

CLIC Update: 18 February 2017, David Townsend: President, Chiputneticook Lakes International Conservancy

### **CLIC Update on the Application by Woodland Pulp to Surrender its License for FERC Project 2660**

I wanted to provide your readers with an update on the situation regarding the application by Woodland Pulp, for permission from the US Federal Energy Regulatory Commission (FERC or the Commission), to permanently remove two of the three gates of the dam at Forest City and surrender its license to operate the levels and flows of water at the dam.

#### **What has been happening with Woodland Pulp's application...?**

Woodland Pulp submitted its application to surrender its license for the dam at Forest City on the 23rd of December of 2016. This license, which has a 30 year term, had only recently been issued by FERC on the 23<sup>rd</sup> of November of 2015. The reason cited by Woodland for applying to turn back its license is because, "the high cost of operating the [Forest City] Project pursuant to the new FERC license renders the Project uneconomical." Within its application, Woodland asked FERC to immediately release the pulp mill from the obligations within the new license to prepare five very detailed management plans. Some of these plans are due for review by Commission staff at the end of March of this year. As of one week ago, Woodland Pulp had not heard back from the Commission on this request and the company is working to complete the management plans in accordance with their original deadlines.

Shortly after Woodland submitted its application to FERC, the task of performing a 'staff review' of the application was assigned by the Commission to its "Environmental and Project Review Branch" of the Division of Hydropower Administration and Compliance. This branch examines applications related to hydropower projects, reviews them for fit within the purposes and objectives of the Commission, contacts the applicant should clarification or additional information be required and makes summaries and recommendations for FERC's commissioners to consider when matters are before the commissioners for decision. That staff review is currently ongoing and no one has projected when it will be completed.

#### **What has been going on outside of FERC.....?**

When Woodland Pulp filed its application in December to surrender its license, the Commission's rules required the applicant to inform parties interested in the issues related to the application. Through its legal counsel (attorney) Woodland served formal notice of its application upon about nine US federal government departments or agencies, about 20 State of Maine government departments or agencies, three representatives of Passamaquoddy Tribes, two US Senate Representatives, one US Congressional Representative, two State of Maine Senators, the State Governor, two County Commissioners, the Downeast Land Trust, Lance Wheaton, the International Joint Commission (IJC) and the St Croix International Waterway Commission (SCIWC).

No such formal notices were served upon Canadian federal government departments or agencies, nor upon any Province of New Brunswick government departments or agencies. Interestingly, no notices were served upon the Towns of Orient, Weston or Danforth, or upon Forest City Me., Forest City N.B., the Parish of North Lake (New Brunswick) or upon the Chiputneticook Lakes International Conservancy (CLIC).

While it is not possible to be aware of the full range of activities going on in the governmental sector, a few details have been obtained and they are worth noting. The various agencies and bureaux of the US Department of Interior which have been historically involved in advising FERC on the conservation issues related to Woodland's license at Forest City, such as the US Fish and Wildlife Service, have been preparing to submit comments which likely will focus upon the proposal by Woodland Pulp to permanently remove two of the three water gates at the dam. The Department of the Interior has agreed to coordinate the submission of the consultation comments from its agencies and bureaux.

At the state level, comments for submission to FERC are currently being drafted by the agencies and bureaux of the State of Maine which have an interest in the disposition of the gates at the Forest City dam. These state agencies and bureaux include, Inland Fish and Wildlife Service, Department of Agriculture, Conservation and Forestry, Department of Environmental Protection, the Maine Forest Service, and Department of Emergency Management.

At the Maine state level, the agencies and bureaux which are planning to forward comments to FERC will share drafts of their comments between themselves in advance, in order to avoid serious inconsistencies or omissions. Different sources have confirmed that the Governor's Office for the State of Maine has been involved in initial discussions about whether the State is interested in purchasing the dam from Woodland Pulp and operating it through one of its government departments. Should the State agree to purchase and operate the dam, Woodland Pulp's property interests in the dam and the impoundments (such as easements and restrictive covenants) would be transferred to the State of Maine, but the FERC license would be surrendered and FERC Project No. P-2660 would cease to exist.

