107 FERC ¶ 61, 120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

FPL Energy Maine Hydro, LLC Project No. 2552-065

ORDER DENYING REHEARING AND STAY

(Issued May 6, 2004)

1. Save Our Sebasticook, separately, and Town of Winslow (Town) and Save Our Sebasticook, jointly, seek rehearing of an order of the Commission, issued January 23, 2004, approving the surrender of FPL Energy Maine Hydro, LLC's (FPL Energy) Fort Halifax Project No. 2552, on the Sebasticook River, in Kennebec County, Maine, and authorizing partial removal of the project dam. 106 FERC ¶ 61,038. For the reasons discussed below, we deny rehearing. We also deny requests for a stay of the surrender order.

I. BACKGROUND

2. The 1.5-megawatt Fort Halifax Project is located about 1,400 feet upstream of the confluence of the Sebasticook River and the Kennebec River, of which the Sebasticook is a tributary. The project was constructed in 1907-08 and was first licensed to Central Maine Power Company (Central Maine) in 1968. Central Maine Power Co., 40 FPC 433 (1968). The Commission issued a subsequent license to Central Maine in 1997. Central Maine Power Co., 81 FERC ¶ 61,249 (1997).

3. In 1998, Central Maine and other owners of hydropower projects in the Kennebec River Basin (Kennebec Hydro Developers Group, or KHDG) entered into an agreement with the State of Maine, federal fisheries agencies, and a group of conservation organizations known as the Kennebec Coalition, under which the project owners would provide funds for fish restoration and the removal of the Edwards Dam, the lowermost dam on the Kennebec, in exchange for an extension of existing license deadlines for the provision of fish passage at the various projects. In respect to the Fort Halifax Project, the KHDG Agreement provided for the installation of a temporary fish pump and trap-and-transport facility for the capture of upstream-migrating alewives (river herring). The agreement also provided for the replacement of these facilities by a fish lift that

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would pass American shad, river herring, and Atlantic salmon, in quantities to meet state fisheries management goals, by May 1, 2003, unless the licensee surrendered its license and the Commission ordered the project dam to be "decommissioned" by the summer of 2003. The agreement prohibited the licensee from seeking to eliminate or defer this permanent fish passage requirement before the Commission or other regulatory bodies.

4. Upon submission of the agreement as a settlement, the Commission amended the pertinent licenses, including the Fort Halifax Project license, to include the fish passage requirements set forth in the agreement. Edwards Manufacturing Co., Inc., 84 FERC ¶ 61,227 (1998). In 1999, the project was transferred to FPL Energy, which installed the temporary fish pump. However, in June 2002, FPL Energy filed an application to surrender the license, because it had determined that the economics of the project would not justify the costs of installing and maintaining the fish lift required by the agreement and the license. As part of the application, FPL Energy proposed to remove several sections of the dam to provide fish passage. FPL Energy later modified its original proposal to widen the dam breach and to alter the method of removal.

5. In the proceeding initiated to process the surrender application, the Commission solicited public comment, and the Commission staff prepared a draft and final environmental assessment (EA). The staff analyzed the dam removal proposal and several alternatives, including surrender of the license with cessation of generation but without dam removal. The staff also considered denial of the surrender application and continued project operation, using a fish pump developed with improved technology (Canavac fish pump). The final EA did not recommend an alternative. In our January 23, 2004 Order, we granted the surrender application and required the licensee to remove the dam in accordance with its modified proposal.

II. DISCUSSION

6. FPL Energy's proposal was generally supported by state and federal agencies and by conservation groups, primarily because partial dam removal would provide fish passage, but was opposed by a number of individuals, Save Our Sebasticook, and the Town, which were concerned with preserving the reservoir and its environment and with anticipated adverse environmental and other effects of drawing down the reservoir. On rehearing, Save Our Sebasticook and the Town (collectively, the opponents) object to the role of the KHDG Agreement in our surrender determination and request that we rehear the application in the light of information that they assert we did not previously have the opportunity to consider.

