UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Clark Fork and Blackfoot, LLC Project No. 2543-066

ORDER ON REHEARING

(Issued May 6, 2005)

1. On January 19, 2005, we issued an order[1] dismissing an application by Clark Fork and Blackfoot, LLC (CFB) to amend the license for the Milltown Dam Project No. 2543 in order to begin implementation of a plan to decommission the project, which is located within a Superfund site, prior to final approval of the plan by the U.S. Environmental Protection Agency (EPA). In brief, we found that, because all of the activities associated with decommissioning and dam removal will be carried out under EPA's control and direction, our jurisdiction with respect to such activities under the Federal Power Act (FPA)[2] is removed by section 121(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[3] The January 19 Order also issued notice of our intent to accept the implied surrender of the project license, and provided an opportunity for comments in that regard.

2. This order denies requests for rehearing of the January 19 Order to the extent they concern our determination with respect to the jurisdictional effects of CERCLA section 121(e)(1) and dismissal of the license amendment application. Based on additional factual information provided by the licensee and intervenors, we are delaying the effective date of license termination pending judicial approval of EPA's decommissioning and dam removal plan. This order serves the public interest by

[1] *Clark Fork and Blackfoot, LLC*, 110 FERC ¶ 61,024 (January 19 Order).

[2] 16 U.S.C. §§ 791a-825r, as amended.

[3] 42 U.S.C. § 9621(e)(1).

affirming that responsibility for cleanup of the Milltown Superfund site rests with EPA and by assuring there will be no regulatory gap in the transfer of jurisdiction from the Commission to EPA.

Background

3. In 1968, the Commission issued a new license for the 3.2-megawatt Milltown Project, located on the Clark Fork River in Missoula County, Montana.[4]

4. In 1983, EPA, pursuant to CERCLA, designated the Milltown Project site as a Superfund site. The reach of the Clark Fork River on which the project is located is contaminated by various heavy metals, leached from now-closed mines upstream. The project reservoir contains approximately 6.6 million cubic yards of contaminated silt.

5. EPA, the Montana Department of Environmental Quality, and others have been studying the site for many years in order to select a permanent clean-up plan (remedy selection). The Commission has several times extended the license term to accommodate these studies and remedy selection. The license currently expires December 31, 2009.

6. In May 2004, EPA and Montana issued a Revised Proposed Plan (Proposed Plan) for the remedy selection. The Proposed Plan provided for the project to be dismantled, the contaminated sediments removed and shipped by rail to an existing repository for contaminated materials nearer to the mine sites, and the project site restored.

7. In October 2004, CFB filed an application to amend the license in order to begin implementing an initial stage of the Proposed Plan, prior to EPA's final decision on remedy selection under CERCLA. In December 2004, EPA made a final remedy selection and issued its Record of Decision (ROD). The ROD provides for the project to be dismantled and removed under EPA's control and direction.

8. Based on EPA's ROD, we issued the January 19 Order. We also stated that, because CFB's license amendment application was being dismissed prior to the Commission issuing a public notice requesting interventions, any requests for rehearing of the January 19 order need to be accompanied by a motion to intervene.

9. In addition, the order gave notice of implied surrender and provided 30 days to comment on the notice of implied surrender. Several entities moved to intervene or filed

[4] 39 FPC 908. The license was issued to Montana Power Company. In 2002, the license was transferred to Montana Power, LLC, which then changed its name to Clark Fork and Blackfoot, LLC.

notices of intervention, most of which were accompanied by comments.[5] Requests for rehearing were filed by CFB and PPL Montana, LLC (PPLM). PPLM is the licensee of the downstream Thompson Falls Project No. 1869.

10. On April 15, 2005, the United States, on behalf of the U.S. Department of the Interior and EPA (United States), and on April 18, 2005, CFB and Atlantic Richfield Company (ARCO), filed motions requesting expedited review and action on the comments and requests for rehearing.