Moving beyond governmental involvement, it should be noted that representatives acting on behalf of certain Passamaquoddy Tribes in Maine have filed comments to FERC objecting to Woodland's proposal to remove two of the three gates as a condition of its surrender of license. The Tribes have expressed concerns that the rush of water through the open gates will be so great that it will significantly inhibit the upriver passage of fish past the dam, possibly disturb Passamaquoddy archeological sites of significant importance and lower the level of water to such an extent that these archeological sites may be exposed to vandalism or looting. The Maine Historic Preservation Commission has filed written comments to FERC and expressed these same concerns about these archeological sites.

Private citizen, Leonard White, has submitted a letter of concern to the Acting Chairperson of FERC about the fact that the Commission appears to be placing very little emphasis upon the impact that dewatering the three impoundment areas will have upon the property values and property rights of the owners of the private lands in Maine and New Brunswick that currently abut the shoreline of the impoundments. He explicitly noted that Woodland Pulp had not served notice of its application to FERC upon Canadian property owners or upon other Canadian stakeholders. Len White lives in Virginia, near Washington DC, and he owns a summer camp on the Maine side of East Grand Lake. He plans to reformat the contents of his letter and resubmit his concerns as a formal written comment for consideration by the FERC's commissioners when Woodland's application for surrender is considered.

Evidence of activities within Canada related to Woodland's application has been very difficult to collect. According to a FERC staff member, the Canadian Embassy has been in contact with the Commission but the level of involvement is not known at this time. It is possible that Canadian federal Member of Parliament, "TJ" Harvey, has been active behind the scenes, but neither he nor his staff has responded to three requests by CLIC to discuss the issues related to impacts on the Canadian side -- should the two

water gates located on the US side of the dam be permanently removed. It is clear that the Canadian federal Department of Fisheries and Oceans is involved.

As for CLIC's activities, some of our most recent activities related to Woodland Pulp's application were detailed within last week's newsletter. Those activities continued and intensified this week, and a number of phone conversations and e-mail exchanges occurred between CLIC, and FERC staff and various stakeholders and groups. Telephone conversations included discussions with representatives from a Passamaquoddy Tribe and the Woodie Wheaton Land Trust. It should be noted, also, that e-mails were exchanged this week between CLIC and a representatives from Woodland Pulp. A number of questions for factual and technical information were put to these representatives, and I am pleased to report that responsive, timely and useful replies were received.

### **Why does it appear as if FERC is not concerned about the impact upon property owners in Maine...?**

FERC has the authority to consider a broad range of issues when considering an application to surrender a license to operate a dam such as the one at Forest City but, to be considered, all such issues must tie back to an existing and connected federal or state law. FERC, like every other regulatory agency, must stay within the scope of its powers to act. Currently, when considering licensing matters (including the surrender of a license), the US Federal Power Act sets out the key factors to be considered and a number of other US Federal and State statutes, such as the US Clean Water Act, and the National Historic Preservation Act, explicitly tie in to those factors.

In relation to licensing matters, the US Federal Power Act requires FERC to give consideration to [hydro] power and development purposes and to give "equal consideration" to factors such as energy conservation, protection of fish and wildlife (including their spawning grounds and habitat) protection of recreational opportunities, preservation of other aspects of environmental quality, and beneficial public uses (including irrigation, flood control, water supply and recreational purposes.) While such authority may be hiding somewhere; so far, I have not been able to find any explicit legislation that authorizes the Commission to consider the financial impact upon the private property owners of the shoreline area of an impoundment or reservoir when considering a license surrender application. While one could creatively interpret words from the Federal Power Act such as "recreational opportunities" and "recreational purposes" to encompass the financial impacts upon private property owners, the Commission likely would regard such considerations as if they were second or third tier factors due to the stretched interpretation necessary to make them fit.

