that was not subject to the relicense provisions of Sections 14 and 15 of the FPA. See 18 C.F.R. § 16.2(d).

⁷ Under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), the Commission may not issue a license for a project unless the state water quality certifying agency has either issued or waived water quality certification. Under Section 401(d), 33 U.S.C. § 1341(d), state certification shall become a condition of any federal license that is issued.

⁸ Under Section 18 of the FPA, 16 U.S.C. § 811, the Commission must require a licensee to construct, operate, and maintain such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

4. The water quality certification contained conditions requiring measures at all five projects, including run-of-river operation, minimum bypass flows, drawdown procedures and restrictions on impoundment drawdowns, upstream eel passage, operational measures for downstream eel passage, upstream fish passage for anadromous fish according to a phased implementation schedule, additional spillage at the Dundee and Gambo Projects to meet dissolved oxygen standards, and a recreational facility enhancement plan. The fishway prescription contained conditions for both anadromous fish and American eels. For anadromous fish, FWS prescribed a phased approach to developing upstream and downstream fish passage facilities, the installation of all of which is dependent on the prior attainment of fish passage at Warren's Cumberland Mills dam, located downstream of the five projects being considered for relicensing, but not subject to the Commission's jurisdiction, because it is not part of any hydropower project.⁹ For eels, FWS prescribed eel ladders at each of the projects for upstream passage and, for downstream passage, project shutdowns for 8 hours per night for 8 weeks in September and October.

5. In a Final Environmental Impact Statement (EIS) issued on June 26, 2002, the Commission staff recommended issuance of new or subsequent licenses for all five projects, with conditions that will be discussed below as pertinent. In issuing the five licenses, we adopted staff's recommended conditions, including conditions that had been recommended by state and federal agencies. We made the licenses subject to the water quality certification conditions and the fishway prescription, both of which we appended to the license orders.¹⁰

6. On rehearing, Warren argues that we required significant and costly enhancements with small or speculative benefits, and that we should remove these obligations from the licenses, because they are excessive, unnecessary, unduly expensive, and unsupported by the record. In particular, Warren argues that we erred in requiring extensive anadromous fish and eel passage measures; excessively high bypass reach minimum flows, provisions for modifications to minimum flows, and a flow study plan for Atlantic salmon; recreational enhancements and recreational use monitoring; and a shoreline management

⁹ Therefore, the Commission could not require Warren to provide fish passage at the Cumberland Mills dam and would have no role in efforts that might be made by other entities to obtain fish passage there. The record does not indicate that any such efforts are now being undertaken or planned.

¹⁰ The water quality certification was attached to each license order in its entirety, while the fishway prescription was attached to each order to the extent that it contained provisions applicable to the project being licensed in that order.

plan for two of the projects. Warren also contends that we failed to balance the burdens of the requirements we imposed against the benefits of hydropower generation, and that we should have issued licenses for 50-year, rather than 40-year, terms, in light of the substantial enhancements we required.

DISCUSSION

7. We will not revise or remove the requirements to which Warren objects. Most of these requirements have their origins in mandatory conditions that the Commission lacks authority to reject, while others were recommended by the Commission staff to protect or enhance resources.

8. Warren argues that there is no evidence in the record to support upstream eel passage facilities other than possibly at the Dundee Project (the project furthest upstream), because data shows that the four downstream projects do not prevent eels from ascending the Presumpscot River. It requests that we reconsider the relevant data on eel movements and densities and find that the upstream passage facilities are not necessary at the lower four projects. Warren proposed to provide downstream eel passage by shutting down the projects and spilling water for 4 hours a night during four 7-day periods in the fall. Warren points out that Maine DEP adopted this proposal in its water quality certification, and that the EIS concluded that this proposal would adequately protect downstream migrating eels from potential turbine entrainment. Warren states that the shutdown provisions contained in the licenses would result in substantially higher generation losses than under its proposal. It requests that we revise the license orders either to substitute its original proposal or provide flexibility for it, Interior, and Maine DEP to consult on alternative measures that would be equally effective but less financially burdensome.

9. The license orders require Warren to begin consultation and development of an anadromous fish passage implementation plan, to be filed within 180 days of issuance of the licenses. The plan is to include a schedule for annual status reports and proposed time intervals for future development of fish passage design plans once it is determined that fish passage is required for each project. Warren argues that, given the record in this proceeding, these requirements are inappropriate, or at least premature.

