

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Augusta, Georgia

Project No. 11810-006

ORDER ON RECONSIDERATION

(Issued November 23, 2004)

1. The City of Augusta, Georgia, applicant for an original license for the Augusta Canal Hydroelectric Project No. 11810, located on the Savannah River in Georgia and South Carolina, has filed a request for reconsideration of a letter from Commission staff requesting Augusta to obtain water quality certification from South Carolina under section 401(a)(1) of the Clean Water Act.¹ As discussed below, we deny reconsideration with respect to the need to obtain certification from South Carolina, but grant Augusta's request to extend the date for providing that certification. This order is in the public interest because it clarifies the procedures to be followed in this proceeding.

Background

2. The Augusta Canal Project is located on the Savannah River near the town of Augusta, Richmond County, Georgia. The project includes: (1) the 1,666-foot-long, 11-5-foot-high stone masonry Augusta diversion dam, stretching across the Savannah from the Georgia to the South Carolina side of the river; (2) a 2,250-foot-long, 190-acre impoundment, located between the diversion dam and the upstream Steven's Creek Dam, which is part of South Carolina Electric and Gas Company's Stevens Creek Project No. 2535; and (3) the first level of the Augusta Canal, which extends about 7 miles between the Augusta Diversion Dam and the Thirteenth Street gates.

3. There are no generating facilities at the Augusta Canal Project. However, the project passes flows that are used by three existing hydroelectric projects located in the Augusta Canal -- the 2.475-megawatt (MW) Sibley Mill Project No. 5044, the 2.05-MW

¹ 33 U.S.C. § 1341(a)(1).

King Mill Project No. 9988, and the 1.2-MW Enterprise Mill Project No. 2935.² Farther up the canal, Augusta operates hydro-mechanical pumping units which deliver raw water to its municipal treatment plants. These units are not part of the proposed project.

4. The project was initially placed in operation in 1847.³ In 1929, the Federal Power Commission issued Augusta a 50-year license to operate the project.⁴ That license expired in 1979. In subsequent years, the City worked at various times to complete a license application.

5. On June 20, 2003, Augusta filed an application for a second original license for the project. Augusta obtained water quality certification from the State of Georgia with respect to the application on December 10, 2003.⁵

6. By letter dated May 5, 2004, Commission staff took note of the Georgia certification and explained that “[b]ecause the project’s diversion dam, from which project discharges will . . . originate, extends across the Savannah River to the South Carolina side . . . you must also obtain water quality certification from South Carolina.”⁶

7. On June 4, 2004, Augusta filed a request for reconsideration, arguing that the project will not result in a discharge into South Carolina waters, so that a South Carolina water quality certification is not required. In the alternative, Augusta asks that the Commission apply the deadline set forth in its current regulations, and extend the time for compliance with the certification request requirement to 60 days following the date that the Commission issues public notice that Augusta’s application is ready for environmental analysis.

² The licensees for these three projects are, respectively, Avondale Mills, Inc., Augusta Canal Authority, and Enterprise Mill, LLC. The Sibley Mill and Enterprise projects are currently in the relicensing process. The license for the King Mill Project expires in 2009; therefore, a license application for that project would be due in 2007.

³ See Augusta’s request for reconsideration at 2.

⁴ See Ninth Annual Report of the Federal Power Commission at 174.

⁵ See request for reconsideration at 1. Augusta has filed with Georgia an appeal of one of three conditions in the certification. *Id.*

⁶ See letter to Max Hicks (Director, Augusta Utilities Department) from Edward A. Abrams (Office of Energy Projects).

Discussion

A. The Need for Certification or Waiver by South Carolina

8. Section 401(a)(1) of the Clean Water Act (CWA) provides that a federal agency may not issue a license or permit for an activity that may result in a discharge into the navigable waters of the United States unless the appropriate state agency either has issued water quality certification for the project or has waived certification.⁷ The Commission requires applicants for hydroelectric licenses to provide evidence that they have applied for water quality certification.⁸

9. Augusta concedes that a portion of the diversion dam, which it characterizes as “a simple structure similar to a weir,” is located in waters “potentially” in South Carolina.⁹ It also states that water flows continuously over the dam.¹⁰ It argues, however, that the project will not cause a discharge.

10. Augusta’s argument rests heavily on a recent Supreme Court case, *South Florida Water Management District v. Miccosukee Tribe of Indians (Miccosukee)*,¹¹ which dealt with the issue of whether a discharge permit under section 402 of the CWA (the National Pollutant Discharge Elimination System (NPDES))¹² was required with respect to a pumping facility in the Florida Everglades that transfers water from a canal into a reservoir. According to Augusta, the Court in *Miccosukee*, while remanding the case for further development of the facts, held that the dispositive question was whether the canal and the area into which water was released unchanged were meaningfully distinct water bodies. Augusta contends that this logic means that water quality certification cannot be required in a case such as this one, where water is flowing continuously in the same river.¹³

⁷ There is no dispute here that the Savannah River is part of the navigable waters.