Discussion

A. Jurisdiction

11. PPLM states that it is not opposed to removal of the dam, but asserts that such an action must be authorized by this Commission under the FPA and only after it has completed a comprehensive environmental analysis.

12. CERCLA section 121(e)(1) provides that "[n]o Federal, State, or local permit shall be required" for onsite removal or remediation actions pursuant to EPA's remedy selection. In the January 19 Order, we construed this broad language to encompass a Commission license.[6] PPLM contends on rehearing that the word "permit" should not be so construed because, under the FPA, a license and a preliminary permit are independent of one another.[7] Congress, PPLM suggests, had preliminary permits in mind when it enacted CERCLA.

13. PPLM's argument ignores the critical differences between a license and a preliminary permit. A license authorizes its holder to construct and operate a project. In stark contrast, a preliminary permit is issued solely to preserve the holder's first-to-file status in any competitive license application proceedings while it gathers information on

[5] PPL Montana, LLC; American Whitewater Affiliation and American Rivers; Mountain Water Company; Clark Fork Coalition; Consumers Energy Company; Atlantic Richfield Company; Missoula City-County Health Department; the United States, on behalf of the U.S. Department of the Interior and the U.S. Environmental Protection Agency; the U.S. Department of the Interior; the Confederated Salish and Kootenai Tribes; and the State of Montana.

[6] 110 FERC ¶ 61,024 at P 14-15.

[7] PPLM rehearing request at 8.

the site's development potential.[8] It authorizes no construction or operation.[9] Indeed, it does not authorize the permittee to do anything, let alone anything that would otherwise be unlawful, and there is nothing a permittee can do that a non-permittee cannot. A preliminary permit therefore does not authorize any action that could possibly be taken in the context of implementing a remedy selection under CERCLA. To interpret section 121(e)(1) as suggested by PPLM would render it a nullity with respect to licensed hydropower projects, and there is no evidence to support the notion that Congress intended to create such an exception to the general scheme of the statute.

14. Our interpretation of section 121(e)(1) also comports, in the absence of any legislative history to the contrary, with a common sense interpretation of the word "permit." Black's Law Dictionary defines "permit" to mean "[a] written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but which is not allowable without such authority."[10] It similarly defines the term "license" to include, e.g., "[p]ermission by some competent authority to do some act which, without such permission, would be illegal"[11] and as a "[p]rivilege from state or sovereign."[12] A license issued under the FPA fits neatly into both definitions.

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[8] A preliminary permit confers certain rights: (1) only the permittee can file a license application for the project during the permit term; (2) the permittee has the right to amend its license application to make it as well adapted as a later-filed competing license application (right of last amendment); and (3) the permittee's application will be selected over a competitor's if both are equally well adapted. *Kamargo Corporation*, 37 FERC ¶ 61,281 at 61,843 (1986).

[9] A preliminary permit is not akin to a property right. *Union Electric Co.*, 27 FPC 801, 807-08 (1962); *Public Utility District of Skamania*, 32 FPC 444, 446 (1964). Its issuance does not convey any interest in land, confer the right of eminent domain, or authorize any construction (or even site access). *Eagle Mountain Energy Company*, 62 FERC ¶ 61,066 (1993), *aff'd sub nom. Mine Reclamation Corp. v. FERC*, 30 F.3d 1519 (D.C. Cir. 1994). A permittee may not enter on non-federal land without the permission of the landowner, which may impose any conditions it wishes on such access. *Mid-Atlantic Energy Engineer, Ltd., et al.*, 78 FERC ¶ 61,225 (1997).

[10] Black's Law Dictionary, Revised 4th Edition, St. Paul, West Publishing Co., 1968 at 1298.

[11] *Id*. at 1067, *citing State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 196 N.E. 664.

[12] *Id.*, c*iting Alabama Power Co. v. FPC*, 128 F.2nd 280, 289 (D.C. Cir. 1942).

