

134 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Appalachian Power Company

Project No. 2210-209

ORDER DENYING REQUEST FOR REHEARING AND MOTION FOR LATE
INTERVENTION

(Issued February 17, 2011)

1. Mr. Richard W. Frie has filed a request for rehearing of a Commission notice denying by operation of law Mr. Frie's request for rehearing of a Commission staff order, as well as a motion for late intervention. The staff order denied an application by Appalachian Power Company, licensee of the Smith Mountain Pumped Storage Project, seeking authorization to allow Mr. Frie to construct a boat dock on Smith Mountain Lake. For the reasons discussed below, we deny rehearing and the motion to intervene.

Background

2. Appalachian Power is the licensee for the 636-megawatt Smith Mountain Project, located on the headwaters of the Roanoke River, in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia. The 20,260-acre Smith Mountain Lake is the project's upper reservoir. The project was relicensed in 2009.¹

3. In 2005, the Commission approved a shoreline management plan for the project, governing use of the lands around the project's reservoirs.² Among other things, the shoreline management plan divides the lands located in the 500 miles of shoreline around Smith Mountain Lake and the 100 miles of shoreline around Leesville Lake, the project's lower reservoir, into several categories: High-Density Commercial, High-Density Multi-Use, Public Use, Low-Density Use, Impact Minimization Zones, and

¹ *Appalachian Power Company*, 129 FERC ¶ 62,201 (2009).

² *Appalachian Power Company*, 112 FERC ¶ 61,026 (2005). The Commission is currently reviewing an update to the shoreline management plan. However, that proceeding is not relevant here, as the matters at issue are governed by the current plan.

Conservation/Environmental Zones. The respective categories define the use that Appalachian Power may (but is not required to) permit without further approval by relevant resource agencies and the Commission. Appalachian Power developed the classifications of specific segments of the shoreline based on the zoning and planning regulations and the land use polices and goals of the counties surrounding the reservoirs.³

4. The Conservation/Environmental Zone classification is the most restrictive classification. The shoreline management plan states that

The Conservation/Environmental Zone classifications seek to protect recreational opportunities, scenic beauty, water quality, fish and wildlife habitat, and wetlands. Conservation/Environmental Zones include large wetland areas usually associated with streamheads at the back of coves, areas identified by the Virginia Natural Heritage Program as important natural communities, or areas within designated restriction zones such as between the boat barriers upstream of the project dams and the dams themselves. Development inside the project boundary in areas designated as Conservation/Environmental Areas is prohibited unless a variance can be obtained.⁴

The order approving the plan states that, among things, construction in Conservation/Environmental zones, and dredging activities not covered by the plan (dredging is prohibited in wetland areas) must be approved by the Commission. In the case of a request for a proposed variance from the plan, Appalachian Power is to consult with resource agencies and decide whether to forward the request to the Commission.⁵ The plan also provides a revision process whereby a property owner or developer may apply to Appalachian for a change in the classification of part of the shoreline.⁶

5. On April 16, 2010, Appalachian Power filed a request for Commission approval of the construction of a private, single-family dock on Smith Mountain Lake, in a shoreline area classified as a Conservation/Environmental Zone. The company stated that it had consulted with state resource agencies and with the U.S. Army Corps of Engineers, none

³ See *Appalachian Power Company*, 112 FERC ¶ 61,026 at P 14.

⁴ *Id.* P 30.

⁵ *Id.* P 35; 38; 61-63.

⁶ *Id.* P 20.

of whom objected to the request. In its description of the environment that would be affected by the construction, Appalachian Power stated that “the dock will be attached to a small portion of the shoreline that was replanted during 2009 as result of a violation (vegetation was cut without a permit), the plants of which have not yet reached maturity, but potentially represent a significant vegetated buffer.”⁷

6. Following receipt of the application, Commission staff sent the company a request for additional information. Among other things, staff asked for a more detailed explanation of why granting the variance would not affect environmental values; the suitability of the site for docking a boat; why the application stated that pilings that would be used for the dock were installed prior to the Commission’s 2005 approval of the shoreline management plan, when aerial photography indicated to the contrary; why photographs attached to the application showed that more pilings were already in place than the project plan showed (notwithstanding that the plan said no new pilings would be installed), that pilings that the plan said would be removed had already been removed, and that pilings shown in the photographs were not consistent with the pilings shown in the project drawings; and whether the proposed activity would affect wetlands.⁸

