

159 FERC ¶ 62,241  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Bard College

Docket No. DI17-1-000

ORDER RULING ON DECLARATION OF INTENTION  
AND FINDING LICENSING REQUIRED

(Issued June 5, 2017)

1. On February 6, 2017, Bard College filed a Declaration of Intention (DI) concerning the proposed Annandale Micro Hydropower Project (Annandale Project), to be located on Saw Kill Creek, near the Town of Red Hook, in Dutchess County, New York.

PROJECT DESCRIPTION

2. The proposed run-of-river Annandale Project would consist of: (1) the existing 8-foot-high Annandale Dam; (2) a 5.5-foot-high overflow spillway; (3) two Gravitation Water Vortex Power Plants having a total installed capacity of 12 kilowatts rated at 9 feet of net head; (4) a transmission line connecting the generating units with Central Hudson Gas & Electric Corporation's electric distribution system; and (5) appurtenant facilities.

PUBLIC NOTICE

3. On March 2, 2017, Commission staff issued a public notice of the DI. The notice established April 3, 2017, as the deadline for filing protests, comments, and motions to intervene.<sup>1</sup> No protests, comments, or motions to intervene were filed.

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<sup>1</sup> The Commission's Rules of Practice and Procedure provide that, if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is not open for business, the filing deadline does not end until the close of business on the next business day. 18 C.F.R. § 385.2007(a)(2) (2016). The filing deadline was 30 days from issuance of the notice (i.e., April 1, 2017), which fell on a Saturday. Thus, the filing deadline was the close of business Monday, April 3, 2017.

## JURISDICTION

4. Pursuant to section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. § 817(1) (2012), a non-federal hydroelectric project must be licensed (unless it has a still-valid pre-1920 federal permit) if it:

- (a) is located on a navigable water of the United States;
- (b) occupies lands or reservations of the United States;
- (c) utilizes surplus water or waterpower from a government dam; or
- (d) is located on a stream over which Congress has Commerce Clause jurisdiction, is constructed or modified on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

## DISCUSSION

5. The project does not occupy any public lands or reservations of the United States and does not use surplus water or waterpower from a Federal government dam. There is insufficient evidence to determine whether Saw Kill Creek is navigable. However, because licensing is required on other grounds there is no need to make a navigability finding.

6. The Saw Kill Creek is a tributary of the Hudson River, which is a navigable water of the United States.<sup>2</sup> As a result, the project would be located on a Commerce Clause stream.<sup>3</sup> In addition, the project would be constructed after August 26, 1935, and would offset electrical needs that would otherwise be supplied by the interstate grid, thus affecting the interests of interstate commerce.<sup>4</sup>

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<sup>2</sup> See *New York Power & Light Corp.*, 8 F.P.C. 231, 250 (1949), (finding the Hudson River to be a navigable waterway from above its confluence with the Sacandaga River at Hadley, New York, to its mouth in the Atlantic Ocean). Saw Kill Creek flows into the Hudson River downstream of its confluence with the Sacandaga River.

<sup>3</sup> For purposes of FPA section 23(b), headwaters and tributaries of navigable waters are Commerce Clause streams. See *FPC v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965).

<sup>4</sup> It is well settled that small hydroelectric projects that are connected to the interstate grid affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1). See *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

## CONCLUSION

7. As explained above, the project would be located on a Commerce Clause stream, would be constructed after 1935, and would affect interstate commerce through its connection to the interstate grid. Therefore, in accordance with section 23(b)(1) of the FPA, Bard College must obtain a license for the construction, maintenance, and operation of the Annandale Project. Because it appears that the project may be eligible for an exemption from licensing, Bard College may consider applying for a small hydroelectric power project exemption of 10 megawatts (MW) or less.<sup>5</sup>

### The Director orders:

(A) Pursuant to section 23(b)(1) of the Federal Power Act, the Annandale Micro Hydropower Project is required to be licensed. No construction or operation of the project may commence until a license or exemption has been obtained.

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825l (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2016). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. A party's failure to file a request for rehearing shall constitute acceptance of this order.

Jennifer Hill, Director  
Division of Hydropower Administration  
and Compliance

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<sup>5</sup> For more information concerning 10 MW exemptions, an applicant may contact the Commission's Division of Hydropower Licensing. Also, see sections 4.30 through 4.39 and 4.101 through 4.108 of the Commission's regulations. 18 C.F.R. §§ 4.30-39, 4.101-08 (2016).