

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
101 FERC ¶ 61,055

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Wisconsin Power and Light Company

Project No. 11162-004

ORDER ON REHEARING AND AMENDING LICENSE

(Issued October 11, 2002)

1. On June 27, 2002, the Director, Office of Energy Projects (Director) issued an original license to the Wisconsin Power and Light Company (Wisconsin Power) to continue to operate and maintain the previously unlicensed 29-megawatt Prairie du Sac Hydroelectric Project, located on the Wisconsin River in Sauk and Columbia Counties, Wisconsin.¹ Intervenors U.S. Department of the Interior and the Wisconsin Department of Natural Resources (Wisconsin DNR) have requested rehearing of the license order. Interior is invoking its reserved authority to prescribe fishways.

BACKGROUND

2. In the licensing proceeding, Interior (filing of February 27, 1997) and Wisconsin DNR (filing of March 24, 1997) recommended that Wisconsin Power be required to design and install upstream fish passage and downstream entrainment protection facilities at the dam, especially for paddlefish (*Polyodon spathula*) and lake sturgeon (*Acipenser fulvescens*).² Interior's February 27, 1997 filing also asked the Commission to reserve Interior's authority to prescribe fishways, pursuant to Section 18 of the FPA.³

¹99 FERC ¶ 62,225 (2002). The project was constructed in 1911 pursuant to a now-expired permit issued by the Secretary of War. See Wisconsin Power and Light Co., 55 FERC 61,169 (1991), affirming that the project is required to be licensed pursuant to Section 23(b)(1) of the FPA, 16 U.S.C. § 817(1).

²The project impoundment, Lake Wisconsin, supports a significant lake sturgeon fishery. Final EA, section IV.C.3.

³99 FERC at p. 64,521. Section 18 of the FPA, 16 U.S.C. § 811, provides that the
(continued...)

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3. The Commission staff's Final Environmental Assessment (Final EA) recommended against requiring the requested fish facilities at this time, having concluded that there is "no technically feasible means to provide upstream fish passage at Prairie du Sac Dam, particularly for the primary species of concern,"⁴ that there is no evidence that fish entrainment and turbine mortality at the project are adversely affecting fish populations, and that protection devices would be unduly costly. Instead, the license required Wisconsin Power, in consultation with Wisconsin DNR, Interior, and others, to develop an aquatic resources enhancement plan.⁵ In addition, license Article 406 reserved the Commission's authority to require such fishways as may be prescribed by the Secretary of the Interior.

DISCUSSION

4. On rehearing, Wisconsin DNR asks that the Commission require Wisconsin Power to conduct a feasibility study on the biological, engineering, and economic aspects of installing upstream and downstream fishways for paddlefish, lake sturgeon, and other fish species selected by the agencies.⁶

³(...continued)

Commission shall require a licensee, at its own expense, to construct, operate, and maintain such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

⁴See Final EA (issued November 8, 2000), Section IV.C.3.

⁵See license Article 408, 99 FERC at p. 64,521-22.

⁶The agency cites to the removal of four dams on the tributary Baraboo River that served to open up another 120 miles of river upstream of the Prairie du Sac dam. (The Baraboo flows into the Wisconsin River about 20 miles upstream of the dam.) The license order also cited the dam removals, 99 FERC at pp. 64,515-16, news of which was filed with the Commission after the Final EA had been issued, but the availability of more upstream habitat does not reduce the difficulties of designing a fishway for the fish to reach such habitat.

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5. On rehearing, Interior states that it "now resubmits its fishway recommendation as a fishway prescription pursuant to section 18 of the FPA."⁷ This serves to moot Wisconsin DNR's rehearing request, which seeks essentially the same license requirements that the Section 18 prescription mandates.

The Commission orders:

(A) The request for rehearing filed on July 25, 2002, by the Wisconsin Department of Natural Resources is dismissed as moot.

(B) The request for rehearing filed on July 29, 2002, by the U.S. Department of the Interior is dismissed as moot.

(C) The license issued June 27, 2002, for the Prairie du Sac Project No. 11162 is subject to the conditions submitted by the Department of the Interior under Section 18 of the FPA, as those conditions are set forth in the appendix to this order, labeled "Appendix B" (to distinguish it from Appendix A of the June 27, 2002 license order).

(D) The license issued June 27, 2002, for the Prairie du Sac Project No. 11162 is amended, at Ordering paragraph (B)(2), item 1 of the project description, to replace "surface elevation of 744.4 feet NGVD" with "surface elevation of 774.4 feet NGVD".

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁷Interior rehearing request at 3. Under "Relief Sought," rehearing request at 5, Interior asks the Commission to adopt its February 27, 1997 fishway recommendations, which the license order rejected, and states that, should the Commission deny rehearing, Interior "hereby resubmits" its 1997 fishway recommendations as a mandatory Section 18 prescription. Because Interior is unambiguously imposing the rejected recommendations as requirements, its rehearing request as to those rejected recommendations will be dismissed as moot.

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APPENDIX B
TO JUNE 27, 2002 ORDER ISSUING ORIGINAL LICENSE
FOR PROJECT NO. 11162

FISHWAY PRESCRIPTION UNDER SECTION 18 OF THE FEDERAL POWER
ACT, SUBMITTED BY THE SECRETARY OF THE INTERIOR ON JULY 29, 2002

For upstream fish passage, the licensee shall develop upstream fish passage facilities at the Prairie du Sac Project that include the following items:

1. Within 12 months of the date of license issuance, the licensee shall provide a detailed engineering and biological evaluation of potential fishway alternatives that would provide safe, timely, and effective fish passage at the PDS Hydro Project, including identification of the fishways that the licensee proposes to implement, to the Wisconsin Department of Natural Resources and the U.S. Department of the Interior, Fish and Wildlife Service (Agencies) for review and approval. The evaluation shall include a detailed description of the design, construction, operation, and maintenance of all fishway alternatives considered, a description of construction materials, and estimated costs of constructing, operating, and maintaining the fishways. The licensee shall collaboratively develop the evaluation with the agencies.
2. Within 12 months of the date of license issuance, the licensee shall install Agency-approved fish protective devices in the intake area of the PDS Hydro Project to prevent fish from entering the turbines. The licensee should, in consultation with the Agencies, evaluate the potential for these devices to work in unison with other downstream fishways developed as a requirement of item 1 above.
3. The licensee shall obtain any additional biological information necessary to fully design the Agency-approved fishways, and shall work collaboratively with the Agencies in the development of the studies and evaluation of study results.
4. Within 36 months of license issuance, the licensee shall design, build, test, and refine the fishway developed and approved by the Agencies as defined in items 1 and 3 above. All preliminary and final design plans and specifications must be provided to the Agencies for review and approval. Preliminary study designs for post construction evaluations must be approved by the Agencies in advance of construction and final study plans must be approved by the Agencies prior to initial operation of the fishways. After the post construction evaluations have been completed, and the Agencies agree that

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sufficient information exists to evaluate fishway operations, any necessary refinements to the fishways determined necessary by the Agencies as a result of the studies shall be completed within 12 months. The licensee shall then develop, in consultation with and for approval by the Agencies, a long-term monitoring plan that will ensure the facilities are achieving their desired goals and objectives throughout the term of the license. The long-term monitoring plan shall be implemented by the licensee.