

176 FERC ¶ 62,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

North Eastern Wisconsin Hydro, LLC

Project No. 8015-012

ORDER GRANTING TEMPORARY AMENDMENT OF EXEMPTION

(Issued July 21, 2021)

1. On May 28, 2021, Eagle Creek Renewable Energy, on behalf of North Eastern Wisconsin Hydro, LLC (NEW Hydro), exemptee for the Shawano Paper Mills Dam Hydroelectric Project No. 8015, filed an application for a two-year temporary amendment of the normal impoundment elevation. The project is located on the Wolf River in Shawano County, Wisconsin.

Background

2. The Commission issued an order granting an exemption from licensing to the project on March 27, 1985.¹ Under Standard Article 2 of the exemption, the exemptee is required to comply with the terms and conditions that Federal or state fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. The Wisconsin Department of Natural Resources (Wisconsin DNR) and the U.S. Fish and Wildlife Service (FWS) provided terms and conditions that, in part, require the exemptee to maintain the impoundment elevation between 801.83 feet mean sea level (msl) and 803.17 feet msl, with a normal impoundment elevation of 802.5 feet msl.

3. As part of a 2015 compliance investigation,² Commission staff determined that contrary to the normal impoundment elevation requirement in the exemption, the exemptee operated the impoundment year-round at a normal pool elevation of 802.9 feet msl from at least 2000-2015.³ Since 2015, through the series of temporary amendments

¹ *Little Rapids Corporation*, 30 FERC ¶ 62,344 (1985).

² April 21, June 29, and September 16, 2015 Commission staff letters.

³ May 10, 2019 Amendment Application.

issued on September 24, 2015,⁴ June 28, 2018,⁵ June 26, 2019,⁶ and June 3, 2020,⁷ the exemptee has received authorization to maintain a normal pool elevation of 802.9 feet msl either year-round or seasonally, as prescribed in each order.

Exemptee's Current Temporary Amendment Request

4. The exemptee requests authorization to increase the normal target impoundment elevation from 802.5 feet msl to a target elevation of 802.9 feet msl year-round for two years, while continuing to operate the project within the authorized elevation range of 801.83 feet msl and 803.17 feet msl. The exemptee states the amendment is necessary to address immediate concerns related to recreation and boater safety, while allowing time to conduct additional consultation and studies, and to prepare an application for a permanent long-term solution.

Prefiling Consultation

5. On May 11, 2021, the exemptee provided a draft of its proposal to the Wisconsin DNR and FWS. On May 12, 2021, the FWS stated it has no concerns with the proposal. On May 21 and 25, 2021, the Wisconsin DNR provided comments stating it has no concerns with the proposal, but recommended the development of an operations plan and stating the exemptee should work with the local units of government (Shawano County, the City of Shawano, and the Village of Cecil) on potential impacts to the National Floodplain Insurance Program (NFIP). The exemptee's May 28, 2021 filing included letters from Shawano County; the City of Shawano; the Village of Cecil; the towns of Washington, Richmond, and Wescott; Walleyes for Tomorrow; and the Shawano Ski Sharks expressing support for the proposed increase in the normal impoundment elevation.

Comments and Public Notice

6. Prior to the exemptee's May 28, 2021 filing of the temporary amendment application, the Commission received comments from nine individuals expressing support for an increase in the normal impoundment elevation. Additionally, on May 5, 2021, an individual requested information on past temporary amendments.

⁴ *North Eastern Wisconsin Hydro, Inc.*, 152 FERC ¶ 62,207 (2015), as extended by *North Eastern Wisconsin Hydro, Inc.*, 160 FERC ¶ 62,164 (2017).

⁵ *North Eastern Wisconsin Hydro, Inc.*, 163 FERC ¶ 62,225 (2018).

⁶ *North Eastern Wisconsin Hydro, Inc.*, 167 FERC ¶ 62,195 (2019).

⁷ *North Eastern Wisconsin Hydro, Inc.*, 171 FERC ¶ 62,115 (2020).

