

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Indiana Michigan Power Company

Project No. 2651-030

ORDER GRANTING REHEARING

(Issued June 5, 2003)

1. By order issued November 27, 2002, the Commission's Office of Energy Projects (OEP) approved after the fact a land exchange agreement involving lands of Indiana Michigan Power Company's (Indiana Michigan) Elkhart Hydroelectric Project No. 2651, located on the St. Joseph River in the City of Elkhart and Elkhart County, Indiana.¹ Prior to the licensee's application for such approval, an unauthorized channel was excavated on forested project wetland. The U.S. Department of the Interior (Interior) filed a timely request for rehearing, which we grant in part.²

BACKGROUND

2. Indiana Michigan owned, in fee, 1.1 acres of project land that abuts an 11.397-acre tract of non-project land owned in fee by Pheasant Ridge Development (Pheasant Ridge). In order that Pheasant Ridge could provide access to the St. Joseph River for eight of its subdivisions, it entered into an agreement with Indiana Michigan under which Indiana Michigan would convey to it fee title to 0.43 of its 1.10 acres, with a reservation of a flowage easement. That proposed transfer was sufficient to provide river access for five of the eight subdivisions. However, river access for the other three subdivisions necessitated the construction of a canal,³ to be located in part on Pheasant Ridge land and in part on

¹101 FERC ¶ 62,130 (2002).

²On February 3, 2003, Indiana Michigan filed an answer opposing the rehearing request. However, answers to requests for rehearing are not permitted under the Commission's regulations. 18 C.F.R. § 385.213(2) (2003).

³The channel is about 50 feet wide by 300 feet long and 10 feet deep, and provides

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about 0.2 acres of the 0.43 acres Indiana Michigan would convey to Pheasant Ridge. Therefore, the agreement also provided for Pheasant Ridge to convey to Indiana Michigan an approximately 0.5-acre flowage easement covering the channel constructed on Pheasant Ridge's property. It appears that, prior to the channel excavation, a forested wetland occupied both non-project and project land at the construction site. Pheasant Ridge proposed to create, as mitigation for wetland to be lost, a new one-acre wetland at the Lake Wood subdivision in Elkhart County, outside of the Elkhart Project's boundary.

3. Although the parties' agreement conditioned performance of its terms on Indiana Michigan's receipt of Commission approval,⁴ the channel was excavated before the licensee applied for such approval.⁵ Subsequently, Indiana Michigan requested retroactive approval of the exchanges and of a revised Exhibit G (project map) reflecting the new project boundary. OEP's order granting approval⁶ required Indiana Michigan to develop a wetland mitigation plan specifying what specific mitigation measures have been completed and what measures remain outstanding, and to monitor the mitigative wetland one year after it was created and report to the Commission the results and the comments of Interior and Indiana Department of Natural Resources (Indiana DNR).

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river access for Pheasant Ridge's private property lot numbers 6, 7, and 8.

⁴Section 5 of the Exchange Agreement states:

I&M's obligation to perform hereunder is conditioned upon, and subject to, I&M's receipt of approval from FERC to exchange the lands as contemplated herein. I&M agrees to promptly file appropriate applications with FERC seeking such approval, after execution of this Agreement.

⁵The unauthorized dredging of the channel was completed in July 2001. Indiana Michigan's application for approval of the agreement was filed on August 6, 2001.

⁶Although the text of OEP's order (see 101 FERC at 64,304) suggests that Indiana Michigan had asked to remove the lands in question from the project boundary, Indiana Michigan's approved revised Exhibit G reflects only an addition to the project of the flowage easement over the channel constructed by Pheasant Ridge on formerly non-project land.

4. On rehearing, Interior asserts that the loss of wetlands and other significant habitat resulting from the channel excavation will have a substantial cumulative impact on habitats,⁷ and argues that either the wetland destroyed by the channel should be restored or, alternatively, that OEP's order should be revised to require the licensee to (1) retain sufficient control over the site to achieve wetland mitigation; (2) include in the wetland mitigation plan provisions for retention of a wetland restoration expert to address issues of design, location, acreage replacement ratios, buffers, appropriate species for vegetation, performance standards, and the appropriate features of a monitoring plan; and (3) monitor for two to three years for emergent wetlands and for five years for forested wetlands.

DISCUSSION

5. Prior to excavating the channel at issue, Pheasant Ridge obtained approval from Indiana DNR, on the condition that it construct and maintain wetlands to compensate for the wetlands destroyed by the excavation.⁸ Indiana Michigan reasons that the mitigation Pheasant Ridge undertook pursuant to its state authorization serves to meet its mitigation obligations under the license. That is not the case. We have no authority over Pheasant Ridge and cannot ensure its compliance with its mitigation obligations to the state. Furthermore, Indiana Michigan is responsible for the unauthorized destruction of those wetlands – about 0.2 acres⁹ – that were located within the project boundary.¹⁰

⁷Interior did not provide evidence of cumulative impacts associated with the project. Interior also notes that on October 17, 1989, the North American Waterfowl Management Plan was accepted by the Commission as a comprehensive plan pursuant to Section 10(a)(2)(A) of the FPA, 16 U.S.C. § 803(a)(2)(A), and argues that the Commission therefore should not approve conveyance of project lands in a manner that will adversely affect waterfowl habitat. But Interior does not submit evidence concerning what adverse effects on waterfowl habitat the channel construction has caused or will cause.

