

UNITED STATES OF AMERICA 111 FERC ¶ 62,038
FEDERAL ENERGY REGULATORY COMMISSION

Tomahawk Power and Pulp Company

Project No. 2239-022

COMPLIANCE ORDER

(Issued April 11, 2005)

Tomahawk Power and Pulp Company (Tomahawk) is the licensee for the Kings Dam Project No. 2239.¹ Tomahawk has violated and continues to violate the terms and conditions of the license for the Kings Dam Project by failing to comply with directives from the Office of Energy Projects, Division of Dam Safety and Inspections, Chicago Regional Engineer (Regional Engineer), and by failing to comply with the article requirements of the license for the project. The 2,509-kilowatt Kings Dam Project is located on the Wisconsin River in Lincoln County, Wisconsin and the project's dam is classified as high hazard pursuant to Section 12.31(b) of the Regulations.²

BackgroundA. Failure to Comply with Regional Engineer Directives

Tomahawk has failed to comply with numerous directives contained in letters from the Regional Engineer. The licensee's failure to comply with directives from the Regional Engineer prevents the Commission from being able to effectively administer its dam safety responsibilities at the Project.

In a letter from the Regional Engineer to the licensee dated October 22, 2004, the Regional Engineer directed the licensee to complete several actions items concerning public safety, project repair, project maintenance, and requirements related to the licensee's Emergency Action Plan (EAP). Overdue action items from the October 22,

¹ Order Issuing New License, issued July 18, 1996 (76 FERC ¶ 61,055).

² Section 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."

2004 letter include the filing of a corrected Emergency Action Plan for the project and the completing of the action items still outstanding from the Operation Inspection conducted in 2002 and the Independent Consultant's Report of 1999. As described in the Regional Engineer's letter dated October 22, 2004 and also indicated in letters from the Regional Engineer dated November 21, 2002 and September 17, 2002, these items include: 1) a plan and schedule to fill in the scour hole downstream of the tainter gates to prevent the undermining and failure of the spillway section of the dam, and 2) a plan and schedule for installing a chain link fence at the spillway and intake section of the dam as a public safety measure to prevent public access to these structures. The October 22, 2004 letter also provided notice to the licensee under Section 31(a) of the Federal Power Act (Act) to the licensee.

In a letter dated February 14, 2005 from the Regional Engineer to the licensee, the licensee was again directed to resolve remaining overdue items as described in the October 22, 2004 letter and to resolve deficiencies in its EAP submittal.³ In the February 14, 2005 letter, the Regional Engineer directed the licensee to, among other things, file a plan and schedule by April 7, 2005, for completing the remaining overdue action items specified in that letter. This letter also directed the licensee to submit, as described in item 6 of the letter, its overdue diving report regarding the repair of the scour hole downstream of the tainter gates.⁴ The February 14, 2005 letter also directed the licensee to resolve action items from the Independent Consultant's Report of 1999, including 1) the repair of the deteriorated concrete at a wall separating the turbine bays, and 2) an investigation of the settlement taking place at the abutments between the embankments and the powerhouse/spillway. The letter also provided notice to the licensee under Section 31(a) of the Act.

B. Failure to Comply with License Article Requirements

The licensee has repeatedly violated the terms and conditions of its license by failing to comply with license requirements for the Kings Dam Project. These violations prevent the Commission from being able to effectively evaluate environmental protection and other concerns at the project.

³ On November 12, 2004, the licensee submitted a filing with regard to its EAP requirement. In the Regional Engineer's February 14, 2005 letter, the licensee was notified of the filing's deficiencies and was directed to submit a new filing.

⁴ As recommended in the Independent Consultant's Report of 1999, this work item is deemed high priority and was due to be performed in 2002.

