

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Bear Swamp Power Company, LLC)
Advisory Ruling)
_____)

June 13, 2008

ADVISORY RULING

By letter dated February 15, 2008, Bear Swamp Power Company LLC (“Bear Swamp” or “Company”) petitioned the Energy Facilities Siting Board (“Siting Board”) for an advisory ruling pursuant to the provisions of 980 CMR 2.07 and G.L. c. 30A, § 8 (“Request”). Bear Swamp seeks the opinion of the Siting Board as to whether a proposed project as described in the Request (“proposed project”) at the Company’s pumped storage generating facility is subject to the Siting Board’s jurisdiction under G.L. c. 164, § 69G or under G.L. c. 164, § 69 H½, and its implementing regulations at 980 CMR 11.00 et seq. As part of its Request, the Company submitted a Memorandum of Law (“Memorandum”) in support of its petition. On April 1, 2008, Bear Swamp submitted a supplement to its Request (“Supplement”).¹ On April 10, 2008, the Siting Board unanimously voted to issue an advisory ruling (Tr. of April 10, 2008 Siting Board Meeting at 22). On April 14, 2008, the Siting Board notified Bear Swamp of the Siting Board’s intent to issue an advisory ruling. The Company responded to two sets of information requests issued by Siting Board staff.

I. DESCRIPTION OF PROPOSED PROJECT

The Bear Swamp Hydroelectric Project (“Project”) is a pumped storage facility that was constructed on the Deerfield River in 1970 pursuant to a license issued by the Federal Energy Regulatory Commission (“FERC”) (Request at 2).² That license was amended in 1997 and 1998, and will expire in 2020 (id.). The capacity of the project in the generation mode is 600 MW when water is released from the upper reservoir to the lower reservoir; the capacity of the project in the pumping mode is 594 when the turbines are accepting water (id.).

¹ The Supplement includes a letter from the Massachusetts Department of Environmental Protection (“MDEP”) stating that the changes in the pumping cycle and discharge rate resulting from construction and operation of the proposed project do not require any amendments to the existing Water Quality Certificates.

² The licensing of the original Bear Swamp project pre-dates the December 31, 1974 creation of the Energy Facilities Siting Council, the predecessor to the Siting Board.

According to Bear Swamp, certain components of the facility have reached the end of their engineering lives and require maintenance, overhaul or replacement (id.). The Company is planning to replace the pump turbine runners and overhaul and rewind both generators of the existing units at the project (“proposed project”). The Company maintains that the proposed project would increase the efficiency of the use of water, and that none of the operational limitations associated with the water use, such as impoundment fluctuation or minimum flow limitations, will change as a result of the proposed project (Supplement, Att. A at 11). According to Bear Swamp, all of the proposed work would be done within the existing underground powerhouse, and there are no plans to modify the upper or lower reservoirs (Supplement, Att.A, March 27, 2008 Cover Letter). Bear Swamp states that the installation of replacement equipment, and overhauling and modification of ancillary equipment would result in an increase in overall capacity of the facility (Request at 2). Specifically, Bear Swamp estimates an increase of 62 MW in the pumping mode of operation and an increase of 66 MW when water is released, or an 11% increase (id. at 2-3; Supplement, Att. A at 11). On March 27, 2008, Bear Swamp filed with the FERC, pursuant to 18 CFR §§ 4.201 (b) and (c), an application for a non-capacity amendment to its existing license for the proposed project (Supplement, Att. A).³

Bear Swamp asserts, inter alia, that the existing Project, constructed in 1970, falls under a grandfathering provision that exempts from Siting Board jurisdiction any facility under construction prior to May 1, 1976 (Memorandum at 9, citing Section 15 of St. 1975, c.617). In addition, Bear Swamp states that the estimated incremental increase in capacity of 66 MW of the proposed project is below the Siting Board’s statutory authority of proposed generating units of 100 MW or greater (id. at 2-3). Bear Swamp maintains that the Siting Board has “repeatedly confirmed” that its authority is limited to those projects which are 100 MW or greater (id. at 3, citing UAE Lowell Power LLC, 11 DOMSB 19 (2000) (Advisory Ruling)).⁴

The Company also refers to 980 CMR 7.04(9)(c), which lists certain “activities” that do not constitute “construction of facilities”. Bear Swamp notes in particular one exclusion that provides that any modification or replacement within a generating plant site which will not increase the gross capacity of the facility by more than 10% is not considered construction of a “facility” (Memorandum at 7). Bear Swamp maintains that although there would be an 11%

³ FERC considers any increase in total capacity of less than 15% as a “non-capacity amendment” 18 CFR § 4.38.

