

133 FERC ¶ 61,143
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. 13445-000

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 Newburgh Hydrokinetic Project (McGinnis Project) to be located on the Ohio River in Warrick County, Indiana, and Henderson County, Kentucky, adjacent to, and downstream of, the existing U.S. Army Corps of Engineers' (Corps) Newburgh Lock and Dam. As discussed below, the order issues a preliminary permit to McGinnis.

Background

2. The McGinnis Project would consist of: (1) a barge that is 100 to 300 feet long by 20 to 52 feet wide attached to the riverbed; (2) ten turbine-generators that are each 6 to 8 feet long and 6 to 8 feet in diameter, mounted in line along the side of the barge; and (3) an armored high-voltage 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 a total installed capacity of 0.35 megawatts and generate about 1,533 megawatt-hours annually. The proposed project site, which would include no dam or impoundment, would include the entire width of the river of approximately 2,200 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.

3. The Commission issued a public notice of McGinnis' application on June 25, 2009, soliciting comments, motions to intervene, notices of intent to file

¹ 16 U.S.C. § 797(f) (2006).

competing applications, and competing applications. No notices of intent or competing applications were filed. On August 20 and 21, 2009, respectively, the U.S. Department of the Interior (Interior) filed comments opposing issuance of the permit on environmental grounds and a timely notice to intervene.² Newburgh Hydro, LLC (Newburgh) filed a timely motion to intervene on August 20, 2009, opposing permit issuance based on potential interference by the proposed project on Newburgh's proposed conventional Newburgh Hydroelectric Project No. 12962, for which it currently holds a preliminary permit.³ McGinnis filed a reply to Interior and Newburgh. On August 24, 2010, the Commission issued a letter to counties and towns in the proposed project area extending the deadline established in the June 25, 2009 notice for the entities addressed, giving those entities a new deadline of October 25, 2010.⁴ In response to that letter, on October 27, 2010 the Town of Newburgh filed a late motion to intervene. Pursuant to Rule 214,⁵ the motion to intervene is granted, subject to the Commission's Rules and Regulations.

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,⁶ 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.⁷ Because a permit is issued

² Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, Interior became a party to the proceeding upon the timely filing of its notice of intervention. 18 C.F.R. § 385.214(a)(2) (2010).

³ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2010).

⁴ This was to ensure that these entities had received notice as required by section 4(f) of the Federal Power Act. *See* 16 U.S.C. § 797(f) (2006).

⁵ 18 C.F.R. § 385.214 (2010).

⁶ 16 U.S.C. § 802 (2006).

⁷ *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.").

only to allow the permittee to conduct investigations and secure necessary data to determine the feasibility of the proposed project and to prepare a development application, it grants no land-disturbing or other property rights.⁸

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.⁹ 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 hydroelectric projects.¹⁰

7. Moreover, we are not required to prepare a comprehensive plan before issuing a permit.¹¹ To ensure that we have adequate information for a determination of project

⁸ 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).

⁹ *See, e.g., Don L. Hansen*, 120 FERC ¶ 61,069 (2007).

¹⁰ *See supra* notes 5 and 6.

¹¹ *See Green Wave Energy Solutions, LLC*, 128 FERC ¶ 61,034 (2009), *appeal docketed*, No. 09-72920 (9th Cir. Sept. 14, 2009).

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 reasonable studies.¹² 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 Existing Permit held by Newburgh

8. On May 19, 2008, Newburgh was issued a preliminary permit for the Newburgh Hydroelectric Project No. 12962 to study the feasibility of constructing a 65-MW conventional hydropower project located at, and integrated into, the Corps' Newburgh Lock and Dam.¹³ On January 5, 2009, Newburgh filed a Notice of Intent and Pre-Application Document for a hydropower license.¹⁴ The proposed boundary for the McGinnis Project overlaps slightly with the boundary for the Newburgh Hydroelectric Project.¹⁵

9. In its intervention, Newburgh contends that the acceptance of McGinnis' preliminary permit application was contrary to section 4.33(a)(1) of the regulations, which provides that the Commission will not accept an application for a preliminary permit for project works that "would develop, conserve, or utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit."¹⁶ Newburgh asserts that both the Newburgh Hydroelectric Project and the McGinnis Project "would use the Newburgh Lock & Dam and the water resources in and around the dam."¹⁷

¹² See *Symbiotics, LLC*, 99 FERC ¶ 61,101, at 61,420 (2002).

