

131 FERC ¶ 61,247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

FPL Energy Maine Hydro LLC

Project No. 2283-072

ORDER ON REHEARING

(Issued June 17, 2010)

1. On April 26, 2010, FPL Energy Maine Hydro LLC (FPL), licensee for the Gulf Island-Deer Rips Hydroelectric Project No. 2283, filed a request for rehearing of Commission staff's order issued on March 25, 2010.¹ In that order, staff required the licensee to revise its land and trail management plan to include an assessment of lands within 200 feet of the high-water elevation of the project's impoundment and to include in the assessment an analysis of lands at risk for excessive or inappropriate development. FPL argues that staff erred in requiring analysis of such lands because protecting lands from excessive or inappropriate development is not a valid project purpose. For the reasons discussed below, we grant rehearing in part and clarify the requirement.

Background

2. The Gulf Island-Deer Rips Project is located on the Androscoggin River in Androscoggin County, Maine. The project extends from river mile 33.7 upstream to about river mile 53.2 and consists of the Gulf Island and Deer Rips Developments, which include two dams with impoundments and three powerhouses. In 2006, staff issued FPL a new license for the project.²

3. The Deer Rips impoundment has a normal full pond elevation of 205.7 feet and extends upstream about 1.3 miles to the tailwater of the Gulf Island powerhouse. The project boundary is at contour elevation 216.0 along part of the impoundment and by metes and bounds survey around the rest. The Gulf Island impoundment has a normal

¹ *FPL Energy Maine Hydro LLC*, 130 FERC ¶62,251 (2010) (March 25 Order).

² *FPL Energy Maine Hydro, LLC*, 116 FERC ¶ 62,159 (2006). The license was later amended to increase the installed capacity of the project. See *FPL Energy Maine Hydro LLC*, 129 FERC ¶ 62,098 (2009); and *FPL Energy Maine Hydro LLC*, 121 FERC ¶ 62,144 (2007).

full headpond elevation of 262.0 feet and extends upstream about 18.2 miles of the Gulf Island Dam. The project boundary is generally at the 270 foot contour elevation. There is a buffer of varying widths (e.g., 100 to 200 feet, or more) along the Deer Rips impoundment. The Gulf Island impoundment has a very narrow buffer (less than 50 feet) along much of its length.

4. To ensure that the project would adequately protect environmental resources (such as aesthetics, public access, recreation, and sensitive habitats) on shorelands along the project impoundments, Article 412 of the new license required the licensee to file, after consultation with specified entities, a land and trail management plan that: (1) addresses management concerns related to project lands and any additional lands within 200 feet of the impoundments that may be needed for project-related purposes and thus should be brought within the project boundary; (2) lists criteria to be used to determine the need for each project-related purpose; (3) provides information on the cost and types of ownership rights to be acquired or other methods of protecting identified lands; (4) describes any allowable uses (i.e., public access, trail development, or protection of wildlife habitats and scenic and cultural resources); and (5) includes conditions to guide the use of identified lands, such as land-clearing and ground-disturbing limitations, development and use restrictions and allowances, and monitoring and inspection procedures.³

5. On November 7, 2008, FPL filed its Article 412 plan⁴ and supplemented it on June 5 and 25, 2009. The licensee's plan proposed land use measures only for lands already in the project boundary.⁵ The plan explained that there are "904 acres of land owned in fee [by the licensee] that can serve project needs including recreational purposes and wildlife protection."⁶ The plan further stated that no additional lands (i.e., privately-owned lands in the boundary or lands outside the boundary within 200 feet of the shoreline) are needed for project purposes.⁷

6. Commission staff's March 25 Order modified and approved FPL's plan. The order reiterated the requirement of Article 412 that FPL assess all lands, regardless of

³ FPL did not seek rehearing of this requirement.

⁴ FPL included in its filing a recreation plan required under Article 411 (docketed as subdocket -065). The recreation plan is not the subject of FPL's request for rehearing.

