

158 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Brentwood Dam Ventures, LLC

Project No. 4254-011

ORDER TERMINATING EXEMPTION BY IMPLIED SURRENDER

(Issued January 19, 2017)

1. This order terminates, by implied surrender, the exemption from licensing for the Exeter River Hydro #1 Project No. 4254 (Exeter River Project), located on the Exeter River in Rockingham County, New Hampshire.

**I. Background**

2. On December 1, 1981, the Commission granted Paul T. Phillips II an exemption from the requirements of Part I of the Federal Power Act for the Exeter River Project.<sup>1</sup> As authorized, the project consists of: (1) a 100-foot-long, 15-foot-high concrete dam; (2) a reservoir with a gross storage capacity of 200 acre-feet at a normal water surface elevation of 140 feet mean sea level; (3) a 60-kilowatt turbine generator unit; (4) a 17-foot-long, 6-foot-diameter steel penstock; (5) a trash rack and head gate; (6) a 17-foot-long, 13-foot-wide brick powerhouse containing a generator; (7) a wood-framed structure housing an abandoned water wheel; and (8) appurtenant facilities. The project has not operated since 1997 when the generator and other project features were damaged by flooding.<sup>2</sup>

---

<sup>1</sup> *Paul T. Phillips II*, 17 FERC ¶ 62,321 (1981).

<sup>2</sup> See March 29, 2000 Letter from Anton J. Sidoti (Director, New York Regional Office) to Mr. Paul Philips.

3. On February 19, 2009, Brentwood Dam Ventures, LLC (exemptee) acquired ownership of the project and exemption.<sup>3</sup> On March 26, 2009, staff from the Commission's New York Regional Office requested that the exemptee file a plan and schedule to restore project operation.<sup>4</sup> The exemptee did not file a plan and schedule.

4. On September 29, 2010, Commission staff inspected the project and found the project in disrepair and poorly maintained. Staff noted dam safety deficiencies that required attention. On October 19, 2010, and April 4, 2011, Commission staff requested that the exemptee file a plan and schedule to restore project operation and address the dam safety deficiencies.<sup>5</sup> The exemptee did not file a response or a plan and schedule.

5. On January 29, 2013, Commission staff again requested that the exemptee file a plan and schedule to restore project operation.<sup>6</sup> In response, on February 26, 2013, the exemptee stated that it was looking into replacement turbines and evaluating financial options and would complete project restoration once decisions had been made.<sup>7</sup> On August 14, 2013, Commission staff inspected the project once more, finding that most of the previously identified dam safety deficiencies remained uncorrected but that some remedial concrete work had been completed to the dam's right abutment.<sup>8</sup> Staff noted that significant repairs, including renovation of the turbine and generator units, would

---

<sup>3</sup> January 17, 2013 Notice of Transfer of Exemption and Brentwood Dam Ventures, LLC January 15, 2013 Filing. Although the transfer was not publicly noticed until January 2013, the exemptee acquired the project in February 2009, notifying the New York Regional Office. Unlike licensed projects, exemptions and their project works may be transferred without Commission authorization.

<sup>4</sup> Letter from Peter R. Valeri (New York Regional Engineer) to Mr. Kale Inoue, co-owner of Brentwood Dam Ventures, LLC (filed as privileged).

<sup>5</sup> Letters from Peter R. Valeri to Brentwood Dam Ventures, LLC (filed as Critical Energy Infrastructure Information).

<sup>6</sup> Letter from Charles K. Cover to Brentwood Dam Ventures, LLC.

<sup>7</sup> Letter from Mr. Matthew M. Randall to the Secretary of the Commission.

<sup>8</sup> See September 4, 2013 Letter from Gerald L. Cross (New York Regional Engineer) to Brentwood Dam Ventures, LLC.

still be necessary to restore project operation.<sup>9</sup> In a follow-up letter dated September 4, 2013, Commission staff requested the exemptee file a progress update and plan regarding project restoration.<sup>10</sup> The exemptee did not file a response.

