

105 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Jackson, Ohio, and Certain Ohio
Municipalities

Project No. 6939-107

ORDER AMENDING LICENSE

(Issued October 27, 2003)

1. On December 3, 2001, the co-licensees for the Belleville Project No. 6939, through their agent, American Municipal Power-Ohio, Inc. (AMP-OHIO),¹ filed a request to amend the license for the Belleville Project No. 6939, located on the Ohio River in Wood County, West Virginia, to delete license terms related to the performance of a fish mortality study and compensatory mitigation. Interventions were filed by the U.S. Department of the Interior and by Ohio River Advocacy. Intervention and protests were filed by the West Virginia Division of Natural Resources (West Virginia DNR) and by the Ohio Department of Natural Resources, Division of Wildlife (Ohio DNR). West Virginia Rivers Coalition filed comments in opposition, and AMP-Ohio replied. For the reasons discussed below, we grant the request to amend the license.

BACKGROUND

2. On September 27, 1989, the Commission issued an original license for the unconstructed Belleville Project, to be constructed at the U.S. Army Corps of

¹ The Belleville Project license, issued to the City of Jackson, Ohio, was subsequently transferred to Jackson and a group of 41 other Ohio municipalities. Together, the 42 municipalities are known as the Ohio Municipal Electric Generation Agency, Joint Venture 5. 63 FERC ¶ 62,191 (1993). Because of the large number of co-licensees, the transfer order required the group to designate an agent for dealings with the Commission. Pursuant to a Management Services Agreement, Municipal Power-Ohio, Inc. (AMP-OHIO), which is not a co-licensee, acts as agent for the licensees and also developed and manages the project.

Engineers' (Corps) existing Belleville Locks and Dam.² The license was issued in conjunction with licenses for 15 other projects in the Upper Ohio River Basin.³

3. Article 404 of the license required the licensees, after consultation with the Corps, U.S. Fish and Wildlife Service (FWS), West Virginia DNR, and Ohio DNR, to prepare and implement a plan to monitor any potential project-induced fish mortality, including a provision to compensate the West Virginia DNR and the Ohio DNR for fish losses occurring during the fish mortality monitoring study.⁴ The licensees' proposed Entrainment Mortality Study Plan was approved with certain modifications by order issued December 26, 1996.⁵

4. AMP-Ohio requests that Article 404's requirements for a fish mortality study and for compensatory mitigation be deleted from the license. It cites to the determination in *City of New Martinsville v. FERC*, 102 F.3d 567 (D.C. Cir. 1996), that since there had been no showing of the projects' adverse effect on the fishery population as a whole, the Commission had no basis upon which to require compensation for individual game fish or non-game fish killed by the New Martinsville Project No. 3206 or the Racine Project No 2570.⁶ AMP-Ohio points out that the Belleville Project is located between the New Martinsville and Racine Projects and was the subject of the same entrainment study. It therefore argues that, in light of *City of New Martinsville*, the Belleville Project licensees should no longer be required to compensate the states for fish entrained at their project. AMP-Ohio also points out that any initial concerns about the cumulative adverse effect on fish populations from entrainment through the 15 projects licensed in the Upper Ohio River Basin in 1989 have been greatly reduced, inasmuch as the licenses for 11 of these projects have been surrendered or rescinded, and the likelihood of the other four being built is uncertain.

²48 FERC ¶ 61,355 (1989).

³See generally *Allegheny Electric Cooperative, et al.*, 48 FERC ¶ 61,363 (1989), *aff'd*, *Dept. of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

⁴ See Article 404(1) and (2), 48 FERC at 62,178-79.

⁵ 77 FERC 62,197 at 64,364 (1996).

⁶ The 47.5-megawatt Racine Project was licensed in 1973; the 35.72-megawatt New Martinsville Project was licensed in 1984.

