

133 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

McGinnis, Inc.

Project No. 13452-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued November 18, 2010)

1. On April 29, 2009, McGinnis, Inc. (McGinnis) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed 0.35-megawatt (MW) Cannelton Hydrokinetic Project (McGinnis Project) to be located on the Ohio River in Perry County, Indiana, and Hancock County, Kentucky, adjacent to, and downstream of, the existing U.S. Army Corps of Engineers' (Corps) Cannelton Lock and Dam and the licensed Cannelton Hydroelectric Project No. 10228. As discussed below, the order issues a preliminary permit to McGinnis.

I. Background

2. The McGinnis Project would consist of: (1) a barge that is 100 to 300 feet-long by 20 to 52 feet-wide barge attached to the riverbed; (2) ten turbine-generators that are each 6 to 8 feet long by 6 to 8 feet in diameter, mounted in line along the side of the barge; and (3) an armored submarine cable to transmit power to a metering station and transformer on shore near a grid connection point located adjacent to the proposed project area. The proposed project would have an installed capacity of 0.35 MW and generate about 1,533 megawatt-hours (MWh) annually. The proposed project site, which would include no dam or impoundment, would include the entire width of the river of approximately 1,750 feet and extend from just below the Corps' dam to approximately 4,000 feet downstream. The proposed project boundary does not include any Corps facilities.

¹ 16 U.S.C. § 797(f) (2006).

3. The Commission issued a public notice of McGinnis' application on July 2, 2009, establishing August 31, 2009 as the deadline to file comments, motions to intervene, notices of intent to file competing applications, and competing applications. No notices of intent or competing applications were filed. The U.S. Department of the Interior (Interior) filed a timely notice to intervene on August 27, 2009² and, on August 31, 2009, comments opposing issuance of the permit on environmental grounds. American Municipal Power, Inc. (AMP)³ filed a late motion to intervene on September 2, 2009,⁴ as amended on November 23, 2009, opposing permit issuance based on potential interference by the proposed project on AMP's Cannelton Project. McGinnis filed a reply to AMP's motion and amendment.

II. Discussion

4. 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,⁵ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license or exemption for the project that is being studied.⁶ Because a permit is issued only to allow the permit holder to conduct investigations and secure necessary data to

² Timely, unopposed motions and notices to intervene are granted by operation of Rule 214 of the Commission's regulations. *See* 18 C.F.R. § 385.214 (2010).

³ AMP is an Ohio nonprofit corporation that provides generation, transmission, and distribution of electricity for its member-public power communities in Ohio, Pennsylvania, Michigan, Virginia, West Virginia, and Kentucky.

⁴ The late intervention was granted by unpublished notice issued on September 30, 2010.

⁵ 16 U.S.C. § 802 (2006).

⁶ *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

determine the feasibility of the proposed project and to prepare a development application, it grants no land-disturbing or other property rights.⁷

A. Interior's Comments

5. Interior recommends that the Commission deny the permit application, contending that the proposed project area includes a section of the Ohio River that has unique habitat value, that the impacts of the proposed project are unknown, and that aquatic resources could be harmed. Noting that there are some twenty similar projects proposed to be located on the Ohio River, near environmentally sensitive areas, Interior recommends that, before individual projects are considered, a comprehensive environmental impact study should be conducted on the cumulative impacts associated with all the proposed hydrokinetic projects. Should the Commission decide to issue the permit to McGinnis, Interior lists additional information it believes is needed before a thorough evaluation of the project's impacts can be made.

6. Interior's concerns relate to the construction and operation of the proposed project and are premature at the permit stage. These concerns can properly be addressed during the licensing process should McGinnis file a development application.⁸ The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. As noted above, a preliminary permit does not authorize a permittee to undertake any ground-disturbing activities, and thus, the issuance of a permit would not have any environmental impact or amplify the impact of nearby hydrokinetic projects.

7. Moreover, we are not required to prepare a comprehensive plan before issuing a permit.⁹ To ensure that we have adequate information to determine project effects and benefits during the licensing phase, we require license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all

⁷ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. 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).

⁸ *See, e.g., Don L. Hansen*, 120 FERC ¶ 61,069 (2007).

