

151 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Brookfield Smoky Mountain Hydropower LLC

Project No. 2169-109

ORDER GRANTING INTERVENTION AND GRANTING REHEARING

(Issued May 14, 2015)

1. On March 11, 2015, Commission staff issued an order (March 11 Order) amending the operating plan for the 380.1-megawatt Brookfield Smoky Mountain Hydro Project No. 2169.¹ On April 1, 2015, American Whitewater filed a motion to intervene and request for rehearing of the March 11 Order.

2. We grant American Whitewater's motion to intervene and its request for rehearing, as discussed below.

I. Background

3. The Brookfield Project² was originally licensed by the Federal Power Commission on March 17, 1955.³ The project is located on the Little Tennessee River and its tributary in Graham and Swain Counties in North Carolina and Blount and Monroe Counties in Tennessee. The Commission issued a new license for the project to the then-licensee, Alcoa Power Generating, Inc., on January 25, 2005, for a term of 50 years.⁴

¹ *Brookfield Smoky Mountain Hydro*, 150 FERC ¶ 62,140 (2015).

² American Whitewater's request for rehearing refers to the project as the Tapoco Project. However, the name was changed to Brookfield Smoky Mountain Hydro Project in 2013. *Brookfield Smoky Mountain Hydropower LLC*, 143 FERC ¶ 62,156 at ordering para. (A) (2013).

³ *Tapoco, Inc. and Carolina Aluminum Co.*, 14 F.P.C. 610 (1955).

⁴ *Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056 (2005). The license was
(continued ...)

4. The North Carolina Department of Environment and Natural Resources – Division of Water Resources (N.C. Division of Water Resources) issued a Clean Water Act section 401(a) Water Quality Certification (Certification) for the project on November 8, 2004, which was incorporated into the January 25, 2005 license as Appendix F. The license also included, as Appendix A, an operating plan for the Santeetlah Reservoir, one of the project’s impoundments.

5. The Certification included a provision⁵ requiring various resource agencies⁵ and Graham County to convene an annual planning meeting in October each year. At the October 5, 2010 annual meeting, the licensee and consulted resource agencies agreed to initiate a process to modify the high flow event schedule contained in the Certification and operating plan, in order to provide greater flexibility in scheduling and create additional recreational opportunities. The N.C. Division of Water Resources issued a revised Certification on June 27, 2014, amending the durations, volumes, and timing of high flow releases scheduled each month for the Cheoah River.

6. On October 3, 2014, Brookfield filed an application to amend the license to reflect the changes made to the Certification. The March 11 Order approved the changes, amending section 1.2.2 High Flow Events (including Table OR-2.3) of the existing operating plan and, for clarity, incorporating the new Certification into the license.

7. American Whitewater filed a timely request for rehearing of the March 11 Order on April 1, 2015.

II. Discussion

8. American Whitewater does not object to the changes made to the operating plan or the Certification by the March 11 Order. Rather, American Whitewater asserts that it should be listed as a party to be formally notified and consulted under sections 1.2.2 and 1.2.4 of the operating plan. Section 1.2.2 currently requires the licensee to provide notice 12 months prior to proposing a schedule for high flow events to the Commission, U.S. Fish and Wildlife Service, U.S. Forest Service, N.C. Division of Water Resources, Eastern Band of Cherokee Indians, North Carolina Wildlife Resources Commission (collectively, the resource agencies), and Graham County. Section 1.2.4 Potential Modifications to Repeating Five Year Schedule of High Flow Events requires the

transferred to Brookfield in 2012. *Alcoa Power Generating Inc. and Brookfield Smoky Mountain Hydropower LLC*, 141 FERC ¶ 62,010 (2012).

⁵ The consulting resource agencies are the N.C. Division of Water Resources, North Carolina Wildlife Resources Commission, U.S. Forest Service, U.S. Fish and Wildlife Service, and the Eastern Band of Cherokee Indians.

licensee to consult annually at the October meeting with the resource agencies and Graham County in order to determine whether to terminate, continue, or modify the additional trial high flow events, or to recommend a permanent change in the repeating five-year schedule of high flow events.

9. American Whitewater argues that its request is in the public interest because it is uniquely situated to represent whitewater recreationists in flow scheduling and is concerned that the additional flexibility in flow scheduling allowed by the amendment could adversely affect its members if it is not consulted in the future.