5. The parties opposing removal of the Article 404 requirements argue that the licensees' reliance on City of New Martinsville is misplaced; that, putting aside cumulative effects, the removal of the Article 404 requirements could harm current efforts to restore paddlefish and shovelnose sturgeon as well as mussel recovery; and that the terms of Section 404 are required by the project's water quality certification, issued pursuant to Section 401 of the Clean Water Act.⁷

DISCUSSION

6. Interior concedes that under City of New Martinsville the Commission could not order mitigation in the absence of evidence that the project involved was having an adverse effect on fish populations. But Interior asserts that Belleville is distinguishable, because Article 404 does not require mitigation; rather, it requires the licensees to perform a study to determine whether mitigation of effects on the fishery population may be necessary. In this instance, Interior argues, the Commission found that the studies existing at the time of licensing had not provided definitive answers concerning Belleville's impact on fishery resources, but deemed that it had enough information to license the project, provided that the project was monitored to detect any adverse effects on fishery resources.

7. The environmental analysis of the Belleville Project was conducted, along with that of other Ohio River Basin projects, in the Final Environmental Impact Statement, Hydroelectric Development in the Upper Ohio River Basin (FEIS), issued in September 1988. That FEIS relied on the results of an entrainment study conducted at the Racine Project, 33 miles downstream of the Belleville Project. The predominant fish entrained during the Racine study were gizzard shad and freshwater drum. Based on the study's results, mortality was estimated to be, at most, 10 percent of those fish entrained. Given the high reproductive potential of these fish, the FEIS concluded that the mortality rate would not result in negative impacts to these fish populations.⁸ The results of the Racine study were applied to

⁷ 33 U.S.C. § 1341.

⁸The FEIS stated that although the entrainment mortality of gizzard shad and freshwater drum will be near 0 to 10 percent of those passing through each project, "this loss will likely be insignificant for populations . . ." See FEIS, Section 4.1.2.3.2. The FEIS also stated that moderate numbers of killed or injured fish would contribute to predation by game fish in tailwaters, and thus sustain the highly productive predator populations there. See FEIS, Section 5.1.1.2.

the New Martinsville Project, 77.5 miles upstream of the Belleville Project. Since Belleville lies between Racine and New Martinsville, it is reasonable to conclude that the conditions existing at those projects also exist at Belleville, and that the Racine study was appropriately applied to Belleville, as well. Therefore, the court's determination in New Martinsville – based on the Racine study -- that lack of a showing of adverse effects on the fishery population meant that the Commission had no basis upon which to require compensation for game fish or non-game fish at New Martinsville or Racine, also applies to Belleville, and that no further study was necessary to determine the effect on fish populations at Belleville.⁹

8. Interior argues that recent restoration efforts to recover paddlefish and shovelnose sturgeon populations, as well as mussel recovery efforts,¹⁰ could be adversely affected by entrainment mortality at Belleville.¹¹ But its argument is not

⁹ To support its argument, Interior references a statement in the Belleville license order that “susceptibility of resident and locally migrating fish to entrainment at this site is uncertain,” 48 FERC at 62,171. But, taken in context, the referenced statement refers not to populations but to uncertainty concerning the precise number of fish entrained. Article 404's requirement that the monitoring plan develop procedures to “quantitatively estimate the annual amount of entrainment-related mortality,” including recommendations for “compensation for any unavoidable fish mortality” contemplated quantification of such numbers with a view to compensation for fish lost, not a determination of effect on the population. In any event, where evidence of a problem has not been shown, the licensee does not have a duty to perform studies to determine whether a problem exists. See *City of Centralia, WA v. FERC*, 213 F. 3d 742 at 749 (D.C. Cir. 2000). If, in the future, a problem is shown to exist, the Commission has authority, under standard Article 15, to impose additional fish entrainment and protection requirements. See Form L-6, 54 FPC 1842, 1847 (1975), incorporated by reference into the Belleville Project license, 48 FERC 61,355 at 62,175, ordering paragraph D.

¹⁰ Article 404 does not apply to mussels. Article 413, which does require mussel monitoring, is not at issue here and will continue in effect regardless of the result in this proceeding.

