

140 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Blue Heron Hydro LLC

Project No. 13226-004

ORDER GRANTING REHEARING AND AMENDING LICENSE

(Issued July 19, 2012)

1. On May 10, 2012, the Vermont Agency of Natural Resources (Vermont ANR) filed a request for rehearing of Commission staff's April 12, 2012 order¹ issuing a new license to Blue Heron Hydro, LLC, (Blue Heron) for the Ball Mountain Dam Hydroelectric Project No. 13226 (Ball Mountain Project). Vermont ANR seeks a reversal of the license order's finding that Vermont Department of Environmental Conservation (Vermont DEC)² waived its water quality certification for the project because the Vermont DEC did not act on Blue Heron's certification application within one year. Vermont ANR submits documentation to show that the water quality certification was timely, and requests that the Commission modify the license order to incorporate the conditions in the certification as part of the license.

2. As discussed below, we grant Vermont ANR's request for rehearing. We amend the license order to incorporate the water quality certification conditions as proffered by Vermont DEC, to the extent discussed below.

Background

3. On November 1, 2010, Blue Heron filed, pursuant to Part I of the Federal Power Act (FPA),³ an application for an original license to construct, operate, and maintain its

¹*Blue Heron, LLC*, 138 FERC ¶ 62,038 (2012).

² Vermont ANR an intervenor in the licensing proceeding, is the administering authority for Vermont's Water Quality Certification program. Vermont DEC is part of Vermont ANR and is responsible for issuing the certification.

³ 16 U.S.C. §§ 791a - 825r (2006).

proposed Ball Mountain Project. The 2,196-kilowatt (kW) project will use the existing Ball Mountain Dam and Lake, which are owned and operated by the U.S. Army Corps of Engineers (Corps) and are not part of the licensed project.

4. In addition to other federally authorized project purposes, the Corps operates the Ball Mountain Dam in coordination with 13 other dams to provide flood protection for the numerous communities along the Connecticut River.

5. The generating facilities for the Ball Mountain Project will be installed in the Corps' existing intake tower in Ball Mountain Lake. The intake tower includes three hydraulic slide gates that are arranged side-by-side at the base of the intake tower on its upstream side and are operated by the Corps to control discharge through the dam. The Ball Mountain Project will consist of two turbine-generator arrays that will be installed in the openings of the two outer slide gates, with the center slide gate being unmodified. The project can only generate electricity using water that the Corps passes through its existing slide gate openings and the inflow of water to the turbine-generator arrays will equal the outflow from the turbine-generator arrays at all times that the project is operating. The project will not have the capability to store water and its operation will not change reservoir elevations or the amount of flows that the Corps releases from the dam.

Discussion

6. Under section 401(a)(1) of the Clean Water Act (CWA),⁴ a federal agency may not issue a license authorizing the construction or operation of a hydroelectric project unless the certifying agency for the state either has issued water quality certification for the project or has waived certification. Section 401(a)(1) further provides that certification is waived if the state certifying agency fails or refuses to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of such request. Section 401 provides specifically that the one-year period commences on the agency's "receipt" of a certification request.⁵ Under section 401(d) of the CWA, conditions of the certification are conditions of any federal license or permit that is issued.⁶

⁴ 33 U.S.C. § 1341(a)(1) (2006).

⁵ For hydroelectric project licenses and license amendments, Commission regulations allow the certifying agency the entire year. *See* 18 C.F.R. § 4.34(b)(5)(iii) (2011).

⁶ 33 U.S.C. § 1341(d) (2006).

7. At the time that the license was issued, the only evidence in the record regarding Blue Heron's request to Vermont DEC for water quality certification was Blue Heron's application, dated July 10, 2009. As noted, Vermont DEC had issued its certification on July 14, 2010. The record thus demonstrated that Vermont DEC had not acted on the July 10, 2009 certification request within the statutory one-year period, so Commission staff concluded that the certification was untimely and that certification had been waived. Nevertheless, the certification conditions were considered as recommendations under section 10(a)(1) of the Federal Power Act (FPA) in the license order.