⁴ We note that Siting Board Advisory Opinions are not precedent.

increase in capacity as a result of the proposed project, the project itself is under the Siting Board threshold of 100 MW and therefore not subject to Siting Board jurisdiction. Although the regulation does not specifically exclude the set of facts this Request presents, the Company argues that the Siting Board cannot reasonably find that all other activities not listed are subject to Siting Board jurisdiction (id. at 8).

With respect to the coordination of licensing and permitting in Massachusetts, Bear Swamp argues that the Massachusetts regulatory scheme in place is designed to coordinate and facilitate the development of hydropower generating facilities that are under 100 MW (Memorandum at 11). It is Bear Swamp's position that the proposed maintenance, overhaul and replacement project does not constitute construction of a "unit" that would be subject to the Siting Board's coordinating authority under G.L. c. 164, § 69H½ (id. at 11-12).

The Company maintains in its Application for Non-capacity Amendment to FERC that Massachusetts' jurisdiction over the proposed project is limited to reviewing the project's Water Quality Certificates pursuant to Section 401 of the Federal Clean Water Act (Supplement, Att. A at 4-7). The Company provided a copy of a letter from the Massachusetts Department of Environmental Protection ("MDEP") that no amendment to the existing Water Quality Certificates will be required for the proposed project (id., Att. B at 2).

In its application to FERC, Bear Swamp lists a number of other approvals held for the existing Project. According to the Company, the proposed project will not affect the terms and conditions of approvals granted under the Massachusetts Wetland Protection Act pursuant to G.L. c. 131 § 40 (Supplement, Att. A at 6). In addition, Bear Swamp states that the proposed project will result in no change to the discharge requirements that are authorized in its National Pollutant Discharge Elimination System ("NPDES") Permit MA 0034886 (September 30, 1999), renewal application dated April 30, 2002, and other related documents that collectively constitute the authorization to discharge pollutants under the Massachusetts Clean Water Act (id., Att. A at 6-7). Finally, the Company states the proposed project will not alter the structures or fill authorized by various agencies of the Commonwealth, pursuant to G.L. c. 91 (id., Att. A at 7).

The Company also argues that Bear Swamp's proposed project is regulated by FERC pursuant to the Federal Power Act ("FPA") (Memorandum at 12-13). As such, Bear Swamp contends that the Siting Board is preempted from asserting jurisdiction over the proposed project (id.). In support, Bear Swamp relies on First Iowa Hydroelectric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) (" First Iowa") and its progeny (id.).

II. ANALYSIS

Pursuant to G.L. c. 164, § 69G, a “generating facility” subject to the Siting Board’s jurisdiction is “any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.” The Siting Board regulations at 980 CMR 7.04 (9)(c) provide a list of activities that are deemed not to constitute construction of facilities as defined by G.L. c. 164, § 69G.

The proposed project consists of maintenance, overhaul, and replacement of systems that would result in an overall capacity increase of 66 MW. The documentation submitted by the Company also suggests that the proposed project would be confined within the existing underground project structure and would result in no changes to the water limitations, discharge requirements, and structure and fill limitations under the existing permits and licenses. Further, it is clear the law provides that the original project was exempt from Siting Board jurisdiction pursuant to Section 15 of St. 1975, c. 617, and the proposed 66 MW increase to the project is below the Siting Board’s 100 MW jurisdictional threshold set forth in G.L.c. 164, § 69G. These statutory limitations, together with the specific facts in this Request regarding the degree of project changes, would suggest that the proposed project is not a facility subject to Siting Board jurisdiction.

