

148 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of New York, New York

Project No. 13287-005

ORDER ON REHEARING AND CLARIFICATION

(Issued September 18, 2014)

1. By order of May 13, 2014, the Director of the Office of Energy Projects (Director) issued an original license¹ to the City of New York (City or licensee) to construct, operate, and maintain the 14.08-megawatt (MW) Cannonsville Hydroelectric Project No. 13287. The project will be located at the City's existing Cannonsville Reservoir, on the West Branch of the Delaware River, near the Town of Deposit, Delaware County, New York. On June 12, 2014, the City filed a request for clarification or, in the alternative, rehearing of the May 13 Order.

2. We deny rehearing but, to the extent discussed below, provide clarification as to several license articles.

I. Background

3. The Cannonsville Reservoir is located on the West Branch of the Delaware River, in the Catskill Mountains of upstate New York. The Cannonsville Dam, which impounds the Cannonsville Reservoir, was built in the mid-1960s for the purpose of supplying water to the City of New York. Intake chambers located approximately 5 miles upstream of the dam withdraw water from the reservoir. The water is then transported through a system of tunnels, aqueducts, and reservoirs, and eventually the City's water supply distribution system. Releases to the West Branch of the Delaware River are made at the dam.

4. Diversions and releases from Cannonsville Reservoir are subject to a 1954 Decree (Decree) issued by the United States Supreme Court that established an equitable allocation of Delaware River Basin waters among the City of New York, and the States of Delaware, New Jersey, New York, and the Commonwealth of Pennsylvania (Decree

¹ *City of New York*, 147 FERC ¶ 62,113 (2014) (May 13 Order).

Parties).² The Decree established, among other things, the amount of water the City could withdraw from its three reservoirs. In 1961, to manage the water allocations under the Decree, the Decree Parties and the federal government entered into the Delaware River Basin Compact (Compact).³ The Compact created the Delaware River Basin Commission as the central authority to regulate and control withdrawals and diversions from surface and ground waters throughout the basin for the conservation, utilization, and development of basin water and related resources, while not adversely affecting the rights and obligations given to the Decree Parties by the 1954 Decree.⁴ Pursuant to the Compact, the Delaware River Basin Commission developed and adopted a Comprehensive Plan for the use of the water resources.⁵ On June 11, 2014, the Delaware River Basin Commission approved the inclusion of the Cannonsville Hydroelectric Project in the Comprehensive Plan.⁶

5. To balance the competing uses of the Cannonsville Reservoir's water resources, while recognizing the rights of the Decree Parties, the Delaware River Basin Commission established the Flexible Flow Management Plan. The program, first implemented in 2007, looks at the needs and water levels of several reservoirs and determines release rates for the City's reservoirs for specific purposes. The program allows flexibility for modifications and adjustments in determining release rates, and helps the Delaware River Basin Commission comply with the Decree. Several iterations of the program have been implemented in the years since its inception. The Flexible Flow Management Plan - Operations Support Tool is the current operations protocol in place until May 31, 2015,⁷ controlling, among other things, the flow releases downstream and water supply diversions.

² *New Jersey v. New York*, 347 U.S. 995 (1954).

³ Delaware River Basin Compact Act of 1961, Pub. L. 87-328, 75 Stat. 688.

⁴ Compact, Sections 3.3, 3.5.

⁵ Compact, Section 3.2. Section 9.1 of the Compact requires the Delaware River Basin Commission to authorize use of the waters for hydroelectric power.

⁶ The Cannonsville Hydroelectric Project is listed under Delaware River Basin Commission Docket No. D-2014-002 CP-1.

⁷ *Delaware River Basin States and New York City Announce One-Year Reservoir Operating Plan Agreement*, May 31, 2014, available at http://water.usgs.gov/osw/odrm/documents/new_reservoir_operating_plan_agreement_reached_2014.pdf.

6. On February 29, 2012, the City, acting through the New York City Department of Environmental Protection, filed a license application for a 14-MW hydroelectric project at the existing Cannonsville Dam and Reservoir. The City's proposal included the construction and operation of a powerhouse adjacent to the existing low-level release works building, as well as 12.47-kilovolt (kV) underground and overhead transmission lines. The City proposed to utilize the existing flows released through the outlet works of the dam, as dictated by the Operations Support Tool, and generate electricity by instead releasing those flows through the proposed powerhouse.