¹¹ In relation to mussels, Interior cites especial concern about the possible entrainment mortality of host fish. (As part of their life-cycle, mussel larvae are released near host fish and attach and live on their fins and gills. After several weeks, the larvae mature into juvenile mussels and drop off the fish.)

sustained by the evidence it has submitted. In Appendix A to its rehearing request, Interior provides a November 2001 report on the status of Paddlefish.¹² The report does not find entrainment at hydropower projects an ongoing threat; rather, it finds that the greatest threat to paddlefish is no longer environmental conditions but excessive exploitation because of a high market demand for paddlefish roe (caviar). Information provided in Appendix B to Interior's rehearing request indicates that shovelnose sturgeon are being reintroduced in the Ohio and Kanawha Rivers. But, according to the Shovelnose Sturgeon Reintroduction Plan,¹³ reintroduction is to take place at the Greenup Pool located at the Corps' Greenup Lock and Dam, situated on the Ohio River some 137 miles downstream from the Belleville Project; the Meldahl Pool, located at the Corps' Meldahl Lock and Dam, about 95 miles downstream of the Greenup Lock and Dam; and on the Kanawha River, which enters the Ohio River near Point Pleasant, West Virginia, below Racine. Interior has not presented evidence that a significant number of such fish exist in the Belleville pool, nor does there appear to be stocking in the Belleville pool. Therefore, the likelihood of capturing Shovelnose Sturgeon during an entrainment study would be small, making interpretation of any results regarding this species difficult. Based on the evidence before us, the institution of recovery efforts and/or presence of these species in the Ohio River is not a basis for the continued requirement for an entrainment study or compensation pursuant to Article 404.¹⁴

9. West Virginia DNR asserts that New Martinsville is inapplicable to this case, because that decision involved a license issued prior to the Electric Consumers Protection Act of 1986 (ECPA),¹⁵ whereas the Belleville license was issued post-ECPA. The New Martinsville court ascribed significance to the

¹² See Interior's Appendix A, Paddlefish in the Ohio River Sub-basin: Current Status and Strategic Management, dated November 26, 2001. Ohio River Fisheries Management Team.

¹³ See Interior's Appendix B, Shovelnose Sturgeon Reintroduction Plan Development, dated March 1, 2002. Ohio River Fisheries Management Team.

¹⁴ If entrainment is found to cause problems for the recovery efforts in the future, standard Article 15 of the license (see n. 9, *supra*) reserves the Commission's authority to modify project facilities or operation to protect fish and wildlife resources.

¹⁵ P.L. 99-495 (October 16, 1986).

distinction, noting that before ECPA added to the itemized public interest uses in FPA Section 10(a)(1) “the protection, mitigation of damage to, and enhancement of, fish and wildlife resources,” that section listed recreation but did not specifically mention fish and wildlife. The court assumed, therefore, that before ECPA only sport fish and game were relevant under Section 10(a). In fact, the protection of and mitigation of damage to all manner of fish and wildlife resources were a part of the Section 10(a) analysis long before ECPA.¹⁶

10. In any event, West Virginia DNR notes that in this proceeding the Commission must take into account fish and wildlife resources, and states that, putting aside the question of the project’s effect on “the fishery,” there are “fish losses” occurring as a result of entrainment at the project, “direct fish mortality” for which the state is seeking compensation pursuant to state law.¹⁷ As West Virginia DNR explains, “the distinction we are making is not one of the semantical difference between fish and fishery, it is one of property and the public

¹⁶ See, e.g., Puget Sound Power & Light Co., 54 FPC 157,159-60 (1975):

The “comprehensive development” standard of Section 10(a) [recodified by ECPA as Section 10(a)(1)] requires that the Commission “protect and preserve every legitimate public interest.” H.R. REP. No. 61, 66th Cong., 1st Sess. at 5 (1919). Legitimate public interest concerns include, among others, resource conservation; water quality control; flood control; fish and wildlife protection; recreation and aesthetic considerations; protection of improvements along reservoir shoreline[s]; drinking water and other domestic municipal and industrial uses; irrigation requirements; navigation; hydraulic coordination; safety and adequacy; and [regional power coordination].

The footnotes in this quote, which are omitted, cite to court and Commission decisions illustrating each referenced public interest consideration. Nor is *Udall v. Federal Power Commission*, 387 U.S. 428 (1967), cited in *New Martinsville*, to the contrary. While the *Udall* opinion referenced the commercial and recreational value of the anadromous fishery there at issue, it also stated that under Section 10(a) the Commission must consider “the protection of wildlife,” 387 U.S. at 444, a term under which the Court included anadromous fish, *id.* at 444.

