

127 FERC ¶ 61,256
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Borough of High Bridge, New Jersey

Docket No. DI09-4-001

ORDER DENYING REHEARING

(Issued June 18, 2009)

1. On April 14, 2009, the Borough of High Bridge, New Jersey (Borough) filed a request for rehearing of a March 16, 2009 order issued by Commission staff.¹ The order found, in accordance with section 23(b)(1) of the Federal Power Act (FPA),² that a license is required to operate the Borough's proposed Lake Solitude Hydro Power Project (Lake Solitude), located on the South Branch Raritan River in Hunterdon County, New Jersey. For the reasons discussed below, we deny rehearing.

Background

2. The Lake Solitude project consists of an existing dam built in 1909, an existing 6.5-foot-diameter steel penstock, and an abandoned building that once served as a powerhouse. The steel penstock is severely corroded, and the powerhouse is completely void of equipment and in poor condition. There are no existing transmission lines and no record of the last time power was generated at the site. The Borough proposes to install a new penstock lining, turbines and transmission lines, and refurbish the powerhouse with new mechanical and electrical equipment. The Borough intends to transmit the power produced by the Lake Solitude project to Custom Alloy, a downstream industry.

3. Section 23(b)(1) of the FPA requires a non-federal project without a valid pre-1920 permit to be licensed if it: (1) is located on a navigable water of the United States; (2) occupies lands of the United States; (3) utilizes surplus power or water power from a government dam; or (4) is located on a body of water over which Congress has

¹ *Borough of High Bridge, New Jersey*, 126 FERC ¶ 62,196 (2009) (March 16 Order).

² 16 U.S.C. § 817(1) (2006).

commerce clause jurisdiction, has undergone project construction on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

4. In the March 16 Order, Commission staff concluded that the Lake Solitude project does not occupy public lands or reservations of the United States nor use surplus water or waterpower from a federal government dam. Staff further concluded that a determination as to the navigability of the South Branch Raritan River is unnecessary because licensing is required on other grounds. The order found that licensing is required because the South Branch Raritan River is a commerce clause waterway, project construction will occur after 1935, and operation of the project will affect the interests of interstate commerce. On rehearing, the Borough disputes each of these findings.

Discussion

A. Commerce Clause Waterway

5. Section 23(b)(1) of the FPA expressly refers to two types of commerce clause waters over which the Commission has jurisdiction: (1) “navigable waters of the U.S.,” and (2) “any stream or part thereof, other than those defined as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce.” Thus, the Commission’s jurisdiction reaches both navigable waters and non-navigable commerce clause waters.³ Non-navigable commerce clause waters include the headwaters and tributaries of navigable waters.⁴

6. In the March 16 Order, Commission staff found that the South Branch Raritan River is a commerce clause waterway because it is a tributary of the Raritan River and the Atlantic Ocean, both of which are navigable waterways.⁵ On rehearing, the Borough argues that there is no commerce clause jurisdiction over the waters at the site of the Lake

³ Although navigable waters are a subset of commerce clause waters, the Commission generally uses the latter term to refer to non-navigable commerce clause waters.

⁴ *Federal Power Comm’n. v. Union Elec. Co.*, 381 U.S. 90, 97 (1965).

⁵ Although the Commission has never made an FPA finding that the Raritan River is navigable, the Atlantic Ocean is inarguably a navigable waterway, and the lower portion of the Raritan River has been used to transport goods for centuries. *See, e.g., Gibbons v. Ogden*, 17 Johns. 488 (N.Y. 1820) (steamboats operate from New York City, south to South Amboy and up the Raritan River to New Brunswick), *rev’d on other grounds*, 22 U.S. 1 (1824). *See also Sheldon Jackson College*, 101 FERC ¶ 61,334 (2002) (a river that flows into the ocean is commerce clause water).

Solitude project because the South Branch Raritan River is located entirely within the State of New Jersey, and the waters at the site are not “navigable waters and cannot transport interstate or foreign commerce.” The Borough believes the South Branch Raritan River is not navigable because these waters do not meet the U.S. Coast Guard definition of navigable waters, and because the New York District of the U.S. Army Corps of Engineers informed the Borough that the South Branch Raritan River would not be considered navigable at the project site.

7. The Borough misunderstands the distinction between non-navigable commerce clause waters and navigable waters in section 23(b)(1) of the FPA. The FPA requires a license for all projects located in navigable waters, and, if two other conditions are met, for projects located in non-navigable commerce clause waters. While Commission staff made no finding as to the navigability of the South Branch Raritan River, the river is nonetheless a commerce clause waterway because it is a tributary of the Raritan River and the Atlantic Ocean. Since the South Branch Raritan River at the project location is a commerce clause waterway under the terms of FPA section 23(b)(1), rehearing is denied on this issue.