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A. The KHDG Agreement

7. The opponents complain that the KHDG Agreement was not developed in an open process, and that inclusion of the Kennebec Coalition, but not of local communities, as a signatory prevented a proper appreciation of the public interest before the agreement was finalized. The opponents contend that the agreement precluded the licensee from including the Canavac fish pump alternative in its surrender application, with the result that the Commission was deprived of relevant information, was unable to consider use of this pump in lieu of dam removal, and was limited to considering the options only of denying the surrender application or granting it and requiring dam removal. The opponents ask us to rehear the application with the option of considering the Canavac fish pump as an alternative means of achieving fish passage.

8. The validity of the KHDG Agreement and the procedures under which it was formulated are not matters for consideration in this surrender proceeding. Although the Commission did incorporate fish passage provisions of the agreement as conditions of the Fort Halifax Project license, the license amendment proceeding in which this was accomplished became final long ago and cannot be revisited here.

9. Moreover, as we stated in the surrender order, a licensee is free to seek surrender of its license, and we cannot require a licensee to continue operating and maintaining a project against its will. 106 FERC ¶ 61,038 at P 31 and n.15. That a licensee may be seeking license surrender to implement the terms of a private agreement does not alter the applicability of this principle. However, although we do not deny surrender applications, we can consider, as we did in this proceeding, whether to require dam removal as a condition of the surrender or to allow a dam to remain in place. Thus, contrary to the opponents' assertions, the KHDG Agreement did not limit the Commission's ability to consider whether partial dam removal should be a condition of license surrender. Our decision to authorize partial removal of the dam was based on the record in this proceeding, including the submissions of the opponents of dam removal and the environmental analysis of the effects of removing the dam and of leaving it in place.

10. The limitations contained in the KHDG Agreement did not deprive us of information about the Canavac fish pump. To the contrary, as the opponents acknowledge, the EA assessed the capabilities of this fish pump and reached certain conclusions about its probable effectiveness in passing the targeted species of fish. In addition, Commission staff conducted a technical conference in October 2003 at which additional information about the Canavac pump was presented. The record thus contains considerable information about the fish pump.

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11. Our inability to require installation and operation of a Canavac fish pump was the result not of a lack of information about the pump but of the fact that the application filed by the licensee was one for surrender of its license. Even if the KHDG Agreement had not restricted the licensee's pursuit of the fish pump option, we would not have required the licensee to install and operate a Canavac fish pump in connection with an application to surrender the license. Such a requirement would have been incapable of enforcement by the Commission upon surrender of the license and termination of Commission jurisdiction, as well as financially unwarranted, given that project generation would cease if the license were surrendered. Therefore, no purpose would be served in reevaluating the application with a view to selecting the Canavac fish pump option, as the opponents urge us to do, because the limitations on the exercise of our authority in a surrender proceeding would continue to preclude this option.

12. As we explained in the surrender order, we could have required installation and operation of the Canavac fish pump only in connection with an application to amend the license, but the licensee filed no such application, and we could not have compelled it to file one. The record leaves little doubt that, in refraining from seeking a license amendment to authorize use of a fish pump, the licensee was constrained by the terms of the KHDG Agreement. However, the agreement's requirements for a fish lift to the exclusion of other fish passage facilities were consented to by the licensee, which also voluntarily sought an amendment of its license to include those provisions as license conditions. The present surrender proceeding is not an appropriate forum for reconsidering whether other fish passage options should have been explored in that amendment proceeding.

B. Substantive Issues

13. The opponents state that the licensee and some state agencies did not provide documentation to support their belief that partial dam removal would not result in an overall reduction of wetlands. The opponents believe that there may, in fact, be a significant wetland reduction, and they ask us to review the documentation provided by the licensee and the state agencies to validate the assumption that no impact would occur.