⁹ *See Green Wave Energy Solutions, LLC*, 128 FERC ¶ 61,034 (2009), *appeal docketed*, No. 09-72920 (9th Cir. Sept. 14, 2009).

reasonable studies requested by resource agencies, including site-specific and cumulative impact analyses.¹⁰ Consistent with that approach, the issues that Interior raises here can be raised in a licensing proceeding, during which the Commission regularly conducts a cumulative impact analysis as part of its environmental review, if this project reaches that stage.

B. Impact on Licensed and Unconstructed Cannelton Hydroelectric Project

8. AMP requests that we deny McGinnis' preliminary permit application because the McGinnis Project would substantially alter AMP's licensed Cannelton Hydroelectric Project, which is currently undergoing construction and is located at, and integrated into, the Corps' Cannelton Lock and Dam. The McGinnis Project's proposed boundary overlaps with the project boundary for the Cannelton Hydroelectric Project, just downstream of the tailrace.¹¹ In the alternative, AMP requests that the boundary for the McGinnis Project be fixed in a manner so as to minimize or prevent impacts on the Cannelton Hydroelectric Project.

9. AMP asserts that McGinnis could only moor its barge at Cannelton Hydroelectric Project's tailrace, and that doing so would impermissibly alter AMP's project works and impact the operation of its project. It argues that McGinnis' proposal would create a backwater effect¹² at the tailrace and reduce head, which in turn would result in decreased power generation at AMP's project. To support its contention, AMP provides an analysis that shows, among other things, that the Cannelton Hydroelectric Project would generate 2,300 MWh less annually if the McGinnis Project were placed fifty feet from its draft tubes. This would cause a net generation loss from both projects, since the McGinnis Project could only generate 1,533 MWh.

10. In addition, AMP argues that the McGinnis project would interfere with the Commission-approved AMP project recreation plan because AMP's recreational fishing pier would be located at the tailrace. Furthermore, it argues that a large barge located

¹⁰ See *Symbiotics, LLC*, 99 FERC ¶ 61,101, at 61,420 (2002).

¹¹ A tailrace is a channel that conveys water discharged from a hydroelectric project back into a stream or river.

¹² Backwater effect is the raising of the water surface elevation upstream of an obstruction placed in the river. The rise in water surface elevation could result in less power and lower average annual energy generation at a conventional hydropower project.

immediately next to a fishing pier could be potentially hazardous if the barge were to become unmoored.

11. If the Commission were to issue a permit to McGinnis, AMP recommends that the Commission fix the boundary of the McGinnis Project to 2,000 to 3,000 feet from the dam in order to ensure no interference with its existing project. At this distance, AMP states that its generation would not be affected.

12. Lastly, AMP argues that McGinnis' application should be denied because the facts in this proceeding are analogous to the situation in *Marseilles Land and Water Co.*,¹³ where the Commission dismissed preliminary permit applications because they would develop, conserve, and use the same water resources as, and was located in close proximity to, projects that were in the licensing phase.¹⁴

13. AMP has failed to show that the issuance of a preliminary permit presents such a clear potential conflict with the Cannelton Hydroelectric Project that we should deny the permit application. The issuance of a preliminary permit would not have any effect on AMP's project because a preliminary permit, by its terms, gives the permit holder no land-disturbing or other property rights or authority to place test devices in the water.¹⁵ Therefore, nothing arising from the grant of a preliminary permit will affect AMP's project or its recreational resources.

14. The record does not show that the McGinnis Project must impact Cannelton Hydroelectric Project to any substantial degree. Indeed, AMP describes varying degrees of potential effects by McGinnis' project on the Cannelton Hydroelectric Project, based on the distance of McGinnis' barge from the Cannelton Hydroelectric Project's tailrace and the number and capacity of McGinnis' turbines. AMP's engineering analysis shows that the effect diminishes as the distance from the tailrace increases and the number and capacity of McGinnis' turbines decreases. At one point, AMP concedes that McGinnis could place its barge within its requested 4,000-foot area and the barge would not have an effect on AMP's project.¹⁶ AMP's arguments only highlight the uncertainty of the McGinnis' proposed project's effects on the Cannelton Hydroelectric Project. The

¹³ 129 FERC ¶ 61,140 (2009) (*Marseilles*).

¹⁴ *See id.* P 32.

¹⁵ *See* Article 1 of Form P-1 to this order.

