

154 FERC ¶ 61,209  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Congdon Pond Hydro, LLC

Project No. 10200-014

ORDER TERMINATING EXEMPTION BY IMPLIED SURRENDER

(Issued March 17, 2016)

1. This order terminates, by implied surrender, the exemption from licensing for the Congdon Dam Project No. 10200, located on Oxoboxo Brook in New London County, Connecticut. The project has not operated since 2002.

**I. Background**

2. On December 9, 1987, the Commission granted Gary Whipple an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for the Congdon Dam Project.<sup>1</sup> As authorized, the project consists of: (1) a 35-foot-high by 170-foot-long dam, with 7-inch-high flashboards; (2) a 6.5-acre reservoir with a storage capacity of 130 acre-feet; (3) two outlet works with an overall length of 23 feet; (4) a 5-foot-diameter by 70-foot-long penstock; (5) a powerhouse containing one 60-kilowatt generating unit; (6) a tailrace; and (7) appurtenant facilities.

---

<sup>1</sup> *Gary Whipple*, 41 FERC ¶ 62,224 (1987).

3. On January 14, 1997, Whipple Hydro Power Corporation<sup>2</sup> informed the Commission that it had sold its interest in the project to William Fay.<sup>3</sup> On May 2, 2002, the Commission's Division of Dam Safety and Inspections (D2SI) – New York Regional Office (NYRO) conducted a dam safety inspection at the project and discovered that the project had ceased generation. On September 16, 2002, Mr. Fay confirmed that the project was not operating, but expected the project to resume operation by November 2002.

4. On August 8, 2007, Mr. Fay notified the Commission that Congdon Pond Hydro, LLC (Congdon Hydro or exemptee), had acquired the project. The new exemptee filed a project update on June 9, 2008, stating that its goal was to have the project operational by the end of 2008, subject to acquiring the necessary funding. On June 10, 2008, D2SI – NYRO conducted an inspection of the project, during which Congdon Hydro indicated that the project would be operational by October 2008. After the inspection, D2SI – NYRO sent Congdon Hydro a letter requiring that safety barriers be repaired and reinstalled immediately and requesting an update on the operational status of the project by November 1, 2008.<sup>4</sup> Congdon Hydro did not provide the requested update.<sup>5</sup>

5. On February 12, 2010, Congdon Hydro informed the Commission that no material changes had been made at the project site, but that it had secured the funding necessary to bring the project back into operation in 2010. On June 29, 2010, in a dam safety inspection follow-up letter, D2SI – NYRO staff stated that Congdon Hydro had indicated that the project would be operational by October 2010 and directed the exemptee to inform the Commission of the project's operational status by December 1, 2010. Congdon Hydro did not respond.

---

<sup>2</sup> On April 1, 1996, Gary Whipple requested that the exemption be transferred to Whipple Hydro Power Corporation. Commission authorization is not required for the transfer or sale of an exemption. *See* Exemption from All or Part I of The Federal Power Act of Small Hydropower Projects with an Installed Capacity five Megawatts or less, Order No. 106 FERC Stats. & Regs. ¶ 30,204, at 31,369 (1980)

<sup>3</sup> Several filings are listed under the name Swift River Hydro Operations Company; William Fay is the President of Swift River Hydro Operations Company.

<sup>4</sup> Letter from Peter R. Valeri (Regional Engineer) to Mr. George Boria (Congdon Hydro) (June 25, 2008).

<sup>5</sup> On March 4, 2009, Congdon Hydro notified the Commission that John D. Morte and Domenic J. Julian had purchased the company in December 2008.

6. On September 12, 2011, Congdon Hydro filed a revised work schedule indicating that the project would resume generation in the first quarter of 2012. On May 28, 2013, D2SI – NYRO conducted another inspection of the project and determined that it was still not operating.

7. On July 19, 2013, D2SI – NYRO staff issued another letter to Congdon Hydro, noting that the project had not been operational since 2002.<sup>6</sup> The letter directed Congdon Hydro to file, within 30 days, a plan and schedule to repair the project and resume generation. After the exemptee failed to respond, D2SI – NYRO notified the Commission’s Division of Hydropower Administration and Compliance (DHAC).

