

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

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Fairlawn Hydroelectric Company, LLC

Project No. 12715-013

ORDER GRANTING EXTENSION OF STAY

(Issued April 19, 2018)

1. On February 28, 2018, Fairlawn Hydroelectric Company, LLC (Fairlawn or licensee), licensee for the Jennings Randolph Hydroelectric Project No. 12715, filed a request to extend the two-year stay of the commencement and completion of construction deadlines under Article 301 of Fairlawn's license, which was granted by the Commission effective April 28, 2016. As discussed below, we will grant the request.

I. Background

2. On April 30, 2012, the Commission issued an original license to Fairlawn to construct, own, and operate the Jennings Randolph Hydroelectric Project, located at the U.S. Army Corps of Engineers' (Corps) Jennings Randolph Dam and Lake, on the North Branch Potomac River in Garrett County, Maryland, and Mineral County, West Virginia.¹

3. Article 301 of the license requires Fairlawn to commence construction of the project within two years of the issuance date of the license, and complete construction within five years of license issuance.² On May 13, 2014, the Commission granted Fairlawn's request that the commencement and completion of construction deadlines be extended by an additional two years.³ Fairlawn's deadlines for commencement and completion of construction were extended to April 30, 2016, and April 30, 2019, respectively.

¹ *Fairlawn Hydroelectric Co., LLC*, 139 FERC ¶ 62,079 (2012).

² *Id.* at 64,224.

³ *Fairlawn Hydroelectric Co., LLC*, Project No. 12715-003 (May 13, 2014) (unpublished order).

4. On April 28, 2016, Fairlawn filed a request for a two-year stay of the commencement of construction deadline set forth in section 13 of the Federal Power Act (FPA),⁴ and the commencement and completion of construction deadlines in Article 301 of Fairlawn's license. Fairlawn asserted that despite its best efforts, the Corps would not be able to approve construction plans and specifications by the April 30, 2016 commencement of construction deadline, preventing it from commencing timely construction of the project. Article 313 of the license, in part, states that no construction of project works may be authorized until the Corps has given written approval of construction plans and specifications for the project.⁵

5. On September 22, 2016, the Commission granted Fairlawn's requested stay (Stay Order).⁶ The Commission found that as final approval of project plans and specifications by the Corps was a pre-condition to project construction, Fairlawn's inability to receive final approval, despite their continued efforts, rendered it unable to commence timely project construction.⁷ The Commission therefore stayed Article 301 of Fairlawn's license by two years, effective April 28, 2016, the date Fairlawn filed its stay request. Fairlawn then had until April 30, 2018, to commence project construction, and until April 28, 2021, to complete construction. The Commission noted in the Stay Order that it was only staying Article 301 of the license, in order to encourage Fairlawn to continue developing the project during the stay.

6. On February 28, 2018, Fairlawn filed a request to extend the stay of the commencement and completion of construction deadlines. Fairlawn states that, although it has worked diligently with the Corps to obtain a "Section 408" permit required by the Rivers and Harbors Act⁸ for the project, it has been unable to do so, and is therefore unable to commence construction by April 30, 2018.

⁴ 16 U.S.C. § 806 (2012).

⁵ *Fairlawn Hydroelectric Co., LLC*, 139 FERC ¶ 62,079 at 64,226.

⁶ *Fairlawn Hydroelectric Co., LLC*, 156 FERC ¶ 61,197 (2016) (Stay Order).

⁷ See Stay Order at P 8.

⁸ Section 14 of the River and Harbors Act of 1899, as codified in title 33, section 408 of the United States Code, states that the Secretary of the Army may permit the alteration or permanent occupation of a Corps' work, such as the Jennings Randolph Dam and Lake, only when, on the advice of the Chief Engineer, "such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408 (2012).