7. On June 4, 2021, the Commission issued a public notice soliciting comments, motions to intervene, and protests on the temporary amendment request. The Wisconsin DNR filed a notice of intervention on June 8, 2021.⁸ On June 15 and 17, 2021, two individuals filed comments expressing concerns related to possible downstream flooding from the drawdown of the impoundment at the end of the temporary amendment. On June 18, 2021, the Town of Matteson and three individuals separately filed comments expressing concerns related to possible downstream flooding. On July 6, 2021, an individual filed comments expressing support for an increase in the normal impoundment elevation.⁹ No other comments, interventions, or protests were filed.

Environmental Review

8. Commission staff reviewed the project exemption, the information provided by the exemptee in its current and previous amendment applications, and other information on the public record to determine whether the proposed amendment would affect water quality and quantity, aquatic resources, or recreational and cultural resources at the project. Commission staff's findings are summarized below.

A. Water Quantity

9. The Shawano Paper Mills Dam is located on the Wolf River downstream of the Balsam Row (Shawano) Hydroelectric Project (FERC No. 710) and is the first barrier on the Wolf River upstream from Lake Poygan on the Winnebago River system. Wolf River Pond is the impoundment on the Wolf River above the Shawano Paper Mills Dam. Wolf River Pond is a 305-acre impoundment¹⁰ with a drainage area of 1,100 square miles, a maximum depth of 14 feet, and a mean depth of six feet.¹¹

⁸ Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, the Wisconsin DNR became a party to the proceeding upon the filing of its notice of intervention. 18 C.F.R. § 385.214(a) (2020).

⁹ This comment was filed outside of the period specified in the notice but included for context to the proceeding.

¹⁰ Although the project boundary encompasses approximately 230 impounded acres, the Wolf River Water Resources Management Plan (WRWRMP) notes that the influence from the pond extends to County Trunk Highway A, approximately 305 impounded acres. WRWRMP at 159.
<https://dnr.wi.gov/topic/fishing/documents/outreach/WolfRiverManagementPlan2019.pdf>

¹¹ *Id.*

10. The Red River is a major tributary to the impoundment which enters Wolf River Pond from the northwest. At its confluence, the Red River drainage basin is 71.2 square miles.¹² Wolf River Pond is also hydrologically connected to the 6,215-acre Shawano Lake via the Shawano Lake Outlet Channel, a major tributary to Wolf River Pond which enters from the east. Shawano Lake has a mean depth of nine feet and a maximum depth of 39.5 feet, with a drainage area of 16.6 square miles.¹³ Shawano Lake is located outside of the project boundary, but is influenced by project operations, although it is uncertain as to what extent due to limited studies on the subject. Shawano Lake residents have expressed that reservoir elevations at the project have a direct influence on water levels in Shawano Lake.

11. Water levels and flow comparisons for the Regional Flood Event or 100-year events are defined for the project within a Federal Emergency Management Agency (FEMA) Flood Insurance study dated November 15, 1985. In a letter dated May 21, 2021, Wisconsin DNR provided in its comments on the temporary variance request that the “FEMA Flood Maps were developed based on an impoundment elevation of 802.5 feet msl as the initial condition of the impoundment prior to an event that would cause water levels to increase.”¹⁴ Accordingly, in its May 21, 2021 comments, Wisconsin DNR stated that “[i]t is the responsibility of the communities (Shawano County, City of Shawano, and Village of Cecil) to ensure any changes that affect the Base Flood Elevation...are reflected on [FEMA] Flood Insurance Rate Maps. Non-compliance of these requirements may be viewed as a [NFIP] violation and the communities are subject to probation or suspension from the NFIP Program. Shawano County, the City of Shawano, and the Village of Cecil, are viewed by FEMA as the entities enforcing their floodplain ordinances and maintaining compliance with Wis. Admin. Code, Chapter NR 116 and 44 Code of Federal Regulations 59 -72.” Accordingly, Wisconsin DNR stated that, “[a]t a minimum, we recommend that NEW Hydro work with the [Wisconsin DNR] to develop a robust operation plan clearly identifying processes and actions that will keep the dam in compliance with their FERC Exemption. We also recommend that NEW Hydro work with the local units of government regarding the proposed water level increases, and the impacts on the current Base Flood Elevation.” In a letter dated May 25, 2021, Wisconsin DNR clarified that the main purpose of the May 21, 2021 letter was to advise “that the proposed pool elevation changes could have ramifications on how the local communities implement the [NFIP].” Consistent with Wisconsin DNR’s recommendation, Commission staff concur that an Operations Plan should be developed with Wisconsin DNR in order to define how the exemptee will comply with the terms of

¹² Exhibit E of Amendment Request filed May 10, 2019.

