

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Great Lakes Hydro America, LLC

Project No. 2634-026

ORDER ON REHEARING

(Issued March 23, 2005)

1. On December 22, 2004, Commission staff issued a new license<sup>1</sup> for the continued operation of the Storage Project No. 2634, located on the South Branch and West Branch of the Penobscot River, in Piscataquis and Somerset Counties, Maine. On January 21, 2005, Great Lakes Hydro America, LLC, (GLHA) licensee for the project, requested rehearing of the December 22 Order. GLHA asks that we modify the conditions of the license included under sections 4(e) and 18 of the Federal Power Act (FPA),<sup>2</sup> so that those conditions reflect the settlement agreement reached by the parties in the relicensing proceeding. GLHA also asks that we modify Article 302 (Drawdown Safety Report), Article 303 (Drawings and Specifications), and Article 304 (Loon Lake Elevations), stating that the timing of actions required by these articles conflicts with the timing requirements of the water quality certification for the project. As discussed below, this order grants rehearing in part and denies rehearing in part. The order is in the public interest because it clarifies the licensee's responsibilities under the license and concludes the proceeding.

**Background**

2. On April 28, 1998, GLHA filed an application for a new license for the Storage Project. On June 23, 2000, the U.S. Department of the Interior (Interior) filed a timely request for reservation of its authority to prescribe fishways under section 18 of the FPA and seven conditions under section 4(e) to protect federal reservation land located within

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<sup>1</sup> 109 FERC ¶ 62,230.

<sup>2</sup> 16 U.S.C. §§ 797(e) and 811, respectively.

the project, i.e. land held by the United States in trust for the Passamaquoddy Tribe.<sup>3</sup> Six of Interior's 4(e) conditions were project-specific requirements, and the seventh was a reservation of its authority under section 4(e) to include such conditions as may be required in the future to ensure the adequate protection and utilization of the federal reservation lands within the project.

3. On August 2, 2004, GLHA filed an Offer of Settlement (Settlement) that includes provisions to protect and enhance fish and wildlife and recreation resources.<sup>4</sup> In the Settlement, Interior agreed to withdraw the six substantive conditions submitted under section 4(e) and to modify its reservations of authority under sections 18 and 4(e) to limit when and in what manner Interior would invoke them. The modified reservations of authority are set out in the Settlement. Interior, however, never made a filing with the Commission revising its prescription or conditions.

4. The December 22, 2004 relicense order included Interior's seven 4(e) conditions and its reservation of authority under section 18, as well as the provisions of the water quality certification, issued by Maine Department of Conservation, pursuant to the Clean Water Act. The license also included Articles 302, 303, and 304, which required GLHA to file reports and analyses to demonstrate that the project's developments can be operated safely while meeting the new lake level and minimum flow requirements, which are conditions of the water quality certification and therefore are contained in the license.<sup>5</sup>

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<sup>3</sup> Section 4(e) requires the Commission to include in the license for a project that a occupies a reservation of the United States such conditions as the Secretary of the department supervising that reservation deems necessary for the protection and utilization of the reservation. Section 18 requires the Commission to require a licensee to construct, operate and maintain such fishways as may be prescribed by the Secretary of Commerce or the Secretary of the Interior.

<sup>4</sup> In addition to GLHA, the Settlement was signed by the Penobscot Nation, the Passamaquoddy Tribe, U.S. Bureau of Indian Affairs, U.S. Fish and Wildlife Service, U.S. National Park Service, Maine Department of Inland Fisheries and Wildlife, Maine Department of Conservation, Adirondack Mountain Club, American Whitewater, and New England FLOW.

<sup>5</sup> GLHA notes that its name is misspelled in the license order: we note that the correct spelling is Great Lakes Hydro America, LLC, rather than Great Lakes Hydro American, LLC.

## **Discussion**

### **A. Conditions under FPA Sections 4(e) and 18**

5. On rehearing, GLHA requests that, consistent with the Settlement, we delete the six project-specific section 4(e) conditions and substitute the specific reservation of section 4(e) authority contained in the Settlement for the more general one submitted previously. The reservation of authority contained in section 3.8.1 of the Settlement differs from the original reservation because, among other things, it may not be exercised by Interior within 10 years of issuance of a new license and then only if there is new information demonstrating that additional conditions are warranted.

6. GLHA similarly asks that we revise the reservation of Interior's authority to prescribe fishways under section 18 of the FPA, contained in Article 402 of the license, to reflect the reservation of authority contained in section 3.8.2 of the Settlement. The reservation of authority in Article 402 differs from the reservation of authority contained in the Settlement in that, under the Settlement, Interior will not seek to exercise its reserved authority within 10 years of issuance of a new license and then only if there is new information demonstrating that additional conditions are warranted.

7. Deletion of the six section 4(e) conditions other than the reservation of authority will not change GLHA's responsibilities under the license, since the substance of those conditions is now included in other license articles that GLHA has not asked us to revise. The only distinction will be that those measures will be required exclusively as the result of our authority, rather than as mandatory conditions imposed by Interior. The revised reservations under both section 4(e) and section 18 will likewise not change the licensee's obligations, but rather will limit the circumstances under which Interior can exercise reserved authority. Interior supported GLHA's requests by letters filed January 4 and January 28, 2005. Under these circumstances, we will delete the six section 4(e) conditions and revise the two reservations of authority, as requested by GHLA and Interior.