Since the issuance of the license for the Kings Dam Project on July 18, 1996, the licensee has failed to comply with license article 407. As more fully described in the license for the Kings Dam Project, article 407 requires the licensee to file, after consultation with the U. S. Fish and Wildlife Service, and the Wisconsin Department of Natural Resources, a plan to monitor purple loosestrife (Lythrum salicaria) in project waters.⁵

Notwithstanding its untimely submittal filed March 10, 2005, the licensee has been out of compliance with license article 409, in violation of a Compliance Order issued February 13, 2003.⁶ As more fully described in the license, article 409 requires the licensee to implement the "Programmatic Agreement among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, the State of Wisconsin, State Historic Preservation Officer, and the State of Michigan, State Historic Preservation Officer (SHPO), for Managing Historic Properties That May Be Affected By New and Amended Licenses Issuing For the Continued Operation of Existing Hydroelectric Projects in the State of Wisconsin and adjacent Portions of the State of Michigan," executed on December 30, 1993, including but not limited to the Historic Resources Management Plan for the project.

⁵ On October 20, 2003, the licensee filed its proposed monitoring plan for purple loosestrife. By letter of November 5, 2003, the Division of Hydropower Administration and Compliance (DHAC) notified the licensee that its plan was deficient due to lack of consultation with the resource agencies, among other things, and directed the licensee to file a responsive plan pursuant to the requirements of article 407 within 60 days. In a previous letter of May 16, 2002, DHAC provided notice under Section 31(a) of the Federal Power Act to the licensee for this requirement.

⁶ In the Compliance Order issued February 13, 2003 (102 FERC ¶62,103) for the Kings Dam Project, the licensee was ordered to file, by March 16, 2003, a Historic Resources Management Plan according to license article 409. On October 20, 2003, the licensee filed a Cultural Resources Management Plan (CRMP) for the Kings Dam Project. By letter of December 23, 2003, the licensee was notified that its filing did not include documentation of SHPO consultation. The licensee did not respond. By letter of February 17, 2005, DHAC notified the licensee that its October 20, 2003 CRMP filing was dismissed and overdue, and also provided notice under Section 31(a) of the Act. On March 10, 2005, the licensee again filed a CRMP, which is currently under review.

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Conclusion

As mentioned earlier, Tomahawk has failed to comply with numerous directives contained in letters from the Regional Engineer. The licensee's failure to comply with directives from the Regional Engineer prevents the Commission from being able to effectively administer its dam safety responsibilities at the Kings Dam Project.

As also mentioned earlier, Tomahawk has repeatedly violated the terms and conditions of its license by failing to comply with license requirements for the Kings Dam Project. The licensee's failure to comply with the terms and conditions of its license prevents the Commission from being able to effectively evaluate environmental protection and other concerns at the project.

The Commission is responsible for ensuring that hydropower licensees comply with the provisions of the Federal Power Act, the terms and conditions of their licenses, and Commission rules and regulations. It is also the Commission's responsibility to ensure that projects are run safely and in an environmentally safe manner. Tomahawk's record of compliance with Regional Engineer directives and with the terms and conditions of the license for the Kings Dam Project is unacceptable. Tomahawk's non-compliance has hampered the Commission's ability to effectively evaluate these important matters.

Tomahawk is in violation of its license and the Commission's regulations for failure to file the plans and schedules as required and set forth in the Regional Engineer's directives, and for its failure to submit the required license article 407 filing, and shall remain in violation until it submits the required materials. Tomahawk is therefore directed to submit the plans and schedules set forth in the above-stated Regional Engineer directives within 15 days of the date of this order. Tomahawk is also directed to submit the above-described license article 407 filing for the Kings Dam Project within 60 days from 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

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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) The licensee shall file, within 15 days from the date of this Order, for the approval of the Regional Engineer, a detailed plan and schedule for complying with the directives contained in the Regional Engineer's letters to the licensee dated October 22, 2004 and February 14, 2005. Deviations from any plan and schedule, submitted pursuant to this Compliance Order and subsequently approved by the Regional Engineer, will be treated as a violation of this Compliance Order.

(B) The licensee shall file, within 60 days from the date of this Order, in accordance with article 407 of the license for the Kings Dam Project, a plan to monitor purple loosestrife (Lythrum salicaria).

(C) The licensee's failure to adhere to the deadlines set forth in Ordering Paragraphs (A) and (B) 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 the license pursuant to Federal Power Act Section 31(a).

(D) The licensee shall file an original and 8 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.

(E) The Director reserves the authority to require the licensee 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).

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(F) 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.

Joseph D. Morgan
Director
Division of Hydropower
Administration and Compliance