

128 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Northern Indiana Public Service Company

Project No. 12514-029

ORDER DENYING REHEARING

(Issued September 17, 2009)

1. On May 20, 2009, Commission staff issued an order¹ modifying and approving the woody debris management plan filed by Northern Indiana Public Service Company (Northern Indiana or licensee) for its Norway-Oakdale Hydroelectric Project No. 12514, located on the Tippecanoe River near the City of Monticello in Carroll and White Counties, Indiana. Northern Indiana filed a timely request for rehearing of the May 20 Order, arguing that it should not be required to remove and dispose of non-organic debris collected at the project. For the reasons discussed below, the Commission denies rehearing.

Background

2. On October 2, 2007, Commission staff issued Northern Indiana an original license for the continued operation of the 16.4-megawatt Norway-Oakdale Project.² The project consists of two developments: Norway, located about one mile north of Monticello, and Oakdale, located about seven miles south of Monticello. Both the Norway and Oakdale developments include a dam, powerhouse, and a reservoir (Lake Shafer and Lake Freeman, respectively).

3. Article 409 of the license order requires Northern Indiana to develop a plan, for Commission approval, to manage woody organic debris at the project dams. The plan

¹ *Northern Indiana Public Service Co.*, 127 FERC ¶ 62,148 (2009).

² *Northern Indiana Public Service Co.*, 121 FERC ¶ 62,009 (2007).

must include, among other things, “a description of the strategies to remove and dispose of all non-organic debris collected at [the] project dams.”³ The purpose of the plan is to improve aquatic habitat in the river reaches below the dams.⁴

4. Northern Indiana filed the plan on March 28, 2008, after consultation with the Indiana Department of Natural Resources (Indiana DNR) and the U.S. Fish and Wildlife Services (FWS). In the plan, Northern Indiana proposed to continue its current strategy of passing non-organic debris through the trash and flood gates at the Norway and Oakdale dams from October through April and during high flow events at other times of the year. Between May and September, Northern Indiana proposed to coordinate with the Shafer and Freeman Lakes Environmental Conservation Corporation (Conservation Corporation), a not-for-profit Indiana organization that owns and manages approximately 2,000 acres of shoreline and reservoir beds within the project boundary and in the project area, to remove large floating debris, including boats, docks, piers, large timbers, and logs.

5. On May 20, 2009, Commission staff modified and approved the plan. In addition to reiterating the Article 409 requirement that Northern Indiana develop strategies to remove and dispose of non-organic debris at the project dams, the order rejected Northern Indiana’s proposal to work with the Conservation Corporation to collect and dispose of large floating non-organic debris from May through September as insufficient.⁵ The order gave the licensee ninety days to file its strategies for the year-round removal and disposal of non-organic debris collected at the project dams.⁶

6. On June 19, 2009, Northern Indiana filed a timely request for rehearing of the May 20 Order, requesting that the Commission eliminate the requirement in Article 409 to remove and dispose of all non-organic debris at the project dams.⁷

³ *Id.* at 64,070.

⁴ *See id.*

⁵ *See Northern Indiana*, 127 FERC at 64,408.

⁶ *See id.*

⁷ Northern Indiana also requested to extend the deadline to comply with the requirement until ninety days after the Commission issues its rehearing order. Commission staff, by unpublished order of July 29, 2009, extended the deadline to November 20, 2009.

Discussion

7. On rehearing, Northern Indiana refers to the May 20 Order, but all of its arguments are centered on Article 409 of the 2007 license order. Northern Indiana essentially argues that the requirement of Article 409 of the license to develop strategies to remove and dispose of non-organic debris placed in the reservoirs is arbitrary, capricious, not based on reasoned decision-making, and contrary to the public interest.⁸

8. The requirement to develop strategies to remove and dispose of non-organic debris at the project dams is not a new one. It was established in Article 409 of the 2007 license order. If Northern Indiana objected to the requirement, it should have sought rehearing of the 2007 license order, but it did not. The time to examine Northern Indiana's arguments against the requirements in Article 409 has long passed.⁹ The May 20 Order did not establish new requirements, but simply reiterated those in Article 409.

9. In any event, the Commission finds that Northern Indiana's arguments are without merit. The requirement to develop strategies to remove and dispose of non-organic debris has ample support in the record. In the licensing proceeding, Commission staff determined that the removal of plastic, Styrofoam, and other non-organic debris would contribute to protecting fish habitat, protecting aquatic resources, and improving aesthetic conditions at the project.¹⁰ Tippecanoe River supports one of the most significant aquatic faunal communities in the eastern United States, especially for fish and freshwater mussels.¹¹ The river is home to three federally listed endangered mussels, two federal candidate mussels, and five state-listed species.¹² It is listed as the tenth most critical watershed out of over 300 small watersheds in the country.¹³ In this ecosystem, several of the listed species are inter-dependent for their survival.¹⁴ Thus, the requirements in

⁸ See request for rehearing at 4.

