

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Blenheim-Gilboa Pumped Storage Project
New York Power Authority

Project No. 2685

**COMMENTS OF SCHOHARIE COUNTY
ON THE NEW YORK POWER AUTHORITY'S
REVISED STUDY PLAN**

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On April 10, 2014, the New York Power Authority (“NYPA”) filed with the Federal Energy Regulatory Commission (the “Commission” or “FERC”), a *Notification of Intent to File an Application for New License and Pre-Application Document* (“*Notice of Intent*”) for the Blenheim-Gilboa Pumped Storage Project (the “BG Project”) located on the Schoharie Creek, in the Towns of Blenheim and Gilboa, Schoharie County, New York.¹ NYPA is utilizing the Commission’s Integrated Licensing Process (“ILP”) to relicense the BG Project.²

On September 22, 2014, NYPA filed its Proposed Study Plan (“PSP”). Schoharie County (the “County”), by and through its counsel, Harris Beach PLLC, submitted comments on the PSP on December 22, 2014.

On January 20, 2015, NYPA filed with FERC its Revised Study Plan (“RSP”) for the BG Project. The County hereby submits its comments on NYPA’s RSP.

COMMENTS

In its *Notice of Intent*, filed April 10, 2014, NYPA proposed its preliminary study plans for the BG Project. These studies included: (1) Historic Structures Study, (2) Phase 1A

¹ Blenheim-Gilboa Pumped Storage Project New York Power Authority, NOI/PAD of New York Power Authority for the Blenheim-Gilboa Pumped Storage Project No. 2685 (FERC Apr. 10, 2014).

² See 18 CFR Part 5.

Archaeological Survey, (3) Literature-Based Assessment of Fish Entrainment and Turbine Passage Survival, and (4) Recreation Use/User Contact Study and Assessment of Effects the Project has on Recreation Use.

The Commission issued its Scoping Document 1 on June 4, 2014, and held scoping meetings on July 7, 2014, at the Gilboa-Conesville Central School in Gilboa, New York, and on July 9, 2014, at the Best Western Inn in Cobleskill, New York. According to NYPA, based on feedback received during the scoping process, the study plans included in the *Notice of Intent* were enhanced and two additional studies were included at the request of stakeholders.³ Building on the previous list, the PSP proposed to include (5) Effect of Project Operations on Downstream Flooding Study, and (6) Socioeconomics Study. Although NYPA expanded the proposed scope with the addition of these two studies, numerous requests by stakeholders for further studies were rejected.

In the RSP, NYPA has now minimally expanded the scope of its proposed studies compared to those contained in the PSP. The County believes, however, that the scope of NYPA's proposed studies remains inadequate to fully address and analyze the environmental and economic impacts that the BG Project has on its surroundings. As the County stated in its comments on the PSP, the scope of the proposed studies should be initially broad to capture any possible impacts that the BG Project poses. The original license for the BG Project was issued almost 50 years ago and host community demographics have changed significantly during this time. At the time the BG Project was first licensed, only potential or anticipated project impacts could be studied and evaluated. The current relicensing proceeding offers the first, and probably last, opportunity for interested stakeholders and FERC to examine actual project operations and

³ PSP, at 1.

to impose appropriate license conditions to minimize adverse impacts and maximize project benefits.

In the RSP, NYPA states that, “these revised studies will enable FERC to meet its obligations under the National Environmental Policy Act to analyze environmental effects of its relicensing action and to ensure that the Project continues to meet the public interest requirements during a new license term, as required under the Federal Power Act.” (RSP at 1-2) NYPA’s minimalistic approach to the scope of studies should be rejected as inconsistent with the purpose of the ILP. FERC created the ILP to allow for greater public participation in the licensing process.⁴ Allowing NYPA to unilaterally refuse to conduct studies requested by stakeholders and only conduct those studies as would minimally satisfy NEPA’s and the FPA’s requirements for a new license is inconsistent with the ILP’s intent of fostering public participation. Such a minimalistic process does not satisfy “public interest requirements” as NYPA alleges.

Accordingly, the County submits the following specific comments on the proposed scope of studies contained in NYPA’s RSP and respectfully requests that FERC give meaningful consideration to the County’s requests.

1. Historic Structures Survey

In its comments on the PSP, the County requested that NYPA expand the Area of Potential Effects (“APE”) to examine how BG Project operations may affect historical structures outside NYPA’s proposed study area. In the RSP, NYPA declined to expand the APE based on its narrow reading of the applicable regulations and a letter from the New York State Historic

⁴ See Docket No. RM02-16: *Hydroelectric Relicensing Under the Federal Power Act*, Final Rule – Order No. 2002 (July 23, 2003), at 1.

Preservation Office (“SHPO”) which stated that SHPO has “no concern with the proposed [APE].” (RSP, p. 53). NYPA’s justification for not expanding the APE should be rejected.