10. Warren argues that the historical presence of all of the fish species for which fish passage facilities are to be designed has not been documented, and that no final plan for anadromous fish management on the Presumpscot River has been adopted by Maine fisheries agencies. Under FWS's prescription, the installation of upstream fish passage facilities at each of the projects above the Saccarappa Project (the project furthest downstream) is to be triggered by passage of a predetermined number of American shad

and river herring at one of the downstream projects; Warren argues that the threshold for triggering installation of these facilities is too low. It also contends that the facilities prescribed by FWS are designed to accommodate an unrealistic run size for these species, and that the run size, if achieved, could have significant adverse effects on freshwater fisheries in the river. Warren asserts that the existing habitat, especially in several tributaries of the Presumpscot, will not be able to support some of the species targeted for restoration. Warren argues that anadromous fish passage measures should not have been required for the Dundee Project, since there is little available habitat between that project and the next dam upstream, and since the Maine fisheries agencies did not request passage at Dundee for shad and alewife. Warren requests that it not be required to file a fish passage implementation plan or to begin the phased implementation of fish passage facilities until these uncertainties have been resolved.

11. The fish passage provisions of the license, as to both American eel and anadromous fish, were prescribed by FWS under Section 18 of the FPA, which obligates the Commission to require such fishways as the Secretary of the Interior prescribes. The prescription specifies not only the physical facilities to be installed but the timing of their installation or operation, as well as the development of plans for their installation and operation. As to American eels, FWS prescribes that upstream passage facilities be fully operational no later than two years from the date of issuance of the licenses, and that downstream passage, through shutdowns, be implemented as soon as the licenses are effective.¹¹ The anadromous fish passage facilities are not to be installed at the Saccarappa Project until two years after fish passage is achieved at Cumberland Mills, and are to be installed successively at each of the four upstream projects only when downstream fish population goals are achieved.¹² However, the prescription provides for the preparation of detailed design plans, installation schedules, and studies to evaluate the effectiveness of all upstream and downstream measures. To ensure compliance with this portion of the prescription, each license contains an article requiring the licensee to prepare a fish passage implementation plan for anadromous fish.

12. In its response to the rehearing request, Interior states that it has examined Warren's arguments and has not been persuaded to change its prescription, which it considers well supported by the record. The Commission has no authority to decline to adopt a Section 18 prescription.¹³ Moreover, some of these fish passage provisions,

¹¹ See, e.g., S.D. Warren, 105 FERC ¶ 61,013 at Appendix B,10.1 E (2003).

¹² Id. at P 35-37.

¹³ American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 2000).

notably the upstream eel passage provisions and the anadromous fish passage facilities and installation schedules, are also included in the water quality certification conditions for the projects, which conditions the Commission also has no discretion to reject.¹⁴ While neither the prescription nor the certification requires the filing of a fish passage implementation plan within 180 days of license issuance, we do not consider this requirement inappropriate or premature. The purpose of the plan is to keep the Commission informed of the progress of anadromous fish restoration efforts. The licensee is not required to install facilities, or even to prepare detailed design drawings, at this time. For the foregoing reasons, we will not modify any of the fish passage provisions that we included in the licenses.

13. Warren recognizes that we lack authority to exclude Section 18 fishway prescriptions in issuing a license, but it urges us nevertheless to find that the installation of fishways at the projects is not necessary. It argues, correctly, that our obligation to include fishway prescriptions in a license does not preclude our taking a position on whether the record supports the prescribed fishways.¹⁵ The Commission staff evaluated the need for eel and anadromous fish passage facilities in the EIS. While the staff did not agree with all aspects of the prescription,¹⁶ we see no need to elaborate on staff's conclusions, which are already part of the record in this proceeding.

14. Warren argues that the license requirements for minimum flows in the bypassed reaches of the Gambo, Dundee, and Mallison Falls Projects are higher than the minimum flows recommended in the EIS and are unnecessary to protect aquatic habitat or to meet applicable water quality standards. It asserts that the requirement in the Dundee and Gambo Project licenses for release of additional minimum flows during the summer months to address dissolved oxygen issues is inappropriate because the projects are not responsible for low dissolved oxygen levels in the river. Warren also argues that a requirement in the Dundee, Gambo, and Mallison Falls Project licenses for a study to determine the suitability of bypass flows for providing habitat for anadromous Atlantic salmon spawning, egg incubation, and juvenile production is unnecessary, because it

¹⁴ American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997). As Warren points out, the certification adopts the project shutdown provisions for downstream eel passage that Warren had proposed. However, since the fishway prescription requires more extensive shutdowns, we are required to include this more stringent mandatory condition in the licenses.

¹⁵ See American Rivers v. FERC, 201 F.3d at 1210.

¹⁶ See EIS at 99-100 and 114-116.

already performed relevant studies in connection with the relicensing applications, and because the licenses require higher bypass flows than had been contemplated when the Maine Atlantic Salmon Commission suggested such a study. All of these requirements are conditions of the water quality certification,¹⁷ which, as noted, we cannot delete.

