

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
102 FERC ¶ 62,103

Tomahawk Power and Pulp Company

Project No. 2239-018, -020, and -021

COMPLIANCE ORDER

(Issued February 13, 2003)

Tomahawk Power and Pulp Company (Tomahawk), licensee for the Kings Dam Project, has violated and continues to violate Section 10(c) of the Federal Power Act, 16 U.S.C. §803(c) (2002), Part 12, Subpart A, Section 12.4(b) and Part 12, Subpart D, Section 12.39 of the Commission's Regulations, 18 C.F.R. §§ 12.4(b) and 12.39 (2002), and the License for Project No. 2239 issued by the Commission on July 18, 1996, 76 FERC ¶ 61,055 (July 18, 1996). More specifically, under Section 12.4(b)(2)(iv), the Commission's Chicago Regional Engineer directed that: (1) modifications be made to Kings Dam to ensure the safety and integrity of the structure under flood flows; and (2) repair of the tainter gates be completed to ensure their safe operation. Until the required work on the spillway is completed, the safety of persons and property within two miles downstream from the dam may be in jeopardy. In addition, Tomahawk has failed to submit five compliance and environmental plans required by the license.

Accordingly, the Commission directs Tomahawk to file within 14 days of the date of this Compliance Order a plan and schedule for completing the necessary modifications to increase the spillway capacity of the project and tainter gate repair work. In addition, the Commission directs Tomahawk to commence construction of the modifications consistent with a plan and schedule approved by the Commission which will assure the construction is completed by September 30, 2003. Furthermore, the Commission directs Tomahawk to file within 21 days of the date of this Compliance Order the compliance and environmental plans required by the license, as discussed more fully below.

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Dam Safety Issue - Failure to Provide Adequate Spillway Capacity

Kings Dam is located on the Wisconsin River in Lincoln County, Wisconsin, and is classified as a high hazard pursuant to Section 12.31(b) of the Regulations.¹ The dam could fail under flood flows because of inadequate spillway capacity, which could lead to loss of life and significant property damage downstream. Until sufficient spillway capacity is installed, the dam constitutes a threat during floods to the residents of more than 40 homes located near the river within two miles downstream of the project.

The current spillway capacity of the project is 20,000 cfs. The dam must be modified to be able to safely pass larger flood flows up to 33,500 cfs. Until the modification is accomplished, flood flows greater than 20,000 cfs will overflow the earthen embankments. These embankments are not designed to be overtopped, and therefore are susceptible to erosion and failure.

By letter dated January 25, 2001 from Peggy A. Harding, P.E., Chicago Regional Engineer to Scott D. Goodwin, CRO informed Tomahawk it had failed to respond to repeated directives from the Commission's Division of Dam Safety and Inspections (D2SI) and CRO to accomplish the modification. CRO directed Tomahawk to complete the work to increase the spillway capacity by September 9, 2002. CRO reiterated its request by letter dated February 7, 2002 from Peggy A. Harding to Scott D. Goodwin. Tomahawk did not meet the deadline. By letter dated September 17, 2002 from Peggy A. Harding to Scott D. Goodwin, CRO notified Tomahawk that it is in violation of 18 C.F.R. Section 12.4(b) and may be subject to the enforcement and penalty provisions of Section 31 of the Federal Power Act.

By letter dated January 17, 2003 from Scott D. Goodwin to Kevin C. Griebenow, Engineer, CRO, Tomahawk stated that it decided to move forward on designing a fuse plug spillway, but did not propose a timetable for action. Given Tomahawk's record of inaction and delay, the Commission has no reason to believe that this work will be pursued at an appropriate pace, or that the necessary spillway expansion will be accomplished. Until Tomahawk completes this work, the threat to downstream residents remains.

¹Section 12.31(b) defines a dam with high hazard potential as "any dam whose failure, in the judgment of the Commission or its authorized representative, might endanger human life or cause significant property damage, or which meets the criteria for high hazard potential as defined by the Corps of Engineers in 33 CFR Part 222."

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Dam Safety Issue - Failure to Complete Tainter Gate Repair

By letter dated February 17, 2000 from John K. Hawk, Acting Chicago Regional Director to Mr. Scott D. Goodwin, CRO notified Tomahawk that it must carry out the corrective measures that the consultant recommended in its Independent Consultant's Inspection Report submitted to CRO by Mr. Douglas A. Spaulding of Spaulding Consultants, by letter dated February 14, 2000. One of the findings of the Independent Consultant was that the bending and axial stresses induced in the tainter gate arms indicated that the tainter gate arms were inadequate to meet current Commission criteria. The needed repair, as proposed by Tomahawk in its letter dated May 8, 2000 from Scott D. Goodwin to Witold Pawlikowski, Engineer, CRO, included: (1) strengthening the gate arms by welding steel plates to the arms to increase their resistance to bending; (2) replacing gate seals; (3) repairing holes in skin plate; and (4) sandblasting and wire brushing the gates.

