

**163 FERC ¶ 62,067**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Merchant Hydro Developers, LLC

Docket No. DI18-2-000

ORDER RULING ON DECLARATION OF INTENTION  
AND FINDING LICENSING NOT REQUIRED

(Issued May 1, 2018)

1. On February 6, 2018, and supplemented on March 5 and April 11, 2018, Merchant Hydro Developers, LLC (Merchant Hydro) filed a Declaration of Intention (DI) concerning the proposed Old Forge Bore Hole Reclamation Pump Storage Project, to be located near the Borough of Duryea, in Luzerne and Lackawanna Counties, Pennsylvania.

## PROJECT DESCRIPTION

2. The proposed closed-loop Old Forge Bore Hole Reclamation Pump Storage Project would consist of: (1) a new upper reservoir with a surface area of 300 acres and a storage capacity of 4,500 acre-feet at a surface elevation of approximately 1,356 feet above mean sea level (msl) created through construction of a new roller-compacted concrete or rock-fill dam; (2) a new lower reservoir with a surface area of 300 acres and a storage capacity of 5,014 acre-feet at a surface elevation of 550 feet msl; (3) four new 5,640-foot-long, 16-foot-diameter penstocks connecting the upper and lower reservoirs; (4) a new 250-foot-long, 150-foot-wide, 50-foot-high powerhouse containing two or three turbine-generator units with a total rated capacity of 450 megawatts; (5) a new transmission line connecting the powerhouse to PPL Electric Utilities' existing electric distribution system; and (6) appurtenant facilities. Merchant Hydro states that it will use only groundwater from an underground abandoned mine to initially charge and seasonally refill the reservoirs.<sup>1</sup> The applicant proposes to transport groundwater to its upper reservoir using underground pumping equipment and intakes.

---

<sup>1</sup> In its application, Merchant Hydro stated that it would obtain groundwater for the project from the Old Forge Bore Hole. Because it appeared that the Old Forge Bore Hole discharges into the Lackawanna River, Commission staff asked Merchant Hydro for additional information about its proposal on April 5, 2018. On April 11, 2018, Merchant Hydro clarified that the intake for its proposal would not be located on the bore hole itself (*continued ...*)

## PUBLIC NOTICE

3. On February 20, 2018, Commission staff issued a public notice of the DI. The notice established March 22, 2018, as the deadline for filing protests, comments, and motions to intervene. On February 26 and March 1, 2018, respectively, Linde Corporation and Susquehanna Mining Solutions, LLC filed comments supporting the project.

## 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.<sup>2</sup> However, the Old Forge Bore Hole Reclamation 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

---

and that the groundwater would be accessed at a separate location.

<sup>2</sup> 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).

## CONCLUSION

6. Consequently, section 23(b)(1) of the FPA does not require licensing of the proposed Old Forge Bore Hole Reclamation 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 Old Forge Bore Hole Reclamation 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. § 8251 (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

---

<sup>3</sup> See *Swanton Village, Vermont*, 70 FERC ¶ 61,325 (1995) (concluding that groundwater is not a non-navigable Commerce Clause stream for purposes of the Commission's mandatory licensing jurisdiction).

Document Content(s)

DI18-2-000\_.DOCX.....1-3