

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Rhineland Paper Company

Project No. 2161-015

ORDER DENYING REHEARING

(Issued June 17, 2005)

1. Rhineland Paper Company (Rhineland) has requested rehearing of a March 3, 2005 Commission staff order<sup>1</sup> modifying and approving a threatened and endangered species protection plan filed by Rhineland under Article 407 of the license for the Rhineland Project No. 2161. This order denying rehearing is in the public interest because it confirms Rhineland's obligation to comply with the terms of its license.

**Background**

2. The 2,120- kilowatt Rhineland Project is located on the Upper Wisconsin River in Newbold, Pine Lake, and Pelican townships in Oneida County, Wisconsin. The project includes a 3,576-acre reservoir and 2,771 acres of land located on or adjacent to the reservoir's 55-mile shoreline. Rhineland owns in fee about 325 acres of land above the project reservoir's normal elevation and holds flowage rights on the remaining project lands.<sup>2</sup> Approximately 75 percent of the shoreline is occupied by privately-owned homes and cottages.

3. On August 20, 2003, Commission staff issued a new license for the project.<sup>3</sup> On rehearing, the Commission rejected Rhineland's contentions that Commission staff had erred by (1) denying Rhineland's proposal to remove from the project boundary approximately 2,478.5 acres of lands directly abutting the project reservoir, based on

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<sup>1</sup> 110 FERC ¶ 62,207.

<sup>2</sup> See 106 FERC ¶ 61,164 at 61,554-55.

<sup>3</sup> 104 FERC ¶ 62,134.

staff's conclusion that Rhinelander had not demonstrated that the lands were not needed for project purposes; and (2) requiring Rhinelander to monitor and control invasive plant species within the project.<sup>4</sup>

4. Rhinelander filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, which subsequently affirmed the Commission's orders.<sup>5</sup>

5. On August 16, 2004, Rhinelander filed for Commission approval as required by license Article 407, a threatened and endangered species plan to protect the federally-listed bald eagle and gray wolf, and the state-listed osprey and wood turtle, and associated habitat. Rhinelander proposed to implement threatened and endangered species habitat protection measures only on project lands it owned.

6. On March 3, 2005, Commission staff issued an order approving, with modifications, Rhinelander's plan.

7. On April 4, 2005, Rhinelander filed a request for rehearing.

### **Discussion**

8. Article 407 of the license for the Rhinelander Project provides that Rhinelander must file with the Commission a threatened and endangered species plan that will:

for the lands within the project boundary: (1) identify and protect mature trees, such as white pines, that have the potential to serve as bald eagle and/or osprey perch and/or nest sites; timber harvest shall not occur within 330 feet from the nest (primary zone) and within 660 feet (secondary zone) during the nesting season (February 15 to August 15); (2) [provide] a schedule of the threatened and endangered species breeding season that shall limit human activity (such as, recreation opportunities) on project lands (such as, existing Parcel 2 a forested bog that provides bald eagle suitable nest habitat from February through August); (3) cooperate with Wisconsin DNR [Wisconsin Department of Natural Resources] to survey annually for any new or active bald eagle nests that occur on project lands within the project boundary; (4) cooperate with Wisconsin DNR and FWS [U.S. Fish and Wildlife Service] to construct and monitor the use of osprey nest platform(s); (5) maintain wilderness areas to protect the wood turtle;

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<sup>4</sup> 106 FERC ¶ 61,164 (2004).

<sup>5</sup> *Rhinelander Paper Co. v. FERC*, 405 F.3d 1 (D.C.Cir., 2005).

(6) maintain semi-wilderness areas to protect the gray wolf; and (7) [provide] a description of the method for monitoring the results of any implemented measures.

9. Rhinelander first objects that Commission staff's order modified the company's plan, which would have required it to implement protection measures only on lands which Rhinelander owned, to instead require that those measures be carried out on all lands within the project boundary, to the extent that Rhinelander has the right to do so.

10. To the extent that all of the lands within the project boundary are included in the project license, the Commission has jurisdiction over them, and can require Rhinelander to take appropriate action thereon.<sup>6</sup> Rhinelander did not seek rehearing with respect to either the substance of Article 407 or its application to all lands within the project boundary. Thus, the argument it raises now is an untimely collateral attack on the licensing order, and we deny it.<sup>7</sup>

11. Second, Rhinelander objects to requirements in the March 3 Order that it file for approval a plan to construct, maintain, and monitor, osprey nesting platforms within the project boundary, and a plan to conduct bald eagle and osprey nesting surveys, in the event that the Wisconsin DNR and the FWS discontinue current surveys of those species at the project. Rhinelander argues that Article 407 requires it to cooperate with the resource agencies, but not to be burdened with costs of the referenced activities, particularly on lands that it does not own. It further contends that osprey protection is a core responsibility of Wisconsin DNR and that Wisconsin DNR and FWS each have developed bald eagle and osprey protection measures that the two agencies can implement without duplicative efforts by Rhinelander.

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<sup>6</sup> We note that the order on the threatened and endangered species plan requires Rhinelander to implement the plan on lands it does not own only to the extent that it has the existing right to do so. In fact, should it prove necessary for Rhinelander to acquire additional rights in order to carry out the plan, it will be required to do so. A licensee must hold all rights in project property necessary to fulfill project purposes. *See Great Northern Paper, Inc.*, 77 FERC ¶ 61,068 at 61,277 (1996), *citing Alabama Power Company*, 12 FERC ¶ 61,060 (1980).

<sup>7</sup> Should, however, Rhinelander obtain Commission authorization to remove lands from the boundary, as discussed in the licensing order, 104 FERC ¶ 62,134 at P 22, it will no longer be obligated to carry out license-related activities there.

12. Again, Rhinelander's arguments are without merit. As we have discussed, the company is responsible for compliance with the conditions of the license on all lands within the project boundary, not just those lands that it owns. Rhinelander is free, as it suggests would be preferable, to cooperate with Wisconsin DNR and FWS to carry out the activities required by the threatened and endangered species plan, and, if possible, to reach agreement with the resource agencies as to who will perform the activities required by the plan. Nevertheless, it is only Rhinelander, the licensee, over whom the Commission has jurisdiction and thus it is only Rhinelander to which we will ultimately look for compliance with license conditions.<sup>8</sup> Even if other entities have responsibilities with respect to threatened and endangered species, we will not allow our licensee to avoid its own public interest obligations.<sup>9</sup>

The Commission orders:

The request for rehearing filed by Rhinelander Paper Company on April 4, 2005, is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>8</sup> See *Smith Falls Hydropower*, 56 FERC ¶ 61,279 (1991); *Beaver Falls Municipal Authority*, 63 FERC ¶ 61,036 at 61,189 (1993).

<sup>9</sup> Rhinelander does not argue that the measures required by the plan are not appropriate. Rather, it seeks to have others perform them.