Tomahawk's failure to complete the strengthening and repairs to the project's tainter gates could impact the reliable operation of the gates during flood conditions. If the gates did not operate properly, it would reduce the ability of the spillway to pass flood flows and the dam could be overtopped and caused to fail. The deteriorated state of the tainter gates was documented in the inspections made by CRO Staff in 2001 and 2002.

A failure of a gate in the closed position would reduce the dam's spillway capacity by one-third as there are three gates of the same size at the dam. A catastrophic failure of a gate with the reservoir at its normal pool level would probably result in an uncontrolled release rate up to about 5,000 cfs from the reservoir. A sudden failure of a gate under normal operation conditions would endanger any recreational users or other persons on or near the river in the vicinity of the dam. The reach of the river immediately below the dam is known to be a popular bank and boat fishing area. As stated above, if the gates did not operate properly during flood conditions, that would reduce the ability of the spillway to pass flood flows and the dam could be overtopped and caused to fail.

By letter dated May 23, 2000 from Peggy A. Harding to Scott D. Goodwin, the Commission approved Tomahawk's plan and schedule to complete the tainter gate repairs by August 29, 2001. By letter dated September 10, 2001 from Peggy A. Harding to Scott D. Goodwin, CRO informed Tomahawk that it had not met the August 29, 2001 date, and required Tomahawk to respond by October 5, 2001. Tomahawk responded on October 5, 2001 but did not address CRO's concerns adequately.

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By letter dated February 7, 2002 from Peggy A. Harding to Scott D. Goodwin, the Commission staff approved Tomahawk's proposed tainter gate remediation plan, as received by CRO on October 18, 2001, and extended the deadline for completing gate repairs and modifications to November 1, 2002. In the same letter, the CRO also directed Tomahawk to develop a Quality Control Inspection Program (QCIP) for the repair of the tainter gates to be submitted 30 days prior to the start of the remedial repair work. The CRO requested the QCIP to ensure that the corroded areas were properly repaired, that the welds met current standards, and that there would be no discharge of any materials into the river. Tomahawk did not submit a QCIP nor complete the remedial work. Accordingly, by letter dated November 21, 2002 from Peggy Harding to Scott D. Goodwin, CRO notified Tomahawk of the danger and that it continues to be in violation of 18 C.F.R. Section 12.4(b) and may be subject to the enforcement and penalty provisions of Section 31 of the Federal Power Act. Tomahawk still has not submitted the required QCIP nor completed the repair work on any of the three tainter gates.

License Violations

In its Order Issuing New License, 76 FERC ¶ 61,055 (July 18, 1996) (July 18, 1996 Order), the Commission ordered Tomahawk to submit the following five plans:

Article 403 - Operational Compliance Plan. The license requires Tomahawk to file for approval with the Commission within 90 days of its issuance, an operational compliance plan to document compliance with the run-of-river operation and reservoir elevation range specified by Article 402. The plan, at a minimum, is to contain six specified steps. Tomahawk is to prepare the plan after consultation with the U.S. Fish and Wildlife Service (USFWS) and the Wisconsin Department of Natural Resources (DNR). The plan is to include documentation of consultation.

Article 407 - Plan to Monitor Purple Loosestrife. The license requires Tomahawk to file for approval with the Commission within 180 days of its issuance, a plan to monitor purple loosestrife. Tomahawk is to prepare the plan after consultation with USFWS and DNR. The plan is to include documentation of consultation. The purple loosestrife is a hazard to the environment in that it degrades the quality of wetlands by out-competing native plants. As native plant communities are reduced, so too are wildlife species which depend on them.

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Article 408 - Plan to Protect the Bald Eagle (*Haliaeetus leucocephalus*).

The license requires Tomahawk to file for approval with the Commission within one year of its issuance, a plan to protect the bald eagle on project lands. The plan is to contain, at a minimum, six specified steps.

Tomahawk is to prepare the plan after consultation with USFWS and DNR.

The plan is to include plan updates and documentation of consultation.

The plan is required by the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

Article 409 - Historic Resource Management Plan.

The license requires Tomahawk to implement the Programmatic Agreement executed on December 30, 1993. The Agreement requires Tomahawk to consult with the Wisconsin State Historic Preservation Officer (Wisconsin SHPO) to address all issues regarding Historic Properties that were not resolved prior to the license's issuance, to develop a Historic Resources Management Plan, and to submit annual reports on January 31 to the Commission and Wisconsin SHPO.

Article 410 - Recreation Plan.