15. PPLM nevertheless attempts to distinguish permits issued by other government agencies from licenses issued under the FPA on the ground that the former merely provide for "conditioned governmental consent" to undertake an activity, while a license "more closely resemble[s] a contract between the licensee and the federal government" because "it confers rights that cannot be altered unilaterally by either the licensee or the Commission."[13] PPLM's argument in this regard is based on FPA section 6,[14] which provides that a license "may be altered . . . only upon mutual agreement between the licensee and the Commission after 30 days public notice." Thus, if the license does not reserve the Commission's authority with respect to a matter, substantial changes in the license conditions regarding that matter require the licensee's consent.[15]

16. PPLM makes far too much of this. Every license represents the federal government's consent to construct and operate the licensed project and, like other permits, includes conditions that must be fulfilled. Moreover, it would impossible for a licensee, even in the absence of project-specific reserved authority, to undertake the activities involved in the remediation of a Superfund site without obtaining prior Commission authorization. The Milltown license, for instance, includes standard license articles that prohibit the licensee from making any substantial alteration to the project area or works without prior Commission authorization,[16] and all construction work must be pre-approved and undertaken pursuant to a Commission-approved construction inspection program.[17] In sum, there appears to be no material distinction for purposes of

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[13] PPLM rehearing request at 9.

[14] 16 U.S.C. § 799.

[15] Section 6 notwithstanding, the Commission may impose "small encroachments" on a license as necessary to give effect to the FPA's broader objective of encouraging comprehensive development. *PG&E v. FERC*, 720 F.2d 78, 89-90 (D.C. Cir. 1983).

[16] *See* Ordering Paragraph (C) of the license, 39 FPC 908 at 911, incorporating Form L-10 standard terms and conditions applicable to constructed major projects, found at 37 FPC 860-66, and standard article 3, 37 FPC at 860.

[17] Standard article 4, 37 FPC at 861. Authority is also reserved essentially to require the licensee to make any changes to the project determined by the Commission to be in the public interest, after notice and opportunity for a hearing (standard article 10, 37 FPC at 863) and more specific reservations are included with respect to the use of project waters, protection of fish and wildlife, and recreation in standard articles 13 and 14 (navigation and other uses of water), 16 and 17 (fish and wildlife), and 18 (recreation), and other matters. *See* 37 FPC at 863-63.

CERCLA section 121(e)(1) between a Commission license and a permit issued by any other governmental agency.

17. PPLM next asserts that our interpretation is inconsistent with cases establishing the broad scope of the Commission's FPA Part I jurisdiction. These include cases holding that the Commission's licensing jurisdiction is comprehensive and exclusive,[18] that it is the only federal agency with authority to license non-federal dams,[19] and that its licensing authority preempts state authority.[20] PPLM adds that we have held our licensing authority to encompass decommissioning of licensed projects.[21]

18. There is no inconsistency here. First, none of the authorities cited by PPLM considered the issue of how operation of the FPA is affected by CERCLA. Second, although only the Commission may issue a license, licenses are subject to mandatory conditioning by other federal agencies pursuant to FPA sections 4(e) and 18.[22] Since 1972, Commission licenses have also been subject to mandatory conditioning authority by the states in the form of water quality certification pursuant to section 401 of the Clean Water Act.[23] Section 404 of the Clean Water Act[24] also requires a licensee for a new development to obtain a dredge and fill permit from the U.S. Army Corps of Engineers. There is therefore nothing remarkable about the constraint on our jurisdiction embodied in CERCLA section 121(e)(1). Finally, principles of federal preemption are irrelevant in this context because CERCLA is a federal law.

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[18] *See Board of Electric Light Commissioners v. McCarren*, 563 F. Supp. 374, 378 (D. Bt. 1982), *aff'd* 725 F.2d 176 (2nd Cir. 1983).

