

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Santiam Water Control District

Project No. 12574-001

ORDER DENYING REHEARING

(Issued May 18, 2007)

1. On February 1, 2005, the Santiam Water Control District (District) filed an application for a conduit exemption for the 600-kilowatt (kW) Stayton Project, to be located on Stayton Ditch, off the North Santiam River in Marion County, Oregon. On January 8, 2007, Commission staff dismissed the application, finding that the project does not qualify for an exemption from the licensing requirements of Part I of the Federal Power Act (FPA).¹ On February 7, 2007, the District filed a timely request for rehearing of the dismissal. As discussed below, we deny rehearing.

Background

2. The 1.0-mile-long Stayton Ditch (Ditch) is part of a water supply system consisting of dams, diversions, canals, and laterals that deliver water from the North Santiam River for agricultural uses in the surrounding area, and for municipal and industrial uses for the cities of Stayton and Salem.² Currently, the District diverts 237 cubic feet per second (cfs) of water to the Ditch from the North Santiam River for these uses.

¹ Unpublished letter from William Guey-Lee, Chief, Engineering and Jurisdiction Branch, Division of Hydropower Administration and Compliance, to Larry Trosi, Manager, Santiam Water Control District.

² Water is diverted into the Ditch from the Little Bennett Dam on the North Santiam River.

3. The proposed project would be located on the Ditch 0.75 miles below the point of diversion. The project consists of the existing Stayton powerhouse, located on the south side of the ditch, and a 600-kw generating unit.³ Two other, non-project structures are also located at the site. The powerhouse for the District's exempted Water Street Project No. 6943⁴ is located on the north side of the ditch. A 40-foot-long weir, over which water passes, connects to the two powerhouses. Together, the three structures completely span the Ditch and retain an impoundment of less than five acres.⁵

4. In addition to the 237 cfs that flows through the Ditch, the District would divert into the Ditch from the North Santiam River an additional 762 cfs, which the Stayton Project would use to generate power. Water entering the powerhouse would drop 16 feet, from 447 to 431 feet mean sea level; and the head created by this drop would be used to generate power. On exiting the powerhouse, the water would continue down the ditch to a point where it would be either: (1) sent through the water distribution system, or (2) returned to the North Santiam River two miles downstream from its point of diversion.

5. The Commission issued public notice of the exemption application, seeking motions to intervene, comments, and terms and conditions. Timely interventions and comments were filed by the U.S. Department of the Interior; the National Marine Fisheries Service (NMFS); the Oregon Department of Fish and Wildlife (Oregon Fish and Wildlife); the City of Salem, Oregon; American Rivers; and the Confederated Tribes of Siletz Indians. NMFS, Oregon Fish and Wildlife, and American Rivers oppose

³ A project on the site (also called the Stayton Project) was previously operated without a license by its then-owner, Pacific Power. In 1989, the Commission found that the project was required to be licensed, because, *inter alia*, it is located on a navigable water of the United States. See *Pacific Power*, 48 FERC ¶ 62,103 (1989). The project stopped operating in 1992.

⁴ The 155-kW Water Street Project No. 6943 is operated by the District under a five-megawatt exemption for a hydroelectric project at an existing dam *Order Granting Exemption from Licensing of a Small Hydroelectric Project of 5 MW or Less*, 29 FERC ¶ 62,433 (1984). It uses 165 cfs which is then passed on to the water distribution system for municipal and agricultural use.

⁵ See memorandum from Karl Swanson (Civil Engineer) to Constantine G. Tjoumas (Director, Division of Dam Safety and Inspections, Office of Energy Projects) (February 1, 2006).

issuance of the exemption from licensing, arguing among other things that the project does not qualify as a conduit exemption.

6. On January 8, 2007, Commission staff dismissed the application, finding that the project did not meet the definition of a conduit exemption.

7. On February 7, 2007, the District filed a request for rehearing of the dismissal, arguing that Commission staff had erred.

Discussion

8. Pursuant to section 30 of the FPA,⁶ the Commission is authorized to exempt from the licensing requirements of Part I of the FPA a hydroelectric facility that (1) is located on non-federal lands, (2) does not include a dam or other impoundment, (3) has an installed capacity of 15 megawatts or less (or 40 megawatts or less for certain facilities owned by state or local entities) and (4) uses for generation “only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.”

9. The Commission’s regulations implementing section 30 state that these small conduit facilities may not be an “integral part of a dam,”⁷ and define a dam for this purpose as “any structure that impounds water.”⁸ The regulations define “conduit” as “any . . . ditch . . . or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.”⁹ In turn, the regulations explain that the term “not primarily for the generation of electricity” includes but is not limited to a conduit: “(1) Which was built for the distribution of water for agricultural, municipal, or industrial consumption and is operated for such a purpose; and (2) To which a hydroelectric facility has been or is proposed to be added.”¹⁰

⁶ 16 U.S.C. § 823 (2000).

⁷ 18 C.F.R. § 4.30(b)(28)(iv) (2006).

⁸ 18 C.F.R. § 4.30(b)(4)(ii) (2006).

⁹ 18 C.F.R. § 4.30(b)(2) (2006).

¹⁰ *Id.*

10. In the January 8, 2007 letter, staff concluded that the project is an integral part of a dam because the Stayton Powerhouse, together with the weir and the Water Street Project powerhouse, form a dam across the Ditch that creates a small impoundment. In addition, staff found that the diversion of 762 cfs would be used for the sole purpose of producing power, inconsistent with our regulations.