15. Warren objects to the inclusion in each license of requirements for recreational enhancements, even though it had proposed many of these enhancements in its license applications, because of the financial burden of the recreational expenditures in combination with the fish passage requirements that have been imposed. It argues that the Commission should reevaluate whether it is in the public interest to require these recreational enhancements, given the Commission's limited ability to reduce the expenditures entailed by mandatory fish passage conditions. Warren also objects to the license requirements for recreational use monitoring and the preparation of a recreational use report at each project, on the ground that the filing of a standard Form 80, for surveying recreational facilities, would in any event be required for the Dundee and Gambo Projects and should satisfy these recreational monitoring purposes.

16. Each license contains an article requiring the licensee to file, for Commission approval, a Recreational Facilities Enhancement Plan, as required by Condition 7 of the water quality certification. Most of the recreational enhancements that are identified in those articles not only were proposed by Warren but also are required by Condition 7 of the certification. The recreational use monitoring and report requirements were recommended by the Commission staff,¹⁸ on the basis that angling and boating use would likely increase with the improved facilities and access being required in the licenses.¹⁹ Therefore, although these requirements are not derived from mandatory conditions, we see no reason to remove them from the licenses. As provided by the Commission's regulations, 18 C.F.R. § 141.14, FERC Form 80 is to be used by licensees to report information with respect to existing and potential recreational use at developments within projects. The recreational use monitoring articles of the Presumpscot licenses contain more specific provisions to determine the adequacy of the recreational enhancements

¹⁷ They are, respectively, Conditions 1B, 6A, and 1G of the water quality certification, Appendix A to each of the licenses.

¹⁸ The staff recommendations were based on, but differed from, recommendations submitted by FWS. We considered and adopted these recommendations under the comprehensive development provision of Section 10(a) of the FPA. See 105 FERC ¶ 61,013 at n.17.

¹⁹ EIS at 264.

required by the licenses for meeting recreational demand at the projects. Because these articles do not simply duplicate the Form 80 requirements, we do not consider the articles redundant and will not delete them from the licenses.

17. The Commission's regulations, at 18 C.F.R. § 8.11, require each licensee of a project under a major or minor license to submit copies of Form 80 to a Commission Regional Office in accordance with specified deadlines. After the initial filing, subsequent filings are to be made every sixth year. The regulations provide that a licensee, after filing an initial Form 80, may request an exemption from any further filing of the form for any development that has no existing or potential recreation use or only a minor existing or potential recreation use.

18. The license articles requiring the recreational use reports provide for them to be filed with the first Form 80 filing in 2009 for the Dundee and Gambo Projects and with the subsequent Form 80 filings for those two projects every 12 years thereafter. The Commission's records indicate that, in 1982, Warren sought and received an exemption from the Form 80 filing for the three minor projects, on the grounds that the projects were located in industrial areas, and that no recreational facilities existed or were planned at the projects. However, this exemption applied to operation of the projects under their original licenses; under the subsequent licenses, Warren will have to comply with the Form 80 filing requirements for these projects. Therefore, we will modify the recreational monitoring articles of the Mallison Falls, Little Falls, and Saccarappa Project licenses to provide for the coordinated filing of the recreational reports and Form 80 for those individual projects, rather than with Form 80 for the Dundee and Gambo Projects.

19. Article 409 of the licenses for the Dundee and Gambo Projects requires Warren to prepare and file a shoreline management plan for lands within 200 feet of the normal high-water level of those projects' reservoirs, for the protection of sensitive plants, future recreational access, and aesthetic resources. The plan is to include identification of licensee-owned lands and other lands that might be appropriate for acquisition and protection, assessment of those lands according to their environmental resource use in the context of the entire shoreline's environmental resource use, maps that delineate the identified shoreline lands, a future use scenario for those lands, and a schedule for implementing the plan. Warren argues that this requirement is excessive, because it owns no lands within these buffer zones, and because the record contains no evidence of resources within the buffer zones that need to be protected, with the exception of one plant species, the small whorled pogonia, in the Dundee Project area.

20. The Commission's regulations, 18 C.F.R. § 4.51(h)(2)(i)(B), provide for a project boundary to be located no more than 200 feet from the exterior margin of a reservoir, defined by the normal maximum surface elevation, except where additional lands must be

included to serve project purposes.²⁰ In the EIS, the Commission staff recommended that the licensee establish such a 200-foot buffer zone around the Dundee and Gambo reservoirs to maintain the current shoreline, protect visual resources, and, in the case of Dundee, protect the federally threatened small whorled pogonia. Because the licensee owns almost no land around the Dundee impoundment and none around the Gambo impoundment, we required the licensee, in preparing the shoreline management plans, to identify lands within the 200-foot buffer zone that might warrant acquisition and protection. Neither project has an extensive shoreline,²¹ and the requirement does not necessarily anticipate extensive land acquisition. Upon submission of the plans, the Commission staff will determine how much land the licensee will have to acquire and include in the project boundaries. This determination will be based on a balancing of beneficial public use factors under Section 10(a)(1) of the FPA, including the benefits to the public of including the land and the reduction of the projects' energy benefits due to land acquisition costs.²²

21. Warren points out that the licenses require a number of study plans within 180 days of license issuance, including plans for headpond control and minimum flow monitoring, recreational enhancement, American eel passage and monitoring, and shoreline management. Warren asserts that preparation of these plans for all five projects will involve consultation, site visits, acquisition of easements, and other time-consuming activities. It requests that, to the extent we do not remove any of the requirements for these plans, we stagger the due dates to reduce the burden of consulting and filing the plans simultaneously.

