

142 FERC ¶ 61,126
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.

River Bounty, Inc.

Project No. 5730-018

ORDER TERMINATING EXEMPTION BY IMPLIED SURRENDER

(Issued February 21, 2013)

1. This order terminates, by implied surrender, the exemption for the 1,500-kilowatt Oakland Hydroelectric Project No. 5730, located on the Susquehanna River in Susquehanna County, Pennsylvania.

Background

2. On June 9, 1982, the Commission granted American Hydro Power Company (American Hydro) an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for the project.¹ The project consists of: (1) a rock-filled timber crib dam 655 feet long and 10.5 feet high; (2) a fish ladder; (3) an impoundment with 825 acre-feet of net storage covering 75 acres at a water surface elevation of 888.6 feet; (4) a concrete powerhouse approximately 22 feet long and 50 feet wide containing three generating units with a total installed capacity of 1,500 kilowatts (kW); (5) a 50- by 180-foot-long tailrace channel; and (6) a 150-foot-long, 33-kilovolt transmission line.²

3. The exemption was made subject to standard articles contained in the Commission's regulations.³ Standard Article 1 provides, in part, that "[i]f any term or condition of the exemption is violated, the Commission may revoke the exemption . . .

¹ *American Hydro Power Company*, 19 FERC ¶ 62,426 (1982).

² The Borough of Oakland, the owner of the project site, has leased the site to River Bounty, Inc. for 99 years, starting in the late 1970s.

³ See 19 FERC ¶ 62,426 (citing 18 C.F.R. § 4.106).

or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.”⁴

4. Standard Article 2 provides that the construction, operation, and maintenance of the project “must comply with any terms and conditions that any Federal or state fish and wildlife agencies have determined are necessary to prevent loss of, or damage to, fish and wildlife resources . . . in the comments submitted in response to the notice of the exemption application.”⁵ In response to the notice, the Pennsylvania Fish Commission and the U.S. Fish and Wildlife Service (FWS) submitted a number of conditions, including a requirement by both agencies that the exemptee must maintain a continuous flow release of 650 cubic feet per second or inflow, evenly distributed across the width of the river.⁶ FWS also required that the exemptee operate the project in such a manner that would not reduce the water surface elevation in the upstream impoundment below the crest elevation of the flashboards or below the crest elevation of the dam if flashboards are not used. Both agencies reserved the right to require fish passage measures. By operation of Standard Article 2, these conditions became requirements of the exemption.

5. In April 2000, American Hydro lost its power purchase agreement and the project was shut down. In 2002, River Bounty, Inc., the lessee of the real estate underlying the project’s dam and facilities, seized possession of these facilities, which it had formerly leased to American Hydro, and became the project’s exemptee.⁷

6. By letter dated June 16, 2004, the Commission’s Regional Engineer informed River Bounty that “Oakland Dam presents [a] hazard to waterborne recreationists and that appropriate warning signs and marker buoys should be installed at strategic locations at the site to alert the public.”⁸ Staff appended to the letter the Commission’s public

⁴ 18 C.F.R. § 4.106(a)(1) (1982).

⁵ 18 C.F.R. § 4.106(a)(2) (1982).

⁶ See letter from William Patterson (FWS) to Kenneth F. Plumb (Commission Secretary) (dated May 20, 1982); letter from Ralph W. Abele (Pennsylvania Boat Commission) to Kenneth F. Plumb (dated May 24, 1982).

⁷ See letter from Richard J. Halloran (American Hydro) to Ms. Liza Velez (Commission staff) (filed April 19, 2004). River Bounty is an entity owned by the Boroughs of Oakland and Susquehanna, Pennsylvania, and the Barnes-Kasson Hospital. *Id.*

⁸ Letter from Anton J. Sidoti (Commission staff) to Charles J. Aliano (River Bounty).

safety guidelines, as well as American Hydro's public safety plan, and ordered River Bounty to put public safety measures in place no later than June 25, 2004.

