

148 FERC ¶ 61,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eastern Hydroelectric Corporation

Project No. 7019-061

ORDER PROPOSING REVOCATION OF LICENSE

(Issued July 17, 2014)

1. Eastern Hydroelectric Corporation (licensee) is in violation of its license for the East Juliette Project No. 7019. The licensee has failed to construct fish passage facilities required by Article 401 of its license, Condition No. 4 of the water quality certification issued by the Georgia Department of Natural Resources (Georgia DNR),¹ an order amending its license to approve fish passage facilities issued December 7, 2012,² and a Compliance Order issued September 5, 2013.³ As discussed below, the Commission proposes to revoke the license pursuant to section 31(b) of the Federal Power Act (FPA).⁴

I. Background

2. On February 28, 1985, Commission staff issued a minor license to the City of Forsyth, Georgia, for the East Juliette Project, located on the Ocmulgee River in East Juliette, Jones County, Georgia.⁵ The current licensee has held the license

¹ *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 (2002) (order amending license and adding Article 401 and four Water Quality Certification conditions issued by Georgia DNR).

² *Eastern Hydroelectric Corporation*, 141 FERC ¶ 62,176 (2012).

³ *Eastern Hydroelectric Corporation*, 144 FERC ¶ 62,211 (2013).

⁴ 16 U.S.C. § 823b(b) (2012). Section 31(b) provides that after notice and an opportunity for an evidentiary hearing, the Commission may issue an order revoking a license, where the licensee is found by the Commission to have knowingly violated a final order after having been given reasonable time to comply fully with that order.

⁵ *City of Forsyth, Georgia*, 34 FERC ¶ 62,438 (1986) (Order Issuing License (Minor)).

since 1995.⁶ The project consists of a 20-foot-high, 1,230-foot-long, concrete gravity dam that creates a 78-acre reservoir with a storage capacity of 418 acre-feet. The license authorized the licensee to produce power on the east side of the Ocmulgee River in two locations, north and south. Water flows to the north powerhouse, containing a 458-kilowatt (kW) generating unit, and is discharged through a 23-foot-wide, 430-foot-long tailrace to the river. Water is also diverted through a 13-foot-wide, 400-foot-long intake canal and a 7-foot-wide, 220-foot-long penstock to the south powerhouse, containing a 229-kW generating unit.⁷

3. The East Juliette Dam is the first passage barrier that anadromous fish, including American shad encounter on their migrations upstream from the Atlantic Ocean to the Ocmulgee River. Georgia DNR, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) state that restoring access to historical spawning habitat for American shad is among their highest priorities for the region.⁸

4. On June 18, 2002, Commission staff amended the license to authorize the construction of an additional powerhouse containing a 1,200-kW generating unit on the west side of the river.⁹ As a result of the increased capacity, the project became a major project and was subject to additional articles, including Article 401, which requires the licensee to install new fish passage facilities at the East Juliette Dam. Article 401 requires the licensee to consult with Georgia DNR, FWS, and NMFS to develop a plan that includes: (1) a construction schedule; (2) a proposed fishway and its operation; (3) a provision for consulting annually with the agencies to address fish passage and entrainment issues at the project; and (4) documentation of the annual consultation. The

⁶ On May 2, 1994, Commission staff approved the transfer of the license from the City of Forsyth, Georgia to PK Ventures, Inc. *City of Forsyth, Georgia and PK Ventures, Inc.*, 67 FERC ¶ 62,090 (1994). Shortly after PK Ventures, Inc. acquired the license for the project, it merged with Tampa Pipeline Company. Proof of this merger was not filed with the Commission until the licensee sought to acquire the license. Consequently, on May 22, 1995, Commission staff approved the transfer of the license from PK Ventures, Inc. to Tampa Pipeline Company, and finally to the current licensee. *Eastern Hydroelectric Corporation, Tampa Pipeline Corporation and PK Ventures, Inc.*, 71 FERC ¶ 62,129 (1995).

⁷ *Eastern Hydroelectric Corporation*, 76 FERC ¶ 62,170 (1996) (order amending license to increase the installed capacity at the project from 643 kilowatts (kW) to 687 kW).

⁸ See NMFS letters filed on August 3, 2010, October 29, 2007, October 13, 2000, and September 6, 2000; FWS letters filed on August 3, 2010, November 13, 2007, October 20, 2000, and September 7, 2000; and Georgia DNR letter filed on September 20, 2010, November 15, 2007, and September 26, 2000.

⁹ *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 (2002).

