

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Appalachian Power Company

Project No. 2210-106

ORDER DENYING REHEARING

(Issued September 21, 2004)

1. On July 27, 2004, Commission staff issued an order approving Appalachian Power Company's application to issue a permit to WHM Corporation to install and operate certain boat docks at Appalachian Power's Smith Mountain Project.<sup>1</sup> On August 24, 2004, Appalachian Power filed a timely request for rehearing of that order.

2. The July 27 Order approved Appalachian Power's request to permit WHM Corporation to install and operate twenty-three stationary docks with two hundred ninety-six covered boat slips and six boat docks with seventy-four floating boat slips totaling three hundred seventy boat slips. Ordering Paragraph (C) in the order requires that:

The licensee, in consultation with the permittee and the Virginia Department of Game and Inland Fisheries, shall develop a mitigation plan for the loss of public access to the area. This plan shall be filed for Commission approval within 6 months of this order. It shall include, but not be limited to, an evaluation of providing additional public access to Smith Mountain Lake on licensee's lands or, as an alternative, funding for public access on lands owned by the permittee, other agencies, or Bedford County.

3. On rehearing, Appalachian Power contends that WHM Corporation should be responsible for providing a site for mitigation, developing the site with additional public

---

<sup>1</sup> Appalachian Power Co., 108 FERC ¶ 62,093 (2004).

access, or negotiating with another entity to develop or fund a site if Appalachian Power does not own a suitable site. It reasons that WHM Corporation, not Appalachian Power, is benefiting from the construction of the private docks within the project boundary. Appalachian Power states that it may consider leasing property to WHM Corporation as a site for the mitigation, but it does not feel that the use of its land for mitigation should be considered as the first, or preferred, option. Appalachian Power requests that Ordering Paragraph (C) be modified to state:

The licensee will ensure that the permittee develops, in consultation with the Virginia Department of Game and Inland Fisheries, a plan to provide additional public access to Smith Mountain Lake as mitigation for the loss of public access to the area. This plan shall be filed for Commission approval within 6 months of this order.

4. The Commission's policy on recreation at licensed hydropower facilities states that the Commission expects that its licensees will acquire and include within the project boundary enough land to provide optimum public recreational resources and access thereto.<sup>2</sup> Further, under Article 7 of Appalachian Power's license, land within the project boundary should be available for use by the public. Appalachian Power has chosen to seek authorization for WHM to construct the boat dock, with the resultant consequence of precluding public access to land that is in the project boundary. It is appropriate that Appalachian Power undertake necessary mitigation and that the mitigation occur on Appalachian Power's current property, if possible. However, if Appalachian Power cannot find any appropriate areas for mitigation on its property, it may look to other places, including, but not limited to, land purchased by WHM Corporation for that use.<sup>3</sup>
5. The Commission carries out its regulatory responsibilities with respect to licensed projects through its licensees,<sup>4</sup> and cannot look to non-licensees for fulfillment of license

---

<sup>2</sup> 18 C.F.R. § 2.7 (2004).

<sup>3</sup> To that the extent that lands not currently within the project boundary are required to provide adequate mitigation, Appalachian Power may be required to obtain sufficient rights over those lands to ensure that the Commission can exercise its regulatory authority, and may have to amend the project boundary to include those lands.

<sup>4</sup> Nockamixon Hydro Associates, 43 FERC ¶ 61,292, at 61,800 (1988); New York State Electric & Gas Corporation, 16 FERC ¶ 61,176, at 61,393 (1981).

requirements.<sup>5</sup> Accordingly, it is Appalachian Power that must prepare and implement the required mitigation plan.

The Commission orders:

The request for rehearing filed by Appalachian Power Company on August 24, 2004, is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

---

<sup>5</sup> Marsh Valley Hydroelectric Co., 64 FERC ¶ 61,120, at 61,953 (1993).