B. Post-1935 Project Construction

8. As long as pre-1935 projects located on commerce clause waters have no post-1935 construction, the project is not required to be licensed. Ordinary repair, maintenance, or reconstruction at a continuously operating project built before 1935 does not constitute post-1935 construction under FPA section 23(b)(1).⁶ However, where a pre-1935 project has been shut down and abandoned, repair or reconstruction to restore generation constitutes post-1935 construction.⁷ To find that a project has been

⁶ *Puget Sound Power and Light Co. v. Federal Power Comm’n.*, 557 F.2d 1311 (9th Cir. 1977); *Farmington River Power Co. v. Federal Power Comm’n.*, 455 F.2d 86, 88-91 (2d Cir. 1972).

⁷ *See Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227, 230 (4th Cir. 1988) (holding that even though the new owners rehabilitated the abandoned project to the exact specifications of the original project, the rehabilitation constituted post-1935 construction under FPA section 23(b)(1)). In *Aquenergy*, the court observed that “section 23(b) was designed to protect the rights of owners to continue to operate projects in existence in 1935; but not to permit a new entrepreneur to start a new business cast in the image of one that had once existed but had been abandoned for more than 30 years.” *Id.*

abandoned, there must have been a cessation of both project generation and project maintenance.⁸

9. Commission staff found that the Lake Solitude project had been abandoned based on the Borough's statements in its declaration of intention that there is no record of the last time power was produced at the facility, and that project works included a severely corroded penstock, a powerhouse void of equipment, and no transmission lines. On rehearing, the Borough argues that the Lake Solitude project was constructed prior to 1935 and the current proposal is only for rehabilitation of existing facilities. The Borough contends that the project was not abandoned since the structural facilities, including the penstock and powerhouse, still exist and the dam has continued to function.

10. The level of rehabilitation required to operate the Lake Solitude project constitutes post-1935 construction. Based on the Borough's statement in its declaration of intention that there is no record of the last time power was produced at the site and its description of the dilapidated facilities, it is clear that the Lake Solitude facilities have been shut down and abandoned. Since a pre-1935 project site has been abandoned, construction activity to restore generation constitutes post-1935 construction within the meaning of FPA section 23(b)(1). Although the Borough's planned activities might have constituted ordinary repair and maintenance had the project operated continuously, because the project has been abandoned this is no longer the case. Therefore, rehearing is denied on this issue.

C. Interests of Interstate or Foreign Commerce

11. Once it has been determined that a project is on a commerce clause waterway and has been the subject of post-1935 construction, a project is required to be licensed if it would affect the interests of interstate or foreign commerce.⁹ A project that is

⁸ Compare *Hodgson v. FERC*, 49 F.3d 822, 828 (1st Cir. 1995) (holding that a twelve-year shut down of a hydroelectric project, during which time the project operator cleaned, maintained and monitored the project, is not abandonment *with James M. Knott, Sr.*, 103 FERC ¶ 61,315, at 62,212 (2003) (finding abandonment where the project had been physically vacated for three years prior to purchase, and no maintenance activities performed).

⁹ In adopting the language requiring an effect on the interests of interstate commerce, Congress intended to invoke "its full authority over commerce, without qualification." *Fed. Power Comm'n v. Union Elec. Co.*, 381 U.S. 90, 97 (1965).

interconnected to the interstate electrical grid affects the interests of interstate or foreign commerce.¹⁰

12. Commission staff found that the interests of interstate commerce would be affected because power produced by the project would be transmitted to Custom Alloy, a downstream industry that is connected to the interstate grid, thereby displacing power that would otherwise be generated elsewhere on the interstate system. On rehearing, the Borough argues that the Lake Solitude project will not affect the interests of interstate commerce because it will not directly connect to the interstate electrical grid and will not displace power from the grid. The Borough further asserts that the Lake Solitude project is not a baseload facility and less than five percent of Custom Alloy's power will come from the Lake Solitude project.

13. Despite the Borough's statement otherwise, the transmission of power from the Lake Solitude project to Custom Alloy would displace power that Custom Alloy would otherwise receive from the interstate grid. As the March 16 Order explained, the project is a member of a national class of judicially recognized small projects whose activities collectively affect interstate commerce by displacing power that would otherwise be generated elsewhere on the interstate system.¹¹ Whether a generation source is directly or indirectly connected to the interstate grid is irrelevant if the project would displace power on the interstate system. Furthermore, because our analysis focuses on the class of small hydroelectric projects that collectively affect interstate commerce, there is no de minimus threshold that must be met before determining that a project displaces power on the interstate system. The fact that the Lake Solitude project would supply Custom Alloy with less than five percent of its power requirements does not affect our determination that displacement would occur.¹² Therefore, rehearing is denied on this issue.

14. Since the Lake Solitude project is located on commerce clause waters, involves post-1935 construction, and affects the interests of interstate commerce, licensing of the project is required under the terms of FPA section 23(b)(1).

¹⁰ *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

¹¹ *Id.*

¹² As for the argument that the Lake Solitude project is not a baseload facility, this is not a relevant consideration in determining whether the project will displace power.

The Commission orders:

The request for rehearing filed by the Borough of High Bridge, New Jersey, on April 14, 2009, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.