6. On November 20, 2013, Commission staff informed the exemptee that its February 26, 2013 response to the Commission's requests was inadequate and directed the exemptee to file a plan and schedule for restoring project operation.<sup>11</sup> On December 19, 2013, the exemptee filed a plan and schedule stating that restoration would begin in September 2014, with project operation resuming in March 2015.<sup>12</sup> On January 31, 2014, Commission staff accepted the exemptee's plan and schedule and required that the exemptee file quarterly progress reports, beginning October 1, 2014.<sup>13</sup> The exemptee did not file any quarterly progress reports.

7. On December 19, 2014, Commission staff requested that the exemptee file the overdue quarterly progress reports. The exemptee subsequently informed the Commission that it was currently unable to move forward with project restoration and requested an extension of time to reevaluate the situation and formulate a new restoration plan.<sup>14</sup> In a telephone call with the exemptee on March 12, 2015,<sup>15</sup> Commission staff repeated its previous requests that the exemptee formulate and file a revised plan and schedule, including a timeline to restore project operation. On March 18, 2015, the exemptee filed a second request for an extension of time, stating that it needed time to

---

<sup>9</sup> See September 4, 2013 Letter from Gerald L. Cross to Brentwood Dam Ventures, LLC.

<sup>10</sup> *Id.*

<sup>11</sup> Letter from Charles K. Cover to Brentwood Dam Ventures, LLC.

<sup>12</sup> Letter from Brentwood Dam Ventures, LLC to the Secretary of the Commission.

<sup>13</sup> Letter from Charles K. Cover to Brentwood Dam Ventures, LLC.

<sup>14</sup> January 9, 2015 Letter from Brentwood Dam Ventures, LLC to the Secretary of the Commission.

<sup>15</sup> Telephone Call from Ashish Desai to Mr. Naoto Inoue of Brentwood Dam Ventures, LLC.

seek a purchaser for the project.<sup>16</sup> The exemptee did not provide a plan and schedule or specify a timeline for filing the requested information with the Commission.

8. On April 15, 2016, Commission staff requested for the seventh time that the exemptee file a revised plan and schedule to restore project operation.<sup>17</sup> Staff also noted that more than one year had passed since the exemptee had last updated the Commission regarding the status of the project. Staff notified the exemptee that failure to restore and maintain project operation would result in Commission action to terminate the exemption by implied surrender. In response, the exemptee informed the Commission that the project was still for sale but did not provide a plan and schedule or timeline.<sup>18</sup>

9. A triennial dam safety inspection was performed by Commission staff on August 22, 2016, in coordination with the New Hampshire Department of Environmental Services – Dam Bureau (NHDES). The inspection revealed no dam safety deficiencies that posed a threat to public safety or required immediate remedial action. On November 9, 2016, Commission staff informed NHDES that if a surrender order is issued by the Commission, jurisdiction over the dam would pass from the Commission to the state.<sup>19</sup> NHDES responded by letter on October 20, 2016, summarizing the inspection findings and acknowledging that jurisdiction over the dam would revert to the State of New Hampshire in the event of an implied surrender.<sup>20</sup>

## **II. Public Notice, Intervention, and Comments**

10. On July 20, 2016, Commission staff issued a public notice of the Commission's intent to terminate the Exeter River Project exemption by implied surrender.<sup>21</sup> The notice

---

<sup>16</sup> Letter from Brentwood Dam Ventures, LLC to the Secretary of the Commission.

<sup>17</sup> Letter from M. Joseph Fayyad to Brentwood Dam Ventures, LLC.

<sup>18</sup> April 27, 2016 Letter from Nato Inoue to the Office of Energy Projects (letter dated March 17, 2015).

<sup>19</sup> See December 22, 2016 Memo from the Division of Dam Safety and Inspections to the Division of Hydropower Administration and Compliance at 3 (filed as Privileged).

<sup>20</sup> Letter from Steve N. Doyon (Administrator, Dam Safety and Inspection Section, NHDES) to John Spain (Regional Engineer), filed as attachment to December 22, 2016 Memo.

<sup>21</sup> 81 Fed. Reg. 49,647 (2016).

established August 19, 2016, as the deadline for filing comments, protests, and motions to intervene. By filing dated August 18, 2016, the U.S. Department of the Interior stated that it has no comments regarding the proposed termination of the project exemption.