⁸ See 18 C.F.R. § 4.34(b)(5) (2004).

⁹ See request for reconsideration at 2-3.

¹⁰ *Id.* at 7.

¹¹ ___ U.S. ___, 124 S. Ct. 1537 (2004).

¹² NPDES permits are required for “the discharge of any pollutant” into the navigable waters. See 33 U.S.C. § 1342.

¹³ See request for reconsideration at 4-8.

11. Augusta reads too much into *Miccossukee*. First, that case involved the necessity for obtaining an NPDES permit under CWA section 402, which is not the case here. Augusta relies in its argument on the term “discharge of a pollutant” (the basis for a requirement to obtain an NPDES permit), which it notes that the CWA defines as “the addition of any pollutant to navigable waters from any point source.”¹⁴ However, the courts have affirmed the Environmental Protection Agency’s conclusion that dams are not point sources, and that dam-induced changes in water quality do not lead to a requirement that dam owners obtain NPDES permits under section 402.¹⁵ Section 401, on the other hand, requires a state certification for “any activity . . . which may result in a discharge,” as distinguished from a “discharge of a pollutant.” As defined in the CWA, the term “discharge” includes a “discharge of a pollutant,” and thus the former term comprises a broader class of activities than the latter.¹⁶ In addition, *Miccossukee* resulted in a remand for further development of the record, and thus it is not yet possible to discern what the Court might decide once the record is complete.

12. We have previously expressed doubt about a general suggestion that operation of a hydroelectric project is not an activity which may result in a discharge for which certification is required under section 401.¹⁷ Indeed, such a conclusion would be inconsistent with our regulations, cited above, and with long-standing practice. Perhaps more to the point, we cannot conclude based on the record here that the operation of the project does not in any way alter the characteristics of the water that flows over the diversion dam. Water passing through the project impoundment may be changed in temperature or in chemical composition. Also, the act of flowing over the dam may alter certain characteristics of the water, such as its dissolved oxygen content.¹⁸ Given that we have no evidence before us showing that Savannah River water is unchanged by its

¹⁴ See request for reconsideration at 6, *citing* 33 U.S.C. § 1362(12).

¹⁵ See *National Wildlife Federation v. Gorsuch (Gorsuch)*, 693 F.2d 156 (D.C. Cir. 1982). In *Gorsuch*, the parties raised only the issue of whether the NDPEs system was applicable to dams. The applicability of section 401 was not under consideration.

¹⁶ See 33 U.S.C. § 1362(16).

¹⁷ See *FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261 (2004) at P 11 and n. 14, *citing* *Public Utility District No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994) (need for certification of project discharges not in dispute); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (2002) (increase in volume of water passing through dam’s replacement turbines was an activity that may result in a discharge and therefore required certification).

¹⁸ See *Gorsuch*, 693 at 161-64 (describing dam-induced changes in water quality).

passage through the Augusta Canal Project, we cannot say with certainty that there will not be a discharge. The threshold for the requirement of state water quality certification – that an activity *may* result in a discharge – is sufficiently low that we cannot hold that it is inapplicable here.

13. Augusta also argues that the Commission has not previously required dual state certifications in cases involving projects spanning the Savannah, citing *South Carolina Electric & Gas Company*¹⁹ and *Georgia Power Company*.²⁰ These cases are distinguishable. In *South Carolina Electric & Gas Company*, an order issued by Commission staff pursuant to delegated authority, staff simply stated that water was discharged through the powerhouse on the Georgia shore of the Savannah River, such that certification was required from Georgia.²¹ Staff did not discuss the issue of whether there was also a discharge in South Carolina. In *Georgia Power Company*, also a delegated order, staff stated that although project dams were located partially in South Carolina “all discharges” originate in Georgia, so that only a certification from Georgia was required.²² In neither of these cases did staff even address whether flows passed over the South Carolina portions of the dams, nor can staff’s brief, conclusory statements be considered to set precedent on the matters at issue here.

14. Augusta attempts to distinguish *Central Vermont Public Service Corporation (Carver Falls)*,²³ a case involving a cross-border dam, where the Commission required certification from both the states of Vermont and New York based on the location of a spillway on the Vermont side of the river. The city argues that *Carver Falls* involved “crestgates, sluice gates, release valves, or some mechanism to cause a discharge in both states,”²⁴ and asserts that there must be “some affirmative discharge” to bring the certification requirement into play.²⁵

¹⁹ 73 FERC ¶ 62,124 (1995).