NYPA proposes to define the APE as “the lands enclosed by the Project’s boundary and lands or property outside of the Project’s boundary where Project construction and operation or Project-related recreational development or other enhancements may cause changes in the character or use of historic properties, if any historic properties exist.” (RSP, p. 53). According to NYPA, its proposed APE is consistent with the NHPA’s regulations. The NHPA’s regulations define the APE as:

“the geographic area or areas within which an undertaking may directly *or indirectly* cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 CFR §800.16(d)(emphasis added).

NYPA’s proposed APE is inconsistent with the federal regulations as it fails to take into consideration indirect impacts that project operations have had and will have in the future on historic properties outside the study area.

NYPA’s proposed APE seeks to treat this project as if it were a routine and commonly found development. To the contrary, the subject project is extraordinary in both its scale and the scope of impacts that it has on communities throughout the County. Thus, NYPA’s proposed APE fails to address the satisfy the applicable regulations.

According to NYPA, the license requires that releases at the lower reservoir essentially equal Schoharie Creek inflows to the lower reservoir. NYPA further states that it does not have the ability to sustainably pass more water below the BG Project than what is received as inflow from upstream. NYPA then jumps to the conclusion that any downstream affects to historic properties are not attributable to BG Project operations.

NYPA alleges that its approach is consistent with FERC's approach in other pumped storage projects license proceedings in which FERC declines requests to extend the APE downstream to locations beyond project-related effects. In support of this assertion, NYPA cites the relicensing of FERC Project No. 2280 – Kinzua Pumped Storage Hydroelectric Project (“Kinzua”). NYPA's reliance on the *Kinzua* proceeding is misplaced. In the *Kinzua* proceeding, it is true that FERC staff declined to expand the APE, at the request of stakeholders, but only after reviewing the results of a reservoir operations study conducted by the applicant, FirstEnergy. According to FERC staff, “[a]lthough cultural resource along the reservoir could be affected by water level fluctuations and erosion, both FirstEnergy's Reservoir Operations Study and Shear Stress Analysis indicate the effects of project operation on water level fluctuations and erosion are negligible.”⁵ Here, BG Project operations on water levels or flows have never been studied. NYPA's conclusory statements about water inflows matching water outflows and that operations do not impact historic structures downstream of the BG Project should be rejected. Not until at least preliminary studies are conducted on BG Project impacts on flooding and water levels can it be determined that historic structures outside the proposed APE are not impacted by project operations.

NYPA further alleges that, according to federal court decisions, agencies such as FERC “need not speculate about all conceivable impacts but it must evaluate the reasonably foreseeable effects of the proposed studies.”⁶ In the case cited, however, the Circuit Court went on to state, “[i]n this context, reasonable foreseeability means that ‘the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.’”⁷ Given the

⁵ Project No. 2280-13: *Kinzua Pumped Storage Hydroelectric Project*, Determination on Requests for Modifications to the Kinzua Pumped Storage Hydroelectric Project Study Plan (May 3, 2013).

⁶ *Dubois v US Dept. of Agriculture*, 102 F3d 1273, 1286 (1st Cir 1996).

⁷ *Id.* at 1286.

nature and magnitude of the BG Project, operations are sufficiently likely to impact water flows and levels and should be taken into account. Indeed, in the *Kinzua* proceeding, FERC staff did not appear to find the nexus between project operations and historic properties outside the proposed APE to be too speculative. In the *Kinzua* proceeding, FERC staff recommended that a Reservoir Operations Study be performed to quantify the level of water fluctuation within the reservoir that was caused by the pumped storage project before determining the scope of the APE.⁸

Based on the foregoing, the County respectfully requests that FERC reject NYPA's blanket denial to expand the APE at least until such time as studies on water levels and flooding can sufficiently demonstrate that BG Project operations have no impact on historic structures beyond NYPA's proposed APE.

2. Socioeconomics

The geographic scope of the study remains unduly restrictive. NYPA continues to propose that the study remain limited to consideration of the socioeconomic impacts it has upon local taxing authorities and those communities that supply first responder services. If, as NYPA presumes without further analysis, the BG Project truly has no socioeconomic impact upon the neighboring communities of the Towns of Fulton, Schoharie, Esperance and Broome, the Socioeconomic Study should readily demonstrate the validity of that assumption. However, NYPA should not be able to exclude consideration of the BG Project's socioeconomic impacts upon these communities solely on the basis of assumptions and conjecture.

NYPA states (RSP, p. 44) that the final list of Neighboring Communities to be included in the study will be derived from the analysis of entities providing first responder support to the BG Project, as described in Task 4 of the Study Plan. When compiled, the list of Neighboring

⁸ Project No. 2280-13: *Kinzua Pumped Storage Hydroelectric Project*, Study Plan Determination for the Kinzua Pumped Storage Hydroelectric Project (October 11, 2011), at 9.