¹³ *Id.*

¹⁴ Wisconsin DNR comments, Appendix 1 of May 28, 2021 Amendment Request.

its exemption. Ordering paragraph (B) requires the exemptee to file an Operations Plan with the Commission for approval.

12. In addition, given that 44 C.F.R. § 65.3 requires communities participating in the NFIP to notify FEMA of increases or decreases to Base Flood Elevations resulting from physical changes affecting flooding conditions, Commission staff encourage the exemptee to work with the local communities regarding any impacts to Base Flood Elevations.

13. Five individuals living downstream of the project and the downstream Town of Matteson filed comments in this proceeding expressing concerns related to possible downstream flooding at the end of previous temporary amendments when the impoundment was drawn down. Additionally, prior to the exemptee filing the temporary amendment application, the Commission received a complaint alleging downstream flooding due to drawdowns that occurred at the end of the previous temporary amendment periods.¹⁵ The comments and complaint all refer to flooding allegedly resulting from the drawdown the exemptee completed to reduce the impoundment elevation at the conclusion of the temporary higher normal elevation. This drawdown was necessary in order to return to the normal elevation specified in the exemption.¹⁶

14. However, flooding due to a drawdown can be prevented in this case by limiting the drawdown rate so it does not significantly increase downstream flows above the inflow to the project impoundment. The exemptee's proposal is for a two-year amendment and does not include any seasonal drawdowns prior to the end of that two-year period. Therefore, Commission staff determine there is sufficient time for the exemptee to consult with the resource agencies and file a plan, for Commission approval, for completing the drawdown at a rate that will not induce or exacerbate downstream

¹⁵ Commission staff are investigating this complaint in a separate proceeding under Docket No. 8015-011.

¹⁶ According to the exemptee's June 18, 2021 filing, the exemptee did not conduct a drawdown during November of 2017 or 2019. During November of 2018, the exemptee states the river rose above bankfull height (but below flood stage) at the downstream Shiocton gage prior to the drawdown, but remained below bankfull height during the drawdown. The exemptee states the river remained well below bank full height during all of November 2020. Bankfull height or stage is an established gage height at a given location along a river or stream, above which a rise in water surface will cause the river or stream to overflow the lowest natural stream bank somewhere in the corresponding reach. Flood stage is an established gage height for a given location above which a rise in water surface level begins to create a hazard to lives, property, or commerce. <https://www.weather.gov/aprfc/terminology>

flooding. This staff-recommended drawdown plan should be incorporated into the Operations Plan required by ordering paragraph (B).

B. Water Quality

15. Wolf River Pond is considered a mesotrophic impoundment and has a bottom substrate consisting mostly of fine sand, silt, and clays, with pockets of organic deposits. The shorelines of the impoundment are vegetated and/or armored¹⁷ and are relatively stable due to the project's run-of-river operation. Approximately 75 percent of the shoreline of the impoundment is developed.¹⁸

16. In a 2016 study, Wisconsin DNR collected water quality data above and below the upstream Balsam Row Hydroelectric Project. The study included parameters such as air temperature, water temperature, conductivity, dissolved oxygen, pH, and water clarity. The water chemistry parameters collected were reviewed and evaluated against Wisconsin DNR's listing methodology for impaired waters. Temperature data recorded in 2016 indicate that surface water temperatures at both sites from June-August were below the ambient temperature criteria for warm-large rivers. The study also found no significant impairments to the environment resulting from excessive nutrients, suspended solids, or temperature at the sites; dissolved oxygen concentrations were never observed below the 5-milligram-per-liter Wisconsin State Water Quality Criteria for these waters.¹⁹ The WRWRMP concludes that "[t]he hydrologic modifications on the Wolf River by the Shawano Paper Mill and Balsam Row Dams have minor impacts on most of the chemical (e.g., nutrients, dissolved oxygen) dynamics of the Wolf River ecosystem."

