

149 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Richard A. Glover, Jr.

Project No. 13997-002

ORDER DENYING REHEARING

(Issued November 20, 2014)

1. On June 24, 2014, Commission staff issued an order denying Richard A. Glover, Jr.'s (Mr. Glover) application for an extension of his preliminary permit for the proposed East Branch Dam Hydroelectric Project (East Branch Dam Project).¹ The project would be located at the U.S. Army Corps of Engineers' (Corps) existing East Branch Dam on the East Branch of the Clarion River in Jones Township, Elk County, Pennsylvania. On June 30, 2014, Mr. Glover filed a request for rehearing of the order denying his permit extension application. This order denies Mr. Glover's request for rehearing.

Background

2. The East Branch Dam is owned and operated by the Corps. The dam is a rolled earth fill embankment that is 1,725 feet long, 184 feet high, 1,115 feet wide at its base, and 20 feet wide at its top. The dam is authorized for the purposes of flood control on the Clarion River, water conservation, water quality, supplementary low-flow, recreation, and conservation of fish and wildlife resources.² On January 10, 2011, Mr. Glover filed a preliminary permit application to study the feasibility of the East Branch Dam Project. The project would consist of the following new facilities: (1) one turbine and generator unit rated at 500 kilowatts; (2) a new powerhouse; (3) a 100-foot-long pipe between the outlet works and the powerhouse; (4) a 50-foot-long discharge pipe; (5) a 50-foot-long transmission line; and (6) appurtenant facilities. The estimated annual generation of the project would be 377 megawatt-hours.

3. On June 24, 2011, the Corps submitted comments to the Commission on Mr. Glover's preliminary permit application. In its comments, the Corps explained that it

¹ *Richard A. Glover, Jr.*, 147 FERC ¶ 62,224 (2014).

² Corps June 24, 2011 Comments at 6.

had recently completed a Dam Safety Modification Study on the East Branch Dam.³ The study recommended the construction of a full-length, full-depth cutoff wall⁴ through the dam to reduce risk and restore the dam to normal operation.

4. On July 20, 2011, Commission staff issued Mr. Glover a three-year preliminary permit to study the feasibility of his project.⁵

5. During his permit term Mr. Glover submitted five progress reports. The five reports were all similar and offered little in terms of describing any progress on his project. Rather, each report simply reiterated that Mr. Glover was working on a business plan and contacting potential contractors, and indicated Mr. Glover's desire to coordinate his project with the Corps' dam safety project.

6. On May 28, 2014, Mr. Glover filed a timely application for an extension of his preliminary permit. Mr. Glover contended that his project was at a "standstill" until the contract for the dam safety project was awarded. In his application for an extension, Mr. Glover did not provide a timeframe for when the contract would be awarded or when construction for the dam safety project would begin.

7. On June 24, 2014, Commission staff denied Mr. Glover an extension of his preliminary permit, stating that he had not carried out the activities under his permit with reasonable diligence. The order stated that there was no evidence Mr. Glover had undertaken the necessary steps to prepare a Notice of Intent to File an Application for a New License and Pre-Application Document, chosen a licensing process, or conducted the required consultation to support a development application. Commission staff concluded that Mr. Glover's desire to hold the site until conditions were more conducive to his project constituted site banking.⁶

³ In January 2008, the Corps determined that the East Branch Dam was potentially unsafe. The following month, the Corps decided to temporarily lower water levels and begin an assessment of repair alternatives that could provide a permanent solution. The Dam Safety Modification Environmental Assessment was completed in July 2010. Corps, *East Branch Dam: Dam Safety Modification Environmental Assessment* at vi (July 2010), available at <http://www.lrp.usace.army.mil/Portals/72/docs/EastBranchRepair/Final%20EBD%20EA%20w%20signed%20FONSI.pdf>.

⁴ A cutoff wall is a barrier of impervious material (e.g., clay, concrete, etc.) inserted into an existing dam to minimize seepage and improve stability of the dam.

⁵ *Richard A. Glover, Jr.*, 136 FERC ¶ 62,049 (2011).

⁶ *Richard A. Glover, Jr.*, 147 FERC ¶ 62,224 at P 5.