7. Appalachian Power filed a response on August 19, 2010.⁹ The company explained that in December 2004, prior to Commission approval of the shoreline management plan, it had issued a permit authorizing off shore dock construction and a 6-foot by 36-foot (216 square foot) walkway, to Mary Anne Petty Morgan, and that the permit was later transferred to Mr. Frie.¹⁰

8. With respect to the unauthorized clearing of some 1,200 square feet of company-owned project shoreline land, Appalachian Power stated that it had discovered that issue in an inspection on April 11, 2005, and promptly notified Mr. Frie of the violation. The company stated that it was impossible for it to count the number of trees that had been cut after the fact, but that it estimated, based on a tree count of an adjacent property, that approximately 1,232 trees, of between ½-inches and 2-inches in diameter needed to be

⁷ Appalachian Power application at 4.

⁸ See letter from Robert J. Fletcher (Commission staff) to Ms. Elizabeth Parcell (Appalachian Power) (dated July 20, 2010).

⁹ See letter from Elizabeth B. Parcell to Kimberly D. Bose (Commission Secretary).

¹⁰ Appalachian Power issues such permits for one-year periods, so the permit would have expired in December 2005.

replaced.¹¹ Appalachian Power included a timeline of its efforts over a period of more than five years (from May 4, 2005, through August 17, 2010) to get Mr. Frie to replant the vegetation consistent with a plan approved by the Virginia Department of Game and Inland Fisheries. The last entry in the timeline, dated August 17, 2010, states: “Inspection conducted; trees that had been previously planted were missing and wildflowers not in existence.”¹²

9. Appalachian Power stated that it did not know when pilings had been installed, but explained that aerial photography by the company in December 2005 showed no pilings, while aerial photography by Franklin County in Spring 2006 showed that pilings had been installed. Photographs of the site taken in December 2009, when compared to earlier pictures, revealed that two pilings had been removed and three short pilings replaced with tall pilings. The company concluded that the pilings had been installed after approval of the shoreline management plan. Appalachian Power also stated that the pilings furthest from shore would have to be removed because they extended too far into the cove.¹³

10. As to the suitability of the site for a dock, Appalachian Power stated that, ideally, docks are located in 10-12 feet of water, although most docks are in 6-8 feet depths. The company estimated that the dock in question would be located in approximately 3-4 feet of water at full pond, which it said should be considered a limited level, given the two-foot reservoir fluctuation. According to Appalachian Power, actual water measurements showed that there would be 3.76 feet of water at the furthest piling from shore and 2 feet at the shoremost piling. In consequence of these “not ideal” circumstances, the company asked to amend its application to include dredging, although the property owner had not asked to be allowed to dredge.¹⁴

¹¹ Appalachian Power August 19, 2010 Response at 3-4.

¹² The company somewhat inconsistently stated elsewhere in the response that “the property owner planted vegetation in an effort to restore the project boundary in accordance with a landscape plan that underwent state agency review and consultation.” *Id.* at 2.

¹³ *Id.* at 4. The company also said that the project survey accurately depicts the existing pilings, but does not classify some posts as pilings.

¹⁴ Appalachian Power August 19, 2010 response at 2-3. Appalachian Power stated that the proposed use would not affect wetlands and no (further) removal of vegetation was contemplated. *Id.* at 2.

11. On November 10, 2010, Commission staff issued an order denying Appalachian Power's application.¹⁵ Staff noted that, shortly after purchasing the property in question, Mr. Frie had completely cleared shoreline vegetation on company-owned lands within the project boundary, without authorization from the licensee or from the Commission. Staff also discussed the company's lengthy efforts to convince the property owner to revegetate the site, culminating in the company's August 17, 2010 conclusion that the landscape plan had not been properly completed.¹⁶ Staff concluded that the lack of a functional shoreline buffer has likely degraded aquatic habitat in a Conservation/Environmental area.¹⁷

12. Staff also expressed doubt that wetlands would not be affected by the dock construction, because the proposal included the installation and removal of pilings, and because a sufficient buffer – which has been missing for several years – is needed to protect against adverse impacts on wetlands.¹⁸

13. Finally, staff found that the proposed dock location is poor for logistical reasons, including the shallow depth in the area, and its location near the back of a cove, where regular siltation would likely occur, necessitating further dredging. Staff also stated that the state resource agencies had not known that the proposal might involve dredging when they reviewed it.¹⁹

14. On December 1, 2010, Mr. Frie filed a timely request for rehearing.

15. On January 7, 2011, the Commission issued a notice denying the request for rehearing by operation of law, explaining that Mr. Frie had not filed a motion to intervene in the proceeding and therefore was not a party entitled to seek rehearing.