[19] *See Niagara Mohawk Power Corp. v. New York State Dept. of Environmental Conservation*, 592 N.Y.S. 141, *aff'd*, 604 N.Y.S. 2nd 18 (N.Y. 1993), *cert. denied*, 511 U.S. 152 (1946).

[20] *See First Iowa Hydro-Electric Co-op v. FPC*, 328 U.S. 152 (1946).

[21] *See Policy Statement on Decommissioning at Relicensing*, 69 FERC ¶ 61,336 (1994).

[22] 16 U.S.C. §§ 797(e) and 811, respectively.

[23] 33 U.S.C. § 1341.

[24] 33 US.C. § 1344.

19. PPLM next argues that the comprehensive development standard of FPA section 10(a)(1)[25] requires the Commission to determine whether removal of Milltown Dam is in the best interest of the entire watershed.[26] This argument, however, is premised on the erroneous notion that we are exercising our section 10(a)(1) licensing authority in this proceeding. The cessation of generation and complete removal of the project by EPA under CERCLA transfers effective regulatory control over the entire project to EPA and leaves the Commission with nothing to regulate. The only authority we can exercise in these unique circumstances is the authority, pursuant to FPA section 6, to accept surrender of the project license. License surrender is not subject to the comprehensive development standard of section 10(a)(1), but to a broad "public interest" standard, which is not the same thing.[27] We continue to believe that the public interest is best served if all matters pertaining to decommissioning of the project and removal of the dam pursuant to EPA's remedy selection are addressed by EPA itself.

20. Finally, PPLM argues that our course here is inconsistent with other proceedings in which we considered issues related to the contamination at licensed projects.[28] Those cases, however, involved the present and future operation of licensed projects. None involved the decommissioning and removal of a project by EPA pursuant to CERCLA.[29]

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[25] 16 U.S.C. § 803(a)(1).

[26] PPLM rehearing request at 10-11.

[27] *Rochester Gas and Electric Corp*., 100 FERC ¶ 61,113 at P 10 (2002); *Niagara Mohawk Power Corp. and Fourth Branch Associates (Mechanicville)*, 98 FERC ¶ 61,227 at 61,902 (2002).

[28] *Public Service Company of New Hampshire*, 75 FERC ¶ 61,111 at 61,376-377 (1996) (addressing issues regarding heavy metals found in reservoir sediments); *Carolina Power and Light Co.*, 69 FERC ¶ 61,168 at 61,646-47 and 61,665 (1994) (including monitoring requirement regarding dioxin contaminated sediments); and *Niagara Mohawk Power Corp. and Northern Electric Power Company, LP*, 86 FERC ¶ 62,040 (1999) (permitting temporary suspension of minimum flow requirements to accommodate a plan for cleaning up polychlorinated biphenyls in the Hudson River).

[29] We also note that the environmental analyses in those cases occurred pursuant to the requirements of the National Environmental Policy Act of 1970. 42 U.S.C. § 4321, *et seq*. Although acceptance of a license surrender, like the issuance of a license or a license amendment, is a federal action for NEPA purposes, surrender of the Milltown license will have no environmental consequences. All of the actions associated with decommissioning of the Milltown project that will have environmental consequences will be undertaken at EPA's direction pursuant to the remediation plan.

B. Implied Surrender

21. In the doctrine of implied surrender, the Commission deems certain actions or events, typically removal of generators or abandonment of project facilities, to demonstrate the licensee's intent to surrender the license. Here, we applied the doctrine based on the fact that CFB's amendment application encompassed actions that are the first step in EPA's final remedy selection, under which the project will be completely removed.

22. PPLM asserts that we erred.[30] It first states that implied surrender is governed by section 6.4 of our regulations,[31] section 6.4 on its face applies only to minor licenses subject to FPA section 10(i),[32] and minor licenses are those with an installed capacity of not more than 2,000 horsepower (1.5 MW) of installed capacity. The Milltown Project has an installed capacity of 3.2 MW.

