

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Clark Fork and Blackfoot, LLC

Project Nos. 2543-063 and
2543-065

ORDER DISMISSING APPLICATION, ISSUING
NOTICE OF INTENT TO ACCEPT SURRENDER OF LICENSE, AND PROVIDING
OPPORTUNITY FOR COMMENTS

(Issued January 19, 2005)

1. In this order, we dismiss the application filed by Clark Fork and Blackfoot, LLC (CFB), licensee for the Milltown Hydroelectric Project No. 2543, to amend the project license by authorizing the permanent drawdown of the project reservoir and certain other actions. Because the entire project is contained within a site designated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ (CERCLA, or Superfund Act), and the actions proposed to be taken under the amendment application would be taken pursuant to a remedial action plan recently adopted under CERCLA by the U.S. Environmental Protection Agency (EPA) and the State of Montana, the Commission concludes that Commission authorization is not required to conduct the activities that would be authorized by the license amendment. We also conclude that the public interest is best served if these actions are carried out solely under EPA's authorization. In addition, because EPA's plan calls for dismantling of the project, we are issuing notice of our intent to accept surrender of the license. Finally, we are providing an opportunity for interested entities to comment on our notice of intent to accept surrender of the license. This order serves the public interest by making clear that responsibility for clean up of the Superfund site rests with EPA, rather than with this Commission.

¹ 42 U.S.C. § 9601, *et seq.*

BACKGROUND

2. On June 3, 1968, the Commission issued a license for the continued operation and maintenance of the 3.2-megawatt Milltown Project, located on the Clark Fork River in Missoula County, Montana.² The license had an effective date of May 1, 1965, and a termination date of December 31, 1993.

3. In 1983 EPA, pursuant to CERCLA, designated the Milltown Project site as the Milltown Reservoir Sediments Operable Unit of the Milltown Reservoir Sediments/Clark Fork River Superfund Site. The Superfund Site extends approximately 120 miles upstream from the project site to Butte, Montana. The reach of the Clark Fork River therein is contaminated by arsenic, copper, zinc, and other heavy metals, which have leached from now-closed mines in the vicinity of Butte. The project reservoir contains approximately 6.6 million cubic yards of contaminated silt.

4. 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). Solutions under consideration included such measures as capping and leaving the sediments in place, removing the sediments by dredging, and removing both the dam and the sediments. The Commission has several times amended the license to extend its term because the remedy selection has not been completed.³ The most recent such amendment, issued April 14, 2004, extended the term of the license through December 31, 2009.⁴

² 39 FPC 908. The license was issued to Montana Power Company. In February 2002, the license was transferred from Montana Power Company to Montana Power, LLC. *See* 94 FERC ¶ 62,265. Thereafter, Montana Power, LLC, changed its name to Clark Fork and Blackfoot, LLC. *See* 102 FERC ¶ 62,124 (2003).

³ 50 FERC ¶ 61,139 (1989); 69 FERC ¶ 61,124 (1994); 91 FERC ¶ 61,280 (2000), *reh'g denied*, 92 FERC ¶ 61,231 (2000); 92 FERC ¶ 61,049 (2002); 105 FERC ¶ 61,048 (2003).

⁴ 107 FERC ¶ 62,028.

5. 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.⁵

6. In anticipation of a license surrender application by CFB, the Commission held issue scoping meetings on June 9, 2004, in Bonner, Montana, and on June 10, 2004, in Opportunity, Montana. The notice of scoping meetings⁶ also solicited written comments, which were filed by several entities.⁷

7. On October 28, 2004, CFB filed an application to amend the license in order to begin implementing Stage 1 of the Proposed Plan, described below.

8. On December 13, 2004, PPL Montana LLC (PPLM), the licensee of the downstream Thompson Falls Project No. 1869, filed comments expressing its opposition to Commission action prior to PPLM being afforded an opportunity to be heard regarding its concerns with the amendment application, plus comments critical of the technical analysis included with the amendment application concerning the likelihood of contaminated sediments being carried downstream as a result of activities associated with the proposed amendment.

9. On December 20, 2004, EPA made a final remedy selection and issued its Record of Decision (Final Plan), pursuant to which the project will be dismantled and removed.

⁵ The Revised Proposed Plan included, in addition to the remediation plan, a site restoration plan under development by the U.S. Fish and Wildlife Service; Confederated Salish and Kootenai Tribes; and the State of Montana through the Department of Fish, Wildlife, and Parks and the Natural Resource Damage Program (Natural Resources Trustees).

⁶ 69 Fed. Reg. 30,291 (May 27, 2004).

⁷ PPL Montana, LLC; Avista Utilities; Clark Fork Coalition; Bonner Development Group; United States Department of the Interior; Clark Fork River Technical Assistance Committee; American Whitewater; Montana Historical Society; and Montana Department of Fish, Wildlife, and Parks.

DISCUSSION

10. Under the Final Plan, clean-up and site restoration is to proceed in three stages. In Stage 1, the licensee will partially draw down the reservoir. EPA will construct a temporary bypass channel for the river and use sheet piling to isolate the sediments from the flowing water, and construct a railroad spur and access roads in the drawn-down reservoir. Stage 1 will begin as soon as possible, and is expected to continue through September 2005. In Stage 2, EPA will ship most of the contaminated sediments by rail to an existing disposal site. It will then lower the reservoir further by removing the turbines from the powerhouse, and removing the powerhouse and most of the dam (*i.e.*, the spillway, radial gate, and the north abutment). In Stage 3, EPA will design and construct a new flood plain and channel to benefit fish, wildlife, and recreational uses.

11. EPA and the U.S. Department of Justice are negotiating with the current owners of the mine sites, who are responsible parties with respect to the costs of cleaning up the project site, and others, including the Natural Resource Trustees, with a view toward filing a consent decree in the United States District Court for the District of Montana. The consent decree would provide, among other things, for selection of the precise actions and activities related to the remediation and restoration of the project site. EPA indicates that the consent decree could be lodged with the court in late January 2005.⁸ CFB's amendment application does not state when it would file an application to surrender the project license, but contemplates that a surrender application would address the effects of the actions to be completed in the subsequent stages of the remediation plan.⁹

12. CFB's license amendment application requested Commission authorization to commence Stage 1 activities in advance of EPA's now final remedy selection. These are: (1) CFB's lowering the project reservoir to a level approximately ten feet below full pool through the radial gate in the project dam to expose the area where contaminated sediment has accumulated; and (2) EPA's isolating the contaminated sediments from flowing water with sheet piling and constructing a bypass channel for the Clark Fork River. CFB states that no permanent alterations of the project structures are needed for

⁸ The Missoulian, Tuesday, December 21, 2004:
<http://www.missoulian.com/articles/2004/12/21/news/top/newsd1.txt>.

⁹ See letter filed July 29, 2004 requesting designation of CFB as the Commission's non-federal representative for consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act at 1.

Stage 1 activities. CFB would only need to shut down the generators and remove the boat barriers and trash booms at the dam. Stage 1 drawdown would begin during a low flow period of the winter months with the timing and drawdown rates controlled to prevent problems associated with ice. During the low flow winter period, the radial gate spillway would function as an ungated overflow structure. As flows increase in the spring, the panel-gate spillway gates and stanchions would be removed, enabling the panel-gate to serve as a second ungated overflow structure. Should it become necessary to refill the reservoir and/or resume generation for any reason, the panel-gates could be restored and the radial gate used to control the rate of refill.¹⁰ CFB stated that the Stage 1 activities need to take place during the December 2004 to September 2005 time frame to ensure timely implementation of the then-proposed, but now final, Plan.¹¹

13. Most of the entities who filed comments in response to the scoping meetings generally supported EPA's proposed plan, but alleged various deficiencies in EPA's analyses and in the Proposed Plan that they contend should be addressed by the Commission in the context of a license surrender application. Others assert that any license surrender application would require compliance by the Commission with certain other statutes, such as the Endangered Species Act¹² and National Historic Preservation Act.¹³

14. The issue we confront here is whether the Commission should entertain a license amendment or surrender application where all of the activities to occur thereunder are components of a remediation and restoration plan developed by EPA and Montana under CERCLA. Section 121(e)(1) of CERCLA¹⁴ provides that:

No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

¹⁰ Application pages A-3 to A-4.

¹¹ Initial Statement at 3.

¹² 16 U.S.C. §§1531-43.

¹³ 16 U.S.C. 470-470w-6.

¹⁴ 42 U.S.C. § 9621(e)(1).

15. CERCLA does not define the word “permit,” but we believe its meaning encompasses an amendment to an existing license and any other Commission authorization that would otherwise be required. We have found nothing in the legislative history of CERCLA to indicate that Congress intended for this broad language to be limited to instances where no other federal, state, or local permits already exist or would otherwise be required with respect to actions conducted on a Superfund site,¹⁵ and our reading of the section comports with the only judicial decision of which we are aware construing section 121(e)(1). In *McClellan Ecological Seepage Situation v. Cheney*,¹⁶ the court cited section 121(e)(1) in rejecting the plaintiff’s contention that a permit was needed under the Resource Conservation and Recovery Act (RCRA)¹⁷ to carry out certain hazardous waste remedial actions at a Superfund site at an Air Force base because all of the actions in question were to be taken in the context of remedial action under CERCLA.

¹⁵ The Conference Report discussion of section 121(e)(1) as enacted simply reiterates the language of the section. The Conference Report’s discussion of the House and Senate bills shows however that the exemption from federal, state, and local permits in the section as enacted is more expansive than the exemptions that would have been provided under either the House or Senate bills. Under the House bill, on-site remedial actions would have required permits under the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and state groundwater laws. Under the Senate bill, no Resource Conservation Recovery Act or Clean Water Act permit would be required for the portion of any response action conducted entirely on-site. H. Rep. No. 99-962, 1986 U.S. Code Cong. and Adm. News, 3276 at 3336-38 (1986).

¹⁶ 763 F.Supp. 431 (E.D. Cal. 1989), *vacated and remanded on other grounds*, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995), *cert. denied*, 516 U.S. 807. The case decided at 47 F.3d 325 held that CERCLA section 113(h), which denies federal courts jurisdiction (with a single exception not relevant here) to entertain challenges to removal or remedial actions selected under CERCLA, barred the plaintiffs’ claims concerning RCRA and the Clean Water Act with regard to all activities being undertaken pursuant to the selected clean-up plan. In contrast, the court held that CERCLA section 113(h) did not bar the plaintiff’s claims concerning non-compliance with RCRA as they pertained to clean-up activities not covered by the plan.

¹⁷ 42 U.S.C. §§ 6901-6991i.

16. The Final Plan, as described above, will result in the cessation of generation and complete removal of the project. EPA will implement, or direct the implementation of, all aspects of its plan, and has effective regulatory control over all aspects of the project. It is entirely within EPA's discretion to determine when to begin activities under the Final Plan. Under these unique circumstances (*i.e.*, a CERCLA site where the remediation plan provides for cessation of project generation and project removal), complete regulatory control transferred from the Commission to EPA when the Final Plan was adopted, and there is nothing left for the Commission to regulate. Thus, there is no longer a basis for Commission jurisdiction. That fact, in conjunction with the operation of CERCLA section 121(e), means that neither EPA nor CFB require any authorization from the Commission to implement the Final Plan. For this reason, it would not be appropriate for the Commission to entertain a license amendment application to commence EPA's plan. We will therefore dismiss the license amendment application.¹⁸

17. We also think this is an appropriate case in which to apply the doctrine of implied surrender, by which the Commission deems certain actions or events, typically removal of the generators or abandonment of the project facilities, to demonstrate the licensee's intent to surrender the license.¹⁹ Here Stage 1 will result in the permanent cessation of generation and is clearly the first step in a process that will result in the complete removal of the project under EPA's authority. CFB's stated intention to file a surrender application is not relevant in light of the fact that CERCLA section 121(e) as applied to the facts of this case obviates the need to file such an application. We therefore deem it

¹⁸ Because CFB's application is being dismissed, the Commission has not issued a public notice requesting interventions. Any request for rehearing of this order must be accompanied by a motion to intervene.

¹⁹ FPA section 6, 16 U.S.C. § 796, and 18 C.F.R. § 6.4. *See, e.g., 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). The doctrine has been expanded to encompass a situation where co-licensees were not able to agree on whether or not to continue operating a project and the co-licensee that wished to operate the project was not able to do so without the cooperation of the other co-licensee. *See Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194 (1999), *reh'g denied*, 90 FERC ¶ 61,250 (2000), *appeal dismissed*, *Fourth Branch Associates v. FERC*, 253 F.3d 741 (D.C. Cir. 2001).

to be CFB's intention to surrender the project license.²⁰ In light of the foregoing, we are issuing in this order notice of our intent to accept surrender of the project license,²¹ effective 45 days from the date of this order.²²

18. Finally, so that we may consider the views of any interested parties prior to the date surrender becomes effective, we are providing 30 days for parties to file comments in response to our notice of intent to accept surrender of the project license.

The Commission orders:

(A) The licensee amendment application filed on October 28, 2004 by Clark Fork and Blackfoot, LLC, for the Milltown Hydroelectric Project No. 2543 is dismissed.

²⁰ Under ordinary circumstances, 18 C.F.R. § 6.4 would require 90 days notice prior to the effective date of license termination by implied surrender. A 90-day notice period is appropriate where the Commission is to consider what conditions, if any, to attach to acceptance of the surrender. Here, however, project retirement and removal will be entirely in the hands of EPA. We will therefore waive this provision of section 6.4, and will provide a 45-day notice period. Similarly, we will waive the 90-day notice requirement of Standard Article 23 of the project license, pertaining to implied surrender. *See Montana Power Co.*, 39 FPC 908, Ordering Paragraph (C) at 911, and Standard Article 23, 37 FPC at 865.

²¹ Subdocket P-2543-065 has been established for this proceeding.

²² It is likewise appropriate for EPA, rather than this Commission, to determine the extent to which other federal statutes, such as NEPA and ESA, may apply to EPA's remediation and site restoration plan and, to the extent they do, for EPA to take any actions that may be required thereunder. In this regard, we note that CFB has been engaged in consultation as the Commission's non-federal representative with the U.S. Fish and Wildlife Service and the Montana State Historic Preservation Officer, based on its belief that the Commission would process a license amendment application. In this context, FWS has issued a Biological Opinion of the effects of EPA's remediation plan on bull trout and bald eagles. There appears to be no reason why these consultations may not continue, if necessary, under EPA's auspices.

(B) The Commission hereby issues notice of its intent to accept surrender of the project license, to be effective 45 days from the date of this order, unless otherwise ordered by the Commission in response to comments received pursuant to Ordering Paragraph (D).

(C) The 90-day notice requirement of 18 C.F.R. §6.4 and of Article 23 of the project license are hereby waived.

(D) Interested entities may submit, within 30 days of the date of this order, comments and/or motions to intervene in the implied surrender proceeding.

(E) The Secretary is directed to promptly publish this order in the Federal Register.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.