16. On January 28, 2011, Mr. Frie filed a motion to intervene out-of-time and a request for rehearing of both the January 7, 2011 notice and the November 10, 2010 staff order.

¹⁵ *Appalachian Power Company*, 133 FERC ¶ 62,135 (2010).

¹⁶ *Appalachian Power Company*, 133 FERC ¶ 62,135 at P 8.

¹⁷ *Id.* P 9.

¹⁸ *Id.* P 10. Staff also stated that the exact location of wetlands, either before vegetation was cleared or currently, is not known.

¹⁹ *Id.* P 11.

Discussion

17. Section 313(a) of the Federal Power Act²⁰ that provides an entity aggrieved by a Commission order in a proceeding to which the entity is a party may timely file a request for rehearing. The Commission's regulations provide generally that persons must file motions to intervene in order to obtain party status.²¹ In many instances, the time for filing motions to intervene is established by Commission notice.²² In some cases, such as investigations of whether the Commission has jurisdiction over a hydropower project and compliance matters between the Commission and a licensee, the Commission may not issue a notice seeking interventions. In these instances, the Commission will treat as timely a motion to intervene that is filed within 30 days of an initial Commission order in a proceeding.²³

18. In this case, Mr. Frie's December 2, 2010 request for rehearing of the staff order denying Appalachian Power's application to authorize Mr. Frie to construct the dock was not accompanied by a motion to intervene. Therefore, the notice of denial by operation of law correctly concluded that Mr. Frie, who was not a party, could not file a request for rehearing.

19. In his January 28, 2011 motion for late intervention, Mr. Frie states that he did not realize that he needed to file a motion to intervene because he believed he was a party to the proceeding, which dealt with his desire to construct a dock. He states that he could not have known that the Commission would deny Appalachian Power's application and that the company would "inexplicably" elect not to file a request for rehearing.

20. To justify a late motion to intervene, an entity must demonstrate good cause.²⁴ Nothing in our regulations or precedent suggests that entities interested in applications filed by regulated entities – even those the filings are arguably intended to benefit –

²⁰ 16 U.S.C. § 8251 (2006).

²¹ See 18 C.F.R. § 385.214(3) (2010).

²² See 18 C.F.R. § 385.210 (2010).

²³ See, e.g., *Hydro Development Group, Inc.*, 115 FERC ¶ 61,191 (2006) (Commission considers motions to intervene timely if filed within 30 days of order issued in proceeding in which public notice not issued but in which movant has right to participate); *Flambeau Hydro, L.L.C.*, 113 FERC ¶ 61,236 (2005).

²⁴ See 18 C.F.R. § 285.214(d) (2010).

automatically become parties. In fact, as discussed above, our regulations make clear that an entity must affirmatively file a motion to intervene to become a party. The December 2, 2010 request for rehearing was filed on Mr. Frie's behalf by counsel. We expect counsel practicing before us to familiarize themselves with relevant portions of the FPA and of our regulations, and to inform their clients of prerequisites such as intervening in a proceeding before filing a request for rehearing. Because Mr. Frie had not sought to intervene when the December 2, 2010 request for rehearing was filed, he lacked the party status necessary to make such a filing, as the notice properly stated. An unexplained failure to follow proper procedure does not constitute good cause. To the extent that Mr. Frie indicates he was relying on Appalachian Power to protect his interests, we have previously held that an entity cannot sleep on its rights while hoping that a Commission proceeding will turn out to its liking.²⁵ We therefore deny the late motion to intervene.

21. While our affirmance of the January 7, 2011 notice renders the remainder of Mr. Frie's arguments moot, we will nonetheless address them, for purposes of clarity.

22. In his December 2, 2010 request for rehearing, Mr. Frie argues that the area on which the proposed dock would be constructed is not a fringe wetlands habitat or scrub habitat, and therefore was improperly classified as a Conservation/Environmental area.²⁶

23. When the shoreline management plan was approved, the area in question was classified as Conservation/Environmental. While it is possible that the area no longer retains the characteristics it once had, this is, as far as we can discern, solely a result of Mr. Frie's unauthorized stripping of the vegetation that was once there. It would be absurd for us to conclude that because the trees that were once in this buffer area have been improperly removed, the area is no longer worthy of protection and should be open to development. We cannot reward behavior that violates shoreline management plans. Moreover, as discussed above, the shoreline management plan contains a process for property owners and developers to contest the validity of classifications. It would have been proper for Mr. Frie to follow that process, but it is not proper for him to bypass the process and seek to have a classification altered in a request for rehearing.