¹⁷ February 21, 2001 filing at 3.

trust doctrine.”¹⁸ The agency maintains that, under West Virginia law, any fish entrainment mortality caused by the project constitutes an unlawful taking of the property of West Virginia citizens, and the state is therefore entitled to compensation for fish killed by project operations.

11. The compensation West Virginia DNR proposes would constitute damages, and the Commission has no authority to adjudicate claims for or require payment of damages.¹⁹ Moreover, the FPA does not impose a “no net loss” requirement or require full replacement for lost resources.²⁰

12. West Virginia DNR argues that the terms of license Article 404 concerning studies and compensation were a required condition of the certification the state issued pursuant to Section 401 of the Clean Water Act.²¹ Specifically, it states that, by letter dated June 5, 1987, and filed with the Commission on June 8, 1987, it set a condition requiring the licensees to obtain sufficient funds to annually compensate West Virginia for fish mortality due to turbine entrainment, and that such compensation was to continue each year until on site studies were completed and other entrainment mitigation satisfactory to West Virginia is negotiated.

13. The June 5, 1987 letter did not, however, constitute West Virginia DNR’s Section 401 water quality certification. Indeed, the letter states that certification was issued by letter issued April 9, 1987. It characterizes the June 5 statements, which reference the funding of compensation for entrainment, as “comments and

¹⁸ West Virginia DNR filing of June 25, 2002, at 2 (emphasis in the original).

¹⁹ See, e.g., Lansing Board of Water and Light, 74 FERC ¶ 61,260 (1996).

²⁰ See, e.g., Northern States Power Co., 78 FERC ¶ 61,363 at 62,509 n. 21 (1997); Tower Kleber L.P., 91 FERC ¶ 61,172 (2000).

²¹ West Virginia DNR also argues that Article 404 must remain in the license because the article is necessary for compliance with state law and, as such, “was a necessary and required condition of the 401 certification . . .,” which states may condition as necessary to ensure such compliance. February 21, 2002 filing at 3. However, this syllogism fails, nor did the certification include any condition requiring license Article 404, by name or in substance.

recommendations.”²² The April 9, 1987 certification does not mention either entrainment studies or compensation for entrainment mortality; it only requires the licensees to consult on entrainment issues and studies completed to date on similar projects, with the aim of reaching a decision on the need for additional mitigation at Bellville.²³ While West Virginia DNR could, based upon future consultations with the licensees, conceivably require compensation, the condition itself does not require monetary compensation, nor does it provide a basis for requiring the licensees to conduct studies.

²² The June 5, 1987 letter was filed in response to the Commission’s letter of April 2, 1987, indicating that certification for the Belleville Project was waived or would be deemed waived pursuant to Order No. 464. But, as West Virginia DNR argued and the subsequent license order made clear, this was not correct. See 48 FERC ¶ 61,355 at 62,171 n. 6 (1989), and Order Denying Applications for License, 48 FERC ¶ 61,363 at 62,326 (1989). The City of Jackson requested certification on April 12, 1983. On April 3, 1984, West Virginia DNR timely denied the request. On April 23, 1984, the City appealed the denial to the Director of the West Virginia DNR, and by order issued June 1, 1984, the Director stayed the denial and remanded the application for further consideration. The Director’s stay order indicated that the state had acted within the one-year waiver period and that his action should not be considered as a waiver of certification. Since the initial denial of certification was timely, and given the terms of the June 1, 1984, stay order, West Virginia DNR’s April 9, 1987 grant of certification was the valid certification.

²³ Condition E8 states:

Licensee shall consult with the West Virginia Department of Natural Resources prior to cofferdam removal to review impingement/entrainment issues and studies completed to date on similar projects. Such consultations shall lead to a decision concerning the necessity of additional mitigation. These consultations shall commence one year before the scheduled date of the cofferdam removal. The Licensee shall install devices or provide other mitigative measures deemed necessary by the West Virginia Department of Natural Resources.

The Commission orders:

The license for the Belleville Project No. 6939 is amended to delete Article 404, together with the requirement that the licensees implement the associated Entrainment Mortality Study Plan approved by order issued December 26, 1996.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.