17. There are no prior or current water quality concerns in the project vicinity. Temperature, suspended solids, and nutrient levels have all been determined to be within the acceptable criteria for state standards. Additionally, the shoreline of the impoundment is relatively stable and not likely to easily erode and discharge suspended sediments into the waterway, especially under the run-of-river mode of operation required at the project. Therefore, Commission staff determine that the proposed two-year variance for a year-round normal pool elevation of 802.9 feet NGVD is not likely to affect existing water quality at or below the project.

¹⁷ An armored shoreline has been stabilized by human influence such as riprap, sheet piling, or a seawall.

¹⁸ WRWRMP at 31.

¹⁹ *Id.* at 32.

C. Aquatic Resources

18. The Wolf River is a warmwater fishery that supports a diverse variety of fish species. A 2014 study conducted by Wisconsin DNR indicated that the most common species are black crappie, bluegill, northern pike, yellow bullhead, golden redhorse, pumpkinseed sunfish, shorthead redhorse, and rock bass.²⁰ The primary predatory game fish found in the reservoir are northern pike, largemouth bass, and smallmouth bass – all of which maintain their populations through natural reproduction. Naturally reproducing walleye are found in Wolf River Pond in low density, as well as muskellunge.²¹ Walleye also spawn below the project and may be affected by seasonal drawdowns. In a comment dated June 4, 2019, Walleyes for Tomorrow voiced concerns regarding potential negative effects on walleye spawning and rearing stemming from the 2019 permanent amendment application (which was subsequently withdrawn) proposing a spring refill of the reservoir prior to June 1 annually, following a winter drawdown beginning November 15. Walleyes for Tomorrow stated that the refill of the reservoir would reduce outflow below the project at a critical time during walleye spawning and rearing, and too sharp a reduction could negatively affect the eggs and fry due to the necessity of these seasonal flows for their life cycle. Therefore, Commission staff determine that reservoir refill rates considering walleye protection measures should be incorporated in the drawdown plan, which is to be included in the Operations Plan required by ordering paragraph (B).

19. The Winnebago River system supports one of the nation's largest naturally reproducing lake sturgeon populations. Consequently, the Wolf River experiences a significant annual spawning run of lake sturgeon traveling from Lake Winnebago to the Wolf River. The Shawano Paper Mills dam is the most downstream obstruction on the Wolf River, blocking migrating fish including lake sturgeon; construction of the Shawano Paper Mills Dam in 1892 totally blocked upstream migration of lake sturgeon, resulting in the eventual extirpation of lake sturgeon above the project.²² Lake sturgeon are an important cultural resource to the Menominee Indian Tribe (Tribe); the species historically utilized the rapids below Keshena Falls as spawning habitat. Wisconsin DNR and the Tribe have worked collaboratively to restore lake sturgeon to the Wolf River since the early 1990's. Similar to the concerns above relating to negative effects of spring refills on walleye spawning and recruitment, Sturgeon for Tomorrow provided comments on June 6, 2019 expressing that "...reducing flows in the Wolf River to refill Shawano Lake in spring, specifically May 15 to 30, could adversely affect lake sturgeon sac fry and larvae at the major spawning site below the Shawano Paper Mill[s] Dam." In a later comment filed April 25, 2020, Sturgeon for Tomorrow indicated that it was "...not

²⁰ *Id.* at 200.

²¹ *Id.* at 194.

²² *Id.* at 47.

opposed to a refill rate of 0.4 inch per day to achieve a summer pool height of 802.9 feet NGVD by June 1 [for the 2020 season].” Therefore, Commission staff determine that refill rates considering sturgeon protection measures should be incorporated in the drawdown plan, which is to be included in the Operations Plan required by ordering paragraph (B).