¹³ *Newburgh Hydro, LLC*, 123 FERC ¶ 62,139 (2008).

¹⁴ See 18 C.F.R. § 5.6 (2010). Newburgh is developing its license application using the Commission's Integrated Licensing Process. See 18 C.F.R. §§ 5.1-5.31 (2010).

¹⁵ The project boundaries overlap from zero feet at the southern end of the Newburgh Lock and Dam to approximately 600 feet (measured from the face of the dam) at the northern end of the Newburgh Lock and Dam.

¹⁶ 18 C.F.R. § 4.33(a)(1) (2010).

¹⁷ Newburgh Intervention at 3. Newburgh also states its concern that, if the Commission issues a preliminary permit for the McGinnis Project, Newburgh may need

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10. We disagree. The Commission has issued permits to applicants whose project boundaries overlap, where it appeared that the projects would not necessarily be mutually exclusive. The dispositive consideration is not a permit application's project boundary, which, along with the location of facilities may change, but rather a project's proposed use of the same water resource as another project.¹⁸ There is nothing in the record to support Newburgh's claim that a hydrokinetic project that makes use of water flowing downstream of a conventional hydroelectric project's tailrace¹⁹ would utilize the same water resource as a conventional project that uses the head created by a Corps dam. To the contrary, Newburgh's proposed project would be located at the Corps' dam, use the head from the dam to generate power, and then discharge water from its powerhouse into the Ohio River immediately downstream of the dam. The McGinnis Project is proposed to be located downstream of the Corps dam and would use Ohio River flows after they are discharged from the Corps dam. McGinnis' proposed project boundary extends 4,000 feet downstream of the dam, and the barge's location within that area has not yet been determined.

11. Because of the possibility that both projects could co-exist, we believe it is appropriate in this case to allow both to continue to be studied pursuant to a preliminary permit. However, given the facts of this case, should both permittees file license applications within the terms of the referenced permits and we find a conflict between the two projects during the licensing stage, Newburgh (as the first permittee) would be treated as the priority applicant in selecting between applicants under section 4.37(c) of our regulations.²⁰

to revisit the studies being conducted to prepare its license application to address cumulative impacts. Newburgh's concern regarding additional cumulative impact studies that might be needed in the future is premature at this stage.

¹⁸ See *Streamline Hydro, Inc.*, 33 FERC ¶ 61,361, at 61,712 (1985).

¹⁹ A tailrace is a channel that conveys water discharged from a hydroelectric project back into a stream or river.

²⁰ 18 C.F.R. §4.37(c) (2010). This section provides that, in deciding between license applications that compete for the same water resource, the Commission will favor the priority applicant, provided that its plans are at least as well as adapted as those of a competing applicant. The priority applicant is defined as a preliminary permittee who files an acceptable development application within the term of its preliminary permit. This section further stipulates that the Commission will, if necessary, provide the priority applicant with an opportunity to render its plans at least as well adapted as those of a

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Permit Information

12. 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.

13. 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 45 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 Application within two years of the permit issuance for development of a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. 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 for financial reasons or otherwise, the permit may be canceled.

14. 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 entities intend to

competing applicant. In the scenario described above, Ordering Paragraph (D) clarifies that in the event of a conflict at the licensing stage between Newburgh and McGinnis, Newburgh would be treated as the priority applicant.

²¹ 18 C.F.R. §§ 5.5 and 5.6 (2010).

²² See 18 C.F.R. § 5.3 (2010).

hold during the term of any license issued any of these proprietary rights necessary for 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 Newburgh Hydrokinetic Project No. 13445 to McGinnis, Inc. for a period effective the first day of the month in which this permit is issued, and ending either 36 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 (FPA) and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) Within 45 days of the issuance date of the permit, the permittee shall file 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.

(D) In the event of a conflict at the licensing stage between Newburgh Hydro, LLC's conventional Newburgh Hydroelectric Project No. 12962 and McGinnis, Inc.'s Newburgh Hydrokinetic Project No. 13445, with respect to applications filed within the terms of the preliminary permits referenced in this order, Newburgh Hydro, LLC (as the first permittee) would be treated as the priority applicant under section 4.37(c) of our regulations, 18 C.F.R. § 4.37(c) (2010).

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

(E) The motion for late intervention filed on October 27, 2010 by the Town of Newburgh is granted.

(F) 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. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2010). The filing of a request for rehearing does not operate as a stay of the effective date of this preliminary permit or of any other date specified in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy 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.