11. On October 31, 2016, the exemptee notified the Commission that it had found a potential buyer for the project exemption and requested an extension of time to complete the transaction and restore project operation.<sup>22</sup> On November 23, 2016, KC Pittsfield, LLC of New Hampshire (KC Pittsfield) filed a late motion to intervene and comments, requesting an extension of time to restore the project. On December 12, 2016, the Commission's Secretary denied the late motion to intervene.

### **III. Discussion**

12. Standard Article 1 of the exemption for the Exeter River Project provides, in pertinent part, that “[i]f any term or condition of the exemption is violated, the Commission may revoke the exemption ... or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.”

13. 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>23</sup> 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>24</sup>

14. Brentwood Dam Ventures has made it clear that it does not intend to or is unable to resume operation of the project. The exemptee's failure to operate and maintain the

---

<sup>22</sup> Letter from Brentwood Dam Ventures, LLC to the Secretary of the Commission.

<sup>23</sup> *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>24</sup> *Congdon Pond Hydro, LLC*, 154 FERC ¶ 61,209, at P 18 (2016); *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).

project as authorized by its exemption is a violation of Standard Article 1. As explained above, the project has not operated for over 17 years, and the exemptee has not made the necessary repairs to restore project operation since it acquired the exemption in 2009. In addition, the exemptee has repeatedly failed to adequately respond to correspondence from Commission staff in a timely manner and has requested multiple extensions of time without specifying any timeline for filing the requested information. 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.

15. We believe that granting an extension of time to allow the exemptee to restore or sell the project is inappropriate under these circumstances. A significant amount of work would be required to bring the project back into operation, including renovation or replacement of the turbine and generator units and removal of vegetation around water-retaining structures.<sup>25</sup> After years of inaction, the exemptee has done nothing more than to make an unsupported statement that it has found a purchaser for the project. The exemptee has not identified the buyer in any of its filings or made any effort to demonstrate that the entity is willing or able to promptly make the repairs needed to put the project back in operation. Under these circumstances, we think the public interest is best served by avoiding further delay and terminating the exemption. Following surrender, if indeed a third party wishes to operate and maintain the project, it can file a new exemption application.<sup>26</sup>

---

<sup>25</sup> See September 4, 2013 Letter from Gerald L. Cross to Brentwood Dam Ventures, LLC.

<sup>26</sup> Indeed, given that the current exemption was issued in 1981, it would be in the public interest to determine whether conditions some 35 years later require additional, or changed, operational and environmental conditions.

16. 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. Accordingly, there is no effect on the environment and an environmental analysis is not required.<sup>27</sup>

17. As discussed above, the Exeter River Project is a small-scale hydroelectric facility classified as having a low hazard potential.<sup>28</sup> The August 22, 2016 inspection revealed no dam safety deficiencies that posed a threat to public safety or required immediate remedial action. Upon surrender of the project, jurisdiction over the dam will pass from the Commission to the state.

18. For the reasons discussed above, the exemption for the Exeter River Project is terminated by implied surrender.

The Commission orders:

(A) The exemption for the Exeter River Hydro #1 Project No. 4254 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 February 21, 2017.

(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 (2016). The filing of a request for rehearing does not

---

<sup>27</sup> See 18 C.F.R. § 380.4(a)(1) (2016). See e.g., *James B. Boyd and Janet A. Boyd*, 136 FERC ¶ 62,119 at P 27, *order denying reh'g*, 138 FERC ¶ 61,085, at P 31 (2012) (finding that under 18 C.F.R. § 380.4(a)(1), environmental analysis was not necessary for the implied surrender of a license 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); e.g., *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986) (finding that license surrender that left all project features in place was not a major federal action significantly affecting the quality of the environment).

<sup>28</sup> The hazard potential of a dam is based on the potential for loss of human life or property damage in the area downstream of the dam in the event of dam failure or incorrect project operation. Hazard potential does not refer to the structural integrity of the dam itself, but rather its effects should failure occur.

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 )

Kimberly D. Bose,  
Secretary.