

161 FERC ¶ 62,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Merchant Hydro Developers LLC

Docket No. DI17-11-000

ORDER RULING ON DECLARATION OF INTENTION
AND FINDING LICENSING NOT REQUIRED

(Issued December 19, 2017)

1. On September 14, 2017, Merchant Hydro Developers LLC, filed a Declaration of Intention (DI) concerning the proposed Pennsylvania Pump Storage Project, to be located near the Borough of Shenandoah, in Schuylkill County, Pennsylvania.

PROJECT DESCRIPTION

2. The proposed closed-loop Pennsylvania Pump Storage Project would consist of: (1) two new roller-compacted concrete or rock fill dams; (2) two new upper reservoirs with a combined surface area of 470 acres and 11,050 acre-feet of usable storage capacity at a water surface elevation of about 1,750 feet mean sea level (msl); (3) a new lower reservoir, including an existing abandoned mine pit with a surface area of 135 acres and 13,200 acre-feet of usage storage capacity at a water surface elevation between 1,140-1,210 feet msl; (4) intakes; (5) a 50-foot-high, 175-foot-long, 100-foot-wide powerhouse with 2 to 3 generating units having a total installed capacity of 500 megawatts; (6) four 7-foot-diameter, 5,280-foot-long penstocks; (7) a transmission line connecting the generating units with PPL Electric Utilities' Wheelabrator Frackville Energy's electric distribution system and/or the Locust Wind Farm adjacent to the proposed project; and (8) appurtenant facilities. Merchant Hydro Developers LLC states that it will use only groundwater from an underground abandoned mine to initially charge and seasonally refill the upper reservoirs. The applicant proposes to transport groundwater to its upper reservoirs using underground pumping equipment and intakes.

PUBLIC NOTICE

3. On October 2, 2017, Commission staff issued a public notice of the DI. The notice established November 1, 2017, as the deadline for filing protests, comments, and motions to intervene. No protests, comments, or motions to intervene were filed.

JURISDICTION

4. Pursuant to section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. § 817(1) (2012), a non-federal hydroelectric project must be licensed (unless it has a still-valid pre-1920 federal permit) if it:

- (a) is located on a navigable water of the United States;
- (b) occupies lands or reservations of the United States;
- (c) utilizes surplus water or waterpower from a government dam; or
- (d) is located on a stream over which Congress has Commerce Clause jurisdiction, is constructed or modified on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

DISCUSSION

5. The project does not occupy any public lands or reservations of the United States and does not use surplus water or waterpower from a Federal government dam. The project is also not located on a navigable water of the United States. The project would be constructed after August 26, 1935, and would offset electrical needs that would otherwise be supplied by the interstate grid, thus affecting the interests of interstate commerce.¹ However, the Pennsylvania Pump Storage Project would use only groundwater. The Commission has found that although groundwater is a Commerce Clause water for the purposes of voluntary licensing under section 4(e) of the FPA, projects that use only groundwater do not require licensing because they are not located on a non-navigable Commerce Clause stream within the meaning of section 23(b)(1) of the FPA.²

CONCLUSION

¹ It is well settled that small hydroelectric projects that are connected to the interstate grid affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1). *See Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

² *See Swanton Village, Vermont*, 70 FERC ¶ 61,325 (1995) (concluding that groundwater is not a non-navigable Commerce clause stream for the purposes of the Commission's mandatory licensing jurisdiction).

6. Consequently, section 23(b)(1) of the FPA does not require licensing of the proposed Pennsylvania Pump Storage Project. If evidence sufficient to require licensing is found in the future, section 23(b)(1) would require licensing. Under section 4(g) of the FPA, the project owner could then be required to apply for a license.

The Director orders:

(A) Section 23(b)(1) of the Federal Power Act does not require licensing of the proposed Pennsylvania Pump Storage Project. This order is issued without prejudice to any future determination upon new or additional evidence that licensing is required.

(B) 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 FPA, 16 U.S.C. § 825l (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2017). 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. A party's failure to file a request for rehearing shall constitute acceptance of this order.

Steve Hocking, Chief
Environmental and Project Review Branch
Division of Hydropower Administration
and Compliance

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