⁹ See 16 U.S.C. § 825l(a) (2006) (providing a 30-day deadline to file a request for rehearing); 18 C.F.R. § 385.713(b) (2009) (providing the procedures for rehearing).

¹⁰ See Final Environmental Assessment (EA), issued February 16, 2007, at 41.

¹¹ See *id.* at 30-31.

¹² See U.S. Department of the Interior's comments, filed November 22, 2005, at 2.

¹³ See EA, *supra* note 10, at 31 (citing RIVERS OF LIFE: CRITICAL WATERSHEDS FOR PROTECTING FRESHWATER BIODIVERSITY (Lawrence L. Master et al. eds. 1998)).

¹⁴ See *id.* at 52.

Article 409 are well supported. In addition, FWS, in its March 25, 2008 comments on Northern Indiana's plan, expressed concern that some of the trash, which would be sluiced downstream, could contain toxic substances or represent physical hazards to fish and other vertebrates.¹⁵ Also, it continued, the trash would damage the aesthetic value of one of Indiana's most significant rivers.¹⁶ Indiana DNR, in its March 18, 2008 comments on the Northern Indiana's draft plan, also expressed concern that sluicing debris would not improve aquatic habitat.¹⁷ These comments provide further support for the non-organic debris removal requirement of Article 409.

10. Northern Indiana argues that it is inequitable to require it to bear the entire burden of removing and disposing of non-organic debris. It maintains that people who use the property around the reservoirs, and not it, place the trash in the reservoirs.¹⁸ Since the Conservation Corporation owns 85 percent of the land in the project area, Northern Indiana argues that the Conservation Corporation should be mainly responsible for the debris removal. In support of its position, the licensee cites *York Haven Power Company (York Haven)*,¹⁹ where the Commission allegedly ordered that the burden of debris removal be spread among a number of entities, including non-licensees.²⁰

11. Northern Indiana misreads *York Haven*. As we explained in *Cocheco Falls Associates*:

Licensees are routinely required to remove from project reservoirs such debris, silt, or other materials as are interfering

¹⁵ See FWS filing of March 25, 2008, at 2.

¹⁶ See *id.*

¹⁷ See Indiana DNR Comments on the Draft Woody Debris Management Plan, available in the Appendix of Northern Indiana's Woody Debris Management Plan, filed on March 25, 2008. Indiana DNR also stressed the sensitivity of the aquatic resources on the Tippecanoe River in its November 16, 2005 comments. See Indiana DNR License Comments and Recommendations (10a and 10j), filed on November 16, 2005, at 5-6.

¹⁸ Even were it timely, Northern Indiana's argument that requiring it to be solely responsible for cleaning up the non-organic debris at the project site would likely encourage more pollution by others who use the reservoirs is unconvincing and provides no basis for allowing the licensee to decline to fulfill its responsibilities under the license.

¹⁹ 21 FERC ¶ 61,430 (1982) (issued in 1980).

²⁰ See request for rehearing at 12.

with the efficiency of project operations, or of navigation, recreation, or other public purposes. A licensee's responsibility in this regard extends beyond those situations that are created or exacerbated by the project itself.²¹

12. The decision in *York Haven* did not reassign the responsibility of debris removal. To the contrary, it recognized that “[t]he removal of debris is the proper responsibility of a licensee in the interests of public safety and project operation.”²² In *York Haven*, there were multiple Commission-licensed hydroelectric projects on the Susquehanna River that were passing debris, which caused a shared debris problem among all the licensees. As a result, in issuing licenses for these projects, the Commission properly required the licensees to cooperate with each other and with governmental entities in devising a plan for debris removal at the projects.²³ Here, we have only one project and only one licensee.

13. Moreover, while the Susquehanna licenses in Project Nos. 405, 1025, and 1881 recognized that “[s]hould the debris problem be of such a magnitude that substantial expense would be involved in its removal, that burden should be allocated among all concerned parties . . . ,”²⁴ the Commission requested more information and required the licensees to conduct a study to determine the magnitude of the burden and to create an appropriate debris-removal plan.²⁵ In Northern Indiana's case, it raised no objection in

²¹ See *Cocheco Falls Associates*, 102 FERC ¶ 61,139, at P 11 (2003). Furthermore, standard Article 19 of Northern Indiana's license provides that “[i]n the construction, maintenance, or operation of the project, the licensee shall be responsible for, and shall take reasonable measures to prevent . . . any form of water . . . pollution.” *Northern Indiana*, 121 FERC at 64,076.

²² *York Haven*, 21 FERC at 62,021.

