

CLIC Update: 28 January 2017, David Townsend: President, Chiputneticook Lakes International Conservancy

What we know about the Application to Surrender the FERC licence to operate the dam at Forest City...

On December 23, 2016, Woodland Pulp filed an application with the US Federal Energy Regulatory Commission (FERC) to surrender its FERC licence to operate the dam located at Forest City. Woodland Pulp owns this dam and about 27 acres of land above and below this dam (both the dam and the surrounding acreage are located partially in the USA and partially in Canada). Since the early 1900s, a dam at Forest City has been used to assist hydroelectric power generation stations located many miles downstream, by using the dam and its gates to impound (store) and then release (as needed), water held back within East Grand Lake, the Thoroughfare passage and North Lake. No hydroelectricity has ever been generated at the Forest City dam location.

Within Woodland's recent application to surrender its licence, the company stated that it is proposing to return this portion of the St. Croix International Waterway to a run-of-river mode, meaning no human manipulation of the rate of flow of water through the dam at Forest City, and to permanently remove two of the three water gates built into that dam. The application did state that the company has concluded that the complete removal of the dam is not necessary or appropriate and this forms no part of the pulp mill's application.

What are the likely consequences if this application to FERC is approved as submitted....

Once these two gates are removed, the water levels of East Grand Lake, the Thoroughfare and North Lake will drop significantly, the impoundments will drain, and the future levels and flows of water related to these two lakes, and in the Thoroughfare, will be determined by the natural precipitation cycles (from seasonal rains, dry spells and melting snow and ice) and by the extent to which the remaining dam structure acts as an obstruction to the downstream flow of water. And, of course if the application to surrender is granted, FERC's legal jurisdiction over the operation of this dam would cease.

Thus, the main consequence of the removal of these gates will be that the average yearly water levels will drop significantly and that the levels and flows for any particular time period likely will fluctuate a great deal. There may be times during the late spring and early summer months when the levels of certain portions of East Grand Lake will be more than six feet below historic summer norms, and there may be times when the rush of water and low levels of water through the Thoroughfare will be so problematic that this passageway may be quite difficult to navigate by boat.

The loss of regulatory control by FERC over the operation of the dam at Forest City and the passage of water through the dam in a run-of-river mode will mean that the many public policy objectives that are currently part of FERC's regulatory agenda will end. Many people do not realize that the US Federal Power Act requires FERC to regulate hydro power works in a balanced manner. This means that a balance of hydro power objectives and general public policy objectives are to be achieved. For our own area these public policy objectives have included regulation of the operation of the dam at Forest City

for flood control, irrigation, navigation, wildlife protection, recreational use promotion, and cultural heritage preservation. For example, in accordance with regulatory requirements or with voluntary operational targets set by representatives of Woodland Pulp, the company has operated the dam at Forest City so as to protect the nesting activities of small mouth bass, loons, beavers and muskrats; kept the levels of East Grand Lake high and stable during the summer months for camp and cottage owners; and managed the downstream levels and flows of water in order to facilitate archeological excavation work on Passamaquoddy Native American cultural heritage sites located nearby. All of these public policy activities will cease if the dam at Forest City operates in a run-of-river mode.

Also, it is likely that many cottage and camp properties now located on the shores of East Grand Lake and on North Lake may cease to be “riparian” in nature once the three impoundments are drawn down. Thus, affected property owners will lose any special legal rights they have to use and enjoy the waters located immediately in front of their own properties to fish, swim, draw water for domestic uses, put in a dock or moor a boat. Such property rights are tied to the presence of water at or very near to the boundary line of the lands in question.

Additionally it will take a while for natural looking shorelines to be re-established for these two lakes following the anticipated drop (overall) in water levels. The natural beauty of our area that is so prized by residents, cottagers and visitors (tourists, hikers, anglers and hunters) will be sorely missed until vegetation grows back. Shoreline-based nesting areas for fish, animals and birds also will need time to be re-established.

Why drain the impoundments on East Grand and North Lake....

From conversations with representatives of Woodland Pulp, it is clear that their application to FERC is seeking permission to permanently remove two of the three gates of the Forest City dam for two key reasons. First, corporate executives believe that the removal of the gates will be requested by FERC commissioners, as an element of granting permission for the company to leave the waterway at the Forest City dam in a run-of-river mode. Second, the company’s representatives have concluded that the prospects for legal liability for water or ice related damages to the properties of surrounding owners will be the lowest if the waterway is left at relatively low water levels.