8. On rehearing, Vermont ANR provides a date stamped copy of Blue Heron's certification application to demonstrate that while the application was dated July 10, 2009, Vermont DEC did not receive it until July 14, 2009. This new information indicates that the certification was not waived; therefore, we are amending the license to incorporate the certification conditions. The certification is attached as Appendix A to this order and is incorporated into the amended license by ordering paragraph (B).

9. Vermont DEC's certification includes 19 conditions. Seven of the conditions are administrative in nature and are not discussed further in this order.⁷ However, as discussed below, several of the substantive conditions appear to be an attempt to alter the way the Corps operates the federal dam and reservoir, and are, given that we have no jurisdiction over Corps facilities, impossible to meet.⁸

A. Unenforceable Conditions

10. The Commission can only enforce Vermont DEC's conditions to the extent that they require action at the privately owned facilities that we can license. The conditions discussed below involve control of the operations at the Corps' dam and reservoir and thus are unenforceable.

11. Condition B requires that Blue Heron operate the project (which Vermont DEC reads to include the Corps dam and reservoir) in a run-of-river mode, except for during flood control operations or when Blue Heron is conducting maintenance approved in advance by Vermont DEC. Vermont DEC defines a run-of-river project as a project that does not operate using stored flows and where outflow from the project is equal to inflow.⁹ The Commission cannot require Blue Heron to change the Corps' operation of

⁷ Conditions A, N, O, P, Q, R and S are administrative.

⁸ We note these conditions are the same conditions proffered by Vermont DEC in the Townsend Dam License Order, Project No. 13368-002, 138 FERC ¶ 62,316 (March 29, 2012).

⁹ Certification at 4, footnote 1.

Ball Mountain Dam and Lake to a run-of-river mode. Condition B also requires a conservation flow and ramping requirements under certain conditions and specifies a minimum reservoir level during project operations. Because flow releases and ramping rates require manipulation of the reservoir, only the Corps can make those operational decisions. Therefore, we cannot enforce Condition B.

12. Condition C requires that when the reservoir is being refilled following a drawdown, no more than 10 percent of inflow will be stored in Ball Mountain Lake, and the remaining 90 percent will be passed downstream. The Ball Mountain Project will not include facilities capable of regulating the reservoir level or outflow from Ball Mountain Dam. Thus, Condition C is unenforceable.

13. Condition D requires that Blue Heron develop a flow and water level management plan detailing how the project will be operated to comply with Conditions B and C. Because Blue Heron will not have any influence on reservoir levels or the quantity of flows released from Ball Mountain Dam, the plan required by Condition D for meeting the requirements of Conditions B and C cannot be developed.

14. Condition F requires that Blue Heron ensure that the Memorandum of Agreement (MOA) for project operation between Blue Heron and the Corps is consistent with the Vermont DEC's certification. The MOA, as required by Article 309 of the license order, will include a detailed description of project operation and any restrictions needed to protect the primary purposes of the Corps' project for navigation, recreation, water quality, and flood control. However, as described above, Blue Heron's project will not include facilities or structures capable of controlling reservoir levels or outflow from Ball Mountain Dam as specified in Conditions B and C, nor will Blue Heron have any control over Corps operations. Thus, this condition is unenforceable.

B. Enforceable Conditions

15. The Commission can enforce the conditions discussed below.

16. Condition E requires Blue Heron to develop a plan, in consultation with Vermont DEC and the U.S. Fish and Wildlife Service (FWS), for continuously monitoring and reporting flow releases, reservoir levels, and inflows and for reporting deviations from the operating conditions specified in Conditions B and C. Because the project will not include facilities or structures capable of controlling reservoir levels or outflow from Ball Mountain Dam as described in Conditions B and C, the plan required by Conditions E is unnecessary. However, because it is a monitoring plan only, the licensee is able to comply with the requirement.

