

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

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Avondale Mills, Inc. Project No. 5044-010

Enterprise Mills, LLC Project No. 2935-017

ORDER DENYING REHEARING AND STAY

(Issued January 19, 2006)

1. Avondale Mills, Inc., licensee for the Sibley Mill Project No. 5044, and Enterprise Mill, LLC, licensee for the Enterprise Mill Project No. 2935, (licensees) have requested rehearing of orders issuing new licenses for their projects,¹ both of which are located on the Augusta Canal in Georgia. The only issue that the licensees raise is the propriety of fishway prescriptions imposed by the U.S. Department of the Interior and the Department of Commerce. If the Commission does not grant rehearing, the licensees ask that Article 401 of the license be stayed. As discussed below, we deny rehearing, because we lack authority to reject or revise the fishway prescriptions. In addition, we deny the request to stay the Article 401 requirements.

Background

2. The Sibley Mill Project is a 2.457-megawatt (MW) hydroelectric development that withdraws up to 1,024 cubic feet per second (cfs) of water from the Augusta Canal.² Water exiting the project powerhouse is returned to the Savannah River through an open concrete channel.³ The 1.2-MW Enterprise Mill Project, also located on the canal,

¹ *Avondale Mills, Inc.*, 113 FERC ¶ 62,132 (2005); *Enterprise Mill, LLC*, 113 FERC ¶ 62,131 (2005).

² The Augusta Canal also provides water to the City of Augusta, Georgia's municipal water intake, which is located upstream of the Sibley Mill and Enterprise Mill Projects.

³ 113 FERC ¶ 62,132 at P 1-3.

withdraws up to 560 cfs of water and returns it to the canal.⁴ The canal empties into the Savannah River.

3. Pursuant to section 18 of the Federal Power Act (FPA),⁵ Commerce's National Marine Fisheries Service submitted a preliminary fishway prescription for the Sibley Mill and Enterprise Mill Projects on July 30, 2004. Interior's U.S. Fish and Wildlife Service filed its preliminary fishway prescription for the two projects on August 5, 2004. Commerce and Interior filed modified fishway prescriptions for the projects on August 4 and August 30, 2005, respectively.

4. On November 17, 2005, the Commission issued new licenses for the Sibley Mill and Enterprise Mill Projects. The departments' modified prescriptions were attached as appendices to the licenses and made conditions of the licenses by ordering paragraphs. In addition, Article 401 of each license required the licensee to file for Commission approval fishway functional design drawings that the prescriptions required each licensee to develop within six months of the issuance date of its license. Article 403 of each license reserved the Commission's authority to require the licensee to construct, operate, and maintain such fishways as the departments might prescribe in the future.

5. Also on November 17, 2005, Interior, Commerce, and the Department of Agriculture published regulations, pursuant to the Energy Policy Act of 2005 (EPA 2005),⁶ implementing section 241 of that act. That section required the departments to establish procedures allowing parties to hydropower licensing proceedings, including license applicants, to request trial-type hearings concerning disputed issues of material fact regarding fishway prescriptions and other conditions proffered by the departments during hydroelectric licensing proceedings under the FPA, and to provide parties the opportunity to propose alternative conditions and fishways.⁷ By their terms, the rules apply to "any hydropower license proceeding for which the license has not been issued, as of November 17, 2005 . . ."⁸

⁴ 113 FERC ¶ 62,131 at P 3, 9. The Augusta Canal Authority's King Mill Project No. 9988 is also located on the canal, between the other two projects.

⁵ 16 U.S.C. § 811 (2000).

⁶ Pub. L. No. 109-58.

⁷ *Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses*; Interim Final Rule, 70 Fed. Reg. 69804 (Nov. 17, 2005).

⁸ *See id.*, and 7 C.F.R. § 1.604(a)(1).

6. On December 16, 2005, the licensees filed a joint request for rehearing. They ask the Commission to reissue the licenses without Article 401, leaving the Article 403 reservation of authority to allow the departments to prescribe fishways at such time as the need for fish passage in the Augusta Canal has developed.⁹ In the alternative, they ask the Commission to stay Article 401 in each license, pending reconsideration of the fishway prescriptions by Interior and Commerce.

Discussion

7. Essentially, the licensees' concern on rehearing is the inclusion of the departments' fishway prescriptions in their licenses. However, the Commission is required by law to require in hydropower licenses fishways prescribed by Interior and Commerce.¹⁰ The licensees argue that there is no present need for downstream fish passage in the Augusta Canal, that the prescriptions were not supported by substantial evidence, and that the departments did not properly consult with the licensees or properly consider alternative prescriptions.¹¹ These are matters for the courts of appeals, not for the Commission, to consider.¹²

8. The licensees assert that they must be given a chance to suggest alternative fishway prescriptions, as provided by EPCAct 2005. They state that, because the departments' new rules were promulgated on the same date as the licenses were issued, they did not have a reasonable opportunity to propose alternatives.¹³ We note that the rules provided a 30-day period for parties to request hearings and to propose alternatives, and that, as far as the record shows, the licensees did not avail themselves of that

⁹ The licensees ask us to "reissue the license without Article 401." Were we to agree to the substance of their request, we would amend the license to delete Article 401, not reissue the license.