¹⁶ *See* AMP's Motion to Intervene and Protest at 9 and Table 1 of Attachment 2 to AMP's Motion to Intervene and Protest (stating no loss of head).

Commission's policy is to issue a permit "[w]here it is not clear at the permit stage that the proposed development would involve an impermissible alteration of an existing license."¹⁷ In fact, we have recently rejected as speculative similar arguments regarding other proposals by McGinnis to place a barge near two existing projects.¹⁸

15. With regard to the overlapping project boundaries immediately downstream of the tailrace, the dispositive consideration for the Commission is not a permit application's project boundary, which, because of the fluid nature of permit project proposals, may change, but whether the project would develop, conserve, or utilize the same water resources as another project.¹⁹ Here, based on all the evidence provided, it is unclear whether the projects would utilize the same water resources despite the project boundary overlap. Therefore, the overlapping project boundaries does not preclude issuance of a permit to McGinnis.

16. Additionally, we find no reason to dismiss McGinnis' permit application under the policy set forth in *Marseilles*. In *Marseilles*, the permit applicant's proposal included diverting flow directly through the headgate structure of a license applicant's proposed project. The license applicant had not received a license and had not constructed a headgate structure yet. The conflict between the proposed permit project and the proposed license project was unambiguous: the permit project was clearly utilizing the same water resource as the license project at the headgate.²⁰ Here, the facts do not demonstrate a clear conflict over the utilization of the same water resources based even on AMP's arguments and supporting engineering analysis. There are too many variables (e.g. distance to tailrace, number and capacity of turbines, and type of turbine) to indicate the existence of a clear conflict. Thus, *Marseilles* does not dictate dismissing the application.

¹⁷ *Phoenix Hydro Corp.*, 58 FERC ¶ 61,205, at 61,641 (1992).

¹⁸ *See McGinnis, Inc.*, 129 FERC ¶ 61,229 (2009).

¹⁹ *See Streamline Hydro, Inc.*, 33 FERC ¶ 61,361, at 61,712 (1985).

²⁰ Unrelated to water resources, the permit proposal also directly interfered with the license applicant's proposal in *Marseilles* by proposing to connect a new transmission line to an existing line, which the license applicant proposed to relocate in order to use the land for its powerhouse, office, parking lot, and historical museum.

C. Permit Information

17. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.²¹ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.²² Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

18. This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of permittees, this permit will also require the permittee to file, within forty-five days of the issuance date, a schedule of activities to be carried out under the permit and target dates for completion of these activities. At a minimum, this should include the filing of the NOI and PAD within one year of permit issuance, along with any request to use the traditional or alternative licensing process, or an NOI and Draft License Application within two years of the permit issuance for development of a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD must also include the time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and a preliminary list of issues identified and necessary studies related to these issues. If the periodic progress reports required by Article 4 of this permit do not show significant progress, or if the permittee fails to comply with any other conditions, the permit may be canceled.

19. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for

²¹ 18 C.F.R. §§ 5.5 and 5.6 (2010).

²² *See id.* § 5.3.

project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.²³

The Commission orders:

(A) A preliminary permit is issued for the Cannelton Hydrokinetic Project No. 13452 to McGinnis, Inc. for a period effective the first day of the month in which this permit is issued, and ending either thirty-six months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) Within forty-five days of the issuance date of the permit, a schedule of activities proposed by the permittee during the three-year permit term, leading to the filing of a development application. At a minimum, this shall include filing, within one year of the date of issuance of this permit, a notice of intent to file a license application (NOI) and pre-application document (PAD), accompanied by, if desired, a request to use the Traditional Licensing Process or Alternative Licensing Process in lieu of the Integrated Licensing Process, or the filing of an NOI and Draft License Application for a Pilot Project no later than two years from the date of issuance of this permit with a request for the necessary waivers to the Integrated Licensing Process to pursue hydrokinetic pilot project licensing procedures. The PAD shall include a time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and for developing and filing a preliminary list of issues identified and studies related to these issues needed to develop a license application.

²³ See *City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981).

(D) This order constitutes final agency action. Any party to this proceeding may file a request for rehearing of this order within thirty days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2010).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Form P-1 (Revised December 2009)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. At the close of each six-month period from the effective date of this permit, the permittee shall file a progress report electronically via the Internet; and shall serve a copy on the intervenors in this proceeding. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The report shall describe, for that report period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land.