14. The Final EA concluded that a portion of the existing wetlands would be degraded with the drawing down of the impoundment, but that wetlands would naturally reestablish in some areas along the river. It concluded that, overall, the acreage of deciduous swamp, shrub swamp, and emergent marsh/wet meadow wetland cover types in the project area would remain about the same or increase slightly following dam

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breach.[1] Staff's conclusions about the effect of partial dam removal on wetlands were not based on the assumptions of the licensee or the agencies but rather on its own independent analysis of the record. Since the staff already considered the record on this matter, and since the opponents have not alleged any inadequacies in staff's review, there is no reason to examine the underlying documentation again.

15. The opponents object that our order did not reflect the actual status of the Sebasticook River fisheries restoration, which they assert is behind schedule due to delays by the Maine Department of Marine Resources (Maine DMR). They state that two upstream hydropower projects on the Sebasticook, the Benton Falls Project No. 5073 and the Burnham Project No. 11472, will not have upstream fish passage facilities in place by the deadlines specified in the KHDG Agreement. They contend that Maine DMR has no plans in place for trap-and-truck operations to substitute for those that will be lost if the Fort Halifax dam is breached. They also argue that the reintroduction plan for alewives into upstream lakes has not been resolved, that actual alewife stocking plans have been delayed for the past two seasons, that American shad returns to the Sebasticook are significantly below forecasts, and that Maine DMR has not developed a plan to provide fish passage at numerous other non-hydropower dams upstream in the Sebasticook system. The opponents contend that Maine DMR did not provide the Commission with complete information regarding these delays, which they ask us to consider in reassessing whether the Fort Halifax dam should be breached.[2]

16. In concluding that FPL Energy should partially remove the project dam in conjunction with the surrender of its license, we relied to a considerable extent on the fact that federal and state fisheries agencies, conservation groups, and hydropower project owners had developed a plan for restoration of anadromous fish in the Sebasticook and Lower Kennebec Rivers according to an established schedule. 106 FERC ¶ 61,038 at P 35. We do not agree with the opponents that delays in the fisheries restoration efforts should affect whether partial dam removal is warranted. Even if these efforts are behind schedule or have not yet been as successful as anticipated, the opponents' arguments do not suggest that Maine DMR intends to abandon those efforts. It is a matter of when, not if, anadromous fish restoration in the Sebasticook will occur. Since fish passage at Fort

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[1] 106 FERC ¶ 61,038 at P 43.

[2] Save Our Sebasticook argues that we should require Maine DMR to provide updated information on these issues. Maine DMR is under no obligation to provide such information, and we lack authority to require it to do so.

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Halifax is a necessary part of that restoration, we see no purpose in contributing to delays in restoration efforts by rescinding our dam removal authorization, particularly since it is clear such an action will not cause the federal and state agency signatories to the KHDG Agreement to accept any fish passage facilities other than a fish lift at the dam.

17. The opponents argue that we did not receive complete and accurate information on the full extent of the existing recreational use and the impacts of partial dam removal on future recreation potential. They ask us to require Maine DMR to submit a comprehensive study that details existing uses in all four seasons and estimates "actual future shoreline angling opportunities."

18. The Final EA found that elimination of the reservoir would result in the loss or reduction of certain recreational activities, including boat-based angling and waterfowl hunting opportunities, ice skating, ice fishing, snowmobiling, and carry-in boat access, but that shoreline angling activities might increase. Id. at P 44. The opponents do not explain why the information relied upon by the staff to reach these conclusions was incomplete or inaccurate. In any event, there was sufficient opportunity in this proceeding for any party to provide evidence of recreational use of the reservoir. Maine DMR was under no obligation to provide such information, and we lack authority to require it to do so.