For contrast, and to make the point more clearly, one should examine the State of Maine legislation (which does not apply here), that addresses the factors to be considered when a dam owner applies to be released from the owner's regulatory obligations to operate the levels of flows of a dam or to dewater a reservoir created by a dam. Maine's legislation specifically requires that the affected land owners of the shoreline properties be given individual notices of the application, that public hearings to hear from property owners may be required, and that the impacts upon the affected private land owners will be an important factor when the application by the dam owner to be relieved from its regulatory burden or to dewater a reservoir is considered.

**How will FERC take into consideration the conservation, protection of fish and wildlife, environmental quality, irrigation, flood control, water supply, recreational opportunities, water quality, heritage preservation or property owner impact issues which may arise on the New Brunswick side of the three impoundment areas...?**

This is a very relevant question and I do not have an answer at this point.

To be specific, Woodland Pulp has applied to surrender its license to operate [FERC Project 2660](#), which includes the dam at Forest City, Me. and property rights associated with the water impoundments located on the Maine side of the international border. Woodland has requested that the two gates on the Maine side be permanently removed as condition of surrender. The company has clearly specified that the remaining gate, on the Canadian side, is not part of this surrender application.

All of FERC's projects involving hydropower related dams are described on the face of each license in terms of their geographical limits. Typically, the geographical limits of FERC's project licenses encompass the licensee's properties necessary for the operation of the dam itself and the surrounding upstream lands up to the high water mark when the reservoirs or impoundments created by the dam are at the 'full pool' stage. Thus, the geographical limits of a typical FERC license follow the various courses of the high water line of the impoundments created by storing water and, obviously, take the shape of those impoundments.

The problem with the geographical limits described within the FERC licence for Project 2660 is that those limits follow the various courses of the high water mark of the shoreline on the Maine side of East Grand Lake, the Thoroughfare and (a very small portion of) North Lake, but do not cross over the international boundary – be it on land or in the water. Therefore, one must ask, if no lands or waters within New Brunswick are included within the terms of the license that Woodland has applied to surrender, how can FERC take any factors into account that particularly relate to New Brunswick waters or lands?

Using the figures that Woodland has supplied to FERC over the years, it is clear that about 46.3 percent of the total surface area (US and Canadian waters) created by all three impoundments is on the New Brunswick side. And, looking at North Lake, in particular, about 94% of the surface area of North Lake is in New Brunswick and almost all of the camps and residences that are located on the shores of North Lake (and in the Thoroughfare) are located in New Brunswick. The particular consequential impacts of this surrender application on the New Brunswick side somehow must be taken into account.

Again, using figures that Woodland Pulp has provided to FERC, it is clear that permanently removing the two gates on the Maine side of the Forest City dam will have significant impacts upon New Brunswick waters and lands on East Grand Lake, the Thoroughfare and North Lake. Each of the three gates at the Forest City dam has a hydraulic capacity such that each gate will permit 667 cubic feet of water per second (cfs) to pass through its respective opening. Thus, if Woodland's application is granted as submitted, this dam will permit up to 1334 cfs to pass through it. One can only imagine what this will do to the levels of North Lake, the Thoroughfare and East Grand. And, during certain times of the year, the rush of water at the dam may be so great that navigation and recreational activities, such as swimming, may be quite difficult in areas of Forest City, N.B., the Thoroughfare and areas of North Lake.

To return to the question that commenced this subsection, how is it possible that FERC will take New Brunswick impacts into account when it appears that they are not even part of the scope of the license or of the proceeding?

**When will FERC make a decision in relation to Woodland's application to surrender its license for Project 2660...?**

Obviously, the time frame available for CLIC and other stakeholders to effectively influence FERC's final decision regarding Woodland Pulp's application to surrender its license and, about the removal or retention of the two gates on the Maine side of the dam will depend, to a significant degree, upon the decision making process chosen by FERC. And, to some extent, the choice of process by FERC will depend upon the Commissioners' view about the complexity of the issues to be considered and decided.