20. Shawano Lake supports a population of walleye that are hatched, reared, and stocked by the Shawano Chapter of Walleyes for Tomorrow. Walleye fry are spawned from adults that are netted in Shawano Lake, then are stocked in an effort to restore the population. Additionally, Walleyes for Tomorrow has installed rocky spawning habitat in Shawano Lake to aid in natural reproduction of the species. Included in the May 28, 2021 amendment application, Walleyes for Tomorrow Shawano Chapter provided comments of support for the increase in normal reservoir elevation proposed in the temporary amendment, stating that the current normal elevation in Shawano Lake (a corresponding elevation of 802.5 feet NGVD in Wolf River Pond) is exposing spawning habitat for species such as blue gills, walleye, and northern pike, thereby negatively impacting these species’ recruitment.²³

21. Typical herptiles in the project vicinity include the blue-spotted salamander, mudpuppy, eastern fox snake, common garter snake, red-bellied snake, American toad, spring peeper, wood frog, painted turtle and snapping turtle.²⁴ Given these species’ mobile nature, Commission staff determine that there would be no adverse effects to herptiles in the project vicinity due to the proposed amendment.

22. The exemptee consulted with FWS in 2019 to obtain a list of federally threatened and endangered species that may occur in the project vicinity. Of the five species on the list, one aquatic organism, the snuffbox mussel, was identified to possibly occur in the vicinity of the project. In its Exhibit E of its 2019 request for permanent amendment (which was then subsequently withdrawn), the exemptee stated that a gradual drawdown of the reservoir (not more than 0.4 feet in a 24-hour period) would allow the snuffbox mussels to migrate to inundated areas before becoming stranded or desiccated. Therefore, Commission staff determine that refill rates considering protection measures for the snuffbox mussel should be incorporated in the drawdown plan, which is to be included in the Operations Plan required by ordering paragraph (B).

²³ Appendix 3 of the May 28, 2021 Temporary Amendment Application.

²⁴ Exhibit E of 2019 Amendment Application.

23. The littoral zone²⁵ of the impoundment is minimal due to its narrow and riverine nature; the maximum rooting depth in the impoundment is 7.9 feet.²⁶ Common aquatic plant species occurring in the project impoundment include common waterweed, coontail, flat-stem pondweed, common watermeal, small duckweed, forked duckweed, wild celery, and stonewort; the invasive Eurasian watermilfoil is also dominant.²⁷

24. The Red River is a major tributary to the impoundment and is considered cool/warmwater, consisting of riffles and pools, along with some moderately deep runs. The Red River has clear, cool water and provides excellent habitat for aquatic species. It is likely that there is significant interaction between aquatic species that inhabit the Wolf and Red Rivers; the Red River likely serves as a source of thermal refuge for riverine fish and mussel species if conditions in Wolf River Pond become seasonally less suitable.

25. The proposed amendment would maintain the reservoir in a run-of-river mode year-round at the historically maintained higher normal elevation of 802.9, and under this scenario, large unnatural seasonal fluctuations (i.e., drawdowns) are not likely to occur under normal circumstances. Additionally, the project has been operated in the proposed manner since at least 2000-2015 and studies from that time frame indicate that the system supports a diverse and healthy aquatic community under the conditions proposed in the variance. The proposed increase to the higher normal target impoundment elevation would occur outside of the spawning and critical rearing period for these species, and if performed under the conditions set forth in the exemption,²⁸ is not likely to negatively affect sturgeon and walleye populations below the project. Therefore, no adverse effects would occur to aquatic resources inhabiting the project impoundment, nor the connected waterways, under the proposed amendment.

26. Given the previous comments relating to impoundment refill rates and timing, if a drawdown/refill becomes necessary due to maintenance or other unforeseen circumstances, Commission staff determine that there could be potential negative effects to lake sturgeon and walleye populations below the project, as well as the federally endangered snuffbox mussel potentially occurring at the project. Therefore, drawdown and refill rates addressing these concerns should be developed and incorporated into the

²⁵ The littoral zone is the area of a lake or impoundment where sunlight penetrates all the way to the sediment, allowing aquatic plants to grow.

²⁶ WRWRMP at 159.