Communities providing first responder services should, at a minimum, include those communities that have mutual aid agreements with the fire departments that service the BG Project. Such communities include West Fulton and Broome, both located in close proximity to the BG Project.

In Task 4 of the Socioeconomic Study (RSP, p. 50), NYPA proposes to identify local communities responsible for providing first responder services to the BG Project. Once the local communities providing such services are identified, NYPA will provide a cost benefit analysis of providing recurring payments for the services first responder units. NYPA further states that its analysis will also establish and specify the types and levels of first responder services required for the BG Project. It is not clear from Task 4 whether NYPA proposes to examine the increased tax burden on local communities arising from the presence of the BG Project. As a tax exempt entity, the BG Project does not contribute proportionately, through taxes, to the costs of first responder services. The taxpayers of local communities are forced to essentially subsidize the BG Project's operations by paying extra taxes to employ additional personnel to provide the BG Project with emergency services and maintain the public health and safety in the local communities where BG Project employees travel and engage in recreational activities. FERC should require that NYPA address such impacts in its analysis of socioeconomic impacts.

NYPA further proposes that its analysis of NYPA's tax-exempt status should be based on the value of BG Project lands as if such lands were unimproved or vacant land. In response to stakeholder comments, including the County's, NYPA has revised the scope of the Socioeconomic Study to clarify that potential tax revenues, in the absence of the BG Project, will be based upon the assumption that the land would have been developed in a manner consistent with the local development patterns." (RSP p. 67) According to NYPA, the average value of

taxable land within the study area will be used. NYPA rejected stakeholder requests to value the BG Project lands as if a similar hydroelectric generating facility had been constructed on the same site by a private developer. (RSP, p. 67)

The County appreciates NYPA's agreement to modify this study to value Project lands as something more than vacant or unimproved lands. NYPA's modifications to the proposed study, however, still fall short of adequately analyzing the BG Project's impacts on local tax revenues. Indeed, NYPA's proposed modifications may result in no, or at least minimal, differences in results then had the study been conducted based on the assumption that the land was vacant. Schoharie is rural in nature. If the majority of land within the County is vacant or undeveloped, the results of NYPA's study will remain essentially the same as if no modifications to the study plan had been made.

The property which the BG Project occupies (RSP Fig. 2.1-1) lies along a stretch of NYS Rt. 30, the County's main north-south artery. The vast majority of property in the county is not adjacent to major arteries and is found along county roads and local town roads. Without exception, the property to be found along county and town roads is not as valuable from a commercial perspective as is the acreage adjacent to major highways. Thus, to value the property upon which the BG Project lies as if it were of lesser value, that is, valued as the average of land found everywhere, where property values are potentially lower, may constitute a flawed methodology. There is no indication from NYPA's discussion of its preferred methodology of valuing its property that it has taken into consideration the inherent difference between property adjacent to major highways and property found along county and town roads.

Contrary to NYPA's allegation (RSP, p. 67) that "there is no indication that a developer other than the Power Authority proposed to develop the Project and had the means of doing so,"

private developers at the time were exploring opportunities to construct similar projects. For example, in 1963, Consolidated Edison Company of New York, Inc., filed an application with the Federal Power Commission to construct the Storm King Project, a pumped-storage facility at the base of Storm King Mountain in Westchester County, New York.⁹ Ultimately, the Storm King Project was abandoned. However, the Storm King Project demonstrates that private utilities, at around the time the BG Project was developed, were exploring similar projects and it is not inconceivable that a private developer would have proposed a project at the BG Project location given the special geographic requirements, and limited locations, for construction of pumped-storage facilities in New York.

At a minimum, FERC should require that NYPA establish a range of impacts that the BG Projects has on local taxes. The starting point for the range should be, as NYPA proposes, consistency with local development patterns and ending with a impacts as if the project were a private hydroelectric facility. Indeed, in addressing “Roads and Bridges,” (RSP, p. 68) NYPA states that “[w]hile there may be cause to evaluate impacts to roads and bridges during construction phase of a project, ongoing impacts are *consistent with those of other commercial and industrial businesses.*” (RSP, p. 68) Therefore, for the purposes of the Socioeconomic Study, NYPA would consider the land as unimproved but for the purposes of assessing traffic NYPA would consider project lands as being occupied by “other commercial and industrial businesses.”

Impacts from NYPA’s tax exempt status are of great concern to the County. The County respectfully requests that FERC give due consideration to its comments and direct NYPA to make appropriate modifications to its Socioeconomic Study to adequately reflect the County’s concerns.

⁹ See <http://library.marist.edu/archives/mehp/scenicdecision.html>.

CONCLUSION

The County appreciates the opportunity to submit comments on NYPA's RSP and looks forward to working with NYPA and other interested stakeholders to develop a proposal for a new license that adequately balances the needs of NYPA, the surrounding communities and the environment.

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