

140 FERC ¶ 61,211  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Borough of Lehigh, Pennsylvania

Project No. 12455-010

ORDER GRANTING STAY

(Issued September 20, 2012)

1. On June 22, 2012, the Borough of Lehigh, Pennsylvania (Borough), licensee for the Beltzville Hydroelectric Project No. 12455, filed a request for a stay of the project license pending the development of an Interim Risk Reduction Measures Plan (Risk Reduction Plan) by the U.S. Army Corps of Engineers (Corps). As discussed below, we will grant the request.

**Background**

2. The 2.6-megawatt (MW) Beltzville Hydroelectric Project was licensed on September 12, 2008.<sup>1</sup> The project will be located at the Corps' Beltzville dam on Pohopoco Creek about five miles upstream of its confluence with the Lehigh River, near the Borough of Lehigh in Carbon County, Pennsylvania. The project will involve reducing the diameter of the existing conduit at the Corps dam by installing a 78-inch-diameter steel pipe liner equipped with a 78-inch butterfly valve and an 84-inch-diameter slide gate. The butterfly valve will connect to a new 60-inch-diameter, 37-foot-long Y-branch penstock that bifurcates into two penstocks (one 36 inches in diameter and 43 feet long, and the other 48 inches in diameter and 39 feet long) leading to the new powerhouse located adjacent to the existing outlet works.

3. Article 301 of the license requires the Borough to commence construction of the project within two years of license issuance (September 11, 2010) and to complete construction within five years of license issuance (September 11, 2013).<sup>2</sup> The

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<sup>1</sup> *Borough of Lehigh*, 124 FERC ¶ 62,194 (2008).

<sup>2</sup> *Id.*

Commission extended these deadlines to September 11, 2012, and September 11, 2015, respectively.<sup>3</sup>

4. Article 303 of the license states that the licensee's design and construction of the facilities affecting the structural integrity of the Government project must be conducted under the review and approval of the Corps.<sup>4</sup> Article 309 requires written approval by the Corps prior to any project construction.<sup>5</sup>

5. On June 19, 2012, the Corps informed the Borough and the Commission that it had identified several potential safety issues with the Beltzville Dam.<sup>6</sup> Specifically, the Corps has classified the Beltzville Dam as a Dam Safety Action Class (DSAC) III dam, requiring the Corps to develop a Risk Reduction Plan.<sup>7</sup> Additionally, the Philadelphia District of the Corps expressed concerns about a warm and wet area causing snow to melt on the downstream face of the embankment in the area of the proposed powerhouse location. An in-depth geotechnical investigation will be incorporated into the Risk Reduction Plan. The Corps further stated that the studies necessary to assess the risks and determine corrective actions could take several years to complete.

6. On June 22, 2012, the Borough requested "that the Commission stay the license, or at a minimum the construction deadlines, for two years, and authorize the Borough to file for an extension of the stay conditioned upon obtaining a more definite completion date from the Corps." The Borough asserts that the stay is necessary for the Corps to complete the dam safety work it needs in order to act on the Borough's request for approval of its project design.

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<sup>3</sup> Unpublished order issued November 20, 2009.

<sup>4</sup> *Borough of Lehigh*, 124 FERC ¶ 62,194.

<sup>5</sup> *Id.*

<sup>6</sup> Corps' letter to the Borough Manager, filed June 19, 2012.

<sup>7</sup> DSAC ratings range from V (Normal) to I (Urgent and Compelling). A DSAC rating of III (High Priority) indicates "Dams that have issues where the dam is significantly inadequate or the combination of life, economic, or environmental consequences with probability of failure is moderate to high." (Corps' headquarters 2012: <http://www.usace.army.mil/Missions/CivilWorks/DamSafetyProgram/ProgramActivities.aspx>.)

## Discussion

7. Section 13 of the Federal Power Act requires a licensee to commence project construction no later than four years after issuance of the license; otherwise, the Commission is required to terminate the license.<sup>8</sup> Hence, the Borough's failure to commence construction by September 11, 2012, would result in termination of its license.

8. It is Commission policy to grant requests for a stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.<sup>9</sup> Such circumstances may occur where there are preconditions to project construction that are beyond a licensee's control, but which appear likely to be resolved within a definitive time frame.<sup>10</sup>

9. In acting on stay requests such as the Borough's, which involve delay of construction of licensed projects at federal dams pending the conclusion of federal activities at the dam that preclude such construction, the Commission has required the licensee to provide a statement from the federal dam agency setting forth the necessary prerequisites to, and likely timing of, that agency's approval of project construction.<sup>11</sup> In

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<sup>8</sup> 16 U.S.C. § 806 (2006). That section states in pertinent part:

That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof . . . . The periods for the commencement of construction may be extended once but not longer than two additional years . . . . In case the licensee shall not commence actual construction of the project works . . . within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

<sup>9</sup> *City of Broken Bow*, 132 FERC ¶ 61,225, at 62,262 (2010) (*Broken Bow*); *Gull Industries, Inc.*, 70 FERC ¶ 61,253, at 61,784 (1995).

<sup>10</sup> *Broken Bow*, 132 FERC at 62,262.

<sup>11</sup> See e.g., *Broken Bow*, 132 FERC at 62,262 (granting licensee a partial two year stay of license due to the Corps' statement that its risk assessment and dam safety modification study would prevent modification of the conduit for several years); *Gallia Hydro Partners*, 65 FERC ¶ 61,274, at 62,260 (1993) (granting licensee a partial stay of license due to Corps' statement that its rehabilitation work on the Corps dam would prevent project construction for two years).

this case, the Borough has presented evidence that the Corps' studies "could take several years to complete." The Commission finds that this is sufficient proof that the Borough likely will not be able to timely commence construction.<sup>12</sup> However, because the extent of the delay caused by the Corps' study is speculative, we will grant the stay for two years, and only Article 301's construction deadline shall be stayed.<sup>13</sup> At the end of this two-year period, the Borough may, if necessary, file for an extension of the stay conditioned upon obtaining a more definite completion date from the Corps.<sup>14</sup>

10. Consistent with Commission practice,<sup>15</sup> we are making the stay effective on June 22, 2012, the date the Borough filed its stay request.

The Commission orders:

(A) The motion for stay of license filed by the Borough of Lehigh, Pennsylvania, on June 22, 2012, is granted as set forth below, and otherwise denied.

(B) License Article 301 for the Beltzville Hydroelectric Project No. 12455 is stayed, effective June 22, 2012, for two years.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>12</sup> See, e.g., *Joseph M. Keating*, 77 FERC ¶ 61,060, at 61,224-25 (1996) (granting licensee a stay of construction deadline when licensee sought to obtain a special use permit from the Forest Service, which was a prerequisite to any ground-disturbing activities).

<sup>13</sup> It appears that the licensee has already complied with the majority of the license conditions. If it needs an extension of any remaining requirements, it may request one.

<sup>14</sup> See generally *Pacific Gas and Electric Company*, 115 FERC ¶ 61,062 (2006) (granting extension of stay).

<sup>15</sup> *City of Marion, Kentucky*, 85 FERC ¶ 61,401, at 62,537 (1998).