

155 FERC ¶ 61,007
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Advanced Hydropower, Inc.

Project No. 14697-000

ORDER DENYING PRELIMINARY PERMIT APPLICATION

(Issued April 5, 2016)

1. On August 3, 2015, Advanced Hydropower, Inc. (Advanced Hydropower) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed McNary Dam Advanced Hydropower Project No. 14697. The project would be located at the U.S. Army Corps of Engineers' (Corps) McNary Lock and Dam facility on the Columbia River near Plymouth in Benton County, Washington, and Umatilla in Umatilla County, Oregon.

I. Project Proposal

2. The proposed project would utilize the existing McNary Dam and would consist of the following new facilities: (1) a 52-foot-wide, 40-foot-high gated intake located on the upstream side of McNary Dam; (2) a 32-foot-wide, 34-foot-high, 234-foot-long concrete penstock installed through McNary Dam; (3) a 103-foot-long, 93-foot-wide powerhouse; (4) a 34-megawatt (MW) vertical shaft Alden turbine; (5) a draft tube discharging flows to the existing McNary Dam tailrace; (6) a 1.24-mile-long transmission line interconnecting with the existing McNary Dam switchyard; and (7) appurtenant facilities. The estimated annual generation of the McNary Dam Project would be 148.92 gigawatt-hours. The proposed project would be located entirely on federal land under the jurisdiction of the Corps.

II. Background

3. Under sections 4(e) and 4(f) of the FPA,² the Commission has the authority to issue preliminary permits and licenses for hydropower projects located at federal dams

¹ 16 U.S.C. § 797(f) (2012).

² 16 U.S.C. §§ 797(e), (f) (2012).

and facilities.³ This jurisdiction is withdrawn if federal development of hydropower generation at the site is authorized, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.⁴

4. The McNary Lock and Dam was authorized by the Rivers and Harbors Act of 1945, as recommended in House Document 75-704.⁵ The Corps owns and operates a 980-MW hydroelectric project at the dam.⁶

5. By letter of August 18, 2015, Commission staff notified the Corps of staff's preliminary determination that, based on the authorizing statute for McNary Dam and the House Document referred to in the statute, the Commission lacked authority to issue a preliminary permit or license for the development of non-federal hydropower at McNary Dam. By letter of September 22, 2015, staff notified the Corps that, upon further review, it reversed its prior preliminary determination and now believed that the Commission retained jurisdiction to authorize the development of non-federal hydropower at the site. On November 10, 2015, the Corps filed comments disagreeing with staff's revised jurisdictional assessment.⁷

6. On December 10, 2015, the Commission issued public notice of Advanced Hydropower's permit application. The U.S. Department of the Interior filed a letter stating that it had no comments. The Oregon Department of Fish and Wildlife, Oregon

³ Commission licenses for projects at federal facilities cannot include the federal facilities as licensed project works. Rather, the Commission licenses only the non-federal facilities of a hydroelectric project.

⁴ See, e.g., *Richard D. Ely, III*, 87 FERC ¶ 61,176 (1999) (citing *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983)).

⁵ Rivers and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10; H.R. Doc. No. 75-704 (1938).

⁶ In addition, the Commission has issued a license for the construction and operation of the McNary Dam Washington Shore Fishway Project No. 10204 at the dam's auxiliary water supply system. See *Northern Wasco County People's Utility District*, 56 FERC ¶ 62,236 (1991).

⁷ On November 17, 2015, Advanced Hydropower filed comments contesting the Corps' November 10 comments.

Department of Environmental Quality, and the Oregon Water Resources Department filed timely notices of intervention.⁸

7. Timely motions to intervene and comments were filed by the Corps⁹ and Bonneville Power Administration (BPA).¹⁰ The Corps opposes Advanced Hydropower's project, claiming that the Commission's jurisdiction over non-federal hydropower at the site has been withdrawn, that the project would conflict with the purposes of McNary Lock and Dam and would interfere with the Corps ongoing turbine replacement program and its potential installation of a surface passage system to achieve juvenile fish survival targets, and that the project may significantly reduce the stability of the dam. BPA opposes the project, claiming that the Commission's authority to issue a permit at the site is withdrawn pursuant to section 2406 of the Energy Policy Act of 1992.¹¹ Advanced Hydropower filed answers to both the Corps and BPA's comments.

III. Discussion

8. 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,¹² which in turn sets forth the material that must accompany an application for a license. The Commission is not required to grant a preliminary permit application, so long as it articulates a rational basis for not doing so.¹³

⁸ Timely notices of intervention filed by state fish and wildlife agencies are granted by operation of Rule 214(a)(2) of the Commission's regulations. 18 C.F.R. § 385.214(a)(2) (2015).

⁹ The Corps' motion to intervene was filed by the Corps' Northwestern Division, and both the Corps' Northwestern Division and Walla Walla District filed comments. This order refers to those comments collectively as comments filed by the Corps.

¹⁰ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's regulations. 18 C.F.R. § 385.214(c) (2015).

¹¹ 16 U.S.C. § 839d-1 (2012).

¹² 16 U.S.C. § 802 (2012).

¹³ See *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210, at P 23 (2016); *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)).

9. In recent decisions, the Commission and its staff have denied preliminary permits for projects at federal facilities after comments received from the relevant federal entities indicated that no purpose would be served in issuing a permit because the federal entity would not approve modifications to its federal facilities. In *Owyhee Hydro, LLC*,¹⁴ we affirmed staff's denial of a preliminary permit because the U.S. Bureau of Reclamation stated that a non-federal entity's proposed use of its federal facility was unacceptable and would not be permitted.¹⁵ Similarly, in *Symphony Hydro LLC*,¹⁶ staff denied a preliminary permit application to study the feasibility of a project at the Corps' Upper St. Anthony Falls Lock and Dam based on the Corps' comment that the project "would preclude or seriously interfere with its use of the lock for navigation and would therefore be incompatible with the statutorily authorized purpose of the facility."¹⁷

10. Here, because the Corps, which owns the McNary Lock and Dam facility and whose permission would be needed for the development of any project at that facility, has stated that it opposes the project, we find there is no purpose in issuing a preliminary permit here.¹⁸ Therefore, Advanced Hydropower's preliminary permit application is denied.

The Commission orders:

(A) The preliminary permit application filed by Advanced Hydropower, Inc. on August 3, 2015, for the McNary Dam Project No. 14697 is denied.

¹⁴ 154 FERC ¶ 61,210.

¹⁵ *Id.* at PP 22-25.

¹⁶ 150 FERC ¶ 62,092 (2015).

¹⁷ *Id.* at P 6.

¹⁸ Given that we are denying the application because of the Corps' opposition to the project, we need not address the issue of jurisdiction over non-federal hydropower development at McNary Lock and Dam. However, we note, with respect to BPA's comments regarding section 2406, that, as we have explained previously, we believe that section 2406 does not withdraw the Commission's jurisdiction and is not meant to create exclusive authority to develop hydroelectric power at all Corps or Reclamation projects in the Pacific Northwest. See *Northern Wasco County People's Utility District*, 74 FERC ¶ 61,158 (1996).

(B) 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 (2015).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.