June 18, 2002 Order also added four conditions to the license contained in a water quality certification issued by Georgia DNR with respect to the amendment.¹⁰ Specifically, Condition No. 4 requires the licensee to install fish passage facilities at the project.

5. After receiving several extensions of time, on January 5, 2006 (as supplemented on April 25, 2006), the licensee filed a plan to construct a fish lift on the east side of the river that incorporated most of the agencies' recommendations.¹¹ The licensee stated that the fish lift would be constructed and operational by March 1, 2007. On August 15, 2006, Commission staff issued an order modifying and approving the licensee's plan.¹²

6. The licensee did not construct the approved fish lift.¹³ Instead, on June 20, 2012, after years of negotiation with the Commission, the Georgia DNR, NMFS, and FWS, the licensee filed a plan to construct a fish ladder¹⁴ rather than the approved fish lift.

¹⁰ Under section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. 33 U.S.C. § 1341(a)(1) (2012). Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project. *Id.* at § 1341(d). Appendix A to the order contains Georgia DNR's water quality certification conditions issued on August 16, 2001. *Eastern Hydroelectric Corporation*, 99 FERC ¶ 62,207 at Appendix A (2002).

¹¹ The proposed fish lift would have operated by crowding fish into a hopper which would rise vertically via an elevator system releasing fish back into the reservoir at the top of the dam.

¹² *Eastern Hydroelectric Corporation*, 116 FERC ¶ 62,132 (2006).

¹³ When the licensee failed to construct the approved fish lift by March 1, 2007, Commission staff issued a Compliance Order to require the licensee to comply with the requirements of the August 15, 2006 Order. *Eastern Hydroelectric Corporation*, 119 FERC ¶ 62,075 (2007). The licensee failed to adequately respond to the Compliance Order. Therefore, on February 8, 2011, Commission staff issued an order directing the licensee to show cause why the Commission should not require the licensee to cease generation at the project. *See Order to Show Cause* issued on February 8, 2011, in Project No. 7019-066. On March 9, 2011, the licensee expressed interest in constructing a fish ladder in lieu of the fish lift. Commission staff, Georgia DNR, NMFS, and FWS consulted with the licensee to develop plans for the fish ladder.

¹⁴ A fish ladder is different from a fish lift in that fish move upstream by swimming through a series of steps or baffles instead of being transported via a hopper and elevator system to the top of the dam.

7. On December 7, 2012, Commission staff issued an order approving and modifying the licensee's new drawings for a fish ladder. The order approved the design of a four-foot-wide ladder that would provide upstream passage of fish (primarily American shad) around the project dam. The fishway entrance would be located on the east side of the north powerhouse's tailrace. Fish that enter the fishway would swim up the ladder through a series of baffles to the project's reservoir.

8. The December 7, 2012 Order required the licensee to modify its fish passage designs and file revised plans and specifications with the Commission's Atlanta Regional Office. In addition, the order required the licensee to file, for Commission approval, a construction schedule that ensured operation of the fish ladder by the beginning of 2014 and a fishway operation plan developed in consultation with Georgia DNR, NMFS, and FWS, which describes the target species for fish passage, operation schedules, and a method for determining the effectiveness of the fishway following its first year of operation. The order required the licensee to file the construction schedule and fishway operation plan within 120 days (by April 6, 2013). Finally, the order required the licensee to convene annual meetings with Georgia DNR, NMFS, and FWS, during the term of the license to review the status of fish passage activities at the project. The licensee did not file the construction schedule, fishway operation plan, or convene a meeting with the agencies by April 6, 2013.¹⁵

9. On April 17, 2013, Commission staff issued a letter directing the licensee to file the overdue construction schedule, fishway operation plan, and documentation of consultation with Georgia DNR, NMFS, and FWS by May 2, 2013.

10. On May 2, 2013, the licensee filed the construction schedule and fishway operation plan. The licensee's construction schedule stated that it would: (1) obtain all permits by June 1, 2013; (2) mobilize the site for construction from June 1 to June 30, 2013; (3) construct the fishway from July 1 to October 31, 2013; (4) test the fishway from November 1 to November 30, 2013; and (5) revegetate and fence the site from December 1 to December 31, 2013. The licensee stated that it would begin fishway operation by March 15, 2014.