24. Mr. Frie also argues that his removal of vegetation did not degrade aquatic habitat.²⁷ This statement is impossible to verify without onsite studies. In any case, even

²⁵ See, e.g. *California Department of Water Resources and the City of Los Angeles*, 122 FERC ¶ 61,150 (2008), *aff'd*, *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009).

²⁶ December 2, 2010 Request for Rehearing at 2-5.

if Mr. Frie had completely restored the site to its prior condition, something that Appalachian Power's inspection reports indicate is not the case, this would not excuse or explain his unauthorized, deliberate disregard of environmental requirements.

25. The record shows – and Mr. Frie does not dispute – that Mr. Frie, without authorization, completely cleared some 1,200 square feet of project lands owned by the licensee in a Conservation/Environmental zone.²⁸ Project lands within project boundaries along the shorelines of regulated hydropower projects are intended for the benefit of the general public. They are subject to reasonable regulation in the public interest, and cannot be completely altered at the whims of adjacent property owners.

26. Mr. Frie also asserts that the depth of the lake at the dock site is several feet higher than Appalachian Power estimates, that project operations typically do not involve a daily two-foot fluctuation, that the area receives little siltation, and that dredging is a permitted activity under the shoreline management plan.²⁹

27. We conclude that Appalachian Power's estimates of lake depth, based on actual measurements, as well as its description of operations at a project that it operates, are more reliable than Mr. Frie's claims. As explained above, dredging activities not contemplated by the shoreline management plan are prohibited without Commission approval, and we see no justification for granting such approval here, in light of the logistical difficulties faced by the dock proposal and the unauthorized destruction of the project buffer zone by the landowner.³⁰ Our staff's statement that siltation may well occur in the area of the dock is not a key factor in our action. We nonetheless find staff's

²⁷ *Id.* at 5.

²⁸ As noted above, the permit that had previously been issued for the dock had apparently expired by the time of Mr. Frie's actions. Even had the permit been in effect, however, it would have authorized only the onshore construction of a 216-square-foot walkway, not the clear-cutting of a 1,200-square-foot buffer zone.

²⁹ *Id.* at 5-6.

³⁰ Further, as staff explained, the resource agencies that reviewed the proposed variance were not informed that the proposal might include dredging, so we cannot presume that they would approve such activity.

conclusion, based on staff's expertise in lake topography and of this project in particular, more persuasive than Mr. Frie's unsupported statements to the contrary.³¹

28. In his January 28, 2011 request for rehearing, Mr. Frye reiterates that the shoreline where the dock would be located was improperly classified, and that documents in the current shoreline management plan update proceeding show that some entities have asserted that Appalachian Power has failed to properly delineate wetland areas. We explained above that the shoreline management plan contains a process for disputing classifications, which Mr. Frie elected not to follow. The ongoing plan proceeding is not relevant here. Moreover, Mr. Frie does not indicate that any entity suggests that the specific lands at issue here were improperly classified, nor does he explain whether commenting entities felt that the company over- or under-classified wetlands.³²

The Commission orders:

The Motion to Intervene Out-of-Time, Motion to Intervene, and Request for Rehearing filed on January 28, 2011 by Mr. Richard W. Frie are hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Mr. Frie also alleges that the November 10, 2010 order improperly concluded that Virginia authorities had the ability to approve the variance. Given that the order denied Appalachian Power's application, such a conclusion would have no effect. Moreover, we construe staff's statement that the state agency "approved" the variance to mean simply that the state indicated that it did not object to the proposal. In any case, as noted above, only the Commission can approve construction in a Conservation/Environmental area.

³² Mr. Frie appends to the January 28, 2011 request for rehearing electronic mail correspondence between himself and Appalachian Power, in which the company apparently answers various of his questions. Among other things, Appalachian Power defends the classification of the lands as Conservation/Environmental; explains that the original dock permit became void when the shoreline management plan was approved; disputes Mr. Frie's water level measurements; and explains that it will not request further variances until the buffer has been successfully re-established.