7. On November 24, 2004, Commission staff issued a letter requiring River Bounty to file a plan and schedule for resuming project operation or, in the alternative, to surrender its exemption.⁹

8. On January 3, 2005, River Bounty responded that no one on its board of directors possessed hydropower expertise, but that it was consulting with engineers in an effort to return the project to operation, and asked for more time to do so.¹⁰

9. On May 25, 2005, Commission staff granted River Bounty additional time to find a new hydropower operator to restore the project, and required the company to file status reports every six months, documenting that the project was in compliance with the terms and conditions of the exemption, that the environmental resources at the project were being protected, and that public safety was ensured.¹¹

10. On November 30, 2005, River Bounty filed a progress report stating it believed the project was in compliance with all requirements, including its public safety plan, and that it was considering entering into an agreement with an experienced hydropower project operator. In a June 30, 2006 progress report, River Bounty stated that it intended to sign a lease agreement with a hydropower operator within one or two months.

11. On August 28, 2006, River Bounty reported by telephone that the training wall between the powerhouse and the tailrace channel had failed. By letter dated August 14, 2006, Commission staff ordered River Bounty to file an incident report along with a plan and schedule for repairing the wall.¹²

12. In an August 22, 2006 response, River Bounty stated that it had no plans to immediately repair the wall and that instead it would soon be leasing the project to a new operator who would make repairs within six to eight months.¹³

⁹ Letter from John E. Estep (Commission staff) to Charles J. Aliano (River Bounty).

¹⁰ Letter from Charles J. Aliano to Commission Secretary.

¹¹ Letter from John E. Estep (Commission staff) to Charles J. Aliano.

¹² Letter from Charles P. Goggins to Charles J. Aliano.

¹³ Letter from Charles J. Aliano to Charles P. Goggins.

13. In an October 20, 2006 letter, Commission staff noted that the left abutment retaining wall also needed to be repaired. Staff requested information on the new operator, as well as the exemptee's plan and schedule for repairing the project and resuming project operations. Staff stated that all repair work should be completed by August 1, 2007.¹⁴

14. On December 4, 2006, River Bounty submitted a plan and schedule for repairing the project and for placing at least one turbine-generating unit back into service by August 1, 2007, with the remaining two units placed back into service by the fall of 2007.¹⁵ Commission staff accepted the schedule by letter dated January 25, 2007.¹⁶

15. On July 3, 2007, Commission staff was contacted by the Pennsylvania Emergency Management Agency because a hole had developed in the Oakland Dam, in the area of the project fish ladder. Consequently, by letter dated July 5, 2007, Commission staff required the exemptee to file an incident report along with a plan and schedule for repairing the dam during the summer and fall of 2007.¹⁷

16. On July 23, 2007, River Bounty filed several letters, stating that it would make necessary repairs to the dam, the fishway, and other project works by August 2008.¹⁸

17. On August 13, 2007, the Pennsylvania Fish & Boat Commission informed the Commission that, pursuant to Standard Article 2 of the exemption, it was requesting the installation of improved fish passage facilities at Oakland Dam.¹⁹

18. By letter dated August 22, 2007, Commission staff notified River Bounty that it had not completed the tasks outlined in its July 23, 2007 plan and schedule. Staff directed River Bounty to take additional measures to prevent the public from gaining access to the dam and to submit, within seven days, documentation that the additional

¹⁴ Letter from Charles P. Goggins to Charles J. Aliano.

¹⁵ Letter from Paul V. Nolan (counsel to River Bounty) to Charles P. Goggins.

¹⁶ Letter from Charles P. Goggins to Charles J. Aliano.

¹⁷ Letter from Charles P. Goggins to Charles J. Aliano.

¹⁸ Letters from Charles J. Aliano and Charles B. Mierek to Charles P. Goggins.