8. On June 30, 2014, Mr. Glover's permit expired.
9. On June 30, 2014, Mr. Glover filed a request for rehearing of the order denying an extension, reiterating his desire to work in tandem with the Corps' dam safety project and his inability to move forward with his own project until the Corps' project was further along.

Discussion

10. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.⁷ In 2013, Congress amended section 5 of the FPA to provide that a preliminary permit term may be extended once for not more than two additional years if the Commission finds that the permittee carried out activities under the permit in good faith and with reasonable diligence.⁸

11. In general, diligently pursuing the requirements of a permit has meant that, at a minimum, a permittee timely filed progress reports, consulted with resource agencies, and conducted environmental studies, such that Commission staff is able to discern from the permittee's actions a pattern of progress toward the preparation of a development application.⁹

12. On rehearing, Mr. Glover argues that he was unable to pursue his preliminary permit requirements because the Corps had not finalized all aspects of its dam safety project. Mr. Glover explains that coordinating his project with the Corps' project would allow him to use, in his own project, environmental studies conducted by the Corps and possibly the Corps' construction equipment, new roads, and staging area. Mr. Glover also claims that grant money for his project would only be available once construction begins. Further, Mr. Glover argues that no other potential developer would likely have been able to pursue a project at the East Branch Dam any faster than he was given the pace of the Corps' dam safety project.

⁷ 16 U.S.C. §§ 797(f) and 798 (2012).

⁸ The Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 493, 495 (2013) (codified as amended at 16 U.S.C. § 798(b)).

⁹ See, e.g., *KC Pittsfield LLC*, 147 FERC ¶ 61,040, at P 11 (2014); *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 26 (2012).

13. After a review of the record, we affirm staff's finding that Mr. Glover did not pursue his development application in good faith and with reasonable diligence during the permit term such as to warrant an extension.

14. During his preliminary permit term, Mr. Glover filed five progress reports, one of which was not filed timely, and one request for extension. The progress reports indicate that Mr. Glover performed no studies during the permit term, never filed any pre-application documents, and did not consult with resource agencies. The extension application and most of the progress reports simply reiterate Mr. Glover's desire to coordinate his project with the Corps' dam safety project and his inability to move forward with studies until the Corps' contractor is selected. Similarly, in his request for rehearing, Mr. Glover contends that he would not be able to develop a detailed schedule for his project, including necessary studies, consultations, and submittals, until after the Corps sets a schedule for its dam safety project.

15. Mr. Glover essentially put his project on hold with the hope that he could work in coordination with the contractor selected for the Corps' dam safety project. Mr. Glover did this despite the fact that he had no assurances that the Corps or the contractor selected by the Corps would want to coordinate development of the two projects. In fact, Mr. Glover concedes that "[t]he Corps has no real interest in [his] project" and that the contractor eventually selected by the Corps "does not have to construct [his] project, but *may* be willing to cooperate" with him.¹⁰

16. Mr. Glover's argument that no other potential developer could likely pursue a project at the dam any faster than he is not relevant to whether the Commission should grant him an extension. The issue is whether Mr. Glover pursued the project in good faith and with reasonable diligence. He did not. Regardless of the status of the Corps' construction contract, Mr. Glover still could have conducted studies and consultations and further developed his project plans and application materials. In addition, another developer may not have relied so heavily on the possibility of future coordination with the Corps and its project, particularly when no assurance of such coordination had been provided.

17. Mr. Glover has continued to delay development of his project. In essence, he wishes to maintain priority over the East Branch Dam site without actually pursuing development until conditions are most conducive for him. The Commission's policy against site banking is that an entity that is unwilling or unable to develop a site, as is the

¹⁰ Request for rehearing at 2 (emphasis added).

case here with Mr. Glover, should not be permitted to maintain the exclusive right to develop it.¹¹

18. For the above reasons, we deny Mr. Glover's request for rehearing. We note, however, that holding a preliminary permit is not a prerequisite to pursuing a development application, so that Mr. Glover remains free to pursue development of the East Branch Dam Project and to file a license application.

The Commission orders:

Richard A. Glover, Jr's request for rehearing, filed on June 30, 2014, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹ See, e.g., *Pine Creek Mine, LLC*, 148 FERC ¶ 61,027, at P 18 (2014); *Public Utility Dist. No. 1 of Pend Oreille County, Washington*, 124 FERC ¶ 61,064, at P 31 (2008).