8. On January 28, 2014, DHAC notified Congdon Hydro that staff records indicated that the project was still inoperable and restoration efforts were at a standstill.<sup>7</sup> The letter required Congdon Hydro to file, within 45 days, a construction plan and schedule for restoring the project’s generating capacity or an application to surrender the exemption. Staff notified Congdon Hydro that if it failed to respond, the Commission would begin a proceeding to terminate the exemption by implied surrender. Congdon Hydro did not respond.

9. On March 28, 2014, Commission staff sent a second letter to Congdon Hydro directing it to file, within 30 days, a construction plan and schedule or a surrender application.<sup>8</sup>

10. On June 19, 2014, Congdon Hydro filed a response stating that the project was tentatively scheduled to resume operation in the 2014-2015 season and that a complete project plan and schedule would be filed by July 30, 2014.<sup>9</sup> However, Congdon Hydro never filed a plan and schedule to restore operation by its proposed July 30, 2014 deadline.

11. On August 25, 2014, Commission staff issued a third letter requiring Congdon Hydro to file a plan and schedule within 15 days or in the alternative, an application to

---

<sup>6</sup> Letter from Gerald R. Cross (Regional Engineer) to Mr. John Morte (Congdon Hydro).

<sup>7</sup> Letter from Charles K. Cover to Mr. John Morte.

<sup>8</sup> Letter from Charles K. Cover to Mr. John Morte.

<sup>9</sup> Letter from Mr. John Morte to Charles K. Cover.

surrender the exemption. The letter again stated that if Congdon Hydro failed to respond, the Commission would take steps to terminate the exemption by implied surrender.<sup>10</sup>

12. The exemptee responded on September 18, 2014, explaining that it needed more time to finalize its plans, seek an alternative source of funding, obtain quotes and contractors to repair and replace equipment, and attend to other matters needed to restore operation. In that filing the exemptee said that it had negotiated an agreement to reroute the project's transmission line and that it would restore project operation by October 1, 2015.<sup>11</sup>

13. On October 8, 2014, Commission staff responded, informing Congdon Hydro that changing the route of the project's transmission line would require an application to amend the exemption. Staff required the exemptee to file a report with the status of its efforts by January 15, 2015, and to include an application to amend the exemption with the report that would reflect the proposed new transmission line. In addition, staff required the exemptee to file updated contact information within 15 days.<sup>12</sup> The exemptee did not file the updated contact information and did not file the required status report or amendment application.

14. On April 9, 2015, Commission staff directed Congdon Hydro through both certified and standard mail to file, within 15 days, a plan and schedule to restore operation, as well as an amendment application if the exemptee still intended to re-route the project's transmission line. Staff again notified the exemptee that if it failed to respond, the Commission would begin a proceeding to terminate the exemption by implied surrender. Congdon Hydro did not respond.<sup>13</sup>

15. On May 4, 2015, the Commission issued a public notice stating its intent to terminate the exemption by implied surrender due to Congdon Hydro's longstanding violation of standard Article 1 for its failure to restore project operation.<sup>14</sup> The notice

---

<sup>10</sup> Letter from Charles K. Cover to Mr. John Morte.

<sup>11</sup> Letter from John D. Morte to Charles K. Cover.

<sup>12</sup> Letter from Charles K. Cover to Mr. John Morte.

<sup>13</sup> Letter from Steve Hocking to Mr. John Morte.

<sup>14</sup> Standard Article 1 of the exemption states, in pertinent part, that "[i]f any term or condition of the exemption is violated, the Commission may revoke the exemption...." 18 C.F.R. § 4.106(i) (1987).

established June 4, 2015, as the deadline for filing comments, protests, and motions to intervene. No filings were received in response to the public notice.

16. On October 8, 2015, Commission staff sent a copy of the public notice to Congdon Hydro by both certified and standard mail requesting any comments on the notice by November 9, 2015. On November 13, 2015,<sup>15</sup> Congdon Hydro sent a letter via e-mail to D2SI – NYRO staff, again asking for more time to finalize plans, seek an alternate source of funding, obtain quotes and contractors, and attend to other matters required to restore project operation. The letter included yet another tentative schedule for restoring project operation, this time by October 1, 2016.