17. Conditions G and H require that Blue Heron develop a plan, in consultation with Vermont DEC, to monitor dissolved oxygen (DO) and water temperature and to determine if the project is degrading water quality in the river downstream of the dam. In

the EA, Commission staff concluded that because the project will not change the quantity of flow releases or the location water will be withdrawn from Ball Mountain Lake, the project will not affect water quality in the river downstream of Ball Mountain Dam. Therefore, staff concluded that this condition is unnecessary and did not recommend the license require Blue Heron to conduct water quality monitoring.¹⁰ However, because the CWA provides that the certification become part of any license that authorizes construction or operation of a project, ordering paragraph (B) requires Blue Heron to conduct the water quality monitoring described in certification Conditions G and H. Additionally, because the Corps operates Ball Mountain Dam and Lake for fish and wildlife enhancement, ordering paragraph (D) requires Blue Heron to also consult with the Corps when preparing the plan.

18. Condition I requires that Blue Heron develop a plan, in consultation with Vermont DEC, Vermont Department of Fish and Wildlife (Vermont DFW), and FWS, for the construction, operation, and maintenance of a downstream fish passage facility for Atlantic salmon. Because a downstream fish passage plan is now required by ordering paragraph (B), Article 405 of the license, which requires downstream fish passage, is unnecessary and is removed by ordering paragraph (C). To the extent that the fish passage facility may alter Ball Mountain Dam, Blue Heron must work with the Corps to develop the facility in a manner that is acceptable to the Corps.¹¹ Accordingly, ordering paragraph (D) requires Blue Heron to also consult with the Corps when preparing the plan.

19. Condition J requires Blue Heron to develop a plan, in consultation with the Vermont DEC, the Vermont DFW, and FWS, to study the effectiveness of the downstream fish passage facility. Because a fish passage effectiveness study plan is now required by ordering paragraph (B), Article 406 of the license, which requires a similar plan, is unnecessary and is removed by ordering paragraph (C). Because the Corps operates Ball Mountain Dam and Lake for fish and wildlife enhancement, ordering paragraph (D) requires Blue Heron to also consult with the Corps when preparing the plan.

20. Condition K requires Blue Heron to develop a plan, in consultation with Vermont DEC, to dispose of debris associated with project operation, including debris collected at project facilities. Because a debris management plan is now required by ordering paragraph (B), Article 404 of the license, which requires a debris management plan, is unnecessary and is removed by ordering paragraph (C). To the extent that debris removal

¹⁰ December 20, 2011 Environmental Assessment for Ball Mountain Dam Hydroelectric Project, Project No. 13226-003, at 35.

¹¹ The fish passage facilities will not be attached to the Ball Mountain Dam.

and disposal may affect Corps facilities or the Corps' operation of Ball Mountain Dam, Blue Heron must work with the Corps to develop removal and disposal procedures that are acceptable to the Corps. Accordingly, ordering paragraph (D) requires consultation with the Corps in the development of the plan.

21. Condition L requires that Blue Heron receive prior review and approval from Vermont DEC for any maintenance or repair work that may have a material adverse effect on water quality.

22. Condition M requires that Blue Heron notify the Vermont DEC within two weeks of project completion and commencement of operation.

23. As noted above, all 19 conditions of the certification are set forth in Appendix A, even those that exceed the Commission's authority to enforce. Ordering paragraph (D) of this order requires Blue Heron to file, for Commission approval, plans and reports required by the certification conditions; notify the Commission of emergencies and other activities; and file amendment applications, as appropriate.

The Commission orders:

(A) The request for rehearing filed by the Vermont Agency of Natural Resources, on May 10, 2012, is granted.

(B) To the extent they are within the Commission's authority to enforce, the license issued on April 12, 2012, is subject to the conditions submitted by the Vermont Department of Environmental Conservation under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2006), as those conditions are set forth in Appendix A to this order.

(C) Articles 404, 405, and 406 of the license issued on April 12, 2012, are removed from the license order.

(D) The following article is included in the license issued on April 12, 2012:

Article 411. *Commission Approval*

(a) Requirement to File Plans for Commission Approval.

Various conditions of this license found in the Vermont Department of Environmental Conservation's (Vermont DEC) water

quality certification (certification) issued pursuant to section 401 of the Clean Water Act (Appendix A) require the licensee to prepare plans in consultation with state and federal agencies but without submittal to or approval by the Commission. Each such plan also shall be submitted to the Commission for approval. These plans are listed below.