11. On May 9, 2013, Commission staff provided comments on the licensee's construction schedule and fishway operation plan. Commission staff concluded that the licensee's construction schedule was unrealistic. According to the schedule, the licensee planned to start construction by July 1, 2013, exactly 60 days from the date of its May 2, 2013 filing. At the time, the licensee had not yet provided its revised plans and specifications to the Atlanta Regional Office, although the December 7, 2012 Order had required the licensee to modify its fishway designs and submit them to the Commission's Atlanta Regional Office, along with other preconstruction plans and specifications, at

¹⁵ On January 11, 2013, the licensee filed a request for rehearing of the December 7, 2012 Order, which the Commission's Secretary rejected as untimely. *Eastern Hydroelectric Corporation*, 142 FERC ¶ 61,055 (2013).

least 60 days prior to the start of construction. In addition, Commission staff stated that the fishway operation plan failed to provide protocols for monitoring the effectiveness of the fishway as required by the December 7, 2012 Order.¹⁶ The December 7, 2012 Order required the licensee to develop the monitoring protocols in consultation with Georgia DNR, NMFS, and FWS; however, the licensee never consulted with the agencies. To ensure that construction of the fishway could begin as soon as possible, Commission staff in its May 9, 2013 letter required the licensee to provide: (1) documentation of consultation with the agencies, (2) fishway effectiveness protocols in its fishway operation plan; and (3) revised plans and specifications to the Atlanta Regional Office.

12. On May 24, 2013, the licensee abandoned the schedule it had filed three weeks earlier and asked for more time to consult with the agencies. The licensee cited a lack of progress in obtaining from Georgia DNR a water withdrawal permit, which is required for the operation of the fish ladder. The licensee also cited a lack of progress in developing the fishway effectiveness protocols. The licensee stated that the fishway effectiveness protocols recommended by NMFS and FWS included tagging fish passed through the fish ladder, providing video monitoring, and tracking the upstream habitat of the fish. The licensee did not agree with the agencies protocols. Instead, the licensee stated that it would provide manual counting and reporting of fishes during the spawning season, but did not describe in detail how it would assess the effectiveness of the fishway.

13. On May 30, 2013, FWS filed comments on the construction schedule and fishway operation plan. On May 31, 2013, NMFS and Georgia DNR also filed comments. The agencies recommended that the licensee follow the effectiveness protocols included in the March 28, 2013 fishway operation plan prepared by Georgia DNR, NMFS, and FWS and sent to the licensee. The agencies also stated that the licensee had not consulted with them to discuss or modify the protocols since March 2013. In addition, Georgia DNR said there were no unusual or exceptional conditions at the project that would delay the licensee's acquisition of a water withdrawal permit.¹⁷

14. On June 20, 2013, Commission staff issued a letter granting the licensee's request for more time to consult with the agencies to develop fishway effectiveness protocols. Commission staff stated that the licensee must file its protocols by August 19, 2013. Commission staff warned the licensee that failure to provide the protocols could result in the imposition of civil penalties or revocation of the license pursuant to section 31 of the FPA.

¹⁶ Georgia DNR, NMFS, and FWS prepared and sent the fishway operation plan to the licensee on March 28, 2013. The licensee included the agencies' plan in its filing but removed the fishway effectiveness protocols.

¹⁷ See Georgia DNR email to Commission staff filed June 13, 2013.

15. The licensee did not file the fishway effectiveness protocols or the revised plans and specifications with the Commission's Atlanta Regional Office.

16. On September 5, 2013, Commission staff issued a Compliance Order, finding that the licensee was in violation of Article 401 of its license, Condition No. 4 of its water quality certificate, and the December 7, 2012 Order.¹⁸ The Compliance Order required the licensee to file a plan and schedule for complying with the December 7, 2012 Order that would enable fishway operation by 2014, including: (1) a detailed fishway construction schedule, including revised plans and specifications for review by the Commission's Atlanta Regional Office; (2) specific fishway effectiveness protocols; and (3) actions taken by the licensee to obtain a water withdrawal permit from Georgia DNR. The Compliance Order stated that the licensee's plan and schedule must include copies of correspondence between the licensee and Georgia DNR, NMFS, and FWS. The Compliance Order directed the licensee to file the outstanding items within 15 days (i.e., by September 20, 2013). Finally, the Compliance Order warned the licensee that failure to comply could result in civil penalties, an order to cease operation of the project, or revocation of the license pursuant to section 31 of the FPA.

17. On September 17, 2013, the licensee provided: (1) a revised construction schedule that pushed construction back another year (with construction beginning July 1, 2014, and ending December 31, 2014); (2) a proposal to discuss the fishway effectiveness protocols with the agencies; and (3) a copy of the draft water withdrawal permit from Georgia DNR. The licensee did not include any documentation of consultation with the agencies.

18. On October 1, 2013, Commission staff issued an order directing the licensee to show cause why the Commission should not require the licensee to cease generation at the project.¹⁹ The order gave the licensee 30 days to respond.