¹⁹ Letter from Mark A. Hartle (Pennsylvania Fish & Boat Commission) to Ms. Kimberly D. Bose (Commission Secretary).

measures had been completed.²⁰ The letter explained in detail how the dam failure had resulted in River Bounty not complying with the flow and fish passage requirements of the exemption.

19. On September 28, 2007, Commission staff informed River Bounty that its failure to provide requested information and plans made it subject to enforcement measures, including the imposition of civil penalties.²¹

20. On October 9, 2007, River Bounty filed a response, stating that it would, by October 31, 2007, stop the leakage from the fish ladder and install necessary safety devices. It disputed that it was in violation of the flow requirements.²²

21. By letter dated May 1, 2008, Commission staff stated that an April 22, 2008 inspection had revealed a 60-foot-wide breach in the dam. Staff noted that broken concrete in the breach could be dislodged during increased flows and that boaters and fisherman should consequently be kept away from the project reservoir and the downstream reach. Staff stated that, during the inspection, representatives of River Bounty had indicated that the company has no funds to repair the dam and asked about surrendering the exemption. Staff directed River Bounty to prepare a draft surrender application or a plan and schedule to immediately repair the dam.²³

22. On December 10, 2009, Commission staff issued a letter discussing River Bounty's failure to repair the project and giving the company 30 days to show cause why its exemption should not be revoked.²⁴

23. On December 18, 2009, River Bounty filed a letter stating that it had signed an operating agreement with Charles B. Mierek, pursuant to which he was to repair the dam but that Mr. Mierek had breached the agreement. River Bounty asked for additional time to secure an agreement with another entity.²⁵

²⁰ Letter from Charles J. Aliano to Charles B. Mierek.

²¹ *See* letter from George H. Taylor (Commission staff) to Charles B. Mierek.

²² Letter from Charles B. Mierek to Kimberly D. Bose.

²³ Letter from Peter R. Valeri (Commission staff) to Charles B. Mierek.

²⁴ Letter from Heather Campbell to Charles B. Mierek.

²⁵ Letter from Myron B. DeWitt to Heather Campbell.

24. On January 19, 2010, Commission staff responded to River Bounty's December 19, 2009 letter, granting an extension until February 28, 2010, for the company to report on its discussions with potential lessees.²⁶
25. On March 1, 2010, River Bounty filed a letter in which it argued that it would not be in the public interest to revoke the exemption and stated that it had reached an agreement in principle with Renew Hydro, Inc. to assess the project's current condition and necessary repairs, and to develop an application for an amendment involving the addition of a new turbine to provide minimum flows, a new fish passage facility, and rehabilitation of the existing controls and turbines/generators.²⁷ River Bounty stated that, should the proposed repairs prove infeasible, it would voluntarily surrender the exemption.
26. On August 11, 2010, River Bounty filed a status report. The company stated that it was negotiating with Renew Hydro, and expected to begin in-water repairs to the dam and fish facilities in the summer or fall of 2010 and to file an amendment application by March 2011.
27. By letter dated April 4, 2011, Commission staff noted that River Bounty had not provided any further information about project repairs or an amendment application, and asked the company to file, within 30 days, a detailed plan and schedule for restoring the project to operation or surrendering the exemption. Staff stated that, in the absence of the requested information, the Commission would begin implied surrender proceedings.²⁸
28. On May 4, 2011, Renew Hydro filed a report stating that it had entered into an agreement with River Bounty for the redevelopment and possible transfer of the Oakland Project (the agreement was attached as a privileged document). Renew Hydro indicated that an application to amend the exemption would be filed in October or November of 2011, that dam repairs would begin in the summer of 2012, that turbine, generator, and control repairs would occur in the winter of 2012, and that the project would be back in commercial operation in winter 2012.²⁹

²⁶ Letter from Heather Campbell (Commission staff) to Mr. Myron B. DeWitt (counsel for River Bounty).

²⁷ Letter from Myron B. DeWitt to Heather Campbell.