7. On May 13, 2014, Commission staff issued an order granting the City a license to construct and operate the project.⁸ The license is subject to a number of project-specific articles, including conditions submitted by the New York State Department of Environmental Conservation in the water quality certification it issued pursuant to section 401 of the Clean Water Act,⁹ as well as standard license articles contained in Form L-11, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce."¹⁰ As the City proposed, water that is currently released through the outlet works of the existing dam will instead be released through the powerhouse, and the license requires that the water made available for generation be done in accordance with the Flexible Flow Management Plan - Operations Support Tool, or any subsequent operations protocol.¹¹

8. On June 12, 2014, the City filed a request for clarification, or in the alternative, rehearing, of several of the standard license articles included in the license. The City contends that the standard license articles related to downstream releases may be inconsistent with the requirements of the Decree and the plans of the Delaware River Basin Commission and the primary purpose of the Cannonsville Reservoir. The City

⁸ May 13 Order, 147 FERC ¶ 62,113.

⁹ Section 401 of the Clean Water Act requires license applicants to provide a water quality certification from the state where the discharge originates, and the conditions of the certification must be included in any license issued. 33 U.S.C. § 1341(a)(1), (d) (2012).

¹⁰ Ordering Paragraph (E) makes the conditions in Form L-11 a part of the license. The conditions are attached to the license. May 13 Order, 147 FERC ¶ 62,113 at 64,394-98.

¹¹ Certification Condition FO1 states that the FFMP-OST, or any successor agreement between the Decree Parties, shall govern reservoir releases. The condition is set forth in Appendix A of the license order and incorporated into the license by Ordering Paragraph (D).

argues that the license reserves to the Commission broadly defined authority that may lead to a future conflict between the Commission, the Delaware River Basin Commission, and the Decree Parties. The City asserts that standard license Articles 10, 12, and 13¹² enable the Commission to exercise authority over the releases of water from the Cannonsville Reservoir, and to direct operation of the reservoir, potentially interfering with the authority of the Delaware River Basin Commission and the Decree Parties, as well as jeopardizing the City's water supply system.¹³ The City also seeks clarification that Commission staff will coordinate with the City's Department of Environmental Protection officials and comply with safety and security rules when visiting the project in order to maintain the security of the City's water supply and not disturb the local bald eagle population.¹⁴

9. As discussed further below, the Commission provides clarification of the Commission's authority under its standard license articles.

II. Discussion

A. Reservoir Releases

10. In issuing the license, the Director included a number of measures to protect and enhance resources in the project area. With regard to reservoir releases, the May 13 Order explains that "[t]o ensure downstream conservation and municipal water supply system releases are maintained, and that the reservoir continues to provide flood control benefits, this license requires the city to operate the project in accordance with the Flexible Flow Management Plan – Operations Support Tool, or any subsequent operating

¹² As explained in greater detail below, the City expresses concern with Article 10 (requiring the licensee to comply with Commission orders to coordinate project operation with that of other projects), Article 12 (making project operations, including flow releases, subject to Commission rule and regulations protecting life, health, and property and for other beneficial public purposes, including recreation), and Article 13 (requiring the licensee to permit reasonable use of the project reservoir and other properties, as ordered by the Commission.)

¹³ The City also alleges, without explanation, that the standard license articles could interfere with its ability to maintain compliance with the Safe Drinking Water Act.

¹⁴ See Standard Article 4, attached to the end of the license. Standard Article 4 gives the Commission the authority to inspect and supervise the construction and operation of the project, and requires the licensee to provide "free and unrestricted access to, through, and across the project lands and project works...."

protocol agreed to by the Decree Parties.”¹⁵ The Order further explains that flows for water supply and downstream releases will not be altered due to operation of the project.¹⁶

11. Standard Article 10 requires the licensee to coordinate operation of the project electrically or hydraulically with such other projects or power systems and in such manner as the Commission may direct “in the interest of power and other beneficial public uses of water resources.”

12. Standard Article 12 provides that the operations of the licensee, so far as they affect the use, storage, and discharge from storage of waters affected by the license, “shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir as such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe....”