While it is likely true that FERC cannot force a licensee (like Woodland Pulp) to continue to operate a dam project that the licensee has determined is uneconomical, FERC has a relatively broad discretion (as previously discussed within this note) regarding the conditions it may impose when accepting the surrender of license. But, once those conditions are satisfied and the surrender accepted, FERC's legal control over its former licensee terminates. It is also true that Woodland, should it retain ownership of the dam, would no longer be authorized to adjust the levels and flows of water at the dam at Forest City to support its hydropower generation facilities located downriver.

As noted at the commencement of this note, FERC employees are now performing a staff review of Woodland's application. Some of the various agencies, corporations and individuals which/who were served with copies of Woodland's surrender application back in December have filed consultation comments with FERC. So far, very few comments have been received and posted. One week ago, a staff member of FERC asserted that once the staff review of Woodland's application was complete, the Commission would formally announce the commencement of a 30 day window for the submission of 'public' (and any other) comments for the Commission to consider. This staff person reinforced the point that since this was a minor project; the process would be a (one shot) notice and comment type (without a public hearing).

By the end of this week, a rumor was circulating that FERC had just decided to hold more than one written consultation phase; with each to commence upon the completion of a specified milestone, and that convening a public hearing, and inviting oral submissions, would be one of the specified milestones. A final written comment period /opportunity would follow the public hearing.

While we will all have to wait for FERC to announce the process and timelines that will apply for Woodland's application, I can say that I would prefer that the Commission convene a process with a public hearing coupled with a few discrete stages for the submission of written comments. This fuller process would provide greater opportunities to better understand and respond to the concerns of the Commissioners and to the arguments offered by the other parties. It would also accord more time to explore alternative solutions, such as the identification of another entity which will agree to operate the gates of the dam in such a manner so as to achieve some of the conservation, environmental and recreational objectives that have historically been achieved through FERC's regulatory program.

Since CLIC has subscribed to FERC's electronic notification system, we will receive all public notices issued by the Commission related to procedural matters regarding Woodland's application. Also, we will receive electronic notice of, and be able to access (as soon as they are posted by FERC), all of the written submissions related to this proceeding.

### **What are the next steps by CLIC...?**

It is the collective view of CLIC's Board members that there would be devastating conservation, environmental, heritage, public safety, recreational, and economic consequences if two of the three

gates of that dam at Forest City are permanently removed and that CLIC should take the leading or a leading role in mobilizing efforts to prevent that devastation.

The Board of Directors of CLIC have committed CLIC to effectively participate in whatever process or processes the US Federal Energy Regulatory Commission provides for the consideration and determination of the application by Woodland Pulp to surrender its license to operate the dam at Forest City. If such is determined to be the best option, it is possible that CLIC would participate in FERC proceedings as an "Intervener," which will give CLIC the status of being a Party to the proceedings.

Within the next seven days or so, on behalf of CLIC and its Board and Members, I will file (some initial) written comments into FERC's formal record related to Woodland's application to surrender license P-2660. These comments will raise the question (and request clarification) as to whether it is within FERC's legislative mandate to consider the potential financial and land use impacts upon the owners of shoreline property in Maine which abuts the water impoundments described within Project No. 2660. Also, within the same submission, I will raise the question (and request clarification) as to whether FERC has the legal jurisdiction to consider any of the negative impacts that might result on the New Brunswick side of the international border if Woodland's application is granted as submitted (with the two gates in Maine removed).

I am pleased to inform that Leonard White (the person whose written submission to FERC's acting chairperson is discussed within this note) has agreed to create a charter and a detailed strategy for a "Save the Dam" campaign that CLIC will roll out. Len has an impressive background in project planning and he is involving the volunteer services of other experts in the field. This planning instrument should be complete within the next 6-8 days.

Bill, I hope that your readers are already thinking about how they each might contribute to these efforts. CLIC will need lots of help.

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(February 18, 2017)