⁵ Licensee's June 25, 2009 Supplement at 12. The filing further states that the land use plan would also apply to any licensee-owned lands outside, but adjacent to, the project boundary, but that there are no such lands. *Id.*

⁶ *Id.*

⁷ *Id.*

ownership, within 200 feet of the reservoir shoreline to determine whether any additional lands merited special protection under the license. Ordering Paragraph (D) required the licensee to conduct this assessment and supplement the plan previously filed with, at a minimum, an analysis of three items: (1) essential habitat data obtained from the Maine Department of Inland Fisheries and Wildlife that revealed several essential deer wintering areas and inland waterfowl wading habitat areas; (2) scenic and aesthetic resources; and (3) lands at risk for excessive or inappropriate development. The results of the assessment are due March 25, 2011.

7. On April 26, 2010, FPL filed a timely request for rehearing of the March 25 Order, stating that it does not object to the requirement to conduct a supplemental assessment and analysis with respect to items (1) and (2), but believes Commission staff erred in requiring item (3) (i.e., an analysis of lands at risk for excessive or inappropriate development). FPL asks the Commission to delete this requirement.

Discussion

8. On rehearing, FPL argues that the analysis should examine whether lands are needed and should be acquired for project purposes, such as protection of natural resources. Citing to sections 4(e) and 10(a) of the Federal Power Act (FPA), FPL contends that identifying lands “at risk for excessive or inappropriate development” is not a legitimate project purpose.⁸

9. We do not require licensees to acquire all lands around project reservoirs, but only those lands needed to serve project purposes. The March 25 Order erred in suggesting that protecting lands from excessive or inappropriate development is in itself a project purpose. Rather, it is one of a number of factors (e.g., cost to acquire a parcel, value of the resource to be protected, risk of damage to the resource through excessive or inappropriate development if not protected under the license) that could be considered in identifying those parcels whose environmental, recreation, or other resources merit protection under the license.⁹ We will amend Ordering Paragraph (D) of the March 25 Order to make this clear.

⁸ 16 U.S.C. §§ 797(e) and 803(a) (2006). Those sections require that the Commission consider power and energy purposes as well as fish and wildlife, recreation, other aspects of the environment, and other beneficial public uses in any licenses that it issues.

⁹ FPL is not responsible for protecting all environmental resources within 200 feet of the water’s edge regardless of the cost. It is however expected to provide a reasonable amount of protection to environmental resources and lands that serve other project purposes.

The Commission orders:

(A) FPL Energy Maine Hydro LLC's April 26, 2010 request for rehearing of the March 25, 2010 Order issued in this proceeding is granted to the extent set forth in this order and clarified as set forth below.

(B) The last sentence of the first paragraph of Ordering Paragraph (D) of the March 25, 2010 Order issued in this proceeding is revised to read:

The assessment shall, at a minimum, include analyses on the following three items that were not adequate in the submitted plan: (1) essential habitat data obtained from the Maine Department of Inland Fisheries and Wildlife that revealed several essential deer wintering areas and inland waterfowl wading habitat areas within 200 feet of the shoreline; (2) scenic and aesthetic resources; and (3) other project purposes (e.g., protection of wildlife habitat, wetlands, recreation, public access).

(C) The first sentence of the second paragraph of Ordering Paragraph (D) of the March 25, 2010 Order issued in this proceeding is revised to read:

The assessment shall provide information on the types of ownership rights to be acquired or other methods of protecting lands needed for project purposes, and shall illustrate that various options were considered to balance the potential financial cost of acquiring additional land rights with optimizing the protection of environmental resources along the Androscoggin River, including, but not limited to: (1) acquiring rights only on certain high-value parcels (e.g., lands that could serve a project purpose and that, if not protected under the license, are at risk of development that would be inconsistent with identified project purposes); (2) obtaining a combination of land rights (e.g., in-fee, conservation easements, etc.); or (3) some combination of these.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.