²⁸ Letter from Steve Hocking (Commission staff) to Mr. Myron B. DeWitt.

²⁹ Letter from John E. Marciszewski (Renew Hydro) to Steve Hocking.

On August 18, 2011, Commission staff sent River Bounty a letter stating that

the Commission requires a definitive detailed plan and schedule for returning the Oakland Project to operating condition within 15 days of the date on this letter. The plan and schedule must provide for the resumption of project operations within a reasonable time frame. Any failure to provide the above plan and schedule may be considered as your intent to surrender the exemption for the Oakland Project and may result in the Commission issuing a notice of termination of the exemption by implied surrender.³⁰

Staff also noted that, by the terms of the agreement between River Bounty and Renew Hydro, that instrument does not become effective until the project returns to commercial operation, so the agreement was not yet effective and River Bounty, as exemptee, remained the responsible party.

29. On September 6, 2011, River Bounty filed a letter stating that Renew Hydro was acting on its behalf in efforts to obtain financing, and asking the Commission to approve the agreement. River Bounty appended correspondence from Renew Hydro, indicating that dam repairs were now scheduled to begin in the fall of 2012, turbine, generator, and control repairs in the spring of 2013, with commercial operations commencing in summer 2013.³¹

30. On September 19, 2011, Commission staff responded to the September 6, 2011, letter. Staff explained, *inter alia*, that it did not approve the agreement because it was conditioned on future events, including the exemptee obtaining project financing and grants to repair and improve the project; agency approvals for the project's redevelopment; and a power sales contract.³² Staff added that the Commission intended to issue a notice of termination of the exemption by implied surrender.

³⁰ Letter from Steve Hocking to Mr. Myron B. DeWitt.

³¹ Letter from Myron B. DeWitt to Kimberly D. Bose.

³² Letter from Steve Hocking to Myron B. DeWitt. Staff was correct that the Commission will not approve agreements regarding hydropower projects, if those agreements are conditioned on the occurrence of future events. In any case, because the Oakland Project has been issued an exemption, no Commission authorization is required for the exemptee to enter into agreements such as the one in question. Because section 8 of the Federal Power Act, 16 U.S.C. § 801 (2006), which requires prior Commission approval of licenses, is waived for exemptions, exemptees may sell, transfer, or otherwise dispose of exemptions, and need only notify the Commission of such actions.

31. On October 4, 2011, the Commission issued public notice of the termination of the exemption for the Oakland Project by implied surrender.

32. On November 4, 2011, the Boroughs of Oakland and Susquehanna, the Barnes-Kasson Hospital, and River Bounty filed a protest, asking the Commission to rescind the notice and to accept the schedule it had proposed in September 2011.³³ The pleading also explained that River Bounty and Renew Hydro had terminated their proposed lease agreement.

33. By letter dated January 5, 2012, Commission staff informed River Bounty that it was accepting the company's proposed schedule and placing the implied surrender proceeding in abeyance. Staff explained that River Bounty needed to consult with relevant state and federal agencies; timely file various plans with the Commission; and file monthly reports showing that it was making progress in its repair efforts.³⁴ In addition, Commission staff notified River Bounty that it must also install fish passage facilities at the same time it repaired the project and restored project operation. Furthermore, Commission staff told River Bounty that if it failed to make steady progress, staff would resume the implied surrender proceeding. To ensure progress, Commission staff required River Bounty to file a report by April 30, 2012, documenting that it had consulted with all appropriate resource agencies and including the results of all engineering, geologic, fish passage and other studies needed to develop plans and specifications. Final plans and specifications were required by August 31, 2012.

34. On January 31, 2012, River Bounty filed a status report listing discussions it had had or intended to have with various entities.