22. Deadlines for submitting plans for impoundment level and minimum bypass flow monitoring, recreational facilities enhancements, and eel passage are set in the water quality certification, although the certification states that the Commission may establish its own submittal schedules. We do not consider it either necessary or advisable to modify the filing deadlines for all of these plans at this time. Both the certification and the fishway prescription require upstream eel passage facilities to be installed and operational within two years of license issuance, and downstream eel passage measures

²⁰ Minor projects, such as Mallison Falls, Little Falls, and Saccarappa, are not required to have a project boundary, unless they are located on federal land. See 18 C.F.R. § 4.61(f).

²¹The Dundee Project has a 1.7-mile impoundment, and the Gambo Project has a 3.3-mile impoundment.

²²See, e.g., Great Northern Paper, Inc., 77 FERC ¶ 61,066 at 61,247-48 (1996).

to be operational immediately following license issuance.²³ Deferring the filing dates for those plans would not help achieve these operational deadlines. Nor are we convinced that the simultaneous filing of the plans specified by Warren will entail a great burden. It is not unusual for a licensee to be required to consult on, prepare, and file a number of plans within 180 days of license issuance. Each of the license articles requiring the filing of plans for project operation and flow monitoring, upstream and downstream eel passage, fish passage implementation, recreational facilities enhancement, and recreational use monitoring provides that the licensee may file one plan covering multiple Presumpscot River projects having similar license conditions and schedules. Further, the licensee is required to file shoreline management plans for only two of the projects.

23. Warren argues that the licenses should have been issued for 50-year rather than 40-year terms, because, in determining that the new licenses would entail a moderate amount of construction and environmental and enhancement mitigation measures, we did not consider the significant costs of installing the anadromous fish passage facilities.²⁴ However, if fish passage is not made available at Cumberland Mills, the anadromous fish passage facilities at these five projects will not be required. In that event, only a moderate amount of construction and enhancement would be required at these projects. If, in the future, anadromous fish passage facilities are required at the projects, the licensee could request an extension of the license terms.

24. Warren appealed the water quality certification to the Maine Board of Environmental Protection, which affirmed issuance of the certification. Warren has appealed the Board's decision to the Cumberland County Superior Court. It asks us to suspend the license conditions that derive from the certification until appellate review is completed. In effect, Warren is asking us to stay these requirements. In acting on stay

²³ Because downstream eel migration measures are required only during September and October, the downstream passage project shutdowns will actually not have to occur until September 2004.

²⁴ The Commission's policy is to issue licenses for 30-year terms for projects with little or no proposed redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount thereof; and 50-year terms for projects with an extensive amount thereof. The Commission's policy is also to coordinate the expiration dates of licenses for projects in the same river basin to the maximum extent feasible, with a view to considering the cumulative impacts of projects in the same river basin collectively at relicensing. We considered this policy in issuing licenses with the same expiration dates for these five projects.

requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, i.e., the stay will be granted if the Commission finds that “justice so requires.”²⁵ Under this standard, the Commission considers a number of factors related to the public interest, such as whether the movant will suffer irreparable injury in the absence of a stay. Here, Warren has not specified any injury that it would suffer if it were required to comply with the certification’s requirements before the court issues a decision. Therefore, we will deny this request.

The Commission orders:

(A) The request for rehearing filed October 31, 2003, by S.D. Warren Company of the orders issued by the Commission in these proceedings on October 2, 2003, is denied.

(B) Subparagraphs (4) and (5) of Article 409 for the Little Falls and Saccarappa Projects and Article 410 of the license for Mallison Falls Project are revised to read as follows:

(4) an implementation schedule that would ensure completion of the monitoring of recreational use so that a recreational use report, based on the monitoring data, and any recommendations shall be filed with the Commission by December 31, 2009. The recreational use report may be filed in conjunction with the “Licensed Hydropower Development Recreation Report” (Form 80) for the project;

(5) a provision for subsequent monitoring and filing, with the Commission, of a recreational use report every 12 years thereafter, and, if there is a need for additional facilities, measures proposed by the licensee to accommodate recreation needs in the project area. The recreational use report may be filed in conjunction with the Form 80 for the project; and

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

²⁵ See, e.g., Clifton Power Corp., 58 FERC ¶ 61,094 (1992).