

145 FERC ¶ 61,255  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

FFP Qualified Hydro 14, LLC  
Western Minnesota Municipal Power Agency

Project No. 13579-002  
Project No. 14491-000

ORDER ISSUING SUCCESSIVE PRELIMINARY PERMIT, GRANTING PRIORITY  
TO FILE LICENSE APPLICATION, AND DENYING COMPETING APPLICATION

(Issued December 19, 2013)

1. On February 1, 2013, at 8:30 a.m., FFP Qualified Hydro 14, LLC (FFP) filed a preliminary permit application, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the Saylorville Dam Water Power Project No. 13579 to be located at the existing Saylorville Dam and Lake on the Des Moines River, in the City of Johnston in Polk County, Iowa. At the same time,<sup>2</sup> Western Minnesota Municipal Power Agency (Western Minnesota) filed, and revised on March 11, 2013, a competing preliminary permit application for the proposed Saylorville Hydroelectric Project No. 14491, to be located at the same site. Western Minnesota has claimed entitlement to municipal preference pursuant to section 7(a) of the FPA.<sup>3</sup> For the reasons discussed below, we are issuing a preliminary permit to FFP and denying Western Minnesota's application.

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

<sup>2</sup> The Commission is open each day, except Saturdays, Sundays, and holidays, from 8:30 a.m. to 5:00 p.m. *See* 18 C.F.R. § 375.101(c) (2013). The two applications were filed between 5:00 p.m. on January 31, 2013 and 8:30 a.m. on February 1, 2013. Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. *See id.* § 385.2001(a)(2).

<sup>3</sup> 16 U.S.C. § 800(a) (2012).

## I. Background

2. Saylorville Dam and Lake are owned by the United States government and operated by the U.S. Army Corps of Engineers (Corps), Rock Island District. The Corps built and operates the dam and lake for the purpose of flood control, water conservation, fish and wildlife habitat management, recreation, and water supply. The dam is 6,750 feet long, 125 feet high (with a crest at 915.5 feet mean sea level (msl)), and 1,125 feet wide at its base and 44 feet wide at the top of the dam. At normal surface elevation of 836 feet msl, Saylorville Lake has a surface area of 5,520 acres and gross storage capacity of 74,000 acre-feet.

3. FFP's proposed project would consist of: (1) a new 400-foot-long by 300-foot-wide forebay channel; (2) a new 75-foot-long by 50-foot-wide by 140-foot-high concrete intake; (3) a new 18-foot-diameter by 75-foot-long concrete lined headrace tunnel; (4) a new 18-foot-diameter by 250-foot-long steel penstock; (5) three 10-foot-diameter, various-length pipelines that connects the penstock to the proposed turbines; (6) a new 120-foot-long by 70-foot-wide concrete powerhouse, containing three 4.8 megawatt (MW) Kaplan turbine-generators, with a combined nameplate capacity of 14.4 MW; (7) a new 275-foot-long by 190-foot-wide tailrace channel; (8) a new 60-foot-long by 50-foot-wide substation; (9) a new 4,950-foot-long, 69-kilovolt (kV) transmission line from the project substation to an interconnection point and a buried 1,000-foot-long, 4.16-kV transmission line from the powerhouse to the project substation; and (10) appurtenant facilities. The project would have a total installed capacity of 14.4 MW and an estimated annual generation of 45.3 gigawatt-hours (GWh). On February 24, 2010, the Commission issued FFP a preliminary permit for the site.<sup>4</sup> The permit expired on January 31, 2013.

4. On February 1, 2013, FFP filed an application for a successive permit to continue to study the project. FFP asserts that it has been diligent under the terms of its previous permit because it has filed a Pre-Application Document (PAD), Notice of Intent with a request to use the Traditional Licensing Process (TLP), and a Planned Study Document (PSD); consulted federal and state agencies; and modified its design concept as a result of its consultations with the Corps.<sup>5</sup>

5. Also on February 1, 2013, Western Minnesota filed an application for a preliminary permit for Project No. 14491-000, to be located at the same site. Western Minnesota's proposed project would consist of: (1) a new 80-foot-long by 35-foot-wide by 95-foot-high concrete intake; (2) three new 14-foot-diameter by 740-foot long

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<sup>4</sup> See *FFP Qualified Hydro 14, LLC*, 130 FERC ¶ 62,158 (2010).

<sup>5</sup> See FFP's Successive Preliminary Permit Application, filed on Feb. 1, 2013, at 12-13.

conduits; (3) a new 100-foot-long by 50-foot-wide concrete powerhouse with three 5-MW Kaplan vertical turbines, having a combined generating capacity of 15 MW; (4) three new 7.5-MW generator units; (5) a 100-foot-long by 75-foot-wide substation; (6) a new 3.73-mile-long, 69-kV transmission line; and (7) appurtenant facilities. The project would have an estimated annual generation of 66 GWh.