10. As a general matter, entities that believe that they should be consulted with respect to matters governed by a license should, during the licensing proceeding, request that they be listed as entities to be consulted in license articles that deal with issues of concern to them. If they are dissatisfied with the terms of the articles, they should request rehearing. If they do not do so, they are time-barred from later raising these issues, which amounts to a collateral attack on the license order.⁶

11. American Whitewater participated in the relicensing process for the project, and did not seek rehearing of the provisions that listed the entities to be consulted as to the operating plan. Ordinarily, this would mean that the group could not later seek to be listed as a consulted entity. However, because the licensee proposed to amend the relevant provisions, it effectively opened the door to American Whitewater making what would otherwise be an untimely request. Further, the plan covers flow scheduling, a matter of direct interest to American Whitewater. In these relatively unusual circumstances, we will allow American Whitewater to seek inclusion as an entity to be consulted, and will amend sections 1.2.2 and 1.2.4 of the operating plan to include it as a consulted entity.⁷

The Commission orders:

(A) American Whitewater's April 1, 2015 motion to intervene is granted.

(B) Note i. of section 1.2.2 (High Flow Events of the Santeetlah Reservoir Operating Plan), Appendix A of the license for Project No. 2169, is revised to read:

⁶ See, e.g., *AmerenUE*, 129 FERC ¶ 61,027, at P 15 (2009) (“[T]o the extent that [movants] object to the fact that the license did not require consultation with them as to public access issues, they should have raised that issue on rehearing of the license order. Such an assertion is now time barred.”).

⁷ We will also add the Commission, which was incidentally removed by the March 11 Order, to the list of parties to be notified in section 1.2.2.

The Applicant will provide 12 months prior notice to the *Commission*, the U.S. Fish and Wildlife Service (USFWS), the U.S. Forest Service (USFS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Department of Environment and Natural Resources (NCDENR), the Eastern Band of Cherokee Indians (EBCI), *American Whitewater*, and Graham County of the proposed schedule of high flow events.

(C) Section 1.2.4 (Potential Modifications to Repeating Five Year Schedule of High Flow Events of the Santeetlah Reservoir Operating Plan), Appendix A of the license for Project No. 2169, is revised to read:

Starting in October 2010, in conjunction with the annual planning meeting required in section 1.2.3 above, the Licensee will consult with the U.S. Fish and Wildlife Service (USFWS), the U.S. Forest Service (USFS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Department of Environment and Natural Resources (NCDENR), the Eastern Band of Cherokee Indians (EBCI), *American Whitewater*, and Graham County regarding the possibility of providing high flow events for whitewater boating purposes on a trial basis in addition to the high flow events contemplated in the repeating five year schedule included in section 1.2.2 above.

If the USFWS, USFS, NCWRC, NCDENR, and ECBI notify the Licensee that they are in full concurrence that biological recovery in the Cheoah River has proceeded to a point that additional high flow events should be scheduled and evaluated on a trial basis, then the Licensee will consult with USFWS, USFS, NCWRC, NCDENR, ECBI, *American Whitewater*, and Graham County to determine the specific number, magnitude, and timing of such additional trial high flow events. *The Licensee may provide additional high flow events* in a manner consistent with other requirements of the License (including but not limited to the Santeetlah Reservoir Operating Curve, the Low Inflow Protocol, and the Maintenance and Emergency Protocol).

In the event that the Licensee, USFWS, USFS, NCWRC, NCDENR, ECBI, and Graham County agree on the provision of additional trial high flow events, then no later than 60 days prior to the anticipated start of the additional high flow events, the Licensee shall file for Commission approval a plan of the proposed revisions to the repeating five year schedule of high flow events.

In conjunction with subsequent annual planning meetings, the Applicant will consult with the USFWS, USFS, NCWRC, NCDENR, ECBI, and *American Whitewater* in order to determine whether to terminate, continue, or modify the additional trial high flow events, or to recommend to the Commission a permanent change in the repeating five year schedule of high flow events. The determination shall be based on USFWS, USFS, NCWRC, NCDENR, ECBI, and *American Whitewater's* assessment of the effects of the additional trial high flow events on the Cheoah River aquatic and associated riparian biological communities, on water levels in Santeetlah Reservoir, and of cumulative and secondary effects on the ecological and aesthetic resources of the Cheoah River corridor.

The Licensee shall make additional filings, as appropriate, notifying the Commission of any additional requested revisions to the repeating five year schedule of high flow events, and upon Commission approval will implement the revised high flow event schedule, *including any changes required by the Commission.*

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.