19. The opponents assert that our order recognized but did not adequately address the negative consequences of partial dam removal. They argue that our action will cause unnecessary risks and burdens to fall on the Town and its residents. The opponents are particularly concerned that the full extent of some effects of breaching the dam will not be known until after the reservoir has been lowered and the site is no longer under the Commission's jurisdiction. These effects include sediment contamination, risk of ice jamming and flooding, soil and bank erosion, and deterioration of project structures over time. The opponents also object to the loss of public recreational access and the burden of replacing a Town sewer line that crosses the reservoir and may be partly exposed after the drawdown.

20. The EA analyzed these issues, and we considered them in our order. The EA concluded that exposure of contaminated sediments would be limited and would not result in human health impacts; to address this issue, we included revegetation and stormwater outfall monitoring provisions as conditions of the surrender. Id. at P 39 and Ordering Paragraph (C). We also required the licensee to include measures to control sedimentation and erosion during the removal process. Id. at Ordering Paragraph (E)(2). Both the EA and the order acknowledged that ice jamming could increase after the dam is breached. Id. at P 41. We imposed conditions to ensure that the remaining project facilities would be in a safe and stable condition during and after completion of the

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partial dam removal. Id. at P 50 and Ordering Paragraph (E). We addressed opponents' recommendations for replacement recreational facilities and access after the impoundment is drawn down. Id. at P 51. We discussed the Town's sewer line and noted that it had been constructed pursuant to an easement granted by the licensee's predecessor. Id. at P 53-55.

21. The measures we required in this proceeding to address issues raised by opponents of the partial dam removal are ones that would sufficiently address environmental impacts, such as possible exposed sediments and erosion, with short-term measures that could be undertaken while the project remains under the Commission's jurisdiction. The opponents do not convince us that these measures, which were based on the staff's conclusions in the EA, would be inadequate. As we explained in the surrender order, such long-term measures as ensuring the maintenance of recreational access or of the condition of the remaining project facilities would necessitate continuing Commission jurisdiction, whereas surrender of a license entails the termination of the Commission's jurisdiction. Id. at P 49-52. Once the surrender becomes effective, any continuing issues would be properly addressed under applicable state regulation. In some respects surrender and dam removal might create costs or losses for the Town and its residents, but the opponents do not explain why avoidance of those impacts should require the dam to be left intact or why these costs should fall on the licensee.[3] In any event, we recognized that there would be some adverse consequences of partial dam removal but determined that, on balance, this action, with the conditions we imposed, had significant benefits over leaving the dam in place.

22. The opponents argue that we did not consider certain information in our order. They state that an abandoned landfill is located adjacent to a stream that flows into the impoundment, and that the extent of "potential exposures" in this area upon draining of the impoundment is unknown. Issues relating to this landfill were not raised during the environmental review process, despite sufficient opportunity, and the opponents do not now explain why lowering the impoundment should have any effect on the landfill. The opponents note that the Comprehensive Plan for the Town of Winslow recognizes the value of the impoundment and establishes the goal of preserving it. The staff's EA and our order considered the uses and benefits of the impoundment to the local community. The opponents claim that our analysis did not consider information from the Maine Department of Transportation (Maine DOT) indicating that the risk of scouring on

[3] In the case of the sewer line this is particularly apt, since its construction was possible only with the approval of the licensee and the Commission.

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existing bridges could increase following dam removal. In fact, the EA discussed these concerns of Maine DOT, which indicated it would assess the need for protection of these bridges in the future.[4]

23. The opponents request that we consider complete removal of the project as the preferred means of achieving fish passage if we do not revise our surrender order to allow use of the Canavac fish pump. In our surrender order, we considered the total dam removal alternative, which had been analyzed in the EA, and concluded that its advantages over partial dam removal were not significant, since the proposed breach would be adequate for fish passage. We also concluded that total dam removal would increase the potential for sedimentation and would result in the complete, rather than partial, loss of an historic structure. Moreover, no party to the proceeding had advocated total dam removal. Id. at P 37. The opponents do not give any reason for seeking total project removal at this stage of the proceeding.

