

167 FERC ¶ 62,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FreedomWorks, LLC

Project No. 14889-000

ORDER DENYING PRELIMINARY PERMIT APPLICATION

(Issued April 12, 2019)

1. On August 24, 2018, and amended on October 15, 2018, and December 27, 2018, FreedomWorks, LLC, (FreedomWorks) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Big Run Pump Storage Hydro Project No. 14889 (Big Run Project). The project would be located near the City of Parsons in Tucker County, West Virginia, and would occupy U.S. Forest Service (Forest Service) land within the Monongahela National Forest (Monongahela Forest).

I. Project Proposal

2. The proposed project would consist of the following: (1) a new upper reservoir with a surface area of 1,213 acres with a storage capacity of 119,387 acre-feet at a surface elevation of approximately 3,350 feet above mean sea level (msl) created through construction of a circular dam and/or dike; (2) a new lower reservoir with a surface area of 1,061 acres with a storage capacity of 113,398 acre-feet at a surface elevation of 2,250 feet msl created through construction of a semi-circular dam; (3) up to four new 7,000-foot-long, 12-foot-diameter penstocks connecting the upper reservoir and lower reservoir; (4) a new 600-foot-long, 50-foot-wide, 25-foot-high powerhouse containing four turbine-generator units with a total rated capacity of 1,000 megawatts; (5) a new transmission line connecting the powerhouse to a nearby electric grid interconnection point with options to evaluate multiple grid interconnection locations; and (6) appurtenant facilities. The proposed project would have an annual generation of 4,380,000 megawatt-hours.

3. The upper reservoir would be located on about 1,200 acres of private land owned by Western Pocahontas Properties. The lower reservoir would be located on about 900 acres of Monongahela Forest land and 160 acres of private land, and would be filled from local inflow including initial charge from the Cheat River. The penstocks connecting the upper reservoir and the lower reservoir would likely traverse the Big Run Bog National Natural Landmark (Big Run Bog) located within the Monongahela Forest. FreedomWorks proposes to conduct feasibility studies, including core bore drilling

¹ 16 U.S.C. § 797(f) (2012).

within the Monongahela Forest to confirm suitable surface geology exists for civil structures, and a number of field surveys and desktop evaluations to determine impacts to aquatic and terrestrial species, streams, area recreation, merchantable timber, and cultural resources. FreedomWorks also proposes to use Forest Service roads for commercial purposes and to construct a new, temporary road at Mill Run Road to facilitate core bore drilling.

II. Background

4. On October 29, 2018, the Commission issued public notice of FreedomWorks' permit application as accepted for filing and solicited comments, motions to intervene, and competing applications.² The Forest Service and West Virginia Division of Natural Resources filed timely notices of intervention.³ The West Virginia Highlands Conservancy and Friends of Blackwater filed comments and timely, unopposed motions to intervene.⁴ The U.S. Department of the Interior (Interior), West Virginia Rivers Coalition, Sierra Club, and several concerned citizens also filed comments.

5. The West Virginia Highlands Conservancy, Friends of Blackwater, West Virginia Rivers Coalition, Sierra Club, and several citizens filed comments expressing concerns or opposing the project, noting the substantial environmental, recreational, and aesthetic impacts that would result from construction and operation should the project be licensed. On December 12, 2018, Interior commented concerning fisheries resources and risks to migratory birds and made recommendations to minimize the potential adverse effect on fish and wildlife resources during the construction and operation of the project. In comments filed on November 16, 2018, the Forest Service stated that FreedomWorks must obtain a special use permit to conduct site surveys and testing on Forest Service land, along with a road use permit to use Forest Service roads commercially.

6. On January 3, 2019, the Forest Service filed comments stating that should FreedomWorks apply for a special use permit, it is unlikely that one would be issued for the Big Run Project. The Forest Service explained that the project is not consistent with the management goals, objectives, and standards identified in the 2006 Monongahela National Forest Land and Resources Management Plan (Monongahela Forest Plan).⁵

² 83 Fed. Reg. 55,160 (Nov. 2, 2018).

³ Timely notices of intervention are granted by operation of Rule 214(a)(2) of the Commission's regulations. 18 C.F.R. § 385.214(a)(2) (2018).

⁴ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's regulations. 18 C.F.R. § 385.214(c) (2018).

⁵ Forest Service regulations provide that the proposed use of a special use permit

7. On January 31, 2019, Commission staff issued a letter requesting that the Forest Service clarify its January 3 comment that it would be unlikely to issue a special use permit for the Big Run Project. Specifically, staff requested further explanation of whether the Forest Service would grant FreedomWorks access to Forest Service lands to conduct feasibility studies under a preliminary permit, including potentially land-disturbing activities. Staff explained that although a preliminary permit would not authorize FreedomWorks to preform land-disturbing activities or otherwise enter lands or waters owned by others without the owners' express permission, any future feasibility studies necessary for a license application would likely require access to Forest Service lands.