Vermont DEC certification condition	Plan name	Due date
I	Downstream fish passage plan	The earlier of April 12, 2014, or 90 days prior to commencing construction of the downstream fish passage facilities
J	Downstream fish passage effectiveness study plan	The earlier of April 12, 2014, or 90 days prior to commencing project operation
K	Debris disposal plan	The earlier of April 12, 2014, or 90 days prior to commencing project operation

The licensee shall include with each plan filed with the Commission documentation that the licensee developed the plan in consultation with the Vermont DEC, Vermont Department of Fish and Wildlife, the U.S. Department of the Interior's Fish and Wildlife Service, and the U.S. Army Corps of Engineers (Corps), and has received approval from Vermont DEC. The Commission reserves the right to make changes to any plan submitted. Upon Commission approval, the plan becomes a requirement of this license, and the licensee shall implement the plan or changes in project operation or facilities, including any changes required by the Commission.

(b) Requirement to File Amendment Applications.

Certain certification conditions in Appendix A contemplate Vermont DEC ordering unspecified long-term changes to project operations or facilities based on new information or the results of studies or monitoring required by the certification, but do not appear

to require prior Commission approval for such changes. These changes may not be implemented without prior Commission authorization, granted after the filing of an application to amend the license.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

Water Quality Certificate Conditions for the Ball Mountain Dam Hydroelectric Project issued by the Vermont Department of Environmental Conservation on July 14, 2010.

A. Compliance with Conditions. The Applicant shall provide notice to the Department of any proposed change to the project that would have a significant or material effect on the findings, conclusions or conditions of this Certification, including any changes to operation of the project. The Applicant shall not make any such change without approval of the Department.

B. Flow and Water Level Management. The project shall be operated in a true run-of-river mode except during scheduled whitewater boating releases, when the Corps has taken control of the project for flood control or special maintenance operations, or when the Applicant is conducting special maintenance operations approved in advance by the Department. When the Applicant is conducting scheduled whitewater boating releases or special maintenance operations, the conservation flow and ramping requirements described in Finding 18 shall be met at all times. Under no circumstances shall the applicant allow the reservoir stage to drop below 25 feet when the project is under the Applicant's control. True run-of-river operation means no utilization of reservoir storage and that outflow from the facility is equal to inflow to the reservoir on an instantaneous basis, as further described in Footnote 1, page 4.

C. Flow Management During Reservoir Refill. During refilling of the project reservoir following a drawdown, up to 10 percent of instantaneous inflow may be placed in storage in order to restore the water level without significantly reducing downstream flows.

D. Flow and Water Level Management Plan. The Applicant shall develop and file with the Department a flow and water level management plan detailing how the project will be operated to achieve compliance with the flow and water level management limitations described above. The plan shall include details of the systems that will be used to maintain a pool stage of at least 25 feet, including a backup system that will function in the event of primary system failure. The plan shall be subject to Department review and approval. Project operation shall not commence prior to approval of the plan by the Department. The Department reserves the right of review and approval of any material changes made to the plan.

E. Monitoring Plan for Reservoir and Flow Management. The Applicant shall develop a plan for continuous monitoring and reporting of flow releases at the project, reservoir levels and inflows. The plan shall include procedures for reporting deviations from prescribed operating conditions to the Department, explaining the reasons for those

deviations and indicating measures to be taken to avoid recurrences. The Applicant shall maintain continuous records of flows and reservoir levels and provide such upon request by the Department. The plan shall include a provision for the inclusion of contemporaneous records from the U.S. Geological Survey gage (West River at Jamaica, Vermont, Gage No. 01155500). The plan shall be developed in consultation with the Department and the U.S. Fish and Wildlife Service. The plan shall be subject to Department review and approval. Project operation shall not commence prior to approval of the plan by the Department. The Department reserves the right to review and approve or deny any material changes made to the plan.

F. Memorandum of Agreement. The Applicant shall ensure that its Memorandum of Agreement with the Corps relating to responsibilities for project operation is consistent with the findings and conditions of this Certification. The Applicant shall provide a copy of the final Memorandum of Agreement to the Department upon its signature. The Department reserves the right to amend or revoke this Certification if the Memorandum of Agreement is not sufficient to ensure the Applicant's compliance with this Certification.