23. Section 6.4, which was promulgated in 1947,[33] decades before CERCLA was enacted, and has not been modified since, is not, however, the only Commission pronouncement governing implied surrender. The doctrine has also been developed through orders in project-specific adjudications, some of which were cited in the January 19 Order. The doctrine has been applied to a project exceeding 1.5 MW installed capacity.[34] We apply or waive section 6.4 as appropriate on a case-by-case basis. Here, we referenced section 6.4 only for the purpose of establishing the effective date of the

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[30] PPLM rehearing request at 12-13.

[31] 18 C.F.R. § 6.4.

[32] 16 U.S.C. § 803(i). Section 10(i) states, as pertinent here:

> In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to in the public interest to waive under the circumstances. . .

[33] Federal Power Commission Order No. 141, 12 Fed. Reg. 8491 (Dec. 19, 1947).

[34] *E.g.*, *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194 (1999) (17 MW).

surrender (i.e., we waived 45 days of the 90-day notice requirement provided therein) not to establish the basis for a finding of implied surrender.[35]

24. PPLM also contends that prior orders accepting implied surrender applications are not relevant here because they involved long-abandoned projects[36] or, in one case, the project was not operating owing to an intractable dispute between co-licensees. These factual distinctions are of no moment. The essence of implied surrender is that actions have occurred or events transpired that make it clear that the project will not be restored to operation or, if it is operating, cannot continue to operate. Thus, the licensee is deemed to have the intention to surrender the license. With EPA's adoption of the ROD, it is clear that the project will be decommissioned under EPA's aegis, either in the context of the ROD becoming binding and enforceable via its incorporation in a consent decree, or in the context of an enforcement action against CFB and ARCO.[37]

25. The January 19th Order's acceptance of the implied surrender of the Milltown license was based on our understanding that EPA's remedy selection in the ROD ensures that EPA's remediation plan will be implemented. The United States, CFB, Montana, and ARCO state, however, that the ROD will become enforceable and be implemented only when it is incorporated into a binding consent decree.[38] CFB states that the parties are still negotiating the language of the consent decree and, when those negotiations are completed, the review and court approval process will require an additional time.[39] CFB

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[35] 110 FERC ¶ 61,024 at P 18 n.20.

[36] *New England Fish Co*., 38 FERC ¶ 61,106 (1987); *Pinedale Power and Light Co*., 38 FERC ¶ 61,036 (1987); and *Watervliet Paper Co*., 35 FERC ¶ 61,030 (1986).

[37] The United States (at 3) states that if the consent decree does not become effective because CFB does not execute it, the United States reserves the right to take enforcement action against CFB and ARCO to order implementation of the remedy selected in EPA's ROD.

[38] CFB at 6, United States at 3, Montana at 3, and ARCO at 4-5. The Confederated Salish and Kootenai Tribes (at 2) concur with the United States and Montana.

[39] The negotiated consent decree must be reviewed by various federal and state agencies before it can be presented to the federal district court for approval. The district court cannot act until after a 30-day public comment period, review of the comments by the federal government, and a motion by the government for entry of the consent decree accompanied by its response to comments. *See* CFB rehearing request at 8.

adds that, until judicial approval of the ROD is obtained, it is not required, and does not intend, to begin implementing EPA's remedy selection.[40]

26. CFB states that, if the surrender were deemed to be effective prior to judicial approval of the consent decree, the project would be operating, possibly for a substantial time, during which neither the Commission nor EPA would have regulatory control.[41] In light of this, and of their statements regarding the finality of the remedy selection, CFB, the United States, Montana, the Confederated Salish and Kootenai Tribes, and ARCO request that we modify the January 19 order to make the surrender effective upon the effective date (as defined by the parties to the consent decree) of a consent decree that contemplates removal of the project dam as part of a CERCLA remedy set out in the final ROD. CFB states that, under these circumstances, it would not file a surrender application. The United States, CFB, and ARCO reiterate the positions taken in their responses to the January 19 order in their motions for expedited action. The United States states that the effective date of surrender is critical to the parties' ability to finalize the consent decree and, if the Commission does not confirm that the effective date of surrender is the effective date of the consent decree, the parties will be unable to finalize and lodge their settlement agreement.