II. Discussion

7. Section 13 of the FPA requires a licensee to commence project construction by the time fixed in the license, which can be no more than two years from the date of the license, and allows the Commission to extend the deadline once, for no more than two additional years. If the licensee does not commence construction by the deadline, the Commission is required to terminate the license.⁹ Accordingly, because the Commission has granted Fairlawn the maximum commencement of construction deadline permitted by the FPA, and because Fairlawn has not been able to commence construction, in the absence of a stay, the Commission would be required to terminate the Fairlawn's license.

8. The Commission reviews requests for stays under the standard established by the Administration Procedure Act: a stay will be granted if the Commission finds that "justice so requires."¹⁰ It is Commission policy to grant requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.¹¹ Such circumstances may occur where there are preconditions to project construction that are beyond a licensee's control.¹²

9. As noted in the Stay Order, final approval of the project plans and specifications by the Corps is a precondition to project construction.¹³ Fairlawn states that it has worked with the Corps consistently since the stay of Article 301 was granted in April

⁹ 16 U.S.C. § 806. That section states in pertinent part:

That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof The periods for the commencement of construction may be extended once but not longer than two additional years In case the licensee shall not commence actual construction of the project works . . . within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

¹⁰ 5 U.S.C. § 705 (2012).

¹¹ *Borough of Lehigh, Pennsylvania*, 140 FERC ¶ 61,211, at P 8 (2012) (*Borough of Lehigh*); *City of Broken Bow, Oklahoma*, 132 FERC ¶ 61,225, at P 7 (2010); *Gull Industries, Inc.*, 70 FERC ¶ 61,253, at 61,784 (1995).

¹² *Borough of Lehigh*, 140 FERC ¶ 61,211 at P 8.

¹³ See Stay Order at P 8.

2016, including replying to the Corps' comments, updating design documents, and contracting with an independent expert peer review team, as required by the Corps.¹⁴ Fairlawn also states that in October 2017, the Corps completed a consequence assessment report, to examine the impact of several dam failure scenarios, and a semi-qualitative risk assessment, to examine the project's potential impacts on dam safety.¹⁵

10. On April 6, 2018, the Corps, after reviewing the results of these and other assessments, issued Fairlawn its 408 permit. In the stay request, Fairlawn stated that it must commence construction in the fall, when "the lake pool is generally at its lowest,"¹⁶ and indicated that if it received its 408 permit in the near future that it could commence construction by September 30, 2018.¹⁷ In addition, Fairlawn still needs to satisfy several pre-construction license requirements, and was not in a position to make the necessary filings with the Commission until it obtained the 408 permit. Accordingly, Fairlawn is unable to commence project construction by the April 30, 2018 deadline for reasons outside its control.

11. For the above reasons, we find that extending our stay of Article 301 of Fairlawn's license for an additional year is warranted. Therefore, the stay of Article 301 of Fairlawn's license is extended until April 28, 2019. Upon expiration of the stay (April 28, 2019) Fairlawn will have two days - until April 30, 2019 - to commence construction, and until April 28, 2022 to complete construction. As was the case with the initial stay, we are staying only Article 301, rather than the entire license, to encourage Fairlawn to continue project development during the extended term of the stay.

¹⁴ We further note that while the commencement and completion of construction deadlines were stayed, Fairlawn has continued to develop the project in accordance with its license. For example, the Commission approved Fairlawn's Owner's Dam Safety Program on August 18, 2017 (required by Article 305 of the license), Post-Construction Erosion Monitoring Plan on November 8, 2017 (required by Article 404 of the license), and Fish Habitat Enhancement Plan on January 10, 2018 (required by Article 401 of the license).

¹⁵ See Fairlawn's February 28, 2018 Request for Extension of Stay at 3.

¹⁶ Fairlawn explained that a low water level is required for the first phase of construction in which the intake structure will be constructed on the lake shore over a period of four months. *Id.* at 4.

¹⁷ *Id.* at 4.

The Commission orders:

(A) The request for extension of stay filed by Fairlawn Hydroelectric Company, LLC, on February 28, 2018, is granted as set forth below.

(B) License Article 301 for the Jennings Randolph Hydroelectric Project No. 12715, stayed for two years effective April 28, 2016, is extended for an additional year, until April 28, 2019.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.