The license requires Tomahawk to file for approval with the Commission within one year of its issuance a Recreation Plan. The Recreation Plan, at a minimum, is to include seven specified steps, including evidence of consultation with appropriated federal and state agencies concerning the protection of federal and state-listed threatened and endangered species, as well as a plan for updates.

Tomahawk has failed to file any of these plans. In particular, Tomahawk's letter dated February 7, 2002 and report filed June 24, 2002 are deficient because they do not contain the comprehensive plans required and there is no evidence Tomahawk consulted with the other government agencies as required by all five Articles.

The Commission is responsible for ensuring that hydropower licensees comply with the provisions of the Act, the terms and conditions of their license, and Commission rules and regulations. By letter dated May 16, 2002 from Peter J. McGovern to Scott D. Goodwin, the Commission's Division of Hydropower Administration and Compliance (DHAC) requested Tomahawk to submit the required plans, in addition to a detailed explanation of its failure to comply timely with the license requirements. The plans were required by June 15, 2002. On June 24, 2002, Tomahawk filed a cover letter and report with the Secretary. However, the information required for the various plans was

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insufficient, and therefore deficient. The report did not contain the substantive plans required by the license articles; rather, it contained a status report for each plan. Further, the report did not contain evidence of resource agency consultation for each of the plans.

By letter dated October 18, 2002 from Peter J. McGovern to Scott D. Goodwin, DHAC again directed Tomahawk to submit the required plans with a due date of December 2, 2002, and notified Tomahawk it is in violation of its license and may be subject to the enforcement and penalty provisions of Section 31 of the Federal Power Act. Again, Tomahawk did not comply with DHAC's directive.

Tomahawk is in violation of its license and the Commission's regulations for failure to file the required plans, and shall remain in violation until it submits the filings. Tomahawk is therefore directed to submit the required plans for the above five articles within 21 days of the date of this order.

Tomahawk's heretofore described violations of the Federal Power Act and its license will be made a part of the compliance history of Project No. 2239 and does not preclude the Commission from taking action, pursuant to Section 31 of the Federal Power Act, 16 U.S.C. 823b, for the violations which have already occurred. In addition, failure to comply with this Order will also subject Tomahawk to the enforcement and civil penalty provisions of Section 31, which includes penalties of up to \$11,000 for each violation per day or license revocation. In determining what action to take, the Commission will consider, in addition to the nature and seriousness of the violation, the efforts of the licensee to remedy the violations in a timely manner.

The Director orders:

(A) Tomahawk shall file a plan and schedule for completing the necessary modifications to increase the spillway capacity of the project as discussed in the body of this Order within 14 days from the date of this Order. Tomahawk may not commence construction until the Commission approves its plan and schedule, and authorizes the start of construction.

(B) Tomahawk shall commence work, to increase the capacity of the spillway, in accordance with the schedule that the Commission approves, and shall complete the work on the spillway no later than September 30, 2003.

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(C) Tomahawk shall file a plan and schedule for completing the necessary tainter gate repair work as discussed in the body of this Order and the QCIP for such work within 14 days from the date of this Order.

(D) Tomahawk shall commence work to repair the tainter gates in accordance with the schedule that the Commission approves, and shall complete the repair work on the tainter gates no later than September 30, 2003.

(E) Tomahawk shall file within 21 days from the date of this Order: (1) Article 403 - Operational Compliance Plan, (2) Article 407 - Purple Loosestrife Monitoring Plan, (3) Article 408 - Bald Eagle Protection Plan, (4) Article 409 - Historic Resources Management Plan, and (5) Article 410 - Recreation Plan, as required by the license and discussed more fully in the body of this Order.

(F) Tomahawk's failure to adhere to the deadlines set forth in Ordering Paragraphs (A) through (E) may result in the imposition of civil penalties of up to \$11,000 per day per violation, an order to cease operation of the project, or revocation of license pursuant to Federal Power Act Section 31(a).

(G) Tomahawk shall file an original and 7 copies of the required materials with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. One copy shall also be filed with the Chicago Regional Office, Federal Building, 230 South Dearborn Street, Room 3130, Chicago, IL 60604.

(H) The Director reserves the authority to require Tomahawk to take additional actions, not ordered herein, necessary to protect human life, health, property, or the environment. See Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c) and Section 12.4(b)(2)(iv) of the Commission's Regulations, 18 C.F.R. § 12.4(b)(2)(iv).

(I) This Order is issued under authority delegated to the Director of the Commission's Division of Hydropower Administration and Compliance and constitutes final agency action. Requests for rehearing may be filed within 30 days of the date of issuance of this order pursuant to 18 C.F.R. § 385.713.

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Joseph D. Morgan
Director
Division of Hydropower
Administration and Compliance