19. On October 30, 2013, the licensee responded to the show cause order, stating that ceasing generation would cause the licensee and its employees economic harm and would eliminate the benefits of hydropower at the site. However, the licensee did not provide any proof of consultation with the agencies or progress in gaining the water withdrawal permit.²⁰ The licensee again asked for additional time to continue discussions with the agencies regarding the fishway effectiveness protocols.

¹⁸ *Eastern Hydroelectric Corporation*, 144 FERC ¶ 62,211 (2013).

¹⁹ *Eastern Hydroelectric Corporation*, 145 FERC ¶ 62,003 (2013).

²⁰ Commission staff's summary of its most recent inquiry to Georgia DNR, filed March 25, 2014, indicates that Georgia DNR has issued the water withdrawal permit; however, the licensee has not filed it with the Commission.

20. The licensee did not make any more filings to satisfy the Compliance Order's requirements.

21. On April 17, 2014, Commission staff issued an order requiring the licensee to cease generation at the project within five days from the date of the order.²¹ On April 28, 2014, and May 28, 2014, Commission staff sent the licensee letters stating that staff is eager to resolve this matter and is available anytime to discuss the actions needed to bring the project back into compliance with the license.²² Staff asked the licensee for a date and time to discuss the situation. The licensee did not seek rehearing of the staff order and has not responded to staff's letters.

II. Discussion

22. Under section 31(b) of the FPA,²³ after providing notice and an opportunity for an evidentiary hearing, we may issue an order revoking a license, if we find that the licensee knowingly violated a final compliance order and was given a reasonable time to comply with that order before the revocation proceeding was commenced. In addition, section 31(b) provides that the Compliance Order shall be subject to *de novo* review and that the Commission shall consider the nature and seriousness of the violation and the licensee's efforts to remedy the violation.

23. This order provides notice that we propose to revoke the license for the East Juliette Project No. 7019 under section 31(b). Commission staff issued the Compliance Order on September 5, 2013, setting out specific parameters for the licensee to achieve compliance with Article 401 of its license, the water quality certification, and a December 7, 2012 Order approving and modifying the licensee's plan to construct a fishway at the project. The Compliance Order required the licensee to file a plan and schedule that includes: (1) a detailed fishway construction schedule, including revised plans and specifications for review by the Commission's Atlanta Regional Office; (2) specific fishway effectiveness protocols; and (3) actions taken by the licensee to obtain a water withdrawal permit from Georgia DNR.

24. For the last twelve years that licensee has failed to construct fish passage facilities as required by Article 401. Further, for the past ten months, the licensee has failed to fulfill, or make any significant progress toward fulfilling the requirements of the Compliance Order and the underlying fish passage requirements. The licensee filed a construction schedule with the Commission that failed to include revised plans and specifications. The licensee planned to begin construction by July 1, 2014. To date, the licensee has not filed any documentation to prove that it followed its construction

²¹ *Eastern Hydroelectric Corporation*, 147 FERC ¶ 62,045 (2014).

²² Both letters were sent by certified mail and were received by the licensee.

²³ 16 U.S.C. § 823b(b) (2012).

schedule. In addition, the licensee failed to develop fishway effectiveness protocols in consultation with the agencies.

25. As stated above, the East Juliette Dam is the first passage barrier that anadromous fish encounter on their migrations upstream from the Atlantic Ocean to the Ocmulgee River. Georgia DNR, NMFS, and FWS state that restoring access to historical spawning habitat for American shad is among their highest priorities for the region. As a result of the licensee's failure to comply with Article 401 of its license, Condition No. 4 of its water quality certificate, the December 7, 2012 Order, and the Compliance Order the project will continue to block the passage of American shad around the project.

26. We find that there is a substantial basis on which to propose revocation. The licensee has failed to comply with its project license and staff orders requiring the construction of required fish passage facilities, which would provide substantial environmental benefits. Based on the record, there is no reason to believe that the licensee intends to come into compliance. Consequently, we propose revocation of the project license.

27. The licensee may request an evidentiary hearing before an Administrative Law Judge within 30 days of this issuance date of this order.²⁴ If, within 30 days, the licensee requests a hearing, the Commission will set the matter for hearing. If the licensee does not request a hearing, the Commission will decide this matter based on the written record.

The Commission orders:

(A) Pursuant to section 31(b) of the FPA, 16 U.S.C. § 823b(b) (2012), the Commission proposes to revoke the license for the East Juliette Hydro Project No. 7019.

(B) Eastern Hydroelectric Corporation may request an evidentiary hearing within 30 days of the issuance date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ 16 U.S.C. § 823b(b) (2012).