G. Dissolved Oxygen. The Applicant shall conduct a study to sample D.O. below the dam and determine if project operation is degrading downstream D.O. concentrations. The study plan shall be developed in consultation with the Department and shall be subject to Department review and approval. Project operation shall not commence prior to approval of the plan by the Department. If the study documents that D.O. concentrations are being degraded, the Applicant shall propose, subject to Department review and approval, changes in project design or operation to mitigate the impact. The Applicant shall implement any project design and operation changes approved by the Department within the timeframes specified by the Department. Failure to implement any required changes may result in a reopening of this Certification.

H. Water Temperature. The Applicant shall conduct a study to determine the impact of project operation on downstream water temperature. The study plan shall be developed in consultation with the Department and shall be subject to Department review and approval. Project operation shall not commence prior to approval of the plan by the Department. If the study documents downstream temperature impacts, the Applicant shall propose, subject to Department review and approval, changes in project design or operation to mitigate the impacts.

I. Downstream Fish Passage. Prior to initial project operation, the Applicant shall install a downstream fish passage facility to convey fish safely and effectively to the river immediately below the dam. A downstream fish passage plan shall be developed in consultation with the Department, the Department of Fish and Wildlife, and the U.S. Fish and Wildlife Service and shall be submitted to the Department at least 180 days prior to

the commencement of construction. The plan shall be subject to Department review and approval prior to construction. The plan shall include:

- 1) Design and construction plans and specifications;
- 2) Plans for operation and maintenance;
- 3) Provisions to minimize entrainment of fish into the generating units;
- 4) Provisions to minimize impingement of fish on devices or structures used to prevent entrainment; and
- 5) Provisions to convey fish safely and effectively downstream of the facility.

Downstream passage shall be provided 24 hours per day, April 1 – June 15 and September 15 – November 15. In years when adult salmon are above the project, the fall passage period shall be extended through December 31. The downstream passage facility shall be functional at all reservoir operating levels. The passage period shall be subject to adjustment based on knowledge gained about migration periods for migratory salmonids.

J. Downstream Fish Passage Effectiveness Study. Prior to initial project operation, the Applicant shall develop a plan to study the effectiveness of the downstream fish passage facility. The study plan shall include a schedule; shall be developed in consultation with the Department of Fish and Wildlife and the U.S. Fish and Wildlife Service; and shall be subject to Department approval prior to implementation. Based on the outcome of the study, the Department may require that the facilities required under Condition I be modified or replaced in order to assure safe passage. The Applicant shall implement any project design and operational changes approved by the Department within the timeframes specified by the Department.

K. Debris Disposal. The Applicant shall develop a plan for proper disposal of debris associated with project operation, including trashrack debris. The plan shall be developed in consultation with the Department, and a draft shall be submitted to the Department for review at least 60 days prior to commencement of project operation. The final plan shall be subject to Department approval. The Department reserves the right of review and approval of any material changes made to the plan at any time.

L. Maintenance and Repair Work. Any proposals for project maintenance or repair work shall be filed with the Department for prior review and approval, if said work may have a material adverse effect on water quality or cause less-than-full support of a designated use of State waters.

M. Commencement of Operation. The Applicant shall notify the Department within two weeks of project completion and commencement of operation.

N. Record Drawings. The Applicant shall provide the Department with a set of as-built plans for the record within one year of the completion of construction.

O. Compliance Inspection by Department. Subject to limitations imposed by the Corps, the Applicant shall allow the Department to inspect the project area at any time to monitor compliance with Certification conditions.

P. Posting of Certification. A copy of this Certification shall be prominently posted within the gate control structure.

Q. Approval of Project Changes. Any change to the project that would have a significant or material effect on the findings, conclusions or conditions of this Certification, including project operation, must be submitted to the Department for prior review and written approval where appropriate and authorized by law and only as related to the change proposed.

R. Reopening of License. The Department may request, at any time, that FERC reopen the license to consider modifications to the license as necessary to assure compliance with the Standards.

S. Continuing Jurisdiction. The Department reserves the right to alter or amend this Certification over the life of the project when such action is necessary to assure compliance with the Standards and to respond to any changes in classification or management objectives for the affected waters.