35. By letter dated April 11, 2012, Commission staff informed River Bounty that it had failed to comply with the January 5, 2012 order by not filing progress reports in February and March. Staff ordered the company to file the reports within five days, and also reminded River Bounty that it was due to file, by the end of April, documentation of consultation with the resource agencies, as well as the results of engineering, geologic, and fish passage studies.³⁵

³³ On October 2, 2001, Mr. Robert G. McNamara filed comments opposing the termination. On October 7, 2011, the Department of the Interior filed a pleading stating that it had no comments.

³⁴ Letter from Steve Hocking to Myron B. DeWitt.

³⁵ Letter from Steve Hocking to Myron B. DeWitt.

36. On April 18, 2012, River Bounty filed a report for February and March 2012. As to consultation with the agencies, the report stated (but did not document) that River Bounty had discussed, but not resolved, fish passage issues with them.³⁶

37. On April 30, 2012, River Bounty filed a request for a two-week extension of the time to file fish passage specifications, along with an April status report stating that it was waiting for responses from resource agencies regarding project surrender, and was in discussion with two entities regarding transfer of the project.³⁷

38. On May 7, 2012, FWS filed a letter, on behalf of the Susquehanna River Anadromous Fish Restoration Cooperative, a multijurisdictional cooperative among FWS, the Susquehanna River Basin Commission, the National Marine Fisheries Service, the Pennsylvania Fish & Boat Commission, the Maryland Department of Natural Resources and the New York State Department of Environmental Conservation, stating that the Oakland Dam is a significant barrier to fish passage, as well as a hazard to boaters and swimmers, and asking the Commission to withdraw the exemption and require removal of the dam.³⁸

39. Commission staff responded to River Bounty's request for an extension by letter dated May 8, 2012.³⁹ Staff directed River Bounty, within five days, to provide copies of any correspondence between the company and resource agencies, none of which had yet been filed. Staff also requested that River Bounty respond to FWS' May 7, 2012 letter. Staff also noted that River Bounty's schedule had called for site inspections and studies in March and April 2012, and that staff had received no response to its requirement that the company file engineering, geologic, and other studies by April 30, 2012.⁴⁰ Staff explained that the failure to demonstrate adequate progress could cause the Commission to move ahead with the implied surrender proceeding.

40. On May 14, 2012, River Bounty responded.⁴¹ It stated that the March and April site inspections had not taken place because the Commission had not approved the

³⁶ Letter from Myron B. DeWitt to Kimberly D. Bose.

³⁷ Letter from Myron B. DeWitt to Kimberly D. Bose.

³⁸ Letter from James G. Geiger (FWS) to Kimberly D. Bose.

³⁹ Letter from Steve Hocking to Myron B. DeWitt.

⁴⁰ Staff noted that fish passage plans and specifications were not due until August 2012, so that no extension regarding them was necessary.

⁴¹ Letter from Myron B. DeWitt to Kimberly D. Bose.

agreement with Renew Hydro. River Bounty dismissed the FWS letter as *ex parte* and disingenuous. River Bounty included copies of emails between itself and the FWS and the Pennsylvania Fish & Boat Commission, but did not provide any letters or other documentation that the company had held any meetings or had solicited comments from the agencies on study needs or its plans to rehabilitate the project. Further, River Bounty provided no information on studies needed to develop its plans and specifications for repairing the dam. Instead, it argued that no studies or site inspections were conducted because none were needed until a plan for redeveloping the site was formulated. River Bounty also suggested that, because the approved schedule for redeveloping the project was originally prepared by Renew Hydro, which was no longer associated with the project, the approved schedule should not be used as a reliable timeline.

41. On June 1, 2012, River Bounty filed a status report which in the main referenced its discussions with several potential project developers. It submitted similar reports on July 3, 2012, August 9, 2012, September 4, 2012, October 11, 2012, and November 7, 2012.