²³ See *York Haven*, 21 FERC at 62,029; see also August 14, 1980 orders issuing new licenses for Project Nos. 405, 1025, and 1881, published in 1982: *Susquehanna Power Co.*, 19 FERC ¶ 61,348, at 61,692; *Safe Harbor Water Power Corp.*, 18 FERC ¶ 62,535, at 63,919; and *Pennsylvania Power and Light Co.*, 21 FERC ¶ 61,429, at 62,016.

²⁴ *York Haven*, 21 FERC at 62,021; *Susquehanna Power*, 19 FERC at 61,685; *Pennsylvania Power*, 21 FERC at 62,007-08; *Safe Harbor*, 18 FERC at 63,913 (emphasis added to underscore supposition).

²⁵ See *York Haven*, 21 FERC at 62,029; *Susquehanna Power*, 19 FERC at 61,692; *Pennsylvania Power*, 21 FERC at 62,016; *Safe Harbor*, 18 FERC at 63,919. The

(continued...)

the licensing proceeding to this requirement or to its potential cost. What we have before us is the licensee's objections to one possible method of debris removal.²⁶ Until Northern Indiana files its plan, which will identify and evaluate other possible alternatives, we are unable to conclude that its burden would be unreasonable.²⁷

14. Northern Indiana alleges that the collection of debris during winter months will be unsafe during icy conditions. When Northern Indiana develops its strategies to remove and dispose of all non-organic debris, it should take into account the possibility of icing at the project dams and provide for a strategy to remove and dispose of the trash safely during the winter months. In reviewing the revised proposal, we will take due account of any seasonal hazards documented by the licensee.

15. In addition, Northern Indiana contends that the installation of the equipment necessary to remove and dispose of the debris could adversely affect the historic

Commission continued, “[s]hould there continue to be disagreement regarding the allocation of expense and responsibility for debris removal, the Commission will determine the extent of its licensees’ responsibilities at that time.” *York Haven*, 21 FERC at 62,021; *Susquehanna Power*, 19 FERC at 61,685; *Pennsylvania Power*, 21 FERC at 62,007-08; *Safe Harbor*, 18 FERC at 63,913.

²⁶ If the information concerning technology feasibility and costs that Northern Indiana presents in its rehearing request only recently came to light, and Northern Indiana believes that the information supports modification or elimination of the requirement to remove and dispose of non-organic debris from project waters, then it can, in consultation with relevant agencies, prepare a request to amend its license.

²⁷ Northern Indiana proposes, as an alternative, to sponsor two clean-up events with the Conservation Corporation whereby volunteers would collect trash along the shoreline of both reservoirs. While this proposal could be one aspect of a more comprehensive plan, standing alone it is insufficient. It does not adequately address the environmental harm of allowing the non-organic debris to pass through the dams. These materials may contain toxic substances or represent physical hazards to wildlife on the river, as well as damage the aesthetics of the river. Collecting the trash only twice a year would not adequately prevent this harm. In addition, the proposal appears to be dependent on volunteers and does not provide for a contingency plan in case not enough people volunteer to collect the trash. Moreover, it places at least some of the burden of organizing the clean-up event on a non-licensee, the Conservation Corporation. In sum, Northern Indiana's proposal inappropriately shifts the licensee's duty to comply with a license requirement on to other parties or the general public.

character of the project's dams and powerhouses, which are both eligible for listing on the National Register of Historic Places.²⁸

16. This allegation, without more, cannot relieve Northern Indiana of the duty to develop strategies to remove and dispose of non-organic debris. Northern Indiana's Historic Property Management Plan requires it to consult with the Indiana State Historic Preservation Office (SHPO) for any proposed construction activity at the project that relates to the dams, powerhouses, equipment, and attendant structures.²⁹ Thus, to the extent any of Northern Indiana's strategies involves additions or modifications to the dams or other project structures eligible for listing, it will need to consult with the Indiana SHPO.

17. For the reasons explained above, the Commission denies Northern Indiana's rehearing request and affirms the requirement in the license to develop strategies to remove and dispose of non-organic debris at the Norway and Oakdale dams. Northern Indiana must prepare its plan in consultation with Indiana DNR and FWS and file it for Commission approval by January 30, 2010. The plan should evaluate the technological and economic feasibility of alternative methods to remove and dispose of non-organic debris and include documentation of consultation with the Indiana DNR and FWS.

The Commission orders:

(A) The request for rehearing filed on June 19, 2009 in Project No. 12514 by Northern Indiana Public Service Company is denied.

(B) Pursuant to Article 409, Northern Indiana Public Service Company must file its plan to develop strategies to remove and dispose of non-organic debris from the Norway and Oakdale dams by January 30, 2010.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁸ The Norway development was put in service in 1923 and the Oakdale development was put in service in 1925.

²⁹ See Historic Property Management Plan, filed November 25, 2008, at 12.