²⁷ *Id.* at 33.

²⁸ Under the Wisconsin DNR's terms and conditions incorporated into the exemption by Standard Article 2, a minimum of 25 percent of the natural base flow of the Wolf River must be passed through the dam or powerhouse at all times.

drawdown plan as part of the Operations Plan, in consultation with Wisconsin DNR and FWS, to address potential reservoir fluctuations, should they become necessary due to project maintenance or unforeseen circumstances.

D. Recreational Resources

27. Recreation facilities are not a requirement of the exemption, however there are numerous recreation opportunities in the vicinity of the project. According to the 2015 Licensed Hydropower Development Recreation Report (Form 80),²⁹ the exemptee reported these recreation amenities were available for public use at the project: a single lane boat launch, boating, portage, fishing, active recreation area (playground), picnic area, winter recreation opportunities, and an access point.

28. Recreational boaters using the reservoir have filed comments indicating that with the lower operating elevation implemented in 2015, boaters have encountered numerous safety and operational issues. The issues relate to boat docks and difficulty operating boat lifts due to shallow water in the vicinity of these docks, and navigation problems in channels due to encountering underwater obstacles at lower water levels, including propellers striking obstructions and the lake bottom. During years when previous variances were granted and the reservoir was operated at the higher elevation, boaters did not encounter these issues. Allowing the exemptee to operate at the higher target elevation of 802.9 feet msl for a two-year period would help alleviate these issues and enhance water-based recreation opportunities.

29. Similarly, the proposed action would not affect existing land-based recreation opportunities near the water's edge (*i.e.*, boat ramps, fishing, and shoreline access), and could potentially benefit recreationists due to the slight increase in the water level by improving access to the shoreline and fishing opportunities. The reservoir has previously operated at the proposed higher elevation, and these land-based recreational opportunities have remained usable for recreationists during years when previous variances have been approved. Commission staff expect land-based recreation, use of boat docks, and boating opportunities would likely be enhanced due to the proposed additional 0.4 feet of elevation in the reservoir.

²⁹ Form 80 required licensees and exemptees to monitor and report on overall recreation use of project lands and waters to the Commission every six years. This requirement was eliminated in December 2018. *See Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects*, Order No. 852, FERC Stats. & Regs. ¶ 31,407 (2018) (cross-referenced at 165 FERC ¶ 61,256); 18 C.F.R. pts. 8, 141 (2020).

E. Cultural Resources

30. Cultural resources of historical significance related to Wisconsin heritage in the vicinity of the project include local buildings and sites within the City of Shawano. Heritage Park, adjacent to the project, is operated by the Shawano County Historical Society. The site was the location of the county's first sawmill and grist mill. The nearby Heritage House was formerly the home of the mill owner. Additionally, several indicant mounds and old village sites are located west and north of the City of Shawano along the Wolf River.

31. Since the exemptee's proposal does not involve ground disturbance or vegetation removal, Commission staff do not expect that cultural resources will be encountered by increasing the elevation of the reservoir by 0.4 foot. While unlikely, unknown cultural resources could be discovered due to shoreline erosion along the Shawano reservoir. If a previously undiscovered cultural resource site is discovered due to the temporary change in reservoir elevation, the exemptee should immediately contact the Wisconsin State Historic Preservation Officer (Wisconsin SHPO) and any tribes that might attach religious or cultural significance to the discovered cultural resources to determine what steps need to be taken to evaluate the discovery. If the cultural resource is determined to be eligible for listing in the National Register of Historic Places, the exemptee must consult with the Wisconsin SHPO and any relevant tribes to determine what measures would be needed to mitigate or avoid any adverse effects. The exemptee should file with the Commission, for approval, a report on the discovery and the effects associated with the temporary change in elevation. If the discovery would be adversely affected, the report should contain the proposed mitigation measures along with any comments received from the Wisconsin SHPO and tribes on the report. The exemptee should allow 30 days for an agency to comment. If there are no comments, the exemptee should include its request for comments in the filing to the Commission. Ordering paragraph (C) requires these measures.