8. On March 11, 2019, the Forest Service responded to Commission staff's January 31 letter. The Forest Service elaborated that on February 12, 2019, FreedomWorks completed its application for a special use permit to conduct licensing feasibility studies, including core bore drilling, for the proposed Big Run Project. The Forest Service denied the special use permit application, citing adverse effects to the Big Run Bog and concluding that the proposed studies are neither consistent, nor can be made consistent, with the standards and guidelines in the Monongahela Forest Plan.⁶

9. On March 18 and 19, 2019, FreedomWorks filed responses to the Forest Service's March 11 comments, disputing the grounds for the Forest Service's denial of the special use permit. Specifically, FreedomWorks argued that the feasibility studies will have no impact on the Big Run Bog and that the Forest Service improperly considered the impacts of project construction, rather than the narrower impacts of feasibility studies, when denying the special use permit. FreedomWorks also stated that it will seek to appeal the special use permit denial.

III. Discussion

must be consistent or able to be made consistent with the applicable forest land and resource management plan. 25 C.F.R. § 251.54(e)(1)(ii) (2018).

⁶ Specifically, standard 8018 of the Monongahela Forest Plan states: “[s]pecial uses may be authorized as long as they do not adversely affect the overall values and qualities for which the special area was established.” Forest Plan, p. III-44. The Big Run Bog special area was established to preserve the unique ecosystem and protect the special area of national significance. The proposed penstocks would likely traverse the Big Run Bog.

10. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA,⁷ which in turn sets forth the material that must accompany an application for a license. A permit is issued to allow the permit holder to conduct investigations and studies to determine the feasibility of the proposed project and to prepare a license application, and it does not grant land-disturbing or other property rights.⁸ The Commission is not required to grant a preliminary permit, so long as it articulates a rational basis for not doing so.⁹

11. The Forest Service has made clear through its January 3 and March 11 comments that it would be unlikely to issue a special use authorization for the project should it be licensed; and that it has denied FreedomWorks's request to enter Forest Service lands to conduct feasibility studies under a preliminary permit, which are necessary to the development of a license application for the proposed project within the Monongahela Forest.¹⁰ Although the upper reservoir and part of the lower reservoir would be located on private land, the project is partially located on and surrounded by the Monongahela Forest, and the location where FreedomWorks proposes to conduct drilling would be on Forest Service land. Thus, FreedomWorks would not be able to determine the feasibility of the proposed project without permission from the Forest Service to access the land within the Monongahela Forest.¹¹ The Commission has previously determined that it

⁷ 16 U.S.C. § 802 (2012).

⁸ A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

⁹ *See, e.g., Rivertec Partners, LLC*, 157 FERC ¶ 61,207 (2016); *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210 (2016); *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)).

¹⁰ FreedomWorks has indicated what it will appeal the Forest Service's denial of its application for a special use permit; we do not address the merits of FreedomWorks' assertion that the Forest Service improperly denied the special use permit.

¹¹ In any event, the Forest Service noted in its March 11 comments that construction and operation of the Big Run Project would be antithetical to the Monongahela Forest Plan because the project would adversely affect the Big Run Bog, a Tier 3 native trout stream, federally threatened and endangered species, and Regional

would be ineffectual to issue preliminary permits for non-federal projects at federal facilities if the agencies that operate the facilities indicate opposition to the proposed projects.¹² Similarly, there would be no purpose in issuing a preliminary permit here where the Forest Service has indicated that it is unlikely to issue the necessary authorizations for the project. Accordingly, FreedomWorks' preliminary permit application is denied.¹³

The Director orders:

(A) The preliminary permit application filed by FreedomWorks, LLC on August 24, 2018, for the Big Run Pump Storage Hydro Project No. 14889 is denied.

(B) This order is issued under authority delegated to the Director and constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2018).

Vince Yearick
Director
Division of Hydropower Licensing

Forester Sensitive Species.

¹² See, e.g., *Advanced Hydropower, Inc.*, 155 FERC ¶ 61,007, at P 9-10 (2016) (preliminary permit application denied for a project located at U.S. Army Corps of Engineers' (Corps) Dam based on Corps' stated opposition to the project).

¹³ The comments filed by the West Virginia Highlands Conservancy, Friends of Blackwater, West Virginia River Coalition, Sierra Club, and concerned citizens are not the grounds for this denial because they relate to the construction and operation of the proposed project and are premature at the permit stage. See, e.g., *McGinnis, Inc.*, 133 FERC ¶ 61,144, at P 6 (2010).

Document Content(s)

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