6. The Commission issued a joint public notice of Western Minnesota's and FFP's competing preliminary permit applications on March 15, 2013, establishing a deadline of May 13, 2013, for filing comments, motions to intervene, competing applications, and notices of intent to file a competing application for Project Nos. 13579-002 and 14491-000. The U.S. Department of the Interior and the Iowa Tribe of Kansas and Nebraska filed pleadings in both proceedings stating that they had no comments. The Iowa Department of Natural Resources (Iowa DNR) filed comments in both proceedings. Western Minnesota filed a timely motion to intervene,<sup>6</sup> opposing FFP's preliminary permit application for Project No. 13579 and arguing that Western Minnesota should be issued a permit based on municipal preference.

7. On October 10, 2013, the Commission issued a *Notice Announcing Preliminary Permit Drawing*, to be held on October 21, 2013, for the purpose of determining which of the two applications would be deemed to have been filed first.

8. On October 21, 2013, Western Minnesota filed a motion requesting that the Commission withdraw the notice of the drawing, arguing that because it was a section 3(7) municipality, its application should be given preference and the drawing was therefore unnecessary.

9. The drawing was held on October 21, 2013, and, as set forth in an October 23, 2013 notice, established the following order of priority: (1) FFP and (2) Western Minnesota.

## **II. Discussion**

10. 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,<sup>7</sup> which in turn sets forth the material that must accompany an application for a license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for

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<sup>6</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. See 18 C.F.R. § 285.214(c)(1) (2013).

<sup>7</sup> 16 U.S.C. § 802 (2012).

a license for the project that is being studied.<sup>8</sup> Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.<sup>9</sup>

11. Section 7(f) of the FPA provides that:

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.<sup>10</sup>

12. Section 3(7) of the FPA defines “municipality” as “a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.”<sup>11</sup>

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<sup>8</sup> 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.”).

<sup>9</sup> 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).

<sup>10</sup> 16 U.S.C. § 800(a) (2012).

<sup>11</sup> *Id.* § 796(7).

**A. Successive Permit Application**

13. As stated earlier, FFP held a preliminary permit for this site under Project No. 13579-000. The Commission will grant successive permits only if it concludes that the applicant has pursued the requirements of its prior permit with due diligence and in good faith.<sup>12</sup> Thus, before we turn to any other issues here, we must determine if FFP meets the foregoing standard.

14. As indicated in its timely progress reports and other filings in the record, during the term of its previous permit FFP has: (1) held a joint agency meeting and continuously consulted with the Corps concerning the project design; (2) filed a notice of intent to prepare a license application and prepared a pre-application document; (3) filed a request to use the Commission's traditional licensing process; (4) filed and solicited comments on its Planned Studies Document; and (5) refined its project design after consultation with the Corps. Therefore, the Commission concludes that FFP has pursued the requirements of its prior permit in good faith and with due diligence,<sup>13</sup> and its current permit application will be considered in competition with Western Minnesota's permit application.

**B. Municipal Preference**

15. As stated in its application, Western Minnesota is a municipal corporation and political subdivision of the State of Minnesota, located in Ortonville, Minnesota.<sup>14</sup> As noted above, Western Minnesota claims that it is entitled to municipal preference under section 7(a).

16. In the present proceeding, Western Minnesota has satisfied the definition of a "municipality" under section 3(7) of the FPA by providing evidence showing that it is competent under Minnesota law to engage in the business of developing, transmitting, utilizing, or distributing power.<sup>15</sup> Both entities appear to be in the early stages of project development and neither applicant contends that its application is superior to the others'.

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<sup>12</sup> See *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at P 8 (2013).

<sup>13</sup> See, e.g., *Northland Power Mississippi River LLC*, 139 FERC ¶ 61,177 (2012).

<sup>14</sup> See Western Minnesota's Preliminary Permit Application at 4.

<sup>15</sup> See Attachment A to Western Minnesota's Preliminary Permit Application (citing MINN. STAT. § 453.54 (2013)).

17. Section 7(a) of the FPA provides us no guidance as to the scope of municipal preference. Accordingly, we are left to develop a reasonable construction of the statute.<sup>16</sup> We conclude that the best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity. It is appropriate that a municipality be granted preference in developing nearby hydropower sites for the benefit of its citizens. However, it is difficult to discern what public interest is served by giving a municipality a preference with respect to a project that is far from the site of the municipality. To do so would effectively make municipalities super-competitors with respect to all new hydropower developments, regardless of their location. For example, if municipal preference were viewed as absolute, a municipal entity located on the east coast could claim preference over a private entity seeking to develop a project in Hawaii. Indeed an unlimited application of municipal preference could wind up harming municipalities in some instances, as in a case where a distant municipality competed for the same water resource as a municipal applicant located at the project site. If both entities could legitimately claim preference, and if they filed applications at the same time, the distant municipality might win a tiebreaker drawing and then deprive the nearby municipality of the right to utilize a local water resource.