13. Standard Article 13 provides, in pertinent part, that the licensee shall “permit such reasonable use of its reservoir or project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interest of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses.”

14. These standard license articles have been included in licenses since the 1950’s,¹⁷ and were updated and standardized in 1975.¹⁸ Standard license articles “contain broad reservations of the Commission’s authority” to at times require alterations to project works that are in the public interest.¹⁹ The standard license articles are included in a

¹⁵ May 13 Order, 147 FERC ¶ 62,113 at P 30.

¹⁶ *Id.* PP 11, 21.

¹⁷ *Cascade Power Co.*, 74 FERC ¶ 61,240, at 61,822 (1996).

¹⁸ *Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act*, 54 FPC 1792 (1975).

¹⁹ *Cascade Power*, 74 FERC ¶ 61,240 at 61,822.

license because a license term may extend for 30 to 50 years, and it is not possible at the time of license issuance to foresee all of the circumstances that might arise through the license term. No entity is required to develop a hydropower project. To the extent they elect to do so, however, they must accept reasonable requirements, such as those embodied in the standard articles, that allow the Commission to protect the public interest, as required by the Federal Power Act (FPA). However, the Commission does not exercise its authority arbitrarily and unilaterally, and, as a practical matter, uses these articles only on rare occasion. In the event that the Commission contemplated changes to the license pursuant to these standard license articles, the licensee would be given notice of the proposed action and an opportunity for hearing regarding the action. Furthermore, the FPA provides that hydroelectric licenses may only be altered upon “mutual agreement between the licensee and the Commission after thirty days’ public notice.”²⁰ The notice and opportunity for comment prevents the Commission from making changes to project operations without the licensee first being heard. Therefore, should the Commission consider a change to project operations, the City and other interested entities would have the opportunity to provide information as to the possible impact of the proposed modification on the City’s obligations under the Decree and the Compact.

15. Moreover, the Director recognized the City’s concerns regarding downstream releases and water supply, and addressed these concerns in the license.²¹ In issuing a license for the proposed project, the Director noted that the City’s water supply distribution system is not part of the proposed project and that it would continue to function under any licensing alternative.²² While recognizing the primary purpose of the project and the authority flowing from the Decree, the Commission still has the responsibility under FPA section 10(a)(1) to ensure that the project is best adapted to comprehensive development of the waterway, taking into account “beneficial public uses” including power production, environmental protection, irrigation, recreation, flood control and water supply.²³

16. In sum, the articles in question are necessary to protect the public interest, but will be invoked only in unusual circumstances and only after the City has notice and an opportunity to comment. The Commission will, to the extent consistent with its responsibilities under the FPA, use its authority under the articles in a manner that is consistent with the City’s water supply and legal obligations. For the above reasons, we deny rehearing on this issue.

²⁰ 16 U.S.C. § 799 (2012).

²¹ May 13 Order, 147 FERC ¶ 62,113 at PP 11, 14, 21, 22, 26, 30.

²² *Id.* PP 11, 21.

²³ 16 U.S.C. § 803(a)(1) (2012).

B. Access to Project Facilities

17. The City also requests clarification that Commission personnel will coordinate with the City's DEP prior to inspecting the project, and comply with all its safety and security procedures.²⁴ The City requests clarification of Standard Article 4, which requires the licensee to provide the Commission with "free and unrestricted access to, through and across the project lands and project works..." and asks that Commission personnel coordinate these visits with the City's Department of Environmental Protection.

18. Commission staff regularly visits hydroelectric projects across the nation for a variety of reasons and to the extent practicable notifies officials at the project site in advance of the date of the visit. These notices include the date and time of the proposed visit, the itinerary of the visit, any personnel the Commission may wish to speak with and any information that may need to be prepared in advance. It is Commission policy to coordinate site visits with project officials for regular inspections and visits whenever possible.

The Commission orders:

(A) The request for rehearing filed by the City of New York, on June 12, 2014, is denied.

(B) The request for clarification filed by the City of New York, on June 12, 2014, is granted to the extent described above and denied in all other respects.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ The Department of Environmental Protection is in charge of monitoring the project area in order to protect New York City's water supply, and to minimize disturbances to the local bald eagle population.