⁸See final order issued by the Natural Resources Commission on March 28, 2001, in *Pheasant Ridge Development Co., Inc. v. Indiana Department of Natural Resources*, Administrative Case No. 00-52 W.

⁹The licensee's response to a request for additional information stated that it could not determine precisely the total acreage of the channel that was constructed on its 0.43 acres. Our estimate is based upon an analysis of the filed Exhibit G and comparison with earlier maps.

¹⁰As noted by OEP's order, the licensee's failure to report the proposed use of a wetland within its project boundary before the work was done was a violation of the

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6. Under the circumstances, we are requiring the licensee to mitigate for loss of project wetland by establishing a new one-acre wetland (separate and distinct from the new wetland that Pheasant Ridge is establishing), to amend the project boundary to include this new wetland, and to require its wetland mitigation plan to so reflect. We are also requiring the additional conditions requested by Interior. The plan must provide, at a minimum, for: (1) the mapped location of the mitigative wetland; (2) the methods and schedule for the wetland's creation; (3) retention of a wetland restoration expert to address issues of design, location, buffers, and appropriate species for vegetation plantings; (4) performance standards as agreed upon with Interior and Indiana DNR; (5) a monitoring plan providing, at a minimum, for (a) the length of the monitoring period,¹¹ (b) the monitoring parameters, (c) the monitoring schedule, and (d) the annual filing of future monitoring reports with the Commission by December 31 of each monitoring year (reports are to include agency comments); and (6) consultation with Interior's Fish and Wildlife Service and the Indiana DNR prior to submission of the plan to the Commission for its approval.¹²

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Commission's regulations, 18 CFR § 12.11 (2003).

¹¹Interior argues that performance standards such as wetland hydrology, vegetation survival, and vegetative diversity cannot be determined in a single year, and therefore that the order's requirement for follow-up monitoring one year after completion of development of the mitigation wetland is inadequate. We agree that one year is insufficient, and are providing for the length of monitoring to be determined, in this instance, through consultation with the agencies.

¹²As noted above, Interior suggested, as another alternative, that the destroyed wetland be restored. It argued that disturbance from site restoration would be temporary, while the effects of retaining the channel and adjacent development which it facilitates will be permanent. However, to dewater the channel at this point would result in the permanent loss of new fish habitat that has evolved since the channel was created in the summer of 2001. Furthermore, restoration would, at most, reestablish an approximately 300-foot strip of wetland, while the licensee is, by this order, required to establish and maintain a new mitigative wetland of one acre. (The combined effect of this order and that of the state's order concerning Pheasant Ridge should result in a total of two acres of new mitigative wetland.)

Interior also cited *Indiana Michigan Power Company*, 91 FERC ¶ 62,091 (2000), for the proposition that fee title offers the best means of ensuring that the comprehensive development and public interest purposes of the license are fulfilled, and that the

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The Commission orders:

(A) The request for rehearing filed in this proceeding on December 27, 2002, by the U.S. Department of the Interior is granted.

(B) Ordering paragraph (B) of the order issued November 27, 2002, in this proceeding is revised to read:

(B) Within 90 days of the date this order is issued, the licensee shall file with the Commission, for approval, a Wetland Mitigation Plan. The plan shall provide for the establishment and maintenance of one acre of mitigative wetland. The plan shall be developed in consultation with the U.S. Department of the Interior's Fish and Wildlife Service (FWS), and Indiana Department of Natural Resources (Indiana DNR), and shall, at a minimum, include: (1) the mapped location of the mitigative wetland; (2) the methods and schedule of its proposed creation; (3) provision for retention of a wetland restoration expert to address issues of design, location, buffers, an appropriate species for vegetation plantings; (4) performance standards as agreed upon by FWS and Indiana DNR; (5) a monitoring plan including, at a minimum, (a) the length of the monitoring period, (b) the monitoring parameters, (c) the monitoring schedule, and (d) the annual filing of future monitoring reports with the Commission by December 31 of each monitoring year (reports are to include the comments of FWS and Indiana DNR).

The Wetland Mitigation Plan and the wetland monitoring results shall each include comments and recommendations from Indiana DNR and FWS. The licensee shall allow the resource agencies at least 30 days to comment and to make recommendations before filing the plan and results documents with the Commission. If the licensee does not adopt any agency recommendation, the filing shall include the licensee's reasons, based on project-specific information. The Commission reserves the right to require

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protection provided by fee ownership should not, absent compelling reason, be compromised by the sale to an adjacent property owner. While we agree fee title offers the best means of protection, easements can also serve to ensure comprehensive development, and retention of easements within the project boundary appears to be the most feasible means to ensure such protection under the circumstances of this proceeding.

further modifications to the Wetland Mitigation Plan, as well as make further requirements based on the wetland monitoring results.

(C) The Director's order is affirmed in all other respects.

(D) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2003).

By the Commission. Chairman Wood dissented with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Wood, Chairman, dissenting:

I would not have required the licensee to establish additional wetlands. While I am concerned about the destruction of wetlands within project boundaries, the Indiana Department of Natural Resources has already addressed the matter by requiring Pheasant Ridge to construct and maintain a new one-acre wetland as compensation for the approximate 0.2 acre loss. The environment has already been made whole, and thus further mitigation is unnecessary.

Pat Wood, III
Chairman