42. On August 22, 2012, Commission staff conducted an inspection of the project. Staff concluded that the project's left training wall has significant concrete deterioration and cracking; that the concrete tailrace wall had failed and not been repaired; that safety signs and buoys required by the public safety plan were not in place; that the spillway breach had expanded to approximately 110 feet; that there were undermined areas on the upstream face of the dam; that reinforcing steel was exposed at several locations on the downstream face of the dam; that concrete was leaking through the left abutment wall; that the dam was being undermined and was separating from upstream steel sections; and that timbers appeared to be pulling away from the downstream concrete cap. Staff concluded that no repair or rehabilitation work had been performed since the previous inspection in May 2010. In addition, staff found that the dam presents a safety hazard to boaters and fisherman, and that River Bounty is not in compliance with its approved public safety plan because it has failed to replace missing signs and buoys.

43. On November 15, 2012, Commission staff issued River Bounty a compliance order.⁴² The order reviewed the history described above and concluded that River Bounty had violated Article 1 of its exemption by failing to operate and maintain the project as described in the exemption. The order also discussed the need to provide fish passage. The order required that River Bounty, within 45 days, provide documentation that it had completed all actions required by the January 5, 2012 letter, and replaced warning signs and buoys to come into compliance with its public safety plan. The order

⁴² *River Bounty, Inc.*, 141 FERC ¶ 62,111 (2012).

warned that River Bounty could be subject to civil penalties and other enforcement measures.

44. River Bounty did not seek rehearing of the November 15, 2012 order. On December 19, 2012, however, the company provided a status report asserting that it had entered into a preliminary agreement with a potential developer and asking for extensions of the repair schedule, such that the dam breach would be repaired by June 2013.

Discussion

45. The doctrine of implied surrender has typically been invoked where, as here, the entity responsible for the project has, by action or inaction, clearly indicated its intent to abandon the project, as by failing for several years to operate or maintain the project with no indication of doing so in the reasonable foreseeable future.⁴³

46. As noted above, Standard Article 1 of the exemption for the Oakland Project provides that an exemptee must comply with the terms and conditions of an exemption, while Standard Article 2 requires compliance with terms and conditions filed by Federal and state fish and wildlife agencies.⁴⁴

47. As discussed above, the exemptee has allowed the Oakland Project to remain out of service for more than 12 years, and the project has deteriorated significantly, to the point where there is a 110-foot-long gap in the dam, so that minimum flows cannot be released across the entire dam; the project fish ladder is inoperable; various other sections of the dam are falling apart; and required public safety measures are not in place. This long-term failure to maintain the project in accordance with the specifications set forth in the exemption demonstrates the exemptee's intent to abandon the project. While the exemptee has made efforts to find another entity to take over the project, it has failed to do so over a 13-year period. During that time, it has not made any repairs to the project, and, in fact, has let it deteriorate further. As noted above, in March 2010, River Bounty itself stated that it would surrender the exemption should repairs prove infeasible.⁴⁵ The almost 13-year failure to make any repairs, including the relatively simple and inexpensive installation of public safety signs and buoys, demonstrates the company's intent to abandon the project. We deem this sufficient to support implied surrender of the

⁴³ See *James B. Boyd and Janet A. Boyd*, 138 FERC ¶ 61,085, at 16 (2012) (citing *James Lichoulas, Jr.*, 124 FERC ¶ 61,255, *reh'g denied*, 125 FERC ¶ 61,195 (2008), *aff'd*, *Lichoulas v. FERC*, 606 F.3d 769 (D.C. Cir. 2010)).

⁴⁴ 18 C.F.R. § 4.10(b) (1982).

⁴⁵ See P 25, *supra*.

exemption. By our terminating the exemption from licensing, jurisdiction over the site will pass to Pennsylvania regulatory authorities, who have been in contact with our staff during this proceeding.

The Commission orders:

(A) The exemption from licensing for the Oakland Hydroelectric Project No. 5730 is terminated by implied surrender, effective 30 days from the issuance of this order.

(B) This order constitutes final agency action. Requests for rehearing of this order may be filed by any party within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2012). The filing of a request for rehearing does not operate as a stay of the effective date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.