¹⁰ See, e.g., *Wisconsin Power & Light Company v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004).

¹¹ See request for rehearing at 9-13.

¹² See *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 at 663 (D.C. Cir. 1996).

¹³ Request for rehearing at 13-14.

opportunity.¹⁴ In any case, as we have discussed, the remedy that the licensees propose, reissuance of the licenses without the prescription, is beyond our authority.

9. The licensees also assert that the prescriptions are improper because they did not contain written explanatory statements, as specified by section 241(c)(4) of EPAct 2005.¹⁵ While it appears that the departments' August 4 and August 30, 2005 filings may not have included the specific findings required by EPAct 2005, nothing in that act or in the FPA gives us authority to reject the prescriptions on this basis. It is for the courts of appeals to determine whether the departments satisfied the requirements of EPAct and, if they did not, to fashion the appropriate remedy.

10. In the event that we do not delete Article 401, the licensees ask that we stay Article 401 pending reconsideration by the departments of their prescriptions. The licensees assert that, under the departments' Mandatory Conditions Review Process (MCRP), the departments will entertain requests for rehearing in appropriate cases and have pledged to file responses to licensees' requests for rehearing in the form of a brief, as provided by the Commission's regulations at 18 C.F.R. § 375.713(d)(2).¹⁶ The licensees ask us to provide the departments with the opportunity to respond to their request for rehearing in the form of such a brief, and to "stay final action on Article 401 pending such reconsideration" by the departments.

11. In respect to situations in which a license has already been issued, the MCRP provides that, if any intervenor submits a request for rehearing that clearly identifies substantial issues with the departments' modified prescriptions and includes supporting evidence, the departments will review those concerns and submit a written response to

¹⁴ The departments' rules state that they apply to "any hydropower license proceeding for which the license has not been issued, as of November 17, 2005," which makes it possible that the departments would conclude that those procedures would not apply to the Sibley Mill and Enterprise Mill licenses, which were issued on that date. However, we do not know how the departments would have construed their rules, because the licensees did not file alternative prescriptions. Again, this would be a matter between the licensees and the departments, and the propriety of the results would have to be reviewed by the courts of appeals, not the Commission.

¹⁵ Request for rehearing at 15-16.

¹⁶ This regulation provides for the Commission to afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

the Commission within 30 days. If the Commission has issued a tolling order, the departments' response will be in the form of a brief pursuant to the regulation cited by the licensees; if the Commission has not issued a tolling order, the departments will submit a response to the commenter and a copy of that response to the Commission. In situations in which more than 30 days is required for a response, the departments will submit, within 30 days, a schedule for submitting a written response.

12. Here, neither of the departments has filed a response, in any form, within 30 days of the filing of the rehearing request. The departments have had the opportunity that the licensees ask us to provide for responding to the rehearing request. Since the departments have filed no indication of their interest in reconsidering their prescriptions, there is no reason to issue a stay pending such reconsideration, and accordingly we will deny the stay request.¹⁷ Should the departments decide to reconsider their prescriptions in the future, Article 403 reserves the Commission's authority to require any prescriptions that are submitted after the licenses become final.

13. Finally, as we stated earlier, the fishway prescriptions were attached to each license and made conditions of the licenses by ordering paragraphs. The purpose of Article 401 is to require that the licensees submit the required drawings to the Commission for approval before implementing them. In the absence of Article 401, the fishway prescriptions would still be conditions of the licenses. Therefore, neither deletion nor stay of Article 401 would absolve the licensees from the requirements of the prescriptions. Rather, these actions would simply remove or stay the Commission's approval authority, which would be an unacceptable result.

The Commission orders:

(A) The request for rehearing filed on December 16, 2005, by Avondale Mills, Inc. and Enterprise Mill, LLC, is denied.

¹⁷ Moreover, it is not clear that the MCRP remains an available option. The departments stated in the November 17 rule that “[g]iven the new procedures mandated by EAct, which effectively subsume or supersede the MCRP, there no longer appears to be a need . . . to continue implementing the MCRP.”

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(B) The request for stay of Article 401 of the licenses for the Sibley Mill Project No. 5044 and the Enterprise Mill Project No. 2935, filed on December 16, 2005, by Avondale Mills, Inc. and Enterprise Mill, LLC, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.