Administrative Conditions

A. Study Plan

32. In the May 28, 2021 application, the exemptee stated it is committed to efforts to secure a permanent amendment to resolve the stakeholder concerns related to the normal impoundment elevation. However, the exemptee indicates pursuing the permanent amendment is contingent upon a cost sharing agreement with Shawano Area Waterways Management (SAWM), which the exemptee was in the process of formalizing. While the exemptee is free to develop a cost sharing agreement, resolving this longstanding issue is the exemptee's responsibility.

33. The exemptee stated it plans to begin efforts toward applying for a permanent amendment later in 2021 but did not provide any information regarding what these efforts

will consist of or the timing of any associated filings. In order to keep the Commission apprised of the exemptee's progress toward resolving this longstanding issue, ordering paragraph (D) requires the exemptee to provide documentation of finalizing the cost sharing agreement with SAWM and a plan and schedule. The plan and schedule must provide a detailed explanation of all studies and information the exemptee will conduct and collect, the dates for conducting any studies, the filing dates for any associated reports, and documentation of agency consultation. Additionally, to ensure that measures are being taken toward a permanent solution, the exemptee must file a status report demonstrating diligence toward completing the tasks necessary to file an application for a permanent amendment or propose implementation of other measures to permanently resolve the recreation and boater safety issues.

Conclusion

34. As stated above, the terms and conditions for the project require the exemptee to maintain the impoundment between elevations 801.83 feet msl and 803.17 feet msl, with a normal elevation of 802.5 feet msl. Under the temporary amendments granted in 2015, 2018, 2019, and 2020, the exemptee operated the project at a target impoundment elevation of 802.9 feet msl, which is consistent with historical operations, albeit contrary to its exemption requirements. The project was operated at the requested higher normal elevation for at least 15 years prior to 2015, and for significant portions of 2015 through 2020, with no observed or reported significant environmental effects. Commission staff do not anticipate any significant environmental effects by approving another temporary amendment to operate at a target impoundment elevation of 802.9 feet msl level, while the exemptee works toward proposing a long-term solution. However, to extend beyond the proposed two-year time frame, a permanent amendment must be filed with the Commission, for approval, as indicated below. In the interim, the temporary amendment should be approved.³⁰

35. Commission staff note that, since 2015, the exemptee has repeatedly applied for either temporary or permanent amendments of the normal impoundment elevation. The prior temporary amendment applications were granted while the permanent amendment application was withdrawn. These previous applications have, on at least some occasions, been filed just prior to the proposed start date. While Commission staff has obtained enough information in this instance to act on the exemptee's application, in

³⁰ Two years from the filing date of the application would fall just before the recreation season (May 28, 2023), and two years from the issuance date of this order would fall in the middle of the recreation season (July 21, 2023). To ensure the Commission has adequate time to process a permanent amendment application, and avoid a possible drawdown that would impact recreation and boater safety in 2023, the temporary amendment should be granted until November 15, 2023, consistent with the previous temporary amendments.

instances where there is a recurring issue at a project, the Commission generally disfavors piecemeal, temporary changes to license or exemption conditions, particularly on such an expedited basis. Accordingly, if the exemptee believes that the normal impoundment elevation required pursuant to Article 2 of the exemption is not consistent with the public interest, the exemptee should apply for a permanent amendment of its exemption, after following the consultation requirements of the Commission's regulations.

36. To allow the exemptee, public, resource agencies, and the Commission adequate time to process an application for a permanent amendment, ordering paragraph (E) requires the exemptee to file the application no later than December 31, 2022. Should the exemptee determine that a permanent amendment is not appropriate, the exemptee must inform the Commission that it is no longer seeking a permanent amendment. Any such notification must be filed no later than December 31, 2022, must explain why a permanent amendment is not the appropriate solution, and include a detailed description of the measures the exemptee proposes to implement to permanently resolve the recreation and boater safety issues.

The Director orders:

(A) Eagle Creek Renewable Energy's, on behalf of North Eastern Wisconsin Hydro, LLC, May 28, 2021 application for a temporary amendment of the normal impoundment elevation requirement at the Shawano Paper Mills Dam Project until November 15, 2023, is approved, as modified by ordering paragraphs (B) through (E).