11. On rehearing, the District disputes both of these conclusions.

12. The District first asserts that the project is not an integral part of a dam, and that no structure on the Ditch impounds water. It states that the Ditch was designed to deliver water to varying locations and that it incorporates natural features of the topography into the delivery system. Further, it states that the weir is merely used to direct the flow either into the power facility or over the weir. According to the District, if the weir had been constructed as a dam, the walls would have been extended deeper to limit the seepage flows under the impoundment structures and abutments would have been built and extended into the surrounding area.¹¹

13. We disagree. As noted above, our regulations define dam as “any structure that impounds water.” An inspection by our regional office concluded that the Stayton Powerhouse (and the other structures on the ditch) are water-retaining, and that they in fact create a small impoundment, a fact that the District does not dispute.¹² The District’s focus on the weir misses this point. In any case, the weir itself contributes to the ability of three structures in the ditch to retain and direct water.¹³ While these structures may not be capable of controlling the storage and release of water to the extent that a dam often does, they nonetheless do create an impoundment, and we therefore conclude that the powerhouse, which forms part of the water barrier, is clearly an integral part of a dam. In promulgating our regulations regarding small conduit exemptions, we stated that such facilities “will not be disqualified unless the powerhouse and the dam together form

¹¹ Request for rehearing at 4-5.

¹² See n.5, *supra*. We have interpreted the term “dam” in the context of conduit exemptions fairly broadly. See *North Side Canal Company*, 67 FERC ¶ 61,040 (1994) (holding that a proposed power canal would be considered to be a dam).

¹³ Characterizing the central structure in the Ditch as a “weir” makes no difference here. In fact, the term can be synonymous with “dam.” See, e.g., Webster’s Third New International Dictionary (G & C Merriam 1981) (defining “weir” as “a dam in a stream to raise the water level or divert its flow”).

a physically and functionally indivisible unit for the impoundment of water.”¹⁴ The two powerhouses and the weir do just that.

14. Indeed, in its application for a five-megawatt exemption for the Water Street Project, the District described the project location as being at a dam.¹⁵ While this statement might appear to be incidental, in fact it is not. In order to qualify for a five-megawatt exemption, a proposed project must be at the site of an existing dam.¹⁶ Thus, to obtain its exemption for the Water Street Project, the District had to show that the structures at the project site constituted an existing dam. Now, in its attempt to qualify for a conduit exemption for the Stayton Project, the District argues that they do not.¹⁷ It cannot have it both ways.

15. In light of the foregoing, we affirm staff’s conclusion that the Stayton Project would be integral to a dam, and therefore does not qualify for a small conduit exemption. Given this holding, we need not reach the District’s second argument, whether the project would alter the primary purpose of the Ditch. We note, however, some doubt as to whether quadrupling flows in the Ditch, with the additional flows apparently being used solely for hydropower, is consistent with maintaining the original purpose of the Ditch.

16. The January 8, 2007 dismissal letter stated that the District could convert its exemption application to a license application pursuant to section 4.93(d) of the

¹⁴ Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act, Order No. 76, FERC Stats. and Regs., Regulations Preambles 1977-1981, ¶ 30,146 at p. 31,002.

¹⁵ See Application for Exemption of a Small Hydroelectric Power Project from Licensing for the Water Street Project No. 6943 (filed May 25, 1984) at Exhibit 1, p. 1. (“[a]n existing hydroelectric generating facility is presently in operation at the dam site on the canal”).

¹⁶ The Public Utility Regulatory Policies Act of 1978 (PURPA) authorizes the Commission to establish a program for the licensing of small hydroelectric projects in connection with existing dams and further defines “small hydroelectric power project” as a project “located at the site of any existing dam, which uses the water power potential of such dam” 16 U.S.C. §§ 2704 and 2708(a)(1) (2000).

¹⁷ The District does not attempt to argue, nor based on the record could it, that there is any significant physical distinction between the Water Street Powerhouse on one side of the ditch and the Stayton Powerhouse on the other.

Commission's regulations.¹⁸ Under this provision, the applicant has 30 days to inform the Commission that it intends to convert its application,¹⁹ and has an additional 60 days to file any additional necessary information.²⁰

17. In its February 7 filing, the District stated that it intended to preserve its right to convert its conduit application to a license application until after our action on its rehearing request. We will, in this instance, allow the District to notify the Commission within 30 days of the date of this order whether it intends to convert its application. Alternatively, the District is free to explore the possibility of filing for a 5-MW exemption.

The Commission orders:

(A) The request for rehearing filed by the Santiam Water Control District on February 7, 2007, is denied.

(B) The Santiam Water Control District shall inform the Commission no later than 30 days from the date of this order if it intends to convert its conduit exemption application for the Stayton Hydroelectric Project No. 12574 to a license application, and, if does so elect, shall file within 90 days from the date of this order any additional information to conform the exemption application to the relevant regulations for a license application.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.

¹⁸ 18 C.F.R. § 4.93(d) (2006).

¹⁹ 18 C.F.R. § 4.93(d)(2) (2006).

²⁰ 18 C.F.R. § 4.93(d)(3) (2006). If the information is sufficient to conform to the license application regulations, the converted application will be considered accepted for filing as of the date the exemption application was filed.