18. This interpretation is buttressed by section 4(f), which requires the Commission, after receiving an application for a preliminary permit, to “give notice of such application in writing to any State or municipality likely to be interested in or affected by such application . . . .”<sup>17</sup> The statute distinguishes between municipalities in general and those likely to be interested in a potential project, and it would be administratively impossible for the Commission to determine which municipalities were likely to be interested other than on the basis of propinquity. Thus, consistent with our holding here, the FPA does not extend the same treatment to all municipalities, and in fact favors municipalities located near a project site.

19. Here, Western Minnesota seeks municipal preference with respect to a project located almost 400 miles from Ortonville on the Des Moines River in Des Moines, Iowa, and the record reveals no connection, beyond a business development interest, between the proposed project and the applicant. We conclude that granting municipal preference to Western Minnesota in these circumstances would not be in the public interest.

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<sup>16</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (stating that “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”).

<sup>17</sup> 16 U.S.C. § 797(f) (2012).

20. Because we have decided that Western Minnesota is not entitled to municipal preference and because there is no claim that either FFP's or Western Minnesota's plan is better adapted than the other, we then turn to the first-in-time tiebreaker. FFP's application was determined to be considered first-in-time by the drawing held on October 21, 2013, so we will issue a successive preliminary permit to FFP to develop the Saylorville Dam Water Power Project No. 13579-002.<sup>18</sup>

**C. Issues Related to Project Construction and Operation**

21. Iowa DNR provided information related to fish, recreation, and terrestrial resources that it states should be studied prior to the preparation of a license application. Specifically, Iowa DNR commented that the following items should be addressed during the study period: the effect of changes in flow hydrodynamics on aquatic biota and sports fishing; the potential impacts of the project on aquatic resources including fish, mussels, and rare, threatened and endangered species; the potential for fish impingement and entrainment impacts caused by turbine operation on fish survival and mortality; and the exploration of turbine technology that would minimize fisheries impacts.

22. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments on environmental effects and measures needed to mitigate the effects are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project, which has not yet been developed in full detail. Should the permittee file a license application, these issues will be addressed in the licensing process.

**D. Consultation and Study Requirements Under the Permit**

23. Iowa DNR specifically recommended that the permittee conduct field fish and mussel field studies during the preliminary permit period to identify species diversity and the presence of threatened and endangered state and/or federal species. In addition, the Iowa DNR recommended that surveys be conducted on terrestrial, aquatic, and semi-aquatic habitats of rare, threatened, and endangered species in the area of potential effect.

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<sup>18</sup> Western Minnesota's argument in its October 21, 2013 Filing that we should not have held a drawing to establish first-in-time priority, given its status as a municipality, is not convincing. A drawing simply establishes a first-in-time priority, to be used as a tiebreaker in the event that one is necessary – that is, if no applicant is granted municipal preference and if no application is deemed superior to another. The fact that we hold a drawing does not mean that we will not ultimately accord one of the applicants municipal preference or find that one application is superior.

24. The Commission has not sought to place all relevant study requirements in preliminary permits.<sup>19</sup> Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.<sup>20</sup> Therefore, we will not at this time require the permittee to perform any specific studies.

### **III. Permit Information**

25. 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. 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.

26. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-month period from the effective date of this permit. A progress report must describe the nature and timing of what the permittee has done under the pre-filing requirements of section 4.38 and Part 5 of the Commission's regulations for the specific reporting period. A permit may be canceled if a permittee fails to file a timely progress report or if the report does not demonstrate that progress is being made by the permittee. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

27. 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 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

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<sup>19</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

<sup>20</sup> See 18 C.F.R. § 4.38 (2013).

applicants for license, the joint application will not be eligible for any permit-based priority.<sup>21</sup>

The Commission orders:

(A) A successive preliminary permit is issued for the Saylorville Dam Water Power Project No. 13579-002 to FFP Qualified Hydro 14, LLC 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) The competing preliminary permit application filed by Western Minnesota Municipal Power Agency for the Saylorville Hydroelectric Project No. 14491-000 is denied.

(C) 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.

(D) The permittee shall coordinate the studies and its plans for access to the site during the term of this permit with the Corps District Engineer to ensure that the feasibility studies will result in a plan of development consistent with the authorized purposes of the federal project.

(E) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2013).

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>21</sup> See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

**Form P-1 (Revised April 2011)****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.** No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. §§ 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. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. 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.