²⁰ 77 FERC ¶ 62,002 (1996).

²¹ 73 FERC at 64,307.

²² 77 FERC at 64,005, n.12.

²³ 85 FERC ¶ 61,410 (1998).

²⁴ Request for reconsideration at 9-10.

²⁵ *Id.* at 10.

15. There is no basis for this contention. Assuming *arguendo* that the diversion dam does not contain sluice gates, flashboards, or other structures to actively control water flow, Augusta does not dispute that it owns the dam and that water flows over it, nor can it argue that without the dam and the impoundment, water flow in the Savannah River would not be different in some degree than it is now. As we have explained above, the dam and the impoundment may alter the characteristics of the water passing through them. It is these changes, and not the specific design or components of the facilities at issue, that give rise to need for certification.²⁶

16. In fact, *Carver Falls* is on point, and consistent with our decision here. In that case, which was the first instance where we considered the need for certification from more than one state in a case involving a project extending across state borders, we specifically rejected the argument that certification is required only from a state in which powerhouse discharges occur. We cited *Virginia Electric and Power Company* for the proposition that a project discharge “is the water that leaves the project as it flows through or over a dam, or through penstocks, powerhouse turbines, and tailraces, and reenters the river or some other waterway.”²⁷ We then stated that “[s]ince water can be discharged from two [or] more locations at a project, and since [Clean Water Act] Section 401 does not limit a jurisdictional discharge to a single location, there may be projects with discharges in two states that need to obtain certification from the respective states.”²⁸ This logic applies with full force in this case.

²⁶ Augusta asserts that South Carolina has concluded that a discharge for the purposes of section 401 arises only at a powerhouse. See request for reconsideration at 9, citing, letter to Robert F. McGhee (Environmental Protection Agency) from Sally Knowles (South Carolina Department of Health and Environmental Control) (dated October 18, 1990) (Exhibit B to request for reconsideration). First, the letter upon which Augusta relies is equivocal (“it appears that Georgia should take certification action on these . . . facilities *if we assume the discharges originate in Georgia* due to the location of the powerhouses”) (emphasis added), and may or may not represent the official or current position of the state. Of course, a conclusion that South Carolina has the authority to issue certification in this case does not mean that the state must exercise that power. Should South Carolina choose to waive certification, it is free to do so. Second, we have already determined, in *Carver Falls*, that the location of a powerhouse on one side of a river did not preclude the requirement of certification by a state on the other side, where a discharge occurred in the second state.

²⁷ 77 FERC ¶ 61,138 at 61,518 (1996).

²⁸ 85 FERC at 62,557.

17. Augusta also argues that the diversion dam is nothing more than a means for providing for water withdrawal, and that no water quality certification is required for the diversion or withdrawal of water.²⁹ We agree that water withdrawal by itself does not require certification.³⁰ The cases cited by Augusta involved intake valves and other structures that did not themselves cause discharges. In this case, however, it is the project's impact on water that continues to flow down the Savannah River, and not the diversion of other flows, that creates the discharge.

B. Request to Alter Deadline

18. Under the Commission's regulations at the time that Augusta filed its application, the city was required to submit with its license application (A) a copy of water quality certification, (B) a copy of a request for certification, or (C) evidence of waiver of certification.³¹ The Commission's revised regulations, effective October 23, 2003, now provide that license applicants are to file this information within 60 days of the date that Commission staff issues public notice (the REA notice) that an application is ready for environmental analysis.³² Augusta included in its June 2003 application the requisite information with respect to Georgia, but not South Carolina. The city now requests in the alternative that if the Commission does not grant its request for reconsideration, we allow it to proceed under the current regulations with respect to certification from South Carolina, such that the necessary information is to be filed within 60 days of the REA notice. This is a reasonable request under the circumstances here, and we will grant it. However, since the REA notice was issued on June 10, 2004, a few days after Augusta filed its pleading, we will require the city to provide the requisite information within 60 days of the date of issuance of this order.

²⁹ Request for reconsideration at 11-12.

³⁰ *See, e.g., North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) (“the withdrawal of water is not an activity that ‘results in any discharge’ for the purposes of the Section 401 of the [Clean Water Act]”).

³¹ *See, e.g.*, 18 C.F.R. § 4.38(f)(7) (2003).

³² *See* 18 C.F.R. § 4.34(b)(5)(i) (2004).

The Commission orders:

The request for reconsideration filed by the City of Augusta, Georgia on June 4, 2004, is granted to the extent set forth herein, and is otherwise denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.