(B) Within 90 days of the issuance date of this order, the exemptee must file an Operations Plan, for Commission approval, that details the actions and processes that will be used to ensure compliance while temporarily operating the project at the higher normal target impoundment elevation. The exemptee must develop the Operations Plan in consultation with the Wisconsin Department of Natural Resources and the U.S. Fish and Wildlife Service (collectively, agencies), and include documentation of agency comments or recommendations, as well as a description of how they were addressed or incorporated into the Operations Plan.

The Operations Plan (plan) must include descriptions of: (1) the processes for increasing the impoundment to the temporary higher normal impoundment elevation; (2) any drawdown(s) that may be required, including the fill and drawdown rates that will prevent flooding and adverse impacts to downstream resources; and (3) how the exemptee will ensure project operations at the temporary higher normal impoundment elevation will prevent increased upstream flooding.

The plan must include a provision for reporting any deviations from the impoundment elevation range of 801.83 to 803.17 feet mean sea level, as follows: Deviations must be reported to the agencies and the Commission as soon as possible, but

no later than ten (10) days of occurrence. The report must include a description of the deviation, as well as the magnitude, duration, and what actions were taken in response, as well as actions taken to prevent similar future deviations. Also, the report should include whether any adverse environmental effects (or if none) were observed as a result of the deviation, as well as a description of how this was determined (*i.e.*, time and methods of survey in the affected area(s)). Documentation of consultation with the agencies as well as any comments received as a result of the deviation must be included in the report.

Additionally, the exemptee must consult with the agencies regarding any planned deviations from the headwater elevation requirement (*i.e.* scheduled maintenance or non-emergency drawdowns) at least ten (10) days prior to initiation. Following the planned deviation, the exemptee must provide a report to the Commission within ten (10) days that includes the reporting requirements detailed above.

(C) If any cultural resources are discovered due to the temporary change in the reservoir elevation at the Shawano reservoir, the exemptee must immediately contact the Wisconsin State Historic Preservation Officer (Wisconsin SHPO) and any tribes that might attach religious or cultural significance to the cultural resources to determine what steps need to be taken to evaluate the discovered cultural resources. If the resource is found to be eligible for the National Register of Historic Places, the exemptee, in consultation with the Wisconsin SHPO and tribes, if applicable, must develop measures to mitigate or to avoid any adverse effects. The exemptee must file with the Commission, for approval, a report on the resource and the effects associated with the temporary change in elevation. If the property would be adversely affected, the report must contain the proposed mitigation measures along with any comments received from the Wisconsin SHPO and tribes on the report. The exemptee must allow 30 days for an agency to comment. If there are no comments, the exemptee must include documentation of consultation in the filing to the Commission. The exemptee must implement mitigation measures until instructed by the Commission.

(D) Within 120 days of the issuance date of this order, the exemptee must file documentation of finalizing the cost sharing agreement with Shawano Area Waterways Management and a plan and schedule for filing a permanent amendment to resolve the longstanding issues with the normal impoundment elevation. The plan and schedule must detail the studies and information the exemptee will conduct and collect, the dates for conducting any studies, the filing dates for any associated reports, and the expected date for filing a permanent amendment. Additionally, by June 30, 2022, the exemptee must file a status report demonstrating diligence toward completing the tasks necessary to file an application for a permanent amendment. The status report must include a detailed explanation of all tasks and studies completed to date, and those that remain to be completed. The status report should also state whether there are any issues that could delay the timely filing of a permanent amendment application and explain what the exemptee is doing to resolve the issues.

(E) No later than December 31, 2022, the exemptee must either file an application for a permanent amendment of the normal target elevation or notify the Commission that it is no longer seeking a permanent amendment. The notification must explain why a permanent amendment is not the appropriate solution, and include a detailed description of the measures the exemptee proposes to implement to permanently resolve the recreation and boater safety issues.

(F) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2018), and the Commission's regulations at 18 C.F.R. § 385.713 (2020). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

Kelly Houff
Chief, Engineering Resources Branch
Division of Hydropower Administration
and Compliance