C. Stay Requests

24. The opponents ask us to stay the surrender order if we do not rescind it, to allow the completion of an ice-jamming study required by the U.S. Army Corps of Engineers (Corps), as well as to give the opponents additional time to pursue resolution "through other means" of the "many remaining issues" generated by the partial removal decision. James L. Gorham, an intervenor in the proceeding, also seeks a stay of the decision, to enable him to obtain access to and review information about meetings among the signatories to the KHDG Agreement.

25. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, i.e., the stay will be granted if the Commission finds that "justice so requires."[5] Under this standard, the Commission considers a number of factors related to the public interest, such as whether the movant will suffer irreparable injury in the absence of a stay and whether the issuance of a stay would substantially harm other parties.

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[4] EA at 25.

[5] See, e.g., Clifton Power Corp., 58 FERC ¶ 61,094 (1992).

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26. The opponents do not furnish much information about the ice-jamming study, other than that the Corps has required the licensee to conduct it to determine how much the risk of ice jamming might increase following breach of the dam, and that completion of the study is expected in May 2004. In our order, we recognized that ice jamming could increase once the dam is breached and concluded that this effect was not capable of being mitigated by any measures that we could impose in a surrender proceeding. Id. At P 41. Our determination that the benefits of partial dam removal outweigh the adverse effects encompassed this finding of an increased potential for ice jams. Since we have already acknowledged this adverse effect, the results of the Corps-required study are unlikely to cause us to reconsider our decision to authorize partial dam removal. The Commission's authorization to remove a dam is independent of any actions that the Corps may require before it grants permission to conduct dam removal activity under its own authority.[6]

27. Otherwise, the opponents do not specify what issues they intend to address during the pendency of a stay, what courses of action they expect to pursue in addressing those issues, or how long a stay would be required for their purposes. Mr. Gorman seeks a stay to address matters relating to the formulation of the KHDG Agreement, but, as we have stated, such matters are not pertinent to our disposition of the surrender application.

28. The movants have not demonstrated that staying our action would enable them to take any action likely to result in a modification of our decision to allow partial dam removal. Therefore, although denying the stay requests might preclude the movants from pursuing certain matters or obtaining certain information before the dam removal process begins, we are not convinced that failure to obtain a stay would cause them irreparable harm. Issuance of a stay would interfere with the licensee's plans, which it is already pursuing, to remove part of the project dam as a prerequisite to surrendering its license.[7] For these reasons, we find that justice does not require a stay of our surrender order.

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[6] Under section 404 of the Clean Water Act, 33 U.S.C. § 1344, the Corps has authority to issue permits for the discharge of dredged or fill material into United States waters.

[7] The licensee filed its plan for retirement of the project and partial removal of the dam on March 22, 2004.

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The Commission orders:

(A) The requests for rehearing of the Commission's January 23, 2004 Order in this proceeding filed by Save Our Sebasticook, individually, and by Town of Winslow and Save Our Sebasticook, jointly, are denied.

(B) The requests for stay of the Commission's January 23, 2004 Order filed by Town of Winslow and Save Our Sebasticook and by James L. Gorman are denied.

By the Commission. Chairman Wood concurring with a separate statement attached.
(S E A L) Commissioner Kelly not participating.

Linda Mitry,
Acting Secretary.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FPL Energy Maine Hydro, LLC Project No. 2552-065

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WOOD, Chairman, concurring:

I am sensitive to the concerns raised by Save Our Sebasticook and the Town of Winslow. The loss of the Fort Halifax Project's reservoir and the affect on the surrounding environment will certainly have a deep and lasting impact. However, the staff's Environmental Assessment (EA) fully and adequately addressed the environmental issues concerning the surrender and partial removal of the project's dam. Taking into consideration the issues raised by the parties and the findings and recommendations contained in the EA, I must conclude that the economics of operating the project with the needed improvements for adequate fish passage makes surrender FPL Maine Hydro's only alternative. I disappointedly concur.

Pat Wood, III
Chairman