

125 FERC ¶ 61,194  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

McCallum Enterprises I, Limited Partnership

Project No. 6066-033

ORDER GRANTING REHEARING

(Issued November 20, 2008)

1. On September 3, 2008, the Commission's Division of Hydropower Administration and Compliance (Commission staff) issued an order<sup>1</sup> approving a request by McCallum Enterprises I, Limited Partnership (licensee) to amend the recreation plan for its Derby Dam Hydroelectric Project No. 6066. The project is located on the Housatonic River in the cities of Shelton and Derby in New Haven and Fairfield Counties, Connecticut.
2. On October 2, 2008, the Connecticut Department of Environmental Protection (Connecticut DEP) filed a request for rehearing of Commission staff's order. For the reasons discussed below, we grant Connecticut DEP's request for rehearing.

**Background**

3. The Commission issued a license for the Derby Dam Project in 1986.<sup>2</sup> The licensee pursuant to its original recreation plan currently maintains within its project a fishing and canoe portage area located in the City of Shelton, Connecticut near the project dam, powerhouse, and tailrace.<sup>3</sup> The area is located on a ribbon of land running

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<sup>1</sup> *McCallum Enterprises I, Limited Partnership*, 124 FERC ¶ 62,166 (2008).

<sup>2</sup> *Eveready Machinery Co., Inc. and McCallum Enterprises, Inc.*, 34 FERC ¶ 62,578 (1986).

<sup>3</sup> In 1987, pursuant to Article 32 of the license, the licensee filed with the Commission and supplemented a report on public access and recreational facilities (recreation plan) to be constructed at the project. *See* filings of April 17 and August 5, 1987.

between the right bank of the Housatonic River on one side and the parallel Shelton Canal on the other.

4. On March 27, 2008, the licensee filed an application to amend its recreation plan to relocate the existing fishing and portage area from the tailrace area to an area farther downstream. The Commission issued public notice of the application on May 30, 2008. Connecticut DEP filed timely comments on the amendment and a motion to intervene on June 30, 2008.

5. On September 3, 2008, the Commission staff issued its order amending the recreation plan and approving the relocation of the recreation area, concluding that the new site would be safer and provide the same recreational opportunities as the present site. Under the amended recreation plan, a new fishing and portage area in place of the old one would be created within the project and the city on the same side of the river approximately 965 feet downstream from the current fishing and portage area.

6. Connecticut DEP filed a timely request for rehearing.

### **Discussion**

7. Connecticut DEP contends that the amended recreation plan's required relocation of the project's fishing and boat portage area in the City of Shelton will unnecessarily diminish recreational opportunities at the project in violation of section 2.7 of the Commission's regulations,<sup>4</sup> which requires licensees to assure optimal development of recreational resources afforded by their projects. The Connecticut DEP asserts, as does the Shelton Conservation Commission in its comments in the proceeding,<sup>5</sup> that the existing shoreline fishing area is heavily used by fishermen who believe that the area offers a quality fishing experience at a location where substantial numbers of fish congregate. Connecticut DEP further explains that relocating the existing recreation area as proposed by the licensee will eliminate public access to nearly 1,000 linear feet of the river and to 1.5 acres of project lands. In contrast, the new site will encompass only 0.15 acres and be at a much less desirable location. Connecticut DEP therefore argues that relocation of the existing fishing and portage area would improperly diminish project recreational resources by eliminating a valuable fishing spot.

8. After reviewing the record in this proceeding we agree with Connecticut DEP that relocation of the existing fishing and portage access area on shoreline of the project in the

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<sup>4</sup> 18 C.F.R. § 2.7 (2008).

<sup>5</sup> See the Shelton Conservation Commission's comments filed on August 25, 2008.

City of Shelton is unwarranted at this time. The licensee has not produced sufficient evidence to support relocating the area nor shown that the proposed new site will provide the same recreational opportunities as the existing site. We are unwilling, without more evidence, to deprive the public of the benefits of recreational fishing at the current site.

9. In its amendment application, the licensee contends that drownings and fatalities in Shelton Canal abutting the existing fishing and portage access area indicate the canal area is unsafe for boaters and shoreline fishermen.<sup>6</sup> However, as the Shelton Conservation Commission in its comments points out, there are no reported fatalities in the canal that involved people using the canal for recreation, and one reported fatality involved a car driving into the canal from a public street outside the project boundary. It notes also that the canal in the area of the existing fishing and portage area is only four feet deep with minimal current.<sup>7</sup> The Commission staff's inspection reports for the project also do not indicate that any fatalities or serious accidents have occurred in the Housatonic River in the vicinity of the existing fishing and portage area over the twenty two year history of the project license.

10. In support of its application, the licensee asserts that swift waters in the project tailrace of up to 4600 cubic feet per second present a hazard to canoeists and fisherman who use the existing fishing and portage access area. Although we are mindful that powerful tailrace releases can potentially endanger watercraft, the Commission's records do not indicate that any serious boating or fishing accidents in the vicinity of the existing fishing and portage area have occurred over the term of the project license.

11. Moreover, as to any safety concerns, Connecticut DEP argues that, through use of appropriate signage and fencing along the Shelton Canal and nearby tailrace area, the licensee can ensure public safety at the current fishing and portage area in conformance with Commission requirements and avoid the need to relocate the site downstream. These recommendations are similar to measures previously put in place by the licensee pursuant to Commission staff recommendations in its June 29, 1998 environmental and public use inspection report for the project, which concluded that the combination of

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<sup>6</sup> See licensee's request for approval of amendment of its recreation plan filed on March 27, 2008.

<sup>7</sup> See Shelton Conservation Commission's comments filed on August 25, 2008. In any event, on May 23, 2007, Commission staff gave the licensee approval to deactivate and fill in the canal. See 119 FERC ¶ 62,152 (2007). The licensee, according to Commission staff, is currently awaiting permits to allow it to proceed.

fencing, signs, boat barriers and warning sirens at the project should protect the public from hazards due to project operations or from project features.<sup>8</sup>

12. The licensee in its application requesting the relocation states that relocation is also warranted because expected high density residential development in the City of Shelton near the existing fishing and portage area will create high levels of foot traffic that will create safety and security issues for the project. We find this argument for relocation wanting for support. The suggestion that there could in the future be increased public use of this recreation site, which could result in some safety issues, is speculative, but in any event such issues would be considered and resolved at such time as they presented themselves.

13. Finally, although the licensee correctly notes that the proposed downstream site has the advantage of having an adjacent parking area which the current area lacks, such a consideration on balance does not overcome the inadequacies of the other arguments in favor of relocation discussed above.

14. In light of the above findings, we must conclude that relocating the project's existing fishing and portage access area within the City of Shelton has not been justified.

The Commission orders:

(A) The request for rehearing filed by the Connecticut Department of Environmental Protection on October 2, 2008, is granted.

(B) The application to amend the recreation plan for Project No. 6066 filed by McCallum Enterprises I, Limited Partnership on March 27, 2008, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>8</sup>See June 29, 1998 staff environmental and public use inspection report at 6. Staff's most recent June 19, 2003 report did not modify or discuss the 1998 report's project safety findings.