The Siting Board, however, must consider whether its regulations at 980 CMR 7.04(9)(c) would require it to take jurisdiction over an 11% increase in output. The Siting Board agrees with the Petitioner that it is reasonable to conclude that failure to be listed in the Siting Board regulations as an example of an activity which is exempt from Siting Board jurisdiction does not automatically render a project jurisdictional. Further, 980 CMR 7.04(9)(c) addresses facilities that, by its terms, are exempt from jurisdiction. Arguably, to be so exempt, a project first would have to meet the definition of a facility as set forth in G.L. 164, § 69G. As stated above, based on the information presented, the proposed project is under 100 MW, and does not constitute a facility. Therefore, 980 CMR 7.04(9)(c) is not applicable. Accordingly, the Siting Board concludes based on the information presented that the proposed project, which would result in a capacity increase of less than 100 MW to an existing project previously exempt from Siting Board jurisdiction, would not constitute a “generating facility” subject to the Siting Board’s jurisdiction pursuant to G.L. c. 164, § 69G.⁵

⁵ Based on this ruling, the Siting Board need not reach the question of whether the Federal
(continued...)

Pursuant to G.L. c. 164, § 69H ½, and its implementing regulations at 980 CMR 11.00 et seq., the Siting Board is required to coordinate the permitting and licensing of hydropower facilities by simplifying requirements of permits and licenses in Massachusetts. Based on (1) MDEP's determination that no amendments to Bear Swamp's existing water quality certificates are required for the proposed project and (2) Bear Swamp's representation that the proposed project would not require amendments to any other existing state permits, the Siting Board does not need to reach the question of whether the proposed project is a unit subject to the permitting and licensing requirements of G.L. c. 164, § 69 H½ and its implementing regulations at 980 CMR 11.00 et seq.

III. ADVISORY RULING

Accordingly, after due consideration of the averments of fact and the argument presented by Bear Swamp, the Siting Board hereby advises Bear Swamp that the proposed project, as described in its February Request, April Supplement and responses to information requests, is not subject to G.L. c. 164, § 69G.⁶ In addition, the Siting Board hereby advises Bear Swamp that the issue of the whether the proposed project is subject to the requirements of G.L. c. 164, § 69 H½ and its implementing regulations at 980 CMR 11.00 et seq. need not be reached.⁷

Dated this 13th day of June, 2008

Selma Urman
Presiding Officer

⁵ (...continued)
Power Act preempts the proposed project from regulation by the Siting Board.

⁶ We note that with the issuance of this advisory ruling, the conclusions reached here may not be reached in a future advisory ruling concerning this issue. As set forth in 980 CMR 2.07, "[n]o advisory ruling shall bind or otherwise estop the Board in any pending or future matter]." If an entity seeks a binding decision of this issue, the entity may either file a petition to construct and raise the issue in the context of that proceeding or may seek a determination of Siting Board jurisdiction pursuant to 980 CMR 2.08. See also Massachusetts American Water Company, D.P.U. 95-41, at 7 (1995).

⁷ In rendering the requested Advisory Ruling, the Siting Board assumes, but does not expressly find, that all material facts have been stated and that the facts are as represented by Bear Swamp's attorneys in the Request, Supplement, and responses to information requests. Should the material facts presented by Bear Swamp change, this Advisory Ruling would not be applicable.

APPROVED by the Energy Facilities Siting Board at its meeting of June 12, 2008, by the members and designees present and voting. **Voting for** approval of the Tentative Advisory Ruling, **as amended:** Ann Berwick (Acting EFSB Chair/Designee for Ian A. Bowles, Secretary, Executive Office of Energy & Environmental Affairs); Rob Sydney, Designee for Philip Giudice, Commissioner (Division of Energy Resources); Laurie Burt, Commissioner (Department of Environmental Protection); Christine Williams, Designee for Daniel O'Connell, Secretary (Executive Office of Housing & Economic Development); Paul J. Hibbard, Commissioner DPU; Tim Woolf, Commissioner DPU and Dans Kuhs, public member.

Ann Berwick, Acting Chair
Energy Facilities Siting Board

Dated this _____ day of June, 2008