## II. Discussion

17. The doctrine of implied surrender is typically invoked where, as here, the entity responsible for the project has, by action or inaction, clearly indicated its intent to abandon the project, but has not filed a surrender application (e.g., the entity has physically abandoned the project property, dissolved its corporate or other legal entity, or has failed or maintain the project with no indication of doing so in the reasonably foreseeable future).<sup>16</sup> The Commission has, in appropriate circumstances, implied an action on the part of an entity regulated by the Commission in the absence, or even in contravention, of that entity's expressed intent. In those circumstances, the key element has been the entity's failure to live up to the obligations of its license or exemption, and the Commission has implied an entity's intent to surrender even where the entity has expressed an interest in continuing to operate the project.<sup>17</sup>

18. Here, the project has not operated for almost 14 years and, to date, the exemptee has performed minimal work at the project despite being given sufficient time to restore operational status. Over the more than eight years that Congdon Hydro has been the exemptee, it has provided several timelines with target dates for restoring project operation but has failed in each instance to make any meaningful progress. Moreover, it

---

<sup>15</sup> The letter was dated October 7, 2015, and was filed with the Commission on November 17, 2015.

<sup>16</sup> See, e.g., *Kevin Drone*, 153 FERC ¶ 61,199 (2015) (terminating exemption by implied surrender); *River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013); *James B. Boyd and Janet B. Boyd*, 138 FERC ¶ 61,085, at P 16 (2012) (citing *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (2008), *reh'g denied*, 125 FERC ¶ 61,195 (2008), *aff'd*, *Lichoulas v. FERC*, 606 F. 3d 769 (D.C. Cir. 2010)).

<sup>17</sup> *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194, at 61,597-98 (1999), *reh'g denied*, 90 FERC ¶ 61,250 (2000).

has repeatedly failed to respond, or has responded late, to multiple Commission letters requiring it to file schedules or updates on the project's status.

19. The most recent schedule submitted by the exemptee<sup>18</sup> states that Congdon Hydro is pursuing various funding options that, if successful, could result in the project being operational by October 2016. However, the exemptee describes the timeline as tentative and provides few details on how it plans to return the project to operational status. Aside from the projected dates for project restoration, the most recent letter and schedule is an identical copy of the schedule the exemptee filed on September 18, 2014. In short, the exemptee has put forth no effort to restore project operation and the project is no closer to operation than when it was acquired by the exemptee in 2007. The exemptee's long-term failure to restore the project's generating capacity and continuing financial inability to carry out the terms of the exemption warrants a finding that it is the exemptee's intent to abandon the project.

20. Terminating this exemption by implied surrender will not authorize any action or alter the current condition of the project or surrounding environment. Rather, this is an administrative action designed to terminate an authorization for an exemption that is, for all practical purposes, no longer in effect. As such, there is no effect on the environment and an environmental analysis is not required.<sup>19</sup>

21. The project is a small hydroelectric facility and is classified as having a low hazard potential. Due to the remote rural location of the project, failure of the dam under any credible loading condition should not have any significant adverse impact to human life or property. An inspection of the project on July 23, 2015, by D2SI – NYRO found no major dam safety deficiencies and no adverse conditions that would threaten the immediate safety of the public. Dam safety staff from the Connecticut Department of Energy and Environmental Protection attended the July 23, 2015 inspection and

---

<sup>18</sup> The exemptee did not respond to the initial May 4, 2015 notice of intent to terminate exemption. The exemptee also failed to timely respond to the Commission's follow-up October 8, 2015 letter requesting comments on the notice within 30 days. The exemptee filed a response and schedule on November 17, 2015.

<sup>19</sup> See 18 C.F.R. § 380.4(a)(1) (2014). See, e.g., *James B. Boyd and Janet A. Boyd*, 136 FERC ¶ 62,119 (2011), *order denying reh'g*, 138 FERC ¶ 61,085 at P 31 (finding that under 18 C.F.R. § 380.4(a)(1), environmental analysis was not necessary for an implied surrender where all project facilities were left in place and such termination would not authorize any action or alter the current condition of the project or surrounding environment); *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986) (finding that license surrender leaving all project features in place was not a major federal action significantly affecting the quality of the environment).

acknowledged that if the exemption was terminated by the Commission, jurisdiction over the dam would pass to the State of Connecticut.

22. For the reasons discussed above, the exemption for the Congdon Dam Project should be terminated by implied surrender effective the date this order is issued.

The Commission orders:

(A) The exemption for the Congdon Dam Project No. 10200 is terminated by implied surrender, effective at the close of business on the issuance date of this order. No applications for this site may be submitted until April 18, 2016.

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2015). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.