27. First, although CFB states that it no longer intends to commence implementation of the ROD before it receives judicial approval, we see no reason to disturb our finding that EPA's approval of the ROD creates a condition of implied surrender. It is clearly the intent of CFB, EPA, and Montana that the project be removed pursuant to the ROD.

28. We share the parties' concerns regarding the possibility of a regulatory gap, and do not wish to interfere with the parties' settlement negotiations. We will therefore modify the effective date of license surrender, to make it coincident with the date on which a consent decree incorporating the ROD (or some other remedy encompassing removal of

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[40] CFB at 3-4. CFB adds that implied surrender cannot be based on its license amendment application because the activities for which authorization was sought (lowering the reservoir and isolating the contaminated sediments) did not preclude re-initiation of power generation in the event that the ROD is not implemented through a negotiated consent decree. CFB rehearing request at 6. Our determination, however, was based on those activities being a component of EPA's final remedy selection providing for removal of the project. *See* January 19 Order, 110 FERC ¶ 61,024 at P 17.

[41] Mountain Water Company, which supplies drinking water to customers from wells located downstream from the projects, makes the same point (at 3). The Missoula City-County Health Department also requests that the transition from Commission to EPA jurisdiction be tied to the completion of the consent decree (at 5).

the project) is approved by the court. We will also direct CFB to provide the Commission with a copy of any such decree.[42]

C. Responses to Comments and Requests for Clarification

29. Whitewater states that it objects to the 45-day time frame for acceptance of license surrender on the ground that EPA "has not established its authority to order removal of Milltown Dam in the Superfund clean-up."[43] It urges us to retain jurisdiction until EPA establishes its authority in this regard or removal of the dam is complete. We are not aware of any controversy regarding EPA's authority in this regard under CERCLA and Whitewater provides no facts or legal argument to support its assertion that there is an issue. We will therefore deny its request for relief.

30. Mountain Water Company, which provides drinking water from wells located downstream from the project and is concerned about contamination of the Missoula aquifer, states that EPA has insufficient experience to operate or decommission a hydroelectric project and urges us to retain jurisdiction until when dam removal is complete. It also urges us to consider, in addition, the consequences if the remedy is approved but not implemented and that the federal district court may disapprove a consent decree and require it to be modified.

31. This Commission has no role in the oversight of EPA's exercise of its statutory authorities. It is premature to consider the consequences of EPA's remedy selection not receiving judicial approval, or being modified in some fashion. Should either of these things occur, we will determine an appropriate course in light of the circumstances then obtaining.

32. Finally, PPLM asks us to clarify that the licensee "cannot take actions in conflict with the project license until such time as cleanup activities at the site actually commence."[44] A licensee is never permitted to take actions in conflict with the license without obtaining a license amendment. Since we affirm our dismissal of CFB's amendment application, there is no longer any such request before us.

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[42] We see no need to revoke our dismissal of the license amendment application. If, for some reason, the ROD is never incorporated into a judicially-approved consent decree, the amendment application will be moot. Likewise, if the ROD is incorporated into a consent decree, section 121(e)(1) will relieve us of jurisdiction, also mooting the amendment application.

[43] Whitewater comments at 3-4.

[44] PPLM rehearing request at 14.

The Commission orders:

(A) PPLM's and CFB's requests for rehearing, filed February 18, 2005, are granted to the extent set forth in this order and are denied in all other respects.

(B) Ordering paragraph (B) of the January 19 Order is modified to provide for an effective date for license surrender of the Milltown license as the effective date of a binding consent decree that provides for removal of the project dam as part of a remedy adopted by EPA pursuant to CERCLA. If a binding consent decree is approved by the court, CFB shall file such decree with the Commission.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.