### **B. Implementation of Water Quality Certification Conditions**

8. The conditions of the water quality certification for the project are included in Appendix A to the relicense order. Among other conditions, the water quality certification requires operating regimes, specified drawdowns, and reservoir elevations for the project's nine reservoirs, and the installation of stop logs and/or gates at the five previously-unlicensed five reservoirs that are now part of the licensed project. The operating regimes for Canada Falls, Seboomook, Caucomgomac, and Ragged lakes are to begin with the spring runoff in 2005 and the regimes for the five previously-unlicensed reservoirs will begin with the spring runoff in 2006.

9. Condition 1A of the water quality certification requires GLHA to fill Seboomook Lake and Canada Falls Lake to as close to full as possible during the spring runoff period and maintain the lake levels reached on May 15 until July 15. After July 15, GLHA may gradually drawdown each lake until it reaches the minimum elevation permitted in Condition 1A. The two lakes are then held at that level until the runoff period in the following spring, when the lakes are refilled again. The new drawdown regimes required by the water quality certification for Seboomook Lake and Canada Falls Lake provide for smaller drawdowns than in the past. As a result, there is less storage available at each lake to hold flood flows that might occur during the spring runoff.

10. Article 302 requires GLHA to submit, within 90 days of license issuance, a report on the effects of limiting the drawdown of Seboomook Lake and Canada Falls Lake on the safe operation of those dams. The report must contain a flood routing study to evaluate the ability of the dams to safely pass flows up to the Inflow Design Flood. GLHA may not implement the new drawdown regime until the report is approved and any required remedial construction is completed. GLHA argues that the requirements of Article 302 conflict with the timing requirements of the water quality certification, although it does not explain the nature of the conflict.

11. The reports required by Article 302 are intended to demonstrate whether the dams at Seboomook Lake and Canada Falls Lake can safely pass the Inflow Design Flood when operated with the reduced drawdowns. The provisions of Article 302 could conflict with the timing requirements of Condition 1A of the water quality certification only if it was determined that remedial construction was required and that the construction would require modification of the drawdown regime required by Condition 1A. The deadline for submitting the reports should allow for review and approval of the reports before GLHA would be able to begin to draw down either of the lakes. However, if there were to be a conflict between dam safety and the requirements of Condition 1A, we would consider safety to be of paramount concern. Given that Maine DEP has not objected to the terms of the license, we presume that it concurs.

12. Article 303 requires GLHA to file a report containing drawings and specifications for the five previously-unlicensed reservoirs that have been added to the project by the new license. Since the structures that make up these developments have not been previously evaluated by the Commission for safety, Article 303 prevents GLHA from installing gates or stop logs in the dams until the report has been approved and any remedial construction has been completed. The provisions of Article 303 could conflict with the timing requirements of the water quality certification if GLHA is not able to install the gates and stop logs at these developments in time to fill the reservoirs during the spring runoff in 2006 and then release the required minimum flows. The deadline for filing the report should allow review and approval of the report before GLHA would need to install gates and stop logs to begin filling the ponds during the 2006 spring runoff. As discussed above, we must insure that these developments are safe before they begin

operating. For these five reservoirs, this means that gates or stop logs should not be used to raise the levels of the ponds until the report is approved.

13. Article 304 limits Loon Lake elevations to not more than 1,027 feet U.S. Geologic Survey (USGS) datum until dam safety analyses have been submitted to and approved by the Commission's New York Regional Engineer. GLHA argues, again without elaboration, that this conflicts with the timing requirements of the water quality certification for the project.

14. Condition 3A of the water quality certification requires GLHA to set stop logs at the dam sill of the Loon Lake dam at elevation 1,020.5 feet USGS datum and then allow lake levels and flows to fluctuate naturally. Since Condition 3A of the water quality certification sets the level for Loon Lake at an elevation 6.5 feet below the maximum elevation permitted by Article 304, we do not see a conflict between Article 304 and the water quality certification. For the reasons stated above, we deny GLHA's request for rehearing of Article 302, 303 and 304.

The Commission orders:

(A) Ordering Paragraph (E) of the December 22, 2004 Order issued by the Commission's staff is revised to read as follows:

(E) This license is subject to the reservation of authority set forth in Appendix B to this order.

(B) Appendix B of the December 22, 2004 Order issued by the Commission staff is revised to read as follows:

**APPENDIX B**

U.S. DEPARTMENT OF THE INTERIOR CONDITIONS  
UNDER SECTION 4(e) OF THE  
FEDERAL POWER ACT

Authority is reserved to the Commission to require that the licensee implement such conditions as may be required by the Secretary of the Interior (Interior) under section 4(e) of the Federal Power Act to ensure the adequate protection and utilization of the land within the project held by the United States in trust for the Passamaquoddy Tribe and described as T3R3 NBKP Alder Brook Township in Somerset County, Maine. Exercise of this authority by the Interior may be made only in accordance with the terms of section 2.2.2 of the Settlement Offer. Incorporation of section 4(e) conditions into the project license is contingent on the Commission

concluding at that time that section 4(e) is applicable to the project (which conclusion shall not be affected by the inclusion of this reservation in the license). This provision shall not limit the licensee's right to oppose such additional measures required by the Interior or to challenge the applicability of section 4(e) to the project.

(C) Article 402 of the December 22, 2004 Order issued by the Commission's staff is revised to read as follows:

Article 402. *Reservation of Authority – Fishways.* Authority is reserved to the Commission to require that the licensee construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be required by the Secretary of the Interior under section 18 of the Federal Power Act. Exercise of this authority by the Secretary of the Interior may be made only in accordance with the terms of section 2.2.3 of the Settlement Offer.

(D) Great Lakes Hydro America, LLC's request for rehearing of Articles 302, 303, and 304 is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.