While the second reason for removal of the gates (reduction of legal liability) has some validity, the belief that the Commissioners of FERC will want the gates removed, and the impoundments drawn down, as a condition of licence surrender may be mistaken. This assessment that Woodland Pulp may misunderstand FERC’s policy objectives surrounding the surrender of licenses for works such as the dam at Forest City is based upon strong comments made to Woodland Pulp in an Order issued in 2011 by FERC commissioners. When replying to concerns previously raised by representatives of Woodland Pulp, that the growing compliance costs related to the public policy activities required by the Commission associated with the operation of dams located at Forest City and Vanceboro may cause the pulp mill to surrender its two licenses, remove the gates and structures for both dams, draw down the reservoirs, and return those parts of the waterway to a run-of-river mode, the Commissioners stated:

“Woodland Pulp appears to misunderstand the implications of a decision on its part not to license the storage reservoirs. Such a decision would mean that the company could no longer manipulate flows from the reservoirs, which would then be operated in a run-of-river mode. It does not mean, however, that the project dams or gates would have to be removed or that the impoundments would necessarily be drawn down. Rather, the company could leave its current facilities in place, in whatever configuration it determined would best meet the needs of the local community, so long as those facilities would no longer manipulate flows. The dams and impoundments could remain, and the reservoirs could continue to provide environmental and recreational benefits to the region.” [From: FERC Order Denying Rehearing, Docket No. D110-9-001, Issued September 15, 2011. The quote is from paragraph 27 of the Order. Underlining has been added.]

When may FERC act on this application to surrender the licence for the dam at Forest City...

At present, it is difficult to assess when FERC may act on Woodland Pulp’s application. Under FERC’s regulations, a dam such as the small one located at Forest City is classified as a “minor project.” The applicable regulations for minor projects permit certain flexibility in the filing requirements for applicants, the processes to be used by the Commissioners and the timeframes for those processes. While more research must be done to confirm all applicable timeframes, it appears that FERC will provide a minimum 30 days of public notice before taking any official action on an application to surrender the licence of a minor project.

As noted above, Woodland Pulp filed its application to surrender its licence to operate the dam at Forest City on the 23rd of December 2016. Recent conversations with a representative from the mill have confirmed that the Federal Energy Regulatory Commission has not as yet replied in any way to this application. As one element of its filing requirements, Woodland Pulp served written notice of its FERC application on a large number of US federal, state, and local government agencies and politicians, and on certain representatives of the Passamaquoddy Tribe. Presumably, FERC must set aside a reasonable period of time for such a large number of governmental agencies and elected representatives to reply, if they so desire, to this application.

The President and/or the Treasurer of CLIC are registered with the Federal Energy Regulatory Commission to receive electronic copies of all FERC notices related to this application. CLIC will be apprised of FERC developments related to this application at the same time as all other interested parties.

What does CLIC plan to do about Woodland Pulp’s application to surrender its licence...

The Chiputneticook Lakes International Conservancy (CLIC) is a lake association with about 250 members of record who, for the most part, are seasonal or permanent residents or users of the lands and waterways affected by the operation of the dam at Forest City. Clearly, CLIC’s members are very interested in the outcome of this application.

There is little doubt the FERC will permit Woodland Pulp to surrender its licence to operate the dam at Forest City. This is because this dam is classified as a minor project under FERC's rules, and because Woodland Pulp has repeatedly made the case that compliance with current FERC requirements applicable to the operation of this dam far exceeds the economic gains (from the water impoundment and release activities at Forest City) to the hydroelectric power generation activities of Woodland's two power generation stations located at Baileyville and Grand Falls. Quite simply, Woodland Pulp can purchase electric power from the international power grid much more cheaply than by absorbing the costs of the operation of the dam at Forest City and benefitting from the modest increments made to its hydroelectric power generation operations located downstream.

The near certainty that FERC will permit Woodland Pulp to surrender its licence for the operation of the Forest City dam does not mean that there is high likelihood that the application will be approved as submitted. The greatest impact will be visited upon natural and human users of this environment if Woodland is permitted to permanently remove any of the operational gates of the dam at Forest City and allow the three impoundments (East Grand Lake, the Thoroughfare and North Lake) to draw down, and thereafter remain at levels dramatically lower than experienced in well over 100 years. As noted within this message, a permanent drawdown of the three impoundments likely is not in keeping with recent FERC policies on the surrender of licenses for dam projects. This argument must be made to the FERC commissioners.

Likely, it is in keeping with current FERC policies that Woodland Pulp will be permitted to surrender its licence for Forest City and leave the waterway in a run-of-river mode (regardless of whether the gates remain in place). Should FERC permit the pulp company to surrender its licence, FERC's regulatory jurisdiction over the operations of the Forest City dam would cease unless some entity started to operate the levels and flows at the dam for purposes related to the generation of hydroelectric power.

The question remains to be explored whether some private or governmental entity might be identified to operate the dam at Forest City to achieve some of the many public policy (non-hydropower related) objectives that FERC historically imposed upon Woodland Pulp (such as flood control, irrigation, navigation, wildlife protection, recreational use promotion, and cultural heritage preservation). In recent conversations with a representative of Woodland Pulp the opinion was expressed that the pulp company is open to discussions related to the operation of the dam at Forest City by other entities for public policy objectives, and even to options that might involve the sale of the dam. (Some properties around the dam are subject to a right of first refusal to purchase should those properties be put up for sale by the pulp company.) These various possibilities should be explored. Such explorations must include research into the legal regulatory implications for the State of Maine and/or the Province of New Brunswick should this dam be actively operated in the future by some private entity.

The Board of Directors of CLIC will hold a board meeting in the very near future to discuss and decide its role in relation to the challenges and opportunities discussed within this note.

Depending upon the roles